


**International Law and Human Trafficking in Fragile and Conflict Affected
Situations: The case of Palestine**

**Submitted by Laurence Wilson to the University of Exeter
as a thesis for the degree of Doctor of Philosophy in Law**

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Signature: 

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Abstract

Human trafficking (HT) is a complex and multi-faceted phenomenon transgressing in the most egregious way an entire web of basic human rights. In 2015, HT was identified by the UN Security Council (UNSC) as a 'serious crime' and a threat to international peace and human security. Since the adoption in 2016 of the landmark UN resolution 2331 condemning HT in the context of armed conflict and post-conflict situations, trafficking in persons in all its forms has been more widely documented as a direct or indirect consequence of conflict and fragility.

Empirical evidence suggests that HT is most likely exacerbated in fragile, migratory, and conflict contexts. Priority is often given to other humanitarian emergencies.

The thesis focuses on HT in fragile and conflict affected situations (FCAS) and seeks to identify how the victims of HT can access adequate standards of protection. Even in conflict settings States remain the primary duty-bearers but are often unwilling or unable to comply with their legal obligations arising from the international legal framework addressing HT to provide human rights protection on the ground.

The thesis examines the contribution as well as the interaction of international human rights, humanitarian, refugee, labour, criminal laws in protecting individuals against HT practices. The thesis identifies challenges in the implementation of the legal framework addressing HT and faced by States in fragile contexts.

The research conducts an in-depth single case study which confirm generic challenges faced by FCAS identified in chapter 7 and investigate specific and unique challenges in the context of Palestine. The study examines the Palestinian legal framework and legal system, the role of Palestinian institutions, civil society organisations and external actors in the building of a harmonised rule of law, with the difficulties experienced regarding the domestic implementation of Palestine's international human rights commitments.

The findings of the research confirm that in the presence of conflict and instability associated with generic components of fragility applicable to other FACS examined in chapter 7, such as the absence of a stable rule of law, and more specifically in the case of Palestine, experiencing a complex legal system due to its plurality, linked to political uncertainties, the implementation of human rights and HT legislation are jeopardised and are not practically as well as judicially enforced.

The thesis contributes in a modest way to understanding the practicalities of implementing a protective framework against HT in Palestine and possibly other conflict settings.

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Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACtHPR	African Court on Human and Peoples' Rights
ADB	African Development Bank
ASEAN	Association of South-eastern Nations
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CAT	Committee against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSO	Civil society organisation
EC	European Commission
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
EU	European Union
ETS	European Treaty Series
EUPOL COPPS	EU Police Coordinating Office for Palestinian Police Support
FCV	Fragility Conflict Violence
FGD	Focus Group Discussion
FJP	Family and Juvenile Protection Unit
FCAS	Fragile and Conflict Affected Situations (States)

GBV	Gender-based violence
GRETA	Group of Experts on Action against Trafficking in Human Beings
HJC	High Judicial Council
HRC	Human Rights Committee
HRC	Human Rights Council
HT	Human Trafficking
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICESCRC	Committee on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee for the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	internally displaced person
IGO	International governmental organization
IHL	International Humanitarian Law
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund
IOM	International Organization for Migration
JAL	Judicial Authority Law
JLAC	Jerusalem Legal Aid Centre
JSRS	Justice Sector Reform Strategy
LHC	Legal Harmonisation Committee
MDB	Multilateral Development Bank
MOI	Ministry of interior
MOJ	Ministry of Justice

MOSD	Ministry of Social Development
MOWA	Ministry of Women's Affairs
NHRC	National Human Rights Commission
NGO	Non-governmental organisation
ODA	Official Development Assistance
OHCHR	Office of the High Commissioner for Human Rights
OPT	Occupied Palestinian Territory
OSCE	Organization for Security and Co-operation in Europe
PA	Palestinian Authority
PLO	Palestine Liberation Organisation
PNC	Palestine National Council
PBA	Palestinian Bar Association
PCBS	Palestinian Central Bureau of Statistics
PICHR	Palestinian Independent Commission for Human Rights
PLC	Palestinian Legislative Council
Rome Statute	Rome Statute of the International Criminal Court
SAARC	South Asian Association for Regional Cooperation
SCS	Single Case Study
SCSL	Special Court for Sierra Leone
Palermo Protocol	The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime
Smuggling Protocol	The Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against the United Nations Convention against Transnational Organised Crime
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCAT	UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
UNDP	United Nations Development Programme

UNDSS	United Nations Department of Safety and Security
UNFPA	United Nations Population Fund
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
UNCTOC	The United Nations Convention against Transnational Organised Crime
UNRWA	United Nations Relief and Works Agency
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
UN Women	United Nations Entity for Gender Equality and the Empowerment of Women
UPR	Universal Periodic Review
WCLAC	Women's Center for Legal Aid and Counselling

International Law and Human Trafficking in Fragile and Conflict Affected Situations: The case of Palestine

Part I Introduction and Framing of the Research

Chapter 1 Introduction

The thesis is divided into three parts for ease of organisation and reading.

Part I consists of Chapters 1, 2 and 3. Chapter 1 introduces the research, chapter 2 addresses the definition and analysis of fragile and conflict affected situations (FCAS) as a basis for examining the interaction between human trafficking (HT) and conflicted fragile environments. Chapter 3 explains the selected research methods adopted and in particular the use of the case study of Palestine to investigate the challenges and limitations inherent to FCAS regarding the implementation of a protective legal framework against HT.

Part II of the thesis comprises three chapters. Chapter 4 provides the understanding and interpretation of the HT legal definition which subsequently impacts on its domestic implementation and on the prosecution of the crime of trafficking. Chapters 5 and 6 examine the contribution and interaction of the international human rights, humanitarian, refugee, criminal and labour legal norms, addressing HT to form a wide protection framework.

Part III of the thesis examines the implementation of the legal framework addressing HT and its limitations, including the overarching human rights framework which are practically verified with the case study of Palestine. Chapter 7 examines the generic challenges faced by States and in FCAS that hinder the implementation of the protective legal framework against human

rights violations and more specifically HT. Chapter 8 provides a condensed historical and political narrative for the analysis of the Palestinian legal framework. This chapter examines in more details the status of international law in the Palestinian legal framework and the challenges faced by Palestine regarding the implementation of its international legal commitments.

Chapter 9 sets out the qualitative analysis of interviews with key stakeholders that uncovers some of the challenges inherent to fragile and conflicted affected situations and in a unique way for Palestine, to implement international legal commitments, focusing on HT. Chapter 10 contains the conclusion.

1.1 Introduction to HT

Human trafficking (HT) transgresses in the most egregious way a web of basic human rights.¹ Trafficking refers to situations of exploitation where human beings are considered as commodities that can be bought, used, sold and disposed of.² In the context of interdependent political, social and economic relations among States, the international community³ is concerned that

¹ Statement addressed by the United Nations Secretary-General Kofi Annan at the International Conference of Palermo on Transnational Organized Crime on 12 December 2000 available at: <http://www.unodc.org/unodc/en/about-unodc/speeches/speech_2000-12-12_1.html> accessed 6 January 2014. See also UNCHR: Report of the Secretary General to the Commission on Human Rights, Fifty-eighth session, E/CN.4/2002/80,3.<<http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/088e2d77a308db8fc1256b870059e794?Opendocument>> accessed 3 January 2014.

² Nilanjana Ray, 'Looking at Trafficking through a new lens' (2006) 12 *Cardozo Journal of Law and Gender* 101. See Louise Shelley, *Human Trafficking – A Global perspective* (Cambridge University Press 2010) 87. See also *Rantsev v Cyprus and Russia* App no 25965/04 (ECHR, 7 January 2010) para.181.

³ The term 'International Community' is used in the thesis as a mix to refer to the whole international system, the international actors including international institutions, NGOs, and civil societies. The concept of international community is subject to ongoing scholar debates. See Gleider I. Hernandez, 'A Reluctant Guardian: The International Court of Justice and the Concept of 'International Community' (2013) 83 (1) *The British Yearbook of International Law* 13,60. See also Bruno Simma and Andreas L. Paulus, 'The International Community Facing the Challenge of Globalization' (1998) 9 *European Journal of International Law* 266, 268.

trafficking of women, men and children affects most countries on the planet.⁴ HT has become a prominent and endemic issue in conflict settings.⁵ This occurrence has been linked to the exacerbation of humanitarian and forced migration crises worldwide.⁶ HT therefore requires global and domestic action as well as multisector collaboration to address this multidimensional crime.⁷

The prohibition of HT is a legal obligation imposed upon States parties under multiple international and human rights instruments. This legal obligation requires States to investigate, prosecute and punish such practices.⁸ Some relevant instruments concerned are the Palermo Protocol,⁹ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),¹⁰ the

⁴ Roza Pati, 'Human Trafficking: An Issue of Human and National Security' (2014) 4 University of Miami National Security & Armed Conflict Law Review 29,33.

⁵ Eleanor Ann Nwadinobi, 'Trafficking and the Boko Haram Conflict: The Not So Good, the Bad, and the Outright Ugly' in John A. Winterdyk and Jackie Jones (eds), *The Palgrave International Handbook of Human Trafficking* (Palgrave Macmillan, Cham, 2019) 1,2. See also Vasiliki Artinopoulou and Alexandra Koufouli, 'Legislation, Policies, and Practices Against Trafficking in Human Beings: The Case of Kosovo' in John A. Winterdyk and Jackie Jones (eds), *The Palgrave International Handbook of Human Trafficking* (Palgrave Macmillan, Cham, 2019) 2.

⁶ UNODC, *Global Report on Trafficking in Persons 2016* (United Nations publication, Sales No. E.16.IV.6) 1,10. See also the open debate of the UN Security Council on HT in conflict situations of 15 March 2017 <<https://www.un.org/press/en/2017/sc12751.doc.htm>> accessed 18 March 2017.

⁷ Harmen van der Wilt, 'Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts' (2014) 13 Chinese Journal of International Law 297. See also Tom Obokata, 'A Human Rights Framework to Address Trafficking of Human Being' (2006) 10 Kurdish Human Rights Project Legal Review 79. See also Shelley (n 2) 2. See Roza Pati, 'Trading in Humans: A New Haven Perspective' (n 7) 136,139. See Idil Atak and James C. Simeon, 'Human Trafficking: Mapping the Legal Boundaries of International Refugee Law and Criminal Justice' (2014) 12 Journal of International Criminal Justice 1019,1021. See also Kirsten Foot, 'Multisector Collaboration Against Human Trafficking' in John A. Winterdyk and Jackie Jones (eds), *The Palgrave International Handbook of Human Trafficking* (Palgrave Macmillan, Cham, 2019) 1,2. See Ella Cockbain, Kate Bowers, and Liam Vernon, 'Using Law Enforcement Data in Trafficking Research' in John A. Winterdyk and Jackie Jones (eds), *The Palgrave International Handbook of Human Trafficking* (Palgrave Macmillan, Cham, 2019) 4.

⁸ See the jurisprudence of the Inter-American Court of Human Rights, case Velásquez-Rodríguez v. Honduras Judgment of 29 July 1988, para.174, 176.

⁹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (15 November 2000) UN Doc A/55/383, Annex II (Palermo Protocol).

¹⁰ Article 6 of the Convention on the Elimination of Discrimination of All Forms of Discrimination Against Women, United Nations (adopted 18 December 1979 by UNGA Res 34/80, entered into force 3 September 1981) 1249 UNTS 13.

Convention on the Rights of the Child (CRC)¹¹ and its Optional Protocol on Sales of Children, Child Prostitution and Child Pornography.¹² At a regional level, the Charter of Fundamental Rights of the European Union,¹³ the 2005 Council of Europe Convention on Human Trafficking,¹⁴ the American Convention on Human Rights (ACHR),¹⁵ the Inter-American Convention on International Traffic in Minors,¹⁶ the Arab Charter on Human Rights,¹⁷ the South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution.¹⁸

The fight against HT has a long legal and political history, starting in 1904 with the adoption of the first 'Convention against White Slavery'¹⁹ which addressed the prostitution of white women and their migration to that purpose. This legal undertaking was followed over the years by five other international instruments which are enumerated in section 1.2 below. These instruments, although focused on the international legal regulation of prostitution and the prohibition

¹¹ Article 35, Convention on the Rights of the Child, United Nations (adopted and opened for signature, ratification, or accession 20 November 1989 by the GA Res 44/25, entered into force 2 September 1990) 1577 UNTS 3.

¹² Articles 1-3, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Pornography (opened for signature 16 March 2001, entered into force 18 January 2002) UN Doc A/RES/54/263.

¹³ Article 5(3) of the Charter of Fundamental Rights of the European Union (2007/C 303/01) (14 December 2007) C 303/1.

¹⁴ Council of Europe Convention on Action against Trafficking in Human Beings, CETS 197 (adopted 16 May 2005, entered into force 1 February 2008).

¹⁵ Article 6 of the American Convention on Human Rights. Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

¹⁶ Article 7, Organization of American States (OAS), Inter-American Convention on International Traffic in Minors, 18 March 1994, OAS, Treaty Series, No. 79.

¹⁷ Article 9, 10.1, 2 of the League of Arab States, Arab Charter on Human Rights, May 22, 2004, *reprinted in* 12 Int'l Hum. Rts. Rep. 893 (adopted 2005, entered into force 15 March 2008).

¹⁸ The 2002 South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution.

¹⁹ International Agreement for the Suppression of the 'White Slave Traffic' (adopted 18 May 1904, entered into force 18 July 1905) 1 LNTS 83.

of slavery,²⁰ framed the legal regime governing what we call today human trafficking.²¹ The origins of the HT concept were therefore rooted in an abolitionist approach to prostitution with a moral objection to such practices and the understanding that prostitution equated to exploitation.²² However, it was only in the early nineties that trafficking became a widespread concern at an international and domestic level.²³ This concern was embraced by States, UN human rights bodies as well as prominent international human rights organisations. The main reason for this mobilisation being that characteristics of the victims had changed over the century. The HT phenomenon was therefore going beyond the trafficking of white women and girls from developed countries²⁴ to encompass non-white individuals, men, and boys from developing and poor countries, from countries at war and other unstable contexts. Other concerns ensued, linking HT with new and major political issues: illegal migration and the framing of HT as a transnational organised crime.²⁵

This growing concern resulted in the elaboration of a Protocol devoted to HT under the umbrella of the UN Convention Against Transnational Organized

²⁰ Laura Reanda, 'Prostitution as a Human Rights Question' (1991) 13 *Human Rights Quarterly* 202. See also Vladislava Stoyanova, 'Human Trafficking and Slavery Reconsidered - Conceptual Limits and States' Positive Obligations in European Law' (Cambridge University Press 2017) chapter 2 'Origins, Context and the Currently Valid Law' 20.

²¹ Nicole N.J. Siller, 'Human Trafficking in International Law Before the Palermo Protocol' (2017) 64 *Netherlands International Law Review* 407. See also Jean Allain, 'White Slave Traffic in International Law' (2017) *Journal of Trafficking and Human Exploitation* 1.

²² Stoyanova, 'Human Trafficking and Slavery Reconsidered -Conceptual Limits and States' Positive Obligations in European Law' (n 20) 22,23.

²³ Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010) 16.

²⁴ *ibid* 16.

²⁵ Stoyanova, 'Human Trafficking and Slavery Reconsidered -Conceptual Limits and States' Positive Obligations in European Law' (n 20) 23.

Crime²⁶ along with two other protocols, the UN Protocol Against the Smuggling of Migrants by Land, Sea and Air,²⁷ and the UN Convention Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition.²⁸

The UN Trafficking Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, known as the Palermo Protocol, defines the offence of 'trafficking in persons' in its article 3(a) as:

'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'.²⁹

1.2 Definition of HT – A multifaceted phenomenon

This section provides an overview of the HT definition. This is prior to addressing in chapter 4, the legal entanglement between HT, slavery, enslavement and forced labour as well as its impact on the judicial consideration of HT. HT is used interchangeably with the term 'modern slavery'

²⁶ The United Nations Convention against Transnational Organized Crime (adopted 8 January 2001, entered into force 29 September 2003) UNGA Res A/RES/55/25.

²⁷ Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime, UNGA Res. 55/25, Annex III, 55 UN GAOR Supp. (No. 49) at 65 (adopted 2001, entered into force 28 January 2004) UN Doc A/45/49 (Vol.I).

²⁸ Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (8 June 2001) UNGA Res A/RES/55/255.

²⁹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (n 9).

although 'modern slavery' has no legal definition under international law. This term is employed by media,³⁰ academics, practitioners and the public to generally refer to HT, slavery crimes, forced prostitution, forced labour, enslavement.³¹ These concepts are in fact intertwined and overlap.³² However, HT, slavery, forced labour are codified within international law instruments whereas the concepts of enslavement and sexual slavery are included in international criminal law statute.³³ The judicial consequences of this entanglement are discussed in more details in chapter 4 part II.

The thesis engages in section 4.2 in an historical overview of anti-trafficking legislation in order to present the development of a collective understanding and concern for HT. This led to its progressive legal codification with the outcome of the 2000 Palermo Protocol.

The history of human exploitation is built upon domination, power, transaction, and exchange. Throughout centuries, some forms of curtailment of personal liberties were universally defined as 'slavery' which was embedded in the culture of civilisations, customs, and people's daily lives.³⁴

³⁰ Elena Krsmanović, 'Mediated Representation of Human Trafficking: Issues, Context, and Consequence' in John A. Winterdyk and Jackie Jones (eds), *The Palgrave International Handbook of Human Trafficking* (Palgrave Macmillan, Cham, 2019) 9.

³¹ Nicole Siller 'Modern Slavery' - Does International Law Distinguish between Slavery, Enslavement and Trafficking? (2016) 14 (2) *Journal of International Criminal Justice* 405,406. See Karen L. Corrie, 'Could the International Criminal Court Strategically Prosecute Modern Day Slavery?' (2016) 14 (2) *Journal of International Criminal Justice* 285, 286.

³² Wilt, 'Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts' (n 7) 298.

³³ Siller, 'Modern Slavery' - Does International Law Distinguish between Slavery, Enslavement and Trafficking? (n 31) 407, 427.

³⁴ Suzanne Miers, 'Slavery: A Question of Definition' (2003) 24(2) *Slavery & Abolition: A Journal of Slave and Post-Slave Studies* 2.

From the mid-eighteenth century, anti-slavery sentiment emerged in European nations and the United States³⁵ characterised by a lengthy process to build a universal and legal prohibition against slavery and slave-related practices.³⁶ From the end of the nineteenth century and up to the codification of the Palermo Protocol in 2000, five international instruments addressed the legal construction of human trafficking occupying the international legal landscape:³⁷ The 1904 International Agreement for the Suppression of the 'White Slave Traffic'; the 1910 International Convention for the Suppression of the 'White Slave Traffic'; the 1921 International Convention for the Suppression of Traffic in Women and Children; the 1933 International Convention for the Suppression of the Traffic in Women of Full Age and the 1949 Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others.³⁸ Since the eighteenth century, civil society organisations (CSOs) advocated for the prohibition of slavery³⁹ as well as trafficking.⁴⁰ They subsequently became involved in the development of international law, international institutions and national legal systems in order

³⁵ Renee Colette Redman, 'The League of Nations and the Right to be Free from Enslavement: The First Human Right to Be Recognized as Customary International Law - Freedom: Beyond the United States' (1994) 70 Chicago- Kent Law Review 759,760.

³⁶ Cherif Bassiouni, 'Enslavement as an International Crime' (1991) 23 N.Y.U. Journal of International Law and Politics 445.

³⁷ Siller, 'Human Trafficking in International Law Before the Palermo Protocol' (n 21) 409.

³⁸ International Agreement for the Suppression of the 'White Slave Traffic,' adopted 18 May 1904, entered into force 18 July 1905, 1 LNTS 83; International Convention for the Suppression of the White Slave Traffic, adopted 4 May 1910, entered into force 8 August 1912, 3 LNTS 278. These two instruments were amended by protocol, approved by the United Nations General Assembly on 4 May 1949, 30 UNTS 23. International Convention for the Suppression of the Traffic in Women and Children, adopted 30 September 1921, entered into force 15 June 1922, 9 LNTS; International Convention for the Suppression of the Traffic in Women on Full Age, adopted 11 October 1933, entered into force 24 August 1934, 150 LNTS 431. These two instruments were amended by protocol, approved by the UN General Assembly on 12 November 1947, 53 UNTS 13. The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, adopted 2 December 1949, entered into force 25 July 1951, 96 UNTS 271.

³⁹ Steve Charnovitz, 'Two Centuries of Participation: NGOs and International Governance' (1997) 18(20) Michigan Journal of International Law 183,191, 192.

⁴⁰ Tom Obokata, 'A Human Rights Framework to Address Trafficking of Human Beings' (n 7) 81,82.

to help build legal accountability against egregious practices. CSOs partly contributed to advance the international criminal justice system through pushing for criminal accountability of human rights violations.⁴¹

The thesis is primarily concerned with examining the 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially of Women and Children.⁴² The definition of HT is contained in article 3 (a) of the Palermo Protocol:

*‘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’.*⁴³

Trafficking involves a process of coercion or deception that begins with the trafficker taking control of the victim’s life.⁴⁴ However, prior to that stage, the victim may already be in a vulnerable situation, deprived of the enjoyment of

⁴¹ Charles Chernor Jalloh, ‘The Role of Non-Governmental Organizations in Advancing International Criminal Justice’ (2015) 1(1) African Journal of International Criminal Justice 47,48.

⁴² Palermo Protocol (n 9).

⁴³ Palermo Protocol (n 9) art. 3 (a).

⁴⁴ Ray (n 2)115.

basic social, economic, and cultural rights.⁴⁵ There are contributing factors such as poverty, lack of education, unemployment, discrimination, gender-based violence,⁴⁶ forced migration and refugee movements due to conflict and fragile affected situations.⁴⁷

The Protocol distinguishes three constituent elements that need to be present in order to characterise the trafficking of persons: the acts, means and purposes, except in cases involving children under eighteen, for which the means element is not required.⁴⁸

(1) An action entails recruitment, transportation, transfer, harboring, or receipt of persons. This phase of trafficking infers a movement and process. HT crime is transnational by nature if it fulfils the criteria described by Articles 2 and 3 (2) of the Convention against Transnational Organized Crimes⁴⁹ but is not required as a constitutive element in domestic offences. The preparatory works of the Convention on Transnational Organized Crimes and the Protocol, reiterated by UNODC in its legal guidance suggests that HT is not exclusively transnational.⁵⁰

⁴⁵ Janie A. Chuang, 'Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts' (1998) 11 Harvard Human Rights Journal 65,160.

⁴⁶ *ibid* 160.

⁴⁷ Ray (n 2) 116. See also Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking Balances for More Effective Legislation' (2009) 17 Cardozo Journal of International and Comparative Law 101,105.

⁴⁸ UNODC, 'The Concept of 'Exploitation' in the Trafficking in Persons Protocol' (2015) 5. See also UNODC, 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto' (2004) para 38, 270.

⁴⁹ See Articles 2, 3(2) of the United Nations Convention against Transnational Organized Crime (n 26).

⁵⁰ UNGA, 'Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions' (3 November 2000) UN Doc A/55/383/Add.1, para. 59. See also UNODC, 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto' (n 48) para 45(a), 275,276. See also Jean Allain, 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol' (2014) 7(1) Albany Government Law Review 2.

Hence, the Protocol can apply to situations where a person is trafficked internally and remain within domestic borders.

During these phases, groups or individuals may be involved, exercising recruitment, transportation and control in diverse ways that establish an 'immense diversity between and within trafficking systems'.⁵¹ As an example, recruitment may occur using information technologies and social media. The BBC website reported on 1st November 2019 that Google, Apple and Facebook-owned Instagram are enabling an illegal online slave market by providing and approving apps used for the buying and selling of domestic workers in the Gulf. The incident was exposed by a BBC News Arabic's undercover investigation. This identified app users in Kuwait was in breach of domestic and international laws on modern slavery, including the case of a woman offering a child for sale.⁵² As part of the anti-trafficking efforts and to assist law enforcement as well as implementing technical counter-trafficking measures, the Council of Europe with other national and international bodies developed a European policy analysing the scale of the impact of the misuse of new information technologies on HT specifically for sexual exploitation purposes.⁵³ The 2005 Council of Europe Convention on Action against Trafficking in Human Beings subsequently covered all forms of trafficking of human being, national or

⁵¹ Frank Laczko and A. Marco Gramegna, 'Developing Better Indicators of Human Trafficking' (2003) 10 *Brown Journal of World Affairs* 179, 181.

⁵² Owen Pinnell and Jess Kelly, 'Slave markets found on Instagram and other apps' *BBC News Arabic* (31 October 2019).

<<https://www.bbc.com/news/av/technology-50240012/maids-for-sale-how-silicon-valley-enables-online-slave-markets>> accessed 2 November 2019.

⁵³ Council of Europe, Final Report: 'Group of Specialists on the Impact of the Use of New Information Technologies on Trafficking in Human Beings for the Purpose of Sexual Exploitation (EG-S-NT)' (2003) 7.

transnational, committed using means of all kinds regardless of the connection to organised crimes.⁵⁴

(2) A means includes a threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power, or abuse of a position of vulnerability, or the giving or receiving of payments or benefits in order to achieve the consent of a person and exercise full control over this person. Most of the 'means' elements from the HT definition overlap.⁵⁵ The term 'coercion' covers a range of behavioural patterns towards the person trafficked including violence, threat, intimidation, fear under which the individual is controlled and kept for the purpose of exploitation. The use of the term 'coercion' is an umbrella term, for related components of the means elements, and is at the core of the legal and conceptual distinction between trafficking and the intertwined phenomenon of smuggling.⁵⁶ However, the wording 'other forms of coercion' in the Protocol suggests that coercion can be other than physical. In this respect, victims of trafficking may experience a diverse range of coercion as first noted in 1957 by Biderman:⁵⁷

'Nonphysical coercive tactics...including isolation (the victim being kept away from family or friends, depriving the individual from affective and social support), exhaustion, threats, occasional indulgences,

⁵⁴ Article 2 of the Council of Europe Convention on Action against Trafficking in Human Beings (n 14).

⁵⁵ Gallagher (n 23) 31.

⁵⁶ Gallagher (n 23) 31.

⁵⁷ Albert Biderman, 'Communist attempts to elicit false confessions from air force prisoners of war' (1957) 33 Bulletin of the New York Academy of Medicine 616, 625.

demonstration of omnipotence, degradation, deprivation of basic human needs such as food, sleep, and health care'.⁵⁸

This can ultimately reinforce submission to traffickers irrespective of physical threats or duress. Psychological coercion based on mental manipulation and psychological abuse can have deep traumatic impacts. According to the interpretative notes of the *Travaux Préparatoires* of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols, the component: 'abuse of position of vulnerability, is such that the person has no real and acceptable alternative but to submit to the abuse involved'.⁵⁹ Furthermore, the Explanatory Report to the European Convention on Action against Trafficking emphasises that vulnerability:

'may be of any kind, whether physical, psychological, emotional, family-related, social or economic. The situation might, for example, involve insecurity or illegality of the victim's immigration status, economic dependence, or fragile health. In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited. Persons abusing such a situation flagrantly infringe human rights and violate human dignity and integrity, which no one can validly renounce'.⁶⁰

(3) A purpose includes exploitation through to prostitution, other forms of sexual exploitation, forced labour or services, slavery, or practices similar to slavery,

⁵⁸ Susie B. Baldwin, Anne E. Fehrenbacher, and David P. Eisenman, 'Psychological Coercion in Human Trafficking: An Application of Biderman's Framework' (2014) *Qualitative Health Research* 1.

⁵⁹ UNODC, *Travaux Préparatoires* of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (2006) 347.

⁶⁰ Explanatory Report of the Council of Europe Convention on Action against Trafficking in Human Beings (2005) CETS No. 197 para.83, p.15.

servitude, or the removal of organs.⁶¹ The concern regarding exploitation is that it is neither defined in the Protocol nor in international law.⁶² Therefore, the question of what constitutes exploitation is left to a variety of domestic understandings and interpretation. The example of the Australian context indicates that the understanding of exploitation concerns mostly misleading working conditions to which victims of HT are subjected to, with restrictions imposed on their movement immediately upon arrival in the country. Such conditions are described as forced labour, servitude and slavery often involving physical, sexual abuse and harm.⁶³ A second example relates to the Philippines legislation on trafficking which focuses on sexual exploitation involving sex tourism, prostitution, pornography, which also encompasses the specific issue of mail-order brides.⁶⁴ Ultimately, there is no 'model legislation' specifying what constitutes 'exploitation' with regard to HT in a domestic context. Hence, Mattar notes that 'there is no model legislation that may be applied by all countries regardless of the particularities of their individual legal systems'.⁶⁵ However, some scholars note that the definition of trafficking in persons the way it is incorporated in some domestic legal orders, suggests that States' jurisdictions 'are not truly compatible with each other, when they speak of 'trafficking', they are mainly speaking about different things'.⁶⁶ The discussion on the lack of

⁶¹ Palermo Protocol (n 9) article 3(a).

⁶² Gregor Noll, 'The Insecurity of Trafficking in International Law' (2007) in 'Mondialisation, migration et droits de l'homme: le droit international en question' 347. Noll notes: 'The meaning of exploitation is 'painfully' unclear in the Palermo Protocol.

⁶³ Andrea Schloenhardt and Hannah Bowcock, 'The role of consent in trafficking in persons prosecutions in Australia' (2015) 39(2) Melbourne University Law Review 592, 599.

⁶⁴ The Republic Act N.9208: Anti-Trafficking in Persons Act of 2003 (Republique of the Philippines). See also Linda Smith and Mohamed Mattar, 'Creating International Consensus on Combating Trafficking in Persons: U.S. Policy, the Role of the UN, and Global Responses and Challenges' (2004) 28 (1) The Fletcher Forum of World Affairs 162.

⁶⁵ Mohamed. Y Mattar, 'Incorporating the Five Basic Elements of a Model Anti trafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention' 3.

⁶⁶ Jean Allain, *The Law and Slavery: Prohibiting Human Exploitation* (Brill Nijhoff, 2015) 266.

consistent interpretation and universal approach⁶⁷ of the elements of the HT definition by academics and various national frameworks are treated in chapter 4.

1.3 The human rights, security, and economic impacts of HT

HT transgresses basic human rights. Trafficking involves denial of social, economic rights,⁶⁸ civil and political rights, equality rights, the right to be free from slavery and slavery-like practices.⁶⁹ HT offends the 'deepest principles of human rights and human dignity' and the 'conscience of mankind'.⁷⁰ HT and all its forms fundamentally 'involve the question of human dignity and the value of a human being'.⁷¹ The violations of individuals' human rights are intertwined with both physical and psychological ill-treatment leading to trauma⁷² that are

⁶⁷ Harmen van der Wilt, 'Trafficking in Human Beings: A Modern Form of Slavery or a Transnational Crime?' (2014) Amsterdam Center for International Law, Research Paper 2014-07, p.2. See also Silvia Scarpa, 'UN Palermo Trafficking Protocol Eighteen Years On: A Critique' in John A. Winterdyk and Jackie Jones (eds), *The Palgrave International Handbook of Human Trafficking* (2019) (Palgrave MacMillan, Cham, 2019) 7.

⁶⁸ Ray (n 2) 115.

⁶⁹ Stephanie Farior, 'The International Law on Trafficking in Women and Children for Prostitution: Making it Live Up to its Potential' (1997) 10 *Harvard Human Rights Journal* 213, 213. See also Joan Fitzpatrick, 'Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combatting' (2003) 24 *Michigan Journal of International Law* 1143, 1165.

⁷⁰ Nina Tavakoli, 'A Crime that Offends the Conscience of Humanity: A Proposal to Reclassify Trafficking in Women as an International Crime' (2009) 9(1) *International Criminal Law Review* 77, 97, 98. See the Preamble of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (adopted 2 December 1949, entered into force 25 July 1951) 96 UNTS 271.

⁷¹ Todd Landman, 'Out of the Shadows: Trans-disciplinary Research on Modern Slavery' (2018) 2(2) *Peace Human Rights Governance* 143, 144.

⁷² UNODC, 'An Introduction to Human Trafficking: Vulnerability, Impact and Action. UN Global Initiative to Fight Human Trafficking' (2008) 83. Clinical research evidence demonstrates that such effects are caused by "experiences of prolonged interpersonal trauma" during which violence and fear are endured so that physical and psychological control are fully exercised on the victims. OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings 'Trafficking in Human Beings Amounting to Torture and other Forms of Ill-treatment' (2013) Occasional Paper Series no. 5, p.54. See also Ray (n 2) 101, 104.

often combined with deceptive methods of recruitment, abusive working and living conditions.⁷³

Exploitative practices have deep and long-lasting repercussions on victims,⁷⁴ affecting every aspect of life which can result in their social ostracism.⁷⁵ Working towards the reintegration of for instance child soldiers within their families, is governments' primary responsibility to provide effective protection and remedial measures.⁷⁶ Reintegration and support can also be provided by a community-based perspective and includes the collaboration organisations on the ground of key players: leaders, elders, spiritual figures of the community.⁷⁷

HT threatens human security⁷⁸ whose primary concern is the protection of human life and dignity at war, during crises and peace times.⁷⁹ HT affects international and national security. Security imperatives triggered for instance by the 9/11 attack⁸⁰ evolved away from the focus on terrorism and violent extremism⁸¹ to encompass other security threats related to the impact of increasing FCAS⁸² that are considered fertile grounds for organised crime.⁸³ In

⁷³ UNODC, 'An Introduction to Human Trafficking: Vulnerability, Impact and Action. UN Global Initiative to Fight Human Trafficking' (n 72) 9.

⁷⁴ Rita Chi-Ying Chung, 'Cultural perspectives on child trafficking, human rights & social justice: A model for psychologists' (2009) 22(1) *Counselling Psychology Quarterly* 85,89.

⁷⁵ Sierra Leone Truth and Reconciliation Commission, Report to the UNSC, volume 3 Three B 'Women and the Armed Conflict in Sierra Leone' (2004) para 8 at 86.

⁷⁶ Report of the Secretary General on children and armed conflict (20 June 2019) UN Doc A/73/907-S/2019/509, para 4 at 2.

⁷⁷ Chung (n 74) 90.

⁷⁸ UNOCHA, Human Security at the United Nations Newsletter Issue 6 (2009-2010).

⁷⁹ The human security concept took a new dimension based on the UNDP, 'Human Development Report' (1994) Chapter II, 22. See Pati (n 4) 29. See also Farhan Navid Yousaf, 'Forced migration, human trafficking, and human security' (2018) 66(2) *Current Sociology Monograph* 209, 220.

⁸⁰ Nanditha Sharma, 'Anti-Trafficking Rhetoric and the Making of a Global Apartheid' (2005) 17(3) *Journal, States of Insecurity, and the Gendered Politics of Fear* 88.

⁸¹ Rachel Locke, 'Organized Crime, Conflict, and Fragility: A New Approach' (2012) *International Peace Institute* 1.

⁸² The World Bank Group Strategy for Fragility, Conflict and Violence 2020–2025, 2.

⁸³ Paula Miraglia, Rolando Ochoa and Ivan Briscoe, 'Transnational organised crime and fragile states' (2012) *OECD Development Co-operation Working Papers* 4. See also the World Bank Group (n 82) 3.

this global environment, HT has become a prominent feature in conflict settings⁸⁴ also linked to the exacerbation of humanitarian and forced migration crises.⁸⁵

The economic impacts of HT are substantial. According to International Labour Organisation (ILO) estimates, profits generated by HT are estimated to be worth billions of US dollars.⁸⁶ This constitutes the second largest source of illegal income in the world after the narcotics trade⁸⁷ although these networks often intersect.⁸⁸

Furthermore, organised crimes such as HT are in themselves powerful mechanisms for the unlawful redistribution of national wealth, which in turn influences political power, markets, and social relations.⁸⁹ HT therefore has repercussions on countries' economies and their public finances. The focus is on law-enforcement mechanisms and institutional structures such as national referral mechanisms, and national rapporteurs on trafficking in human beings.⁹⁰

⁸⁴ Report of the Secretary General on trafficking in persons in armed conflict pursuant to Security Council resolution 2388 (2017) UN Doc S/2018/1042 of 21 November 2018, para 4 at 2.

⁸⁵ UNODC, 'Global Report on Trafficking in Persons (United Nations Publication 2016) 1,10. See the open debate of the UN Security Council on HT in conflict situations of 15 March 2017 <<https://www.un.org/press/en/2017/sc12751.doc.htm>> accessed 18 March. See also the Financial Action Task Force (FATF), 'Financial Flows from Human Trafficking' (2018) 12.

⁸⁶ ILO reports stating that forced labour generates US \$ 150 billion in illegal profits per year of which US\$ 99 billion comes from sexual exploitation. ILO, 'Profits and Poverty: The Economics of Forced Labour' (2014). See ILO, Patrick Belser, 'Forced Labour and Human Trafficking: Estimating the Profits' (2005). However, it is acknowledged that ILO's methods of calculating profits have not been independently verified. See also Mohammed Y. Mattar, 'Trafficking in Persons, Especially Women and Children, in Countries of the Middle East: The Scope of the Problem and the Appropriate Legislative Responses' (2002) 26(3) Fordham International Law Journal 721.

⁸⁷ Elżbieta M. Goździak and Micah N. Bump, 'Data and Research on Human Trafficking: Bibliography of Research-Based Literature' (2008) 13.

⁸⁸ Shelley (n 2) 5.

⁸⁹ UNODC, 'An Introduction to Human Trafficking: Vulnerability, Impact and Action. UN Global Initiative to Fight Human Trafficking' (n 72).

⁹⁰ UNODC, 'An Introduction to Human Trafficking: Vulnerability, Impact and Action. UN Global Initiative to Fight Human Trafficking' (n 72) 12. See UNGA/RES/60/147 United Nations Resolution Basic Principles and Guidelines on the Right to a Remedy and Reparation for

The financial impact of the criminal justice and law-enforcement responses to trafficking is a significant burden particularly in the case of FCAS and developing countries where resources are scarce. One estimate concerning donors support suggests that between 2003 and 2012, donor countries allocated a combined average of USD 124 million annually for HT related interventions, predominantly funding projects in Southeast Asia, Eastern Europe, and Sub-Saharan Africa.⁹¹

1.4 The magnitude of HT

HT is portrayed to have reached ‘epidemic proportions’⁹² transcending geographic boundaries.⁹³ HT has been among the fastest growing forms of transnational crime.⁹⁴ Despite a shared universal condemnation of HT and the fact that it is legally debated to be categorised as a serious crime,⁹⁵ HT far from being eradicated remains widespread in quantitative occurrence and impact.⁹⁶ Estimates fluctuate around 800,000 persons trafficked beyond international borders every year.⁹⁷

Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2006).

⁹¹ Martina Ucnikova, ‘OECD and Modern Slavery: How much aid money is spent to tackle the issue?’ (2014) 3 *Anti-Trafficking Review: Following the Money: Spending on Anti-Trafficking* <<https://doi.org/10.14197/atr.20121437>> accessed 12 November 2017.

⁹² Tavakoli, ‘A Crime that Offends the Conscience of Humanity: A Proposal to Reclassify Trafficking in Women as an International Crime’ (n 70) 97.

⁹³ Yousaf (n 79) 217.

⁹⁴ Shelley (n 2) 2.

⁹⁵ Wilt, ‘Trafficking in Human Beings: A Modern Form of Slavery or a Transnational Crime?’ (n 67) 3. Tomoya Obokata, ‘Trafficking of Human Beings as a Crime against Humanity: Some Implications’ (2005) 54(2) *International and comparative law quarterly* 445.

⁹⁶ <<http://www.antitraffickingreview.org/index.php/atrjournal/issue/view/16>> accessed 19 July 2019.

⁹⁷ Linda Smith and Mohamed Mattar, ‘Creating International Consensus on Combating Trafficking in Persons: U.S. Policy, the Role of the UN, and Global Responses and Challenges’ (2004) 2 (1) *The Fletcher Forum of World Affairs* 155. See also United States Congressional Research Service (n 80). See more recently, Siller, ‘Human Trafficking in International Law Before the Palermo Protocol’ (n 21) 408.

Measuring the scale and extent of HT is nevertheless a difficult task and has caused some disagreement among researchers, practitioners, and policymakers, especially with regard to the reliability of data.⁹⁸ Capturing an accurate picture and reliable data of HT's scale has been and remains a challenge⁹⁹ particularly because of the 'hidden' nature of the population concerned.¹⁰⁰ HT victims feel ashamed and fear reporting to the authorities. They are often unable or prevented to do so. In addition, anti-trafficking domestic legislation for prosecution and victim as well as witness protection may be lacking, inadequate, or not implemented.¹⁰¹ Second, there are complexities associated with the processes of collecting, recording, and research data interpretation¹⁰² as there are no standard and rigorous research methodology or consistency to gather such data.¹⁰³ Estimates are disparate and figures may tend to be inflated in order to attract media coverage, donor

⁹⁸ Rhacel Salazar Parreñas, Maria Cecilia Hwang, and Heather Ruth Lee, 'What Is Human Trafficking? A Review Essay' (2012) 37 (4) *Sex: A Thematic Issue*, University of Chicago Press 1016. See also Karen Bravo, 'Exploring the Analogy between Modern Trafficking in Humans and the Transatlantic Trade' (2007) 25 *Boston University International Law Journal* 207,219.

⁹⁹ Elżbieta M. Goździak and Micah N. Bump, 'Data and Research on Human Trafficking: Bibliography of Research-Based Literature' (n 87) 13. Eurostat Statistical Working Papers, 'Trafficking in Human Beings' (European Union publication, 2015) 14.

¹⁰⁰ Frank Laczko, 'Data and Research on Human Trafficking' in Frank Laczko and Elżbieta Goździak (eds) *Data and Research on Human Trafficking: A Global Survey* (IOM, 2005) 5. Goździak and Bump (n 87) 13. See United Nations Global Action to Fight Human Trafficking (UN. GIFT) Background Paper, 'Quantifying Human Trafficking, its Impact and the Responses to it' (2008) The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna 2. See also Frank Laczko and Marco A. Gramegna (n 51). See also United Nations on Drug and Crimes (UNODC) is a UN entity mandated to assist States in the implementation of the Palermo Protocol. UNODC Global Report on Trafficking in Persons (2014).

¹⁰¹ Laczko and Gramegna (n 51) 12.

¹⁰² Jody Raphael, 'Returning Trafficking Prevalence to the Public Policy Debate: Introduction to the Special Issue' (2017) 3(1) *Journal of Human Trafficking* 3.

¹⁰³ Jyoti Sanghera, 'Unpacking the Trafficking Discourse' in Kamala Kempadoo. Boulder (eds), *Trafficking and Prostitution Reconsidered. New Perspectives on Migration, Sex Work and Human Rights* (CO: Paradigm, 2005) 21. For instance, in some countries, some organisations record the victim once the crime is reported some other may register the victim when the crime is investigated or at the prosecuting phase. See also Ronald Weitzer, 'Human Trafficking and Contemporary Slavery' (2015) 41 *Annual Review of Sociology* 224,227.

funding¹⁰⁴ and to gain the attention of policy-makers¹⁰⁵ as well as meet aid agencies priorities'.¹⁰⁶ Western countries, illustrated by the 2017 Annual report of the United Kingdom (UK) Independent Anti-Slavery Commissioner, have stressed the need 'for a robust data collection mechanism'.¹⁰⁷ Meanwhile the European Commission reports improvements on some aspects of data collected.¹⁰⁸ Third, the differences between domestic legal definitions and interpretation of what constitutes HT¹⁰⁹ add to the challenges of identification.¹¹⁰ This is often combined with difficulties in the implementation of domestic legislation criminalising HT as well as weak undertakings by law enforcement.¹¹¹ Data collection is less likely to be coherent or a priority in fragile contexts which are amplified by a lack of both institutional and financial capacity.¹¹²

¹⁰⁴ Fiona David, 'Building the Infrastructure of Anti-Trafficking, Part II: Why measurement matters' (2017) 8 *Anti-Trafficking Review* 150,151.

¹⁰⁵ Ronald Weitzer, 'The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade' (2007) 35 *Politics and Society* 447,455. See also Sanja Milivojevic and Sharon Pickering, 'Trafficking in people, 20 years on: Sex, migration and crime in the global anti-trafficking discourse and the rise of the 'global trafficking complex' (2013), 25(2) *Current Issues in Criminal Justice* 585,596.

¹⁰⁶ Ronald Weitzer, 'Prostitution control in America: Rethinking public policy' (1999) 32 *Crime, Law and Social Change* 83,102.

¹⁰⁷ Independent Anti-Slavery Commissioner Annual Report (2016 – 2017) 13 <http://www.antislaverycommissioner.co.uk/media/1164/iasc_annual-report-16-17-web.pdf> accessed 12 November 2017.

¹⁰⁸ European Commission, 'Data collection on trafficking in human beings in the EU' (2018) 17.

¹⁰⁹ Eurostat, Statistical working papers, 'Trafficking in Human Beings' (2014) 15. < http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20141017_working_paper_on_statistics_on_trafficking_in_human_beings_en.pdf> accessed 11 February 2016. See United Nations Global Action to Fight Human Trafficking (UN. GIFT) (n 99) 8. See also the report from the Commission to the European Parliament to the European Parliament and the Council, 'Report on the progress made in the fight against trafficking in human beings (2016) as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims' (European Commission publication, 2016) 4,5. See Amy Farrell and Leke de Vries, 'Measuring the Nature and Prevalence of Human Trafficking' in John A. Winterdyk and Jackie Jones (eds), *The Palgrave International Handbook of Human Trafficking* (Palgrave Macmillan, Cham, 2019) 2.

¹¹⁰ Raymond Saner, Lichia Yiu and Laurel Rush, 'The measuring and monitoring of human trafficking' (2018) 21(2) *Public Administration and Policy* 94,97.

¹¹¹ *ibid* 99.

¹¹² Laczko and Gramegna (n 51) 190.

The main sources of raw data are gathered by the United Nations Office on Drugs and Crime (UNODC),¹¹³ the International Organization for Migration (IOM),¹¹⁴ the International Labour Organisation (ILO)¹¹⁵ and the United States (US) State Department,¹¹⁶ all of whom have developed databases on HT. At the European level, Eurostat collects data from official national sources and provides indicators on identified victims, prosecutions, and convictions.¹¹⁷ However, not all members' States are able to provide coherent data based on requested indicators. Hence, data interpretation and analysis should be carefully considered despite progress made with comparison to previous gathered data.¹¹⁸ In the same vein, the Organisation for Security and Cooperation in Europe (OSCE) is concerned with improving information exchange on data collection from Governments of OSCE participating States and from CSOs in order to avoid duplication and overlapping efforts initiated by other international institutions such as the Council of Europe or UNODC.¹¹⁹

With regard to specific figures, the ILO for instance estimates that 40.3 million persons were victims of modern slavery in 2016 and in 2017.¹²⁰

An estimate of 15.4 million persons, mostly women and girls are victims of forced marriage.¹²¹ An estimate of 24.9 million victims of forced labour trapped

¹¹³ Global database created under the Global Programme Against Trafficking in Human Beings (GPAT) of UNODC < <https://www.unodc.org/middleeastandnorthafrica/en/project-profiles/glot59.html>> accessed 13 July 2020. See Frank Laczko, *Data and Research on Human Trafficking: A Global Survey* (n 100) 13.

¹¹⁴ IOM Counter-Trafficking Database < <https://www.ctdatacollaborative.org/>> accessed 13 July 2020. Laczko and Gramegna (n 51) 187.

¹¹⁵ ILO's central statistics database < <https://ilostat.ilo.org/data/>> accessed 12 July 2020.

¹¹⁶ US Government data base.

¹¹⁷ Eurostat, working paper (2015) (n 99) 16.

¹¹⁸ Eurostat, working paper (2015) (n 99) 10.

¹¹⁹ OSCE, 2014-15 Report of the Special Representative and Coordinator for Combating Trafficking in Human Beings, (2015) 13.

¹²⁰ ILO, 'Global estimates of modern slavery: forced labour and forced marriage' (2017) 9.

¹²¹ *ibid* 11.

in situations by coercion or deception, characteristics that capture the full realm of HT for labour and sexual exploitation or what is described as ‘modern-day slavery’.¹²² Out of this latter estimate, 4.8 million are victims of sexual exploitation and 16 million are victims of forced labour exploitation such as agriculture, construction, domestic and manufacturing work.¹²³ The remaining 4.1 million are subjected to forced labour in contravention with ILO standards, imposed by State authorities.¹²⁴

Implementing coherent and effective anti-trafficking strategies rely partly upon a consensus in existing measures within the international community to understand the magnitude of HT phenomenon.¹²⁵ Reliability of data remains therefore paramount for all countries experiencing HT.¹²⁶

1.5 Focus of the research: HT in fragile and conflict affected situations

In December 2016, the UN Security Council (UNSC) adopted the landmark resolution 2331. This UN resolution condemns HT in context of armed conflict and post-conflict situations, stressing that HT:

¹²² ILO (n 120) 9,10,11. The report mentions that numbers do not include trafficking for the removal of organs or for forced marriage or adoption unless the practices lead to situation of forced labour or services.

¹²³ The Financial Action Task Force (FATF), ‘Financial Flows from Human Trafficking’ (2018) 9.

¹²⁴ ILO (n 120) 11. See also The Financial Action Task Force (n 123) 9. See also the Protocol to the Forced Labour Convention 29 (1930) (adopted in June 2014, entered into force 9 November 2016) reaffirming that ILO standards are complementary to UN human rights instruments in particular the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and others such as: Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) UN. Doc A/810, the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural (entered into force 16 December 1966) 993 UNTS 3. The Slavery Convention (1926), the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956).

< http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_248900.pdf > accessed 12 February 2016.

¹²⁵ Farrell and de Vries (n 109) 2.

¹²⁶ Kristiina Kangaspunta, ‘Mapping the inhuman trade: Preliminary findings of the database on trafficking in human beings’ (2003) 3(1&2) Forum on Crime and Society 81.

'undermines the rule of law and contributes to other forms of transnational organized crime which can exacerbate conflict and foster insecurity, instability and undermine development'.¹²⁷

This UN resolution paved the way for resolution 2388. The latter confirms the application of the HT definition in situation of exploitation during conflict and post conflict as well as HT being associated with sexual violence in such contexts.¹²⁸ The UNSC refers to 'conflict-related sexual violence' which encompasses 'trafficking in persons when committed in situations of conflict for the purpose of sexual violence/exploitation'.¹²⁹ Furthermore, the UN Secretary General requests international action with specific reference to women and children subjected to trafficking in areas of armed conflict.¹³⁰ In 2018, the UN Secretary-General stressed once more the urgency of addressing the nexus between trafficking in human beings conflict-related sexual violence (CRSV) referring to fragile and conflict contexts.¹³¹

The thesis addresses the UNSC's concerns by examining the nexus of HT in FCAS. Examples of HT's occurrence in fragile contexts includes reports of more than 14,000 men, women and children abducted and forced into slavery in Sudan during the civil war between 1986 and 2002.¹³² Reports of Rohingya Muslims trafficked from Myanmar and Bangladesh to Thailand and Malaysia

¹²⁷ UNSC Res 2331 (20 December 2016) UN Doc S/RES/2331, para 1 at 3.

¹²⁸ UNSC, Res 2388 (21 November 2017) UN Doc S/RES/2388, p.1.

¹²⁹ Report of the UN Secretary-General on conflict-related sexual violence (15 April 2017) UN Doc UNSC S/2017/249, para 2 at 1.

¹³⁰ Report of the Secretary General on trafficking in persons in armed conflict pursuant to Security Council resolution 2388 (n 128) paras 1,3,4 at 1,2.

¹³¹ UN Security Council Report of the Secretary-General on Conflict-Related Sexual Violence (S/2018/250), 23 March 2018.

¹³² Human Rights House Foundation, Sudan, and modern slavery (2007) <<https://humanrightshouse.org/articles/sudan-and-modern-slavery/>> accessed 3 August 2019.

from 2012 to 2015 with the discovery of cages in camps and mass graves at Wang Kelian in Malaysia.¹³³ There are also reports of migrants being sold for the purpose of slavery in Libya¹³⁴ and slave markets of Yazidi women in Iraq¹³⁵ and Syria.¹³⁶ These incidences illustrate that HT feeds off weak legal institutions, civil war, political unrest and corruption.¹³⁷

States in a fragile situation are often unable to implement their legal obligations arising from the international legal framework. This includes the framework of international human rights law (IHRL), international refugee law (IRL), international humanitarian law (IHL), international criminal law (ICL) and international labour law (ILL).

The choice of examining IHRL, IHL, IRL, ICL and ILL was guided by the complexity posed by FCAS and the context in which HT takes place, often involving multiple human rights violations. These regimes come in support to the Palermo Protocol for a more complete understanding of the various aspects of HT. Hence, the different legal constituents of the definition of HT as well as the multifaceted dimension of HT practices are of concern to these chosen legal regimes which based on their focus, address specific constituent of the HT definition, and interact to form a wider protection framework.

¹³³ Fortify Rights, ‘ “Sold like Fish” - Crimes Against Humanity, Mass Graves, and Human Trafficking from Myanmar and Bangladesh to Malaysia from 2012 to 2015’ (2015) 47, 92.

¹³⁴ <<https://www.un.org/press/en/2017/sc13105.doc.htm> > accessed 1 August 2019.

¹³⁵ <<https://www.theguardian.com/commentisfree/2018/oct/06/nadia-murad-isis-sex-slave-nobel-peace-prize>> accessed 1 August 2019.

¹³⁶ <<https://www.sbs.com.au/news/dateline/is-beheaded-50-yazidi-women-remaining-3000-likely-to-be-sold-into-sex-slave-market>> accessed 1 August 2019. See also <https://www.washingtonpost.com/world/after-five-failed-attempts-to-escape-isis-slavery-she-tried-one-last-time/2019/02/23/2137450c-3469-11e9-8375-e3dcf6b68558_story.html?noredirect=on&utm_term=.07120cd26e82> accessed 1 August 2019.

¹³⁷ Yemen <<https://www.state.gov/reports/2019-trafficking-in-persons-report-2/yemen/>> accessed 3 August 2019.

The added value of these chosen frameworks can provide various recourses for HT victims which compensate for the weaknesses of the Palermo Protocol on this aspect and its weaknesses regarding human rights protection. As an example, IHRL provides HT victims human rights protection as well as the right to effective remedy at a domestic level primarily, then at an international level through quasi-judicial UN human rights mechanisms or through regional human rights judicial mechanisms.

1.6 Purpose of the research

The aim of this research is threefold: first, to provide a better understanding of the multifaceted nature of the crime of HT and its occurrence in Fragile and Conflict-Affected Situations (FCAS) which exacerbates vulnerability to HT; secondly, to clarify definitional issues of HT arising from the Palermo Protocol and how the elements of the definition relate to each other. This clarification enables an effective use of the definition for implementation and enforcement purposes. For this, the research examines relevant international instruments and legal branches of international law that form the framework addressing HT for protection purposes. Thirdly, the particular challenges faced by FCAS to implement the HT legal framework are analysed through the field research for the case study of Palestine. Palestine is chosen as it is both fragile and conflict affected. Palestine is also accessible albeit with unpredictable security restrictions. Most occurrences of HT in FCAS are off limits to field research, as exemplified by Syria,¹³⁸ northern Nigeria, South Sudan, Libya, or Yemen.

¹³⁸ Report of the Secretary-General, 'Children and armed conflict' (20 June 2019) UN Doc A/73/907-S/2019/509, para 177 at 27.

The purpose of the research is grounded in the concern that despite the existence of an international legal framework addressing HT there are significant challenges in FCAS to counter this phenomenon and to implement the international normative HT framework. Moreover, implementation challenges appear deep-rooted despite a supportive international community dedicated to combat HT. This includes academic scholarship, UN human rights mechanisms and monitoring bodies, international human rights organisations,¹³⁹ CSOs, grassroots communities.¹⁴⁰ HT generates huge profits, yet, HT is not considered a priority compared to terrorism¹⁴¹ despite recent political statements that express commitment to eradicate this serious crime.¹⁴² HT is described as a complex crime involving a range of other criminal offences:¹⁴³ property crimes, fraud, abduction, however these offences are not always clearly perceived as part of HT.¹⁴⁴ Another reason pertains to the fact that some countries have still not enacted specific legislation against HT, resulting in difficulties for law enforcement personnel to identify trafficked victims¹⁴⁵ and for HT to be prosecuted.

In the context of 'state fragility' and political instability there is a need to analyse how domestic actors along with external state building interventions address

¹³⁹ Stoyanova (n 20) 1.

¹⁴⁰ Shelley (n 2) 25.

¹⁴¹ GRETA: Group of Experts on Action against Trafficking in Human Beings, 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Belgium' (2017) para.102 at 24.

¹⁴² Joint statement of 8 March 2019, from The Ministry for Foreign Affairs in France and from The Ministry for Foreign Affairs in Sweden < <https://www.diplomatie.gouv.fr/en/french-foreign-policy/human-rights/events/article/combating-human-trafficking-and-sexual-exploitation-joint-op-ed-by-minister>> accessed 20 July 2019. See also the message from the US Secretary of State in the 2018 US Trafficking in Persons Report (2018),.

¹⁴³ < <https://www.europol.europa.eu/crime-areas-and-trends/crime-areas/trafficking-in-human-beings>> accessed 20 July 2019.

¹⁴⁴ <<https://www.theguardian.com/global-development-professionals-network/2013/jul/11/human-trafficking-and-law-enforcement>> accessed 1 August 2019.

¹⁴⁵ Chung (n 74) 93. See also Atak and Simeon (n 7)1023.

HT. Researching the case-study of Palestine illustrates the complexity of addressing HT through primary hand inquiry building a picture of HT in Palestine at a micro level. The thesis supports the position that ‘microlevel empirical studies can provide a superior, evidence-based foundation for the development of official policies regarding human trafficking’.¹⁴⁶ The research is undertaken based on extensive legal and field research: individual and group interviews questionnaire design, note taking, observing meetings and conference.¹⁴⁷

1.7 Research approach

The approach of the research is to examine first the definitional complexity of HT, identified *inter alia* by the United Nations Working Group on Trafficking in Persons and perceived ‘as an obstacle to the effective implementation of the international legal framework around trafficking persons, and its national equivalents’.¹⁴⁸ The research will demonstrate that despite the existence of an international, broad and unequivocal legal definition of HT,¹⁴⁹ there are nevertheless, remaining definitional controversies. Controversies are partly linked to difficulties for States party to the Protocol to fully understand its legal meaning and articulate the different constitutive elements of the HT definition. In addition, the research will address through selected academic positions and

¹⁴⁶ Ronald Weitzer, ‘New Directions in Research on Human Trafficking’ (2014) 653(1) *The Annals of the American Academy of Political and Social Science* 6,21.

¹⁴⁷ Two examples include: visits to Interpol and second a visit to the Mehwar Women’s Centre, Bethlehem in July 2018. The shelter is managed by the Ministry of Social Development.

¹⁴⁸ UNODC, *The Role of ‘Consent’ in the Trafficking in Persons Protocol* (2014) Issue Paper 6.

¹⁴⁹ Gallagher (n 23) 12. See Siller, ‘Human Trafficking in International Law Before the Palermo Protocol’ (n 21) 447. See also Laura L. Shoaps, ‘Room for Improvement: Palermo Protocol and the Trafficking Victims Protection Act’ (2013) 17(3) *Lewis & Clark Law Review* 931,933.

landmark jurisprudence, how elements within the definition relate to each other in order to legally construct and establish the practice. Characterised in some instances as a 'serious crime' or a crime of concern, the legal status of HT in the international justice system is discussed in part II but is not the focus of the study.

The complexity to understand this legal concept has consequences both on the domestic judicial interpretation by States parties to the Protocol and the domestic implementation of the normative framework addressing HT. Making the understanding of the definition easier would not only assist states to have a better grasp of the HT phenomenon but would also assist practitioners to apply the law. This is fundamental to identify individuals in need of protection against HT. The research analyses the case study of Palestine reviewing how civil society and other multiple actors within Palestine, understand HT in their local context and how they are able to legally draft the HT definition within the Palestinian legal system.

With regard to the sensitive nature of the topic and the links with organised crime, security risks may arise for the researcher and the participants. Hence, the choice was made not to interview potential or actual victims of HT. In addition, for security related reasons and in order not to damage the trust built up with Palestinian interviewees, the researcher completely refrained from expanding the research to Israel. Access to the Gaza Strip was not allowed, the research focused therefore on the West Bank part of Palestine.

1.8 The research question and objectives

The research question and its two sub-questions are formulated as follows:

What are the challenges to implement the international legal framework addressing HT in FCAS?

1. What is the legal framework under international law through which vulnerable individuals can be protected against HT practices?
2. How can this normative framework come in support to the Palermo Protocol for wider legal protection and be implemented in fragile and conflict affected situations?

To further shed light on the research question, the research examines whether the international legal framework addressing HT available to Palestine can be implemented effectively in order to protect against HT and related human rights abuses.

The primary objective of the research is to provide a thorough understanding of the multifaceted nature of the crime of HT and its occurrence in Fragile and Conflict-Affected Situations (FCAS) noting that FCAS sometimes refers to 'States' as opposed to 'Situations'. Second, present the normative definition of HT and critically analyse the legal consequences of its definitional complexity for the purposes of its domestic interpretation as well as of its prosecution. Third, explore through the applicability of international law and the interaction of its various branches what protective legal framework against HT is available, specifically in FCAS and to identify their limitations. Fourthly, based on the above three objectives, identify the challenges to implementing the protective

legal framework addressing HT in FCAS with a focus on the case study of Palestine.

Specifically, with regard to the case study of Palestine, the primary approach is to provide a historical, legal, and judicial background that shaped and impacted on the performance of the Palestinian legal system. The research then examines the challenges of implementing Palestine's overall human rights legal commitments. Thirdly, the study analyses the challenges of implementing and building an HT legal framework, associated with the prevailing political instability in Palestine and the multi-layered nature and unique FCAS setting.

1.9 Contribution of the research and limitations

Despite the accession of Palestine to the Palermo Protocol in December 2017, Palestine is an overlooked location with regard to HT.¹⁵⁰ This empirical analysis, through the case study, contributes to knowledge by filling a gap in the empirical literature on HT in the fragile context of Palestine. Based on analysis of the research findings, it is envisaged that the research may be valuable in informing multidisciplinary stakeholders dedicated to combating HT by contributing to a more in depth understanding of the HT legal aspects and phenomenon, particularly in Palestine. Furthermore, the research investigates the challenges faced by Palestine to implement international human rights commitments and the legal framework addressing HT. In this sense the research may be of practical value to Palestine which is in the process of drafting anti-trafficking

¹⁵⁰ Ashley Russell, 'Human Trafficking: A Research Synthesis on Human Trafficking Literature in Academic Journals from 2000–2014' (2018) 4(2) *Journal of Human Trafficking* 114, 129. See Shelley (n 2) 25.

domestic legislation and setting up related national referral mechanisms with an action plan. The research contributes to a better understanding of the process Palestine is going through regarding the implementation of its international legal commitments, in the midst of a political split with a deep rooted fragmented legal and judicial system.

1.10 The research process

The thesis focuses on a real-world problem and is both desk-based and field grounded. It is furthermore concerned with public policy and legal reforms relevant to research.¹⁵¹ The research is exploratory and partly draws upon extensive personal experience of humanitarian interventions in FCAS. This invites the researcher to consider a mixture of qualitative data with quantitative data where it exists and not necessarily proceeding through a fixed sequence of steps.¹⁵²

Qualitative research and its design, 'is an ongoing process that involves "taking" back and forth between the different components of the design, assessing the implications of goals, theories, research questions, methods and validity threats for one another'.¹⁵³ The research process encompasses an 'integrated' and 'comparative' approach which goes beyond analysis and research in law and is intimately linked to implementation of policy and the law. This is achieved by means of enquiry through interviews, through investigation of the case study and its context. Exploratory research entails interpreting the natural context

¹⁵¹ Ian Dobinson and Francis Johns, 'The Qualitative Legal Research' in Mike McConville and Wui Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2010) 19.

¹⁵² Joseph A. Maxwell, *Qualitative Research Design – An Interactive Approach* (2005, Sage Publications, 2nd edn, 2005) 3.

¹⁵³ *ibid* 3.

based on cultural, historical, political legacies and their significance with regard to the phenomenon observed.

The premise of the comprehensive and integrated approach is that members of different institutions, with reference to law enforcement and legal professionals for example, work together at several levels to achieve common aims. An integrated approach recognises that no one profession has a monopoly over responses to the challenges of HT and that by making best use of the broad range of knowledge, skills and assets of all parties, maximum results may be achieved. The research process is also complemented by the use of a 'functional approach' rooted in the understanding that people hold different attitudes towards objects, events, issues, and behaviours.¹⁵⁴

The thesis adopts the position that the reliance upon a sole legal based approach to address HT cannot encompass the wide range of counter trafficking efforts.¹⁵⁵ Counter trafficking efforts/measures require action in every policy area, and need to involve many stakeholders, including civil society, utilising tools that foster cooperation.

Law represents 'just one among many tools used to regulate human behaviour' in order to find solutions to any forms of violence.¹⁵⁶ The thesis examines therefore through the case study, the role of States' institutions, the involvement and support of civil society organisations, its networks, grassroots communities

¹⁵⁴ Daniel Katz, 'The Functional Approach to the Study of Attitudes' (1960) 24(2) Public Opinion Quarterly 163, 204.

¹⁵⁵ Rona Smith and Lee McConnell, L, 'Introduction to human rights research methods' in Lee McConnell and Rhona Smith (eds), *Research Methods in Human Rights* (2018) 3.

¹⁵⁶ International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Report prepared by the International Committee of the Red Cross for the 28th International Conference of the Red Cross and Red Crescent (2-6 December 2003) 22.
<<https://casebook.icrc.org/case-study/icrc-ihl-and-challenges-contemporary-armed-conflicts>> accessed 12 February 2020.

and the overall political as well as social will for the implementation and enforcement of legal norms against HT.¹⁵⁷ Nevertheless, the law remains the central focus. Furthermore, with reference to the prosecution opening statement of Carla del Ponte:

'the law is not a mere theory or an abstract concept. It is a living instrument that must protect our values and regulate civilized society'.¹⁵⁸

1.11 The case study of Palestine

Palestine is considered as an FCAS. Palestine corresponds to the general criteria of what constitutes fragile, and conflict affected in a unique environment. Palestine (Gaza and the West Bank) is included within all Fragile States Indices; World Bank, OECD, EU, Fragile States Index (The Fund for Peace). The new World Bank Assistance Strategy for the West Bank and Gaza (2022-25) confirms the fragility of Palestine and closely follows the principles set out in the WBG Strategy for Fragility, Conflict and Violence (2020-2025).¹⁵⁹ Since 1949, Palestine has experienced a prolonged and intensive state-building journey involving continuing interaction between domestic and external actors. This interaction is characterised by international aid interventions under multiple

¹⁵⁷ Chuang, 'Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts' (n 45) 106.

¹⁵⁸ Carla del Ponte, Former Chief Prosecutor for the UN International Criminal Tribunal for the Former Yugoslavia. Prosecution opening statement for the Milosevic's case (12 February 2002) < http://www.icty.org/x/cases/slobodan_milosevic/trans/en/020212IT.htm > accessed 11 March 2016.

¹⁵⁹ World Bank, 'Assistance Strategy for the West Bank and Gaza for the period FY 22-25 (2021) 15.

mandates within which the UN operates, through a variety of agencies, funds, and programmes.¹⁶⁰

The research demonstrates that Palestine faces multi-dimensional challenges, the foremost being sixty years of occupation of the Gaza Strip¹⁶¹ and the West Bank, including East Jerusalem. The occupation by Israel has resulted in Palestine's territorial, administrative, legal, judicial, and societal fragmentation. Ultimately, this fraction was aggravated by the split between competing political parties of Fatah and Hamas. The political division exacerbated the challenge to achieve the harmonisation of Palestine legal framework, bringing further difficulties for Palestine to address its legal system as well as to implement its international legal commitments. Hence, the attempt to resolve the crisis of legitimacy in law-making process in the West bank and Gaza as well as to unify the legal and judiciary institutions.¹⁶² The research takes place in this unique setting within which the prolonged occupation has led to a deep-rooted chronic protection crisis¹⁶³ and restrictions on Palestinians' enjoyment of basic human

¹⁶⁰ UNDP, 'United Nations Development Assistance Framework State of Palestine 2018-2022' (2018) 1.

¹⁶¹ Report of the United Nations Fact Finding Mission on the Gaza Conflict' (15 September 2009) UN Doc. A/HRC/12/48, 85 para 276: 'Israel has without doubt at all times relevant to the mandate of the Mission exercised effective control over the Gaza Strip'. The Mission is of the view that the circumstances of this control establish that the Gaza Strip remains occupied by Israel. See also the 'Report of the Independent Fact-Finding Committee on Gaza: No Safe Place' (presented to the League of Arab States 30 April 2009) 16. See also an extensive demonstration of effective control by Israel post its disengagement in August 2005: John Dugard, 'Human Rights in Palestine and Other Occupied Arab Territories', Report of the Special Rapporteur John Dugard on the Situation of Human Rights in the Palestinian Territories Occupied since 1967' (21 January 2008) UN Doc A/HRC/7/17 para 11. See also Shane Darcy and John Reynolds, 'An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law' (2010) 15 (2) *Journal of Conflict & Security Law* 241.

¹⁶² Mia Swart, 'A Framework for Unity and Reconciliation in the State of Palestine – Proposals for Legal Reform' (UNDP, 2016) 5.

¹⁶³ Maissaa Almustafa, 'Relieved Vulnerabilities of Palestinian Refugees: Governing Through Exclusion' (2018) 27(2) *Social & Legal Studies* 164,168,170.

rights. In 2019, approximately two million people and 70% of the inhabitants of Gaza are in need of some form of humanitarian assistance.¹⁶⁴

Palestine presents itself as a potentially empirically rich case study within a specific context. The choice of a single case study enables an in depth understanding of the circumstances in which the phenomenon of HT occurs.¹⁶⁵

Palestine is one of the longest lasting humanitarian and refugee crises.¹⁶⁶ In this respect, Palestine presents a unique case¹⁶⁷ and context.¹⁶⁸ Some may argue that this uniqueness has limitations as

'the case study research is designed to focus in detail on a given situation rather than to provide findings that are generalizable to other situations'.¹⁶⁹

However, the research supports that from an interpretive perspective, generalization can occur from the particularity of the case which

'enable others, whether policy makers or practitioners, to engage with the issues in the process of generalizing to their own or similar contexts or for their own purpose'.¹⁷⁰

¹⁶⁴ UNDP, 'United Nations Development Assistance Framework State of Palestine 2018-2022' (n 160) 2. See also the HRC, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 (15 March 2019) UN Doc A/HRC/40/73, para 13. 5.

¹⁶⁵ Fabio Luiz Mariotto, Pedro Pinto Zanni and Gustavo Herminio Salati Marcondes de Moraes, 'What is the Use of a Single-Case Study in Management Research?' (2014) 54(4) *Revista de Administração de Empresas* 358,363.

¹⁶⁶ Susan M. Akram, 'Palestinian Refugees and Their Legal Status: Rights, Politics, and Implications for a Just Solution' (2002) 31(3) *Journal of Palestine Studies* 36.

¹⁶⁷ Helen Simons, 'Interpret in context: Generalizing from the single case in evaluation' (2015) 21(2) *Evaluation* 173,175.

¹⁶⁸ Robert K. Yin, *Case Study Research – Design and Methods* (SAGE, , 4th edn, 2009) 47.

¹⁶⁹ Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *Oxford Handbook of Empirical Legal Research* (OUP 2010) 12.

¹⁷⁰ Simons (n 167) 177.

Palestine experiences problems characteristic of a fragile situation: the presence of ongoing conflict; weak infrastructure and institutions; insufficient judicial and bureaucratic capacities; extreme poverty and difficult socio-economic circumstances. The Palestine question continues to challenge the world of politics, international and diplomatic relations.¹⁷¹

The UN General Assembly deciding to accord to Palestine 'non-member observer State status in the United Nations'¹⁷² in 2012. Subsequently, in April 2014, Palestinian President Mahmoud Abbas signed letters for accession to fifteen international treaties and conventions as encouraged by the Basic Law promoting the protection of human rights.¹⁷³ In particular, Palestine acceded on fifth of January 2015 to the Rome Statute in conformity with its Article 12 paragraph 3 accepting the jurisdiction of the International Criminal Court.¹⁷⁴ This international legal commitment constitutes a landmark undertaking enabling Palestine to enter into legal cooperation and relations with the international community and related institutions. Palestine received the symbolic diplomatic recognition of 137 countries.¹⁷⁵ In October 2014, Sweden

¹⁷¹ < <http://www.whatsinblue.org/2018/02/israelpalestine-arria-formula-meeting.php>> accessed 22 February 2018.

¹⁷² UNGA Resolution 67/19 (4 December 2012) A/RES/67/19, para.2, p.3. See also Martin Wählisch, 'Beyond a Seat in the United Nations: Palestine's U.N. Membership and International Law' (2012) 53 Harvard International Law Journal 229.

¹⁷³ Including the 1949 Geneva Conventions, the Vienna Convention, The Hague Convention, Conventions on the rights of children, women, persons with disabilities, on racial discrimination, torture, corruption, genocide, apartheid, the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 and the International Covenant on Economic, Social and Cultural Rights (entered into force 16 December 1966) 993 UNTS 3. See also article 10 (2) of the Basic Law. See also: This Week in Palestine, 'State of Justice' (2017) Issue 226, p.9 <www.thisweekinpalestine.com> accessed 12 July 2020.

¹⁷⁴ <<https://www.hrw.org/news/2015/04/01/icc-palestine-newest-member>> accessed 26 July 2019.

¹⁷⁵ < <http://palestineun.org/about-palestine/diplomatic-relations/>> accessed 21st February 2018. See also Perry Cammack, Nathan J. Brown and Marwan Muasher, *Revitalising Palestinian Nationalism* (Carnegie Endowment for International Peace, 2017) 10.

recognised Palestine as a State.¹⁷⁶ Similarly, in October 2014, in a non-binding vote the British Parliament gave diplomatic recognition to an independent Palestinian State.¹⁷⁷ The European Parliament on 17 December 2014 plenary session also passed a resolution on the recognition of Palestinian statehood.¹⁷⁸ In September 2017, another milestone undertaking sought since 2010,¹⁷⁹ was the accession of Palestine as a member of Interpol. Among its tasks, Interpol enables police and law enforcement agencies and other key institutions to cooperate at an international, regional, and national level, to combat HT.¹⁸⁰ On 29 December 2017, Palestine submitted a list of twenty-two international instruments for ratification to the UN Secretary General including the Palermo Protocol as well as the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁸¹

The uniqueness of the Palestinian situation is evidenced by the position of Israel as an occupying power which violates international law, eroding the prospects

¹⁷⁶ See article <<http://www.reuters.com/article/2014/10/30/us-sweden-palestinians-recognition-idUSKBN0IJ1DU20141030>> accessed 1 December 2014.

¹⁷⁷ See article <<http://www.theguardian.com/world/2014/oct/14/israel-condemns-british-mps-vote-palestinian-state>> accessed 13 October 2014.

¹⁷⁸ See <<http://www.europarl.europa.eu/news/en/news-room/content/20141212IPR01105/html/European-Parliament-resolution-on-recognition-of-Palestine-statehood>> accessed 17 March 2015.

¹⁷⁹ Interpol Resolution No. 13 GA-2017-86-RES-13. See also Martin Wählisch, 'Beyond a Seat in the United Nations: Palestine's U.N. Membership and International Law' (2012) 53 Harvard International Law Journal Online 226,256.

¹⁸⁰ Cooperation for instance with Eurojust, Europol, the International Organization for Migration (IOM), the International Labour Organization (ILO), the Organization for Security and Co-operation in Europe (OSCE), the United Nations Office on Drugs and Crime (UNODC). See also <<https://www.al-monitor.com/pulse/originals/2017/10/palestine-interpol-national-central-bureau-israeli-criminals.html>> accessed 1st November 2017.

¹⁸¹ <<https://www.haaretz.com/middle-east-news/palestinians/int-l-treaties-abbas-seeks-to-join-to-protest-jerusalem-move-1.5629959>> accessed 21 April 2018. See also the accession of the State of Palestine to the Palermo Protocol on 29 December 2017. <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=en> accessed 21 April 2018.

of a future Palestinian State.¹⁸² This is aggravated by the expansion of Israeli settlements into Palestinian territory, including East Jerusalem¹⁸³ based on the 1945 British Defence Emergency Regulations allowing *inter alia* land confiscation.¹⁸⁴ The political conflict between Israel and Palestine, the dissension over existing and proposed international boundaries, raises security and legal issues with regard to who is responsible and accountable for the protection of the population and the enforcement of domestic legislation. In addition, other issues interfere: the factional Palestinian division which heightened in 2007;¹⁸⁵ the amalgam of the current legal system applicable in Palestine as a legacy of the ongoing occupation by a series of States;¹⁸⁶ the lack of ability to harmonise and clarify Palestine's legal system; the difficulty to implement international legal obligations. The aforementioned parameters impact on Palestine's international legal status as well as its good governance and the building of a coherent rule of law.

This sociopolitical context prevails together with the unresolved question of statehood and legal status under international law despite the United Nations General Resolution A/67/L.28 of 26 November 2012 recently adopted by the vote of 138-member states '...to accord to Palestine non-member observer State status in the United Nations...'.¹⁸⁷ The latter was reiterated in the

¹⁸² Edward P. Djerejian, Marwan Muasher and Nathan J. Brown, 'Two States or One? Reappraising the Israeli-Palestinian Impasse' (2018) Carnegie Endowment for International Peace 1.

¹⁸³ *ibid* 1.

¹⁸⁴ Mais A.M Qandeel, *Enforcing Human Rights of Palestinians in the Occupied Territory* Daniel Hürlimann and Marc Thommen (eds), (Carl Grossmann Publishers, Daniel Hürlimann and Marc Thommen (eds), Vol. 4, 2018) 5.

¹⁸⁵ UNDP Report, 'The Palestinian National Unity & Social Cohesion Project' (2014) 4.

¹⁸⁶ UNDP, 'A Review of Palestinian Legislation from a Women's Rights Perspective' (2012) 7.

¹⁸⁷ UNGA Res. 67/L.28 (26 November, 2012) UN Doc A/RES/67/L.28.

subsequent UN Resolution 67/19 in December 2012.¹⁸⁸ The ongoing debate concerning the proposed two State solution, stalled for more than twenty years, suggests that this research may make the reasonable assumption that the existing status quo will continue for some time.¹⁸⁹

The current legal status of Palestine under international law has deep implications and practical repercussions on the daily life of Palestinians including their enjoyment to basic human rights. The issue of how legal protection against human rights violations and in particular HT can be implemented and judicially enforced in such a volatile and vulnerable context, is pertinent. The case of Palestine presents multiple layers of complexity and exemplifies many elements of what can be described as a 'wicked problem'.¹⁹⁰

HT and its manifestation in Palestinian society is a taboo¹⁹¹ subject, under-researched with an absence of data and accurate information.¹⁹² At present, no governmental or non-governmental organisations (NGOs) are compiling accurate statistics of HT neither are reported cases on HT in judicial proceedings. In addition, scarce reports reveal a definitional confusion as to what HT entails.¹⁹³ Despite the limited availability of accurate data and studies,

¹⁸⁸ UNGA Res. 67/19 of 4 December 2012.

¹⁸⁹ Pdraig O'Malley, 'Israel and Palestine: The Demise of the Two-State Solution' (2017) 29(1) *New England Journal of Public Policy* 6. See also <<https://dppa.un.org/en/security-council-briefing-situation-middle-east-under-secretary-general-rosemary-dicarlo-1>> accessed 30 September 2019.

¹⁹⁰ Horst W.J. Rittel and Melvin M. Webber, 'Dilemmas in a General Theory of Planning' (1973) 4 *Policy Planning* 155,161.

¹⁹¹ Taboo is defined by the Cambridge dictionary as a subject, word, or action that is avoided for religious or social reasons.

¹⁹² Reported by SAWA. SAWA is a Palestinian, non-profit civil society organization established in 1998 to eliminate all types of violence against women and children, and to promote gender equality in Palestinian society. The organisation published a briefing report in conjunction with UNIFEM to assess the extent, challenges and policy recommendations associated with Human Trafficking in Palestine. See SAWA and United Development Fund for Women (UNIFEM), 'Trafficking and Forced Prostitution of Palestinian Women and Girls: Forms of Modern-Day Slavery' (2008).

¹⁹³ *ibid* 10.

the thesis has identified concerns with regard to reported allegations of HT.¹⁹⁴ Preliminary discussions in the field emphasised the concern that HT is crowded out by other prioritised issues. These are related to emergency relief assistance, reconstruction, and recovery of infrastructure in Gaza, following repeated Israeli incursions and overall security concerns. Other parameters relate to Palestinian factional politics, human rights violations committed by the Israeli occupying power, by the Palestinian Authorities and the *de facto* Gaza Authorities, as well as the challenged legitimacy of Palestinian authorities, the wider peace and state building processes.

Initial scoping discussions and personal correspondence with local NGOs uncovered several important factors regarding the nature, context and challenges associated with HT in Palestine.¹⁹⁵ The trafficking routes involves crossing borders with Israel within the Gaza Strip, the West Bank and East Jerusalem in the overall complex system of closure and movement restrictions.¹⁹⁶ The socio-economic factors including increasing economic insecurity, high unemployment levels and poverty, expose vulnerable Palestinians to multiple forms of trafficking particularly through existing known trafficking routes adjacent to Gaza in the Sinai Peninsula.¹⁹⁷ Trafficking in Palestine exists for the purpose of forced labour,¹⁹⁸ forced prostitution,¹⁹⁹ forced

¹⁹⁴ *ibid* 10.

¹⁹⁵ Discussions with local UN staff (ILO, UNDP, UNODC) (Ramallah) Discussions with SAWA directors in February 2015 (Ramallah).

¹⁹⁶ SAWA and UNIFEM (n 192) 9.

¹⁹⁷ Conny Rijken and Mirjam van Reisen, 'Sinai Trafficking: Origin and Definition of a New Form of Human Trafficking' (2015) 3(1) *Social Inclusion* 113.

¹⁹⁸ See the contribution to the HT discourse: Nadia Shabana, *Child Labour in Palestine*, International Trade Union Confederation (30 October 2008),

<<http://www.ituc-csi.org/child-labour-in-palestine.html>> accessed 15 June 2014.

¹⁹⁹ SAWA and UNIFEM (n 192) 12.

begging,²⁰⁰ organs trafficking and the recruitment of child soldiers.²⁰¹ In most cases, women are trafficked for purposes of forced marriage or forced prostitution, while children may be subject to exploitation by providing labour in Israeli settlements farms through Palestinian middlemen.²⁰² Furthermore, children are trafficked internally and forced into begging or in some instances recruited by extremist Palestinian groups to carry out armed attacks.²⁰³ The high prevalence of domestic violence, forced and early marriage, poor educational and employment opportunities make Palestinian women and girls more susceptible to trafficking.²⁰⁴ Despite the current drafting of a new penal Code, Palestine does not comply yet with the 'commitments contained in the international conventions to which the PA committed itself in April 2014'.²⁰⁵ Applicable criminal laws do not provide adequate protection to women and girls, especially in instances of gender-based violence and trafficking.²⁰⁶

²⁰⁰ ILO, 'The situation of workers of the occupied Arab territories' (2020) 42.

²⁰¹ Defence for Children International - Palestine Section, 'Recruitment and Use of Palestinian Children in Armed Conflict', (2012)

<http://www.dci-palestine.org/sites/default/files/recruitment_report_-_final.pdf> accessed 12 March 2015. The report documents instances where Palestinian children have been used as human shields (by Israeli forces), as informants and as child soldiers by Hamas.

²⁰² Human Right Watch, 'Ripe for Abuse Palestinian Child Labor in Israeli Agricultural Settlements in the West Bank' (2015)

<https://www.hrw.org/sites/default/files/report_pdf/isrpal0415_4up.pdf> accessed 11 March 2016.

²⁰³ Jihad Shomaly, 'Use of Children in the Occupied Palestinian Territories' Defence for Children International (2004) <https://www.essex.ac.uk/armedcon/story_id/000205.pdf> accessed 17 February 2016.

²⁰⁴ SAWA and UNIFEM (n 192) 4.

²⁰⁵ European Commission Report: 'Implementation of the European Neighbourhood Policy in Palestine Progress in 2014 and recommendations for actions' (2015) 10

< <https://www.un.org/unispal/document/auto-insert-200829/>> accessed 14 July 2020. See also Euro-Mediterranean Human Rights Networks, 'Palestine- Report on violence against women in the context of conflict' (2015)

< <http://euromedrights.org/wp-content/uploads/2015/12/EMHRN-Factsheet-VAW-Palestine-EN.pdf>> accessed 11 March 2016.

²⁰⁶ Human Rights Watch, ' World Report, Israel and Palestine - Events of 2018

< <https://www.hrw.org/world-report/2019/country-chapters/israel/palestine>> accessed 22 July 2019.

The following statement describes the desperate state of Palestinians, particularly those living in Gaza, UNRWA former Commissioner-General of UNRWA noted:

‘From a recent letter to the UN by a Palestine refugee living in an UNRWA refugee camp in Gaza desperately seeking work, I read (...) Poverty kills me and my family every day, I swear we cannot live more in this situation, and I do not have the means to live. (...) my brother tried to kill himself because of poverty....no work, no money, food decreased, family problems...’.

Such statement voices the despair of the Palestinian refugee community in Gaza trying to escape which may expose them to trafficking practices even if it means risking their lives.²⁰⁷

The initial foregrounding and reported allegations suggest that HT is already embedded in Palestine. The extent of HT is however, neither fully known nor understood. In addition, Palestine did not yet implement a protective legal framework against such practices even though Palestine’s accession to the Palermo Protocol set Palestine on a path to address HT, practically and legally. This issue alone justifies doctoral research. The rationale for focusing on what may appear as a unique case is the multitude of complexities that characterise Palestine when extracting ‘lessons identified and learnt’ to other contexts and

²⁰⁷ Statement by Commissioner-General Pierre Krähenbühl to the Fourth Committee of the United Nations General Assembly (the Special Political and Decolonization Committee), New York, 4 November 2014. <<http://www.unrwa.org/newsroom/official-statements/commissioner-general-statement-fourth-committee>> accessed 13 February 2016. See also the Opening Remarks of the UN Secretary General to the High Level Conference <<https://www.un.org/sg/en/content/sg/speeches/2015-06-02/remarks-high-level-conference-%E2%80%99Cunrwa65-sustaining-human-development>> accessed 2 August 2017.

territories. The research is concerned with observations and verifying experience on the ground and interviews with a wide range of actors. Palestine field-based research can provide an understanding of the progression of the building of a legal framework integrating Palestine's international legal commitments in particular human rights obligations and most recently, legal obligations arising out from the Palermo Protocol.

1.12 Structure of the thesis

The thesis consists of three parts, each with three chapters. Chapter 1 Part 1, introduces the background to the thesis, the purpose of the research on HT in contexts of instability and conflict, introducing the research question. The research outlines the impact of the widespread occurrence of HT, particularly its incidence in conflict contexts which has raised international concern and action at the highest levels such as the UN Security Council (UNSC). Part I provides primarily the core and the scope of the HT definition, introducing the debate around the HT definition as bearing legal consequences detailed in Part II. Part I chapter 2 presents the concept of FCAS and the nexus between HT and fragile environments.

Part I explains why Palestine is the choice as case study satisfying the criteria for fragility according to international definitions and indices.

Part I lastly presents the philosophy, methodological approaches and tools adopted to conduct this socio-legal research with specific considerations pertaining to the research being partly based in FCAS.

Part II analyses in chapter 4 the legal entanglement between HT, slavery, enslavement and forced labour and its impact on the judicial consideration of

HT. Chapters 5 and 6 examine relevant branches of international law which contribute to form a legal framework addressing HT also applicable to FCAS contexts: human rights law, humanitarian law, international criminal law, refugee law and labour law. Limitations to protection against HT arising from the applicability of these various legal frameworks are identified.

Part II focuses on the crucial grassroots and advocacy roles of national human rights institutions and civil society organisations (CSOs) to address gaps in implementation from international and domestic human rights frameworks²⁰⁸ as well as their contribution to enhance the domestic legal and judicial system.²⁰⁹

Part III begins with an overview and critique of the evolution of theoretical approaches on the implementation of international law in domestic legal systems. Part III then examines more specifically, the means and measures of implementation through the involvement of a variety of international and domestic actors, focusing on the UN and its human rights mechanisms as well as national human rights mechanisms, CSO and other hybrid actors. All are together conduits to a more practical implementation of human rights protection and HT. Part III examines generic challenges identified in FCAS that hinder the implementation of the protective legal framework against human rights violations and HT. The case study of Palestine is presented through the analysis of data gathered, giving an overview of how the ongoing conflict

²⁰⁸ Advocacy networks of NGOs: Africa, Asia, Europe, and the Americas. In the case of Asia, the Global Alliance against Traffic in Women (GAATW) was instrumental at different stages of the consolidation of the HT legal framework and particularly in the advocacy for the Palermo Protocol implementation. See also Jalloh (n 41).

²⁰⁹ Cherif M. Bassiouni, Daniel Rothenberg, Ethel Higonnet, Cynthia Farenga and Augustus Sol Invictus, 'Addressing International Human Trafficking in Women and Children for Commercial Sexual Exploitation in the 21st Century' (2010) 81 *International Review of Penal Law* 417,486,487.

impacts on the social, economic, political and security fabrics of Palestine²¹⁰ which fostered both a dysfunctional rule of law and a fragmented judicial system. Part III therefore provides an analysis of the Palestinian legal and institutional framework, examining the specific challenges Palestine faces in order to comply to international human rights and HT commitments. Part III highlights the significant role of Palestinian civil society organisations and the contribution of other key stakeholders in the implementation and enforcement of the legal framework protective of human rights violations and HT. The case study of Palestine is used to test the research question and the findings via the desk-based review undertaken in Part II.

The concluding part provides a summary of the main issues and challenges examined throughout the research together with an overall assessment of the research question and recommendations.

1.13 Summary

The rationale, background and focus of the research is announced, justified and the research question is posed. The research examines what framework international law creates through which vulnerable individuals can be protected against HT practices. In addition, the research examines the challenges to implement this normative framework in FCAS. The phenomenon of HT is a complex matrix of issues, prevalent in most countries of the world. However, difficulties persist in understanding the scale of HT and the reliability of empirical data utilised to define anti-trafficking strategies. HT is a web of core human

²¹⁰ <https://www.al-monitor.com/pulse/originals/2019/02/palestinian-security-services-shuffle-abbas-israel.html?utm_campaign=20190301&utm_source=sailthru&utm_medium=email&utm_term=Daily%20Newsletter> accessed 3 March 2019.

rights violations entangled with a global economy system impacting on the world economy as a significant source of illegal profit.

The anti-trafficking legal framework emerged at the beginning of the twentieth century with a primary focus on sexual exploitation. This was influenced in the 1980s by the sex and prostitution debate, infusing HT with a sensational narrative widely diffused by the media. The focus of HT as a phenomenon that primarily affects women and girls has been to the detriment of men and boys. More recently, other concerns have infiltrated the anti-trafficking agenda such as migration flows, child exploitation, labour trafficking or the trafficking of human organs.²¹¹ The anti-trafficking intervention framework is grounded by the legal outcome of the 2000 UN Palermo Protocol establishing for the first time a universal definition of HT. One of the weaknesses of the Palermo Protocol is that the instrument focuses on a criminal justice response, dominating therefore the anti-trafficking agenda over victim's human rights protection.²¹² The wide ratification by States party to the Protocol has been nevertheless an encouragement to incorporate anti-trafficking measures in regional and national legislations.²¹³

The research identifies and examines the challenges to implementing the protective legal framework addressing HT in FCAS with a focus on the case study of Palestine.

²¹¹ Allegations of organs trafficking are reported to be performed on Palestinian martyrs < <https://www.egypttoday.com/Article/2/17353/Israel-harvests-Palestinian-martyrs%E2%80%99-organs>> accessed 22 February 2018.

²¹² Article 5 of the Palermo Protocol (n 9).

²¹³ As of 4 September 2020, 178 countries are party to the Protocol. < https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en> accessed 4 September 2020.

The choice of the case study of Palestine embraces the various challenges raised earlier. The history of the Israeli-Palestinian conflict has embedded and imposed a juxtaposition of various legal systems in Palestine. The empirical and research challenge with regard to the hidden nature of the HT applies to Palestine and the fact that it is considered a 'taboo' issue as well as a shameful topic. The latter was commonly expressed by the group of interviewees as HT was exclusively related to sexual practices. This confirmed the lack of knowledge of the contents of the HT definition. Hence, the scarcity of research on HT in Palestine justifies the choice of the case study. In addition, the conditions experienced by Palestinian society as well as the overall context of the fragile situation in the Middle East region are supportive of the need to legally prevent and protect against HT. Furthermore, there is an expressed need by Palestinian CSOs as well as the commitment from some government personnel to support research, collect data in order to assess the scale of HT in Palestinian territory and equip Palestine with a protective legal framework against HT.

To conclude, the thesis will seek to draw conclusions concerning the problem of HT, the policy implications and potentially the need for legal reforms, the latter preferably at the domestic level. This will be achieved by reference to the examined body of knowledge on HT and the case study findings.

Chapter 2 The Nexus between HT and Fragile and Conflict Affected Situations

2.1 Introduction

Chapter 1 introduced the concept and definition of HT. This chapter explores the nexus between HT and FCAS.

Chapter 1 noted the UNSC's concern regarding the connections between HT and FCAS and the subsequent challenges to implement legal protection for individuals subject to trafficking in such settings. Since the adoption in 2016 of the landmark Resolution 2331 condemning HT in the context of armed conflict and post-conflict situations, trafficking in persons in all its forms becomes more reported as direct or indirect consequences of conflict and fragility.

In 2018, further to UN Security Council Resolutions 2331 (2016) and 2388 (2017), the UN Secretary-General confirms the urgency to address the nexus between HT for the purpose of sexual exploitation and conflict-related sexual violence.²¹⁴

Empirical evidence suggests that HT is most likely exacerbated in migratory and conflict contexts.²¹⁵ In addition empirical evidence suggests the connection between slavery and conflict.²¹⁶ More so where States are 'fragile', 'weak' and

²¹⁴ UN Security Council, Report of the Secretary-General on Conflict-Related Sexual Violence (S/2018/250), 23 March 2018.

²¹⁵ UNODC, 'Countering Trafficking in Persons in Conflict Situations, Thematic Paper' (2018) 1.

²¹⁶ Jacqueline Joudo Larsen and Davina P. Durgana, 'Measuring Vulnerability and Estimating Prevalence of Modern Slavery' (2017) 30(3) CHANCE 21.

'failing'.²¹⁷ Notable recent cases include Syria,²¹⁸ Libya,²¹⁹ Iraq,²²⁰ and Yemen.²²¹

Prior to, and subsequent to the UN resolutions 2331 and 2388, HT remains overlooked in crisis situations²²² as part of the response to humanitarian emergencies. In addition, 'there is an 'absence of a functioning protection pathway for victims of trafficking'.²²³ This gap in knowledge hampered accurate analysis of causes and effects of the HT phenomenon in such context. Nevertheless, specific parameters that affect counter trafficking efforts in crisis remain: The difficulty to access conflict zones which result in the challenge to gather data on HT and consequently to evaluate the absolute impact of crises on HT trends.²²⁴ Furthermore, in protracted crises, certain social groups are hard-to-reach as they are hidden, isolated and in extreme vulnerable situations.²²⁵ 'People caught in crises are at higher risk of being left behind'.²²⁶ Victims of HT are part of these vulnerable groups and are frequently excluded

²¹⁷ OECD, 'Concepts and Dilemmas of State Building in Fragile Situation: From Fragility to Resilience' (2008) 9 (3) *Journal on Development* 3.

²¹⁸ ICMPD, 'Targeting Vulnerabilities: The Impact of the Syrian War and Refugee Situation on Trafficking in Persons – A Study of Syria, Turkey, Lebanon, Jordan and Iraq' (2015) 128.

²¹⁹ <http://time.com/longform/africanslavetrade/?utm_source=NEWS&utm_medium=email&utm_content=2nd+section+4th+story+time&utm_campaign=HQ_EN_therefugeebrief_external_20190314> accessed 14 March 2019.

²²⁰ ICMPD (n 218) 138.

²²¹ IOM, 'Addressing Human Trafficking and Exploitation in Times of Crisis' (2015) 16, 17, 18.

²²² *ibid* 3. See also, UNGA, Report of the Secretary General: 'Trafficking in women and girls' (7 August 2020) 7.

²²³ < https://globalinitiative.net/analysis/ht_crises/> accessed 29 June 2021.

²²⁴ IOM, 'Addressing Human Trafficking and Exploitation in Times of Crisis' (n 221) 11.

²²⁵ Amy Ellard-Gray, Nicole K. Jeffrey, Melisa Choubak and Sara E. Crann, 'Finding the Hidden Participant: Solutions for Recruiting Hidden, Hard-to-Reach, and Vulnerable Populations' (2015) 14(5) *International Journal of Qualitative Methods* 1.

²²⁶ Landry Signé, 'Leaving No Fragile State and No One Behind in a Prosperous World: A New Approach' in Homi Kharas, John W. McArthur, and Izumi Ohno (eds), *Leave No One Behind. Time for Specifics on the Sustainable Development Goals* (Brookings Institution Press, 2019) 245.

from traditional means of data collection.²²⁷ The question arises as to how to reach these individuals in such settings and implement adequate standards of protection to victims of HT. Furthermore, in fragile and conflict affected situations, States remain the primary duty-bearers to provide human rights protection on the ground but are often unable or unwilling to comply with their legal obligations arising from the international law framework.

Section 2.2 examines the definition of FCAS noting the lack of agreement on a core definition and the interchangeable use of terms referring to conflict, fragility, and fragile situations or affected contexts. The section presents therefore, the contentious definition of fragile States, highlighting various approaches adopted in the literature and a divergent understanding of what constitute fragile and failed States. The section provides an overview of the overall contexts in which fragility develops. Analysis of fragile contexts is paramount to understanding the prevalence and occurrence of HT.

Section 2.3 examines challenges to approaches based on the ‘fragility’ concept.

Section 2.4 examines that context is everything to understanding fragility.

Section 2.5 examines the interaction between HT and conflict environments.

2.2 Defining FCAS

The focus on FCAS has developed simultaneously with security strategies undertaken by some Western donor countries. It reached particular importance

²²⁷ Emma Samman, Paula Lucci, Jessica Hagen-Zanker, Tanvi Bhatkal, Amanda Telias Simunovic, Susan Nicolai, Elizabeth Stuart, and Charlotte Caron, ‘SDG progress -Fragility, crisis and leaving no one behind’ (2018) Overseas Development Institute (ODI) 6.

following the attacks of 11 September 2001 on the US.²²⁸ Post 9/11 the US government renewed its focus on security as it identified a number of weak States believed to foster terrorist activities²²⁹ and organised crimes.²³⁰ More generally, growing correlation was being made between terrorism and state fragility.²³¹

The fragility of the State means that in many instances its monopoly of coercive power which represents its core competence, is in decline.²³² Thus, as explored earlier, this feeds the contention that fragile or failed States have become threats to global security²³³ and ‘the main security challenges of our time’.²³⁴ These States are therefore perceived to be the ‘single most important problem for international order’²³⁵ providing an environment conducive to patterns of violence exercised by either private, criminal or terrorist groups. The complexity associated with various dimensions of fragility have implications in the field of human rights as well as HT.

Post war reconstruction has its roots in the Marshall Plan implemented after the Second World War. How and why the ‘fragility’ of States began to occupy the

²²⁸ Olivier Nay, ‘International Organisations and the Production of Hegemonic Knowledge: how the World Bank and the OECD helped invent the Fragile State Concept’ (2014) 35(2) *Third World Quarterly* 210,211. See James Putzel, ‘Why developments actors need a better definition of ‘state fragility’’ (2010) *Crisis State Research Centre* 1.

²²⁹ Ruan van der Walt and Hussein Solomon, ‘Histories and Spaces of Terrorism in Africa: The Post-9/11 Strategic Challenge of Somalia’s al Shabab’ (2014) 3(1) *Afro Eurasian Studies Journal* 71,72, 89.

²³⁰ *ibid* 82.

²³¹ Amichai Magen, ‘Fighting Terrorism: The Democracy Advantage’ (2018) 29(1) *Journal of Democracy* 111,119.

²³² Raimo Väyrynen, ‘Complex Humanitarian Emergencies: Concepts and Issues’ in E. Wayne Nafziger, Frances Stewart and Raimo Väyrynen (eds) *War, Hunger, and Displacement*. Volume 1(Oxford Scholarship Online, 2011)3.

²³³ Patrick, Stewart, ‘Weak States and Global Threats: Assessing Evidence of “Spillovers”’ (2006) Working Paper N.73, p.2.

²³⁴ Robert M. Gates, ‘Helping Others Defend Themselves: The Future of U.S. Security Assistance’ (2010) 89(3) *Foreign Affairs* 1,2.

²³⁵ Francis Fukuyama, *State-Building: Governance and World Order in the 21st Century* (Cornell University Press, 2004) 92.

minds of Western powers is hard to pinpoint. At some stage in the 1990s the changing nature of conflict and global insecurity became harder to ignore. As the interconnectedness of States grew with globalisation, the impact of conflict was no longer localised. Since the 1990s, there has been a wide range of literature generated by government policy, international institutions²³⁶ and academics, providing expansive but at times mutually contested definitions as to what constitutes states 'fragility'²³⁷ as well as to understand their increasing incidence and impact.²³⁸ Despite the separate realms of academics and practitioners, both were involved in feeding the understanding of fragile States research.²³⁹

The development of 'fragile state' terminology has since been widely applied in the field of international assistance, including in relation to development, humanitarian activities, peacebuilding, and state-building.²⁴⁰ 'Fragility' has become the core label used by donors in order to legitimate their interactions with interventions in recipient countries, usually countries that are poor and devastated by conflicts.²⁴¹

Academic definitions on FCAS generally agree on key elements²⁴² such as 'the inability of a State to fulfil basic functions that respond to the basic needs and

²³⁶ Olivier Nay, 'Fragile and failed states: Critical perspectives on conceptual hybrids' (2013) 34(3) *International Political Science Review* 326.

²³⁷ Roland Paris, 'Ordering the World: Academic Research and Policymaking on Fragile States' (2011) 13(1) *International Studies Review* 58.

²³⁸ Volker Boege, Anne Brown, Kevin Clements and Anna Nolan, 'On Hybrid Political Orders and Emerging States: State Formation in the Context of 'Fragility' (2008) *Berghof Research Center for Constructive Conflict Management* 1,3.

²³⁹ Paris (n 237) 67.

²⁴⁰ Sonja Grimm, Nicolas Lemay-Hébert, and Olivier Nay, 'Fragile States': introducing a political concept' (2014) 35(2) *Third World Quarterly* 197. Ines A. Ferreira, 'Measuring state fragility: a review of the theoretical groundings of existing approaches' (2017) 38(6) *Third World Quarterly* 1291.

²⁴¹ Nay, 'International Organisations and the Production of Hegemonic Knowledge: how the World Bank and the OECD helped invent the Fragile State Concept' (n 228) 211.

²⁴² Grimm, Lemay-Hébert, and Nay (n 240) 199.

welfare of its citizens'.²⁴³ Furthermore, fragile States are unable to deliver other core functions, the most important of which is security.²⁴⁴ Other expected functions of the State include the protection of political and human rights, a functioning rule of law, access to basic services: education, health, justice, access to decent livelihood and economic opportunities.²⁴⁵

Academics note that the term 'fragility' unfolds a proliferation of expressions and characteristics, used interchangeably as a catch-all concept for: weak States, collapsed State, failing State, fragile or absent State,²⁴⁶ 'States with limited legitimacy, authority, capacity, governance, security, socioeconomic and human development'.²⁴⁷ These concepts have generated much academic debate:²⁴⁸

State fragility and failure are subject to vague competing and sometimes contradictory conceptualisations. Their limited utility as an analytic categorisation is commonly acknowledged, yet the terminology remains in common usage'.²⁴⁹

²⁴³ Derick W. Brinkerhoff, 'State Fragility, International Development Policy, and Global Responses' (2016) 3 International Development Working Paper 3. Claire Mcloughlin, 'Topic Guide on Fragile States' (2012) Governance and Social Development Resource Centre 9. See also Nay, 'Fragile and failed states: Critical perspectives on conceptual hybrids' (n 236) 327.

²⁴⁴ OECD, 'Concepts and Dilemmas of State Building in Fragile Situation: From Fragility to Resilience' (n 217) 39.

²⁴⁵ *ibid* 40.

²⁴⁶ Andrew Albertson and Ashley Moran, 'Untangling the Complexity of Fragile States' (2017) Truman Center 2. Grimm, Lemay-Hébert and Nay, 'Fragile States': introducing a political concept' (n 240) 198,199. See also Brinkerhoff (n 243) 2. See also Ines Afonso Roque Ferreira, 'Defining and measuring state fragility: a new proposal' (2015) The Annual Bank Conference on Africa 2.

²⁴⁷ Landry Signé, 'Leaving No Fragile State and No One Behind in a Prosperous World: A New Approach' 239.

²⁴⁸ Boege, Brown, Clements, and Nolan (n 238) 3.

²⁴⁹ Derick W. Brinkerhoff, 'State Fragility and Failure as wicked problems: beyond naming and taming' in Andrew Burrows and Alan Rodger (eds) *The Political Invention of Fragile States – Processes and Embodiments* (Routledge, 2015).

Scholarly attempts to define fragile States have nevertheless helped to define and refine understandings of state fragility as a policy problem.²⁵⁰ Thus, research has helped inform the development of operational frameworks for responding to this problem. Put another way, scholarly ideas have helped to 'order' the conceptual world for policymakers who face the difficult task of responding to most disorderly parts of the physical world'.²⁵¹ Hence, 'scholars played a leading role in the articulation of the concept of State failure'.²⁵²

The 'fragile State' concept was disseminated by international policy actors such as the World Bank and the OECD, both of which function as platforms gathering aggregate data and analysis, disseminating knowledge and policy on development assistance and global governance.²⁵³ OECD has produced an annual report on FCAS each year since 2005. OECD's early definition of FCAS highlights that:

'States are fragile when state structures lack political will and/or capacity to provide the basic functions needed for poverty reduction, development and to safeguard the security and human rights of their population'.²⁵⁴

This research favours the OECD definition of 2018 which focuses on the frequent occurrence of conflict and violence that accompany state fragility. Fragility generates a 'combination of exposure to risk and insufficient coping capacity of the State, system and/or communities to manage, absorb or mitigate

²⁵⁰ Paris (n 237) 65.

²⁵¹ *ibid* 62.

²⁵² *ibid* 61.

²⁵³ Nay, 'International Organisations and the Production of Hegemonic Knowledge: how the World Bank and the OECD helped invent the Fragile State Concept' (n 228) 212, 214. See also Rianne Mahon and Stephen Mc Bride, 'Standardizing and disseminating knowledge: the role of the OECD in global governance' (2009) 1(1) *European Political Science Review* 83.

²⁵⁴ The OECD Principles for Good International Engagement in Fragile States and Situations (2007) para 3.

those risks. Fragility can lead to negative outcomes including violence, the breakdown of institutions, displacement, humanitarian crises, or other emergencies'.²⁵⁵ In this regard, the African Development Bank (ADB) provides another thorough description on the occurrence of conflict and violence and their impact on societal structures:

'Fragility comes about where pressures become too great for countries to manage within the political process, creating the risk of conflict and outbreak of violence - the most extreme manifestation of fragility - whether interstate or civil war, ethnic or tribal conflict, widespread criminality or violence within the family. Countries that lack robust institutions, diversified economies and inclusive political systems are the most vulnerable. In the most acute cases, violence has the effect both of magnifying the underlying pressures and eroding the institutions needed to manage them, creating a fragility trap from which it is very difficult to escape'.²⁵⁶

The UK Department for International Development's (DFID) initially described fragile countries where the government 'cannot or will not deliver its basic functions to the majority of its people, including the poor'.²⁵⁷ The UK converging with OECD, currently analyses fragile states in relation to conflict and instability relying on three principles: (i) protecting the means of survival); (ii) promoting

²⁵⁵ OECD, 'OECD State of Fragility 2016: Understanding Violence' (OECD Publication, 2016) 21.

²⁵⁶ High Level Panel on Fragile States, 'Ending conflict & building peace in Africa: A call to action' (2014) African Development Bank 8.

²⁵⁷ DFID Report, 'Why we need to work more effectively in fragile states' (2005), Poverty Reduction in Difficult Environments Team/ Aid Effectiveness Team Policy Division.

and supporting a political process to reduce violence. (iii) preparing a foundation for longer term stability.²⁵⁸

The OECD associates state fragility when

*‘state structures lack political will and/or capacity to provide the basic functions needed for poverty reduction, development and to safeguard the security and human rights of their populations’.*²⁵⁹

The World Bank (WB) assesses state fragility as ‘facing particularly severe development challenges: weak institutional capacity, poor governance, and political instability. Often countries experience ongoing violence as the residue of past severe conflict.’²⁶⁰ Key features of fragile States described by the International Monetary Fund (IMF), which partly shares the WB approach, are usually low-income countries given a three-year CPI score.²⁶¹ Fragility also entails that prior to this three-year period, the presence of UN or regional peacekeeping or building operations, and if there was no CPI registered due to conflict.²⁶²

USAID’s early definition of fragility focused on vulnerability and crisis, whereby states are ‘unable or unwilling to adequately assure the provision of security and basic services to significant portions of their populations and where the

²⁵⁸ UK Stabilisation Unit, ‘The UK Government’s Approach to Stabilisation - A guide for policy makers and practitioners’ (2019) 11.

²⁵⁹ OECD, Principles for Good International Engagement in Fragile States and Situations, (n 254).

²⁶⁰ Gary Milante and Michael Woolcock, ‘New Approaches to Identifying State Fragility’ (2017) 8(1) Journal of Globalization and Development 2.

²⁶¹ CPI: Country Policy and Institutional Assessment (CPIA) scores established by the World Bank, rating from 1 to 6 (high) and represent ‘the key instrument used to select countries eligible for financial assistance’: Nay (n 228) 216.

²⁶² The Independent Evaluation Office of the International Monetary Fund (IEO), ‘The IMF and Fragile States. Evaluation Report 2018’ 9.

legitimacy of the government is in question'.²⁶³ States in crisis are therefore 'those States where the central government does not exert effective control over its own territory or is unable or unwilling to assure the provision of vital services to significant parts of its territory, where legitimacy of the government is weak or non-existent, and where violent conflict is a reality or a great risk'.²⁶⁴

Evidently there are a mix of convergent and complementary definitions of state fragility which partially overlap or conflict with one another.²⁶⁵ This leads to note that fragility remains an elusive as well as evolving concept for both academics and policymakers.²⁶⁶ Hence, no single and universal accepted definition can capture the complexity and phases of fragility as well as the composite measures of fragility.

2.3 Challenges to approaches based on 'fragility'

The definitions presented above highlight the variety of characteristics associated with fragility.²⁶⁷ Scholars have highlighted that the lack of definitional clarity manifests itself in the problem of how to measure state fragility.²⁶⁸ This underlines that the academic approach goes beyond performance issues, policy recommendations and 'solutions' to question the values and assumptions underlying the concept.²⁶⁹ Scholars have worked on a sounder theoretical and methodological approach to develop a more comprehensive and coherent

²⁶³ Frances Stewart and Graham Brown, 'Fragile states' (2010) 3 Centre for Research on Inequality, Human Security and Ethnicity (CRISE) 9.

²⁶⁴ USAID, 'USAID's Approach to Fragile States Programming in Africa' (2006) 4.

²⁶⁵ David Carment, Stewart Prest, and Yiagadeesen Samy, 'Determinants of State Fragility and Implications for Aid Allocation - An Assessment Based on the Country Indicators for Foreign Policy Project' (2008) Research Paper N.2008/46, p.3.

²⁶⁶ *ibid* 3.

²⁶⁷ Rachel M. Gisselquist, 'Varieties of fragility: implications for aid' (2015) 36(7) *Third World Quarterly* 1269.

²⁶⁸ Ferreira (n 246)1292.

²⁶⁹ Ferreira (n 246) 1292.

assessment of measurement aware that 'different frameworks and methodologies have resulted in diverse lists and rankings of fragile States'.²⁷⁰

There are concerns with the use of fragility rankings and 'Fragile States Index' (FSI) data aggregation methods,²⁷¹ as well as other similar rankings such as the ones provided by OECD. Measurement criteria tend to conclude simplistically, similar fragility levels and settings, which do not capture the entire components of fragility and its variety or specificities on the ground. Illustration is given through a qualitative analysis, based on the FSI's security indicators,²⁷² of three of the most fragile States: Somalia, the Central African Republic and Sudan. The analysis reveals that these countries do not follow a linear trajectory and certainly differ with gradual changes, diverging developmental stages, in different areas of their boundaries.²⁷³

From the aid policy perspective, the 'assessment' of the degree of fragility has some bearing on the extent of development aid²⁷⁴ provided by donors to address specific issues such as human rights of which HT is part. As an example, assessment of 'fragility' at a local level, is undertaken in Somalia with the support of the Federal Government of Somalia (FGS).²⁷⁵ In this case, one focus is on stabilising local security. To this end, a 'thorough understanding of

²⁷⁰ Ferreira (n 246) 1292.

²⁷¹ Tim Glawion, Lotje de Vries and Andreas Mehler, 'Handle with Care! A Qualitative Comparison of the Fragile States Index's Bottom Three Countries: Central African Republic, Somalia and South Sudan' (2019) 50 (2) *Development and Change* 277, 278.

²⁷² The Fragile States Index (FSI) is a critical tool in highlighting not only the normal pressures that all states experience, but also in identifying when those pressures are outweighing a states' capacity to manage those pressures. <<https://fragilestatesindex.org/methodology/>> accessed 2 April 2019.

²⁷³ Glawion, Vries and Mehler (n 271) 294,295.

²⁷⁴ Carment, Prest and Samy (n 271) 2.

²⁷⁵ The Fund for Peace, 'Fragile States Index Annual Report 2019' 23,24.

context in fragile States is a prerequisite of effective and properly sequenced engagement'.²⁷⁶

Hence, as part of State and institution building efforts, with the support of international engagement, it is necessary to understand the dynamics and causes of fragility as well its various manifestations.²⁷⁷ There are significant challenges to identification of symptoms and causes of fragility as they may sometimes appear confused, exhibiting a 'complex array of interdependent factors'.²⁷⁸ The fragile state concept is not static and many States go through phases of fragility with episodes of crisis not all of which spiral towards instability and violence. These fragile phases can nevertheless challenge both weak and strong states.²⁷⁹

Thus, State 'fragility' has multifaceted causes²⁸⁰ and is multidimensional. The OECD has tried to capture this multi-dimensional fragility perspective through an innovative framework based upon a typology of core fragility drivers: economic, social, political, and environmental.²⁸¹ Developing this multidimensional or multifaceted depiction of fragility was previously suggested by the African Development Bank in 2014.²⁸²

Fragile settings are a result of a combination of drivers that include political, economic, social and security considerations. Most recent research focuses

²⁷⁶ Carment, Prest and Samy (n 265) 5.

²⁷⁷ OECD, 'Concepts and Dilemmas of State Building in Fragile Situation: From Fragility to Resilience' (n 227) 7.

²⁷⁸ Timothy Besley, Torsten Persson, 'Fragile States and Development Policy' (2011) 9(3) *Journal of the European Economic Association* 371.

²⁷⁹ Seth Kaplan, 'Identifying Truly Fragile States' (2014) 37(1) *The Washington Quarterly* 49,51.

²⁸⁰ Brinkerhoff (n 243) 9.

²⁸¹ OECD, 'States of Fragility 2018' (2018) 7, 82.

²⁸² African Development Bank, High Level Panel on Fragile States, 'Ending conflict & building peace in Africa: A call to action' (2014).

therefore on identifying prevalent internal and external factors. These are non-exhaustive and focus on 'violent conflict, poverty, economic and structural conditions, weak formal institutions',²⁸³ 'international political economy, regional and global insecurity'.²⁸⁴ The approach of some analysts has been to consider the variables of authority, legitimacy, and capacity. The latter constitute the three pillars to state building²⁸⁵ which are interdependent.²⁸⁶

Legitimacy denotes the State's ability to have its authority fully recognised, accepted and asserted throughout the territory.²⁸⁷ Sources of legitimacy can be divided into four general categories: The 'input' legitimacy, which refers to legitimacy derived through systems and process, such as democratic elections. The 'output' or 'performance' legitimacy, where legitimacy is attained by delivering results, illustrated by Hezbollah in Lebanon and Hamas in Gaza and their provision of local social services. The 'charismatic' legitimacy, that is derived through charismatic leadership and the sharing of beliefs represented for instance by Nelson Mandela. Lastly the 'international' legitimacy, when the international community recognises an act or actor as legitimate such as the formation and formal recognition of South Sudan.²⁸⁸

The capacity variable refers to States that are able to 'perform basic governance functions in the areas of security, rule of law, and basic social services necessary to meet citizens' basic needs and expectations'.²⁸⁹ Capacity

²⁸³ Mcloughlin (n 243) 16.

²⁸⁴ Mcloughlin (n 243) 16.

²⁸⁵ Peter Tikuisis and David Carment, 'Categorization of States Beyond Strong and Weak. Stability' (2017) 6(1) *International Journal of Security & Development* 4.

²⁸⁶ Graham Teskey, Sabina Schnell and Alice Poole, 'Beyond Capacity – Addressing Authority and Legitimacy in Fragile States' (2012) 3.

²⁸⁷ Miraglia, Ochoa and Briscoe (n 90) 5.

²⁸⁸ OECD, 'The State's Legitimacy in Fragile Situations: Unpacking Complexity' (2010).

²⁸⁹ Dominik Balthasar, 'States of fragility: Where to in 2019?' (2019) 02/19 Policy Brief 1,2.

encompasses the understanding that States is a service provider with the primary purpose to exercise its core functions detailed above.²⁹⁰

The dimension of authority' refers to 'the legislative power of the State and its ability to control its territory, and to provide core public goods, stability and security to its people'.²⁹¹ Therefore, in order 'to exercise its authority, the State needs both to enjoy legitimacy among its elites and to have the capacity to enforce its decisions'.²⁹² Researchers and policy makers recognise this state building framework and it has received much attention in early institutional building processes. More recently, it has been suggested that addressing fragility based on the trilogy of capacity, legitimacy and authority is too simplistic and narrowly promotes a 'whole-of-government approach'.²⁹³ This approach neglects other core drivers that have wider impact such as political and societal. The latter may fuel countries vulnerability, thus contribute to the occurrence of human rights violations.²⁹⁴

As a result of these limitations in assessing 'fragility' which solely focused on state functions, some development agencies have evolved towards widening the concept using terms such as 'situations of fragility'. This entailed widening the State focus approach to the state of society.²⁹⁵ Hence, the assessment of local context can play a significant role in the design of aid policy.²⁹⁶ This is verified in chapter 9. A wider societal perspective reflects a more accurate and

²⁹⁰ Gisselquist (n 267).

²⁹¹ David Carment and Yiagdeesen Samy March, 'Aid targeting to fragile and conflict-affected states and implications for aid effectiveness' (2019) UNU-WIDER Working Paper 2019/8, 2.

²⁹² Graham Teskey, Sabina Schnell, Alice Poole, 'Beyond capacity – addressing authority and legitimacy in fragile states' (2012).

²⁹³ Nay (n 238) 220.

²⁹⁴ OECD, 'States of Fragility 2018' (2018) 26.

²⁹⁵ Mcloughlin (n 243) 10.

²⁹⁶ Gisselquist (n 267) 1270.

holistic perspective of fragility. This civil society grounded approach to fragility often reveals a lack of trust in government authority and its institutions, something that would have important implications when considering HT.²⁹⁷ This combination can be accompanied by a lack of vertical and horizontal accountability from the executive and governing institutions. Mutual obligations between the State and its citizens are compromised in the midst of disrupted rule of law²⁹⁸ with weak or nonexistent functioning of judicial enforcement mechanisms. This rupture contributes further to the collapse of a political order, societal structures, and safeguards against impunity. In these situations of fragility, the State is often unable²⁹⁹ to fulfill its international human rights legal commitments³⁰⁰ which thus has an impact in the way human rights violations and HT can be addressed.

2.4 Context is everything

Literature on fragile States demonstrates that there is growing need for more refined definitions and analysis, and the importance of understanding context.³⁰¹

The deeper contextual analysis of fragile states emerged during the period of the post-Cold War in relation to institutional fragmentation of countries at war,

²⁹⁷ Adrien Katherine Wing, 'The Palestinian Basic Law: Embryonic Constitutionalism' (1999) 31 (2) *Case Western Reserve Journal of International Law* 383, 394,395.

²⁹⁸ UNODC, *Global Report on Trafficking in Persons* (2014) 42.

²⁹⁹ William Malley, 'Trust, Legitimacy and the Sharing of Sovereignty' in Trudy Jacobsen, Charles Sampford and Ramesh Thakur (eds) *Re-envisioning sovereignty, the end of Westphalia?* (Ashgate, 2008) 291, 293.

³⁰⁰ Scott Sheeran and Sir Nigel Rodley, 'The broad review of international human rights law' in Scott Sheeran and Sir Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013). See also René Provost, *Human Rights Law, and International Humanitarian Law* (Cambridge University Press Online 2009) 60.

³⁰¹ Charles T. Call, 'Beyond the 'failed state': Toward conceptual alternatives' (2010) 17(2) *European Journal of International Relations* 303,305.

and as a result of outbreaks of numerous civil conflicts.³⁰² For instance, Somalia, Yugoslavia which were branded as evidence of ‘failed states’³⁰³ in which central authority collapsed and where conflict and violence have been omnipresent over the years.³⁰⁴ Analysis of fragile contexts reveals that the absence of effective central government, hence the struggle for state control, has often created a precarious security situation.³⁰⁵ Armed groups controlling parts of the country’s territory such as Libya, Central Republic of Africa, Republic Democratic of Congo contribute to the fractured nature of society and the erosion of legitimacy as well as the rule of law.³⁰⁶

The evolving concept of ‘fragile States’ and ensuing problems with definitions and measurement has forced the international community to focus attention increasingly on areas specifically beset by conflict and violence because of the links to poverty and vulnerability. In 2019, the World Bank reported that fragility, conflict, and violence (FCV) have become the new development frontier.³⁰⁷ Extrapolated poverty data in fragile States suggest that ‘by 2030, at least half of the world’s poor people will be living in fragile and conflict-affected settings’.³⁰⁸ Literature on conflict concurs that humanitarian crises have increased in figures and longevity.³⁰⁹ The average humanitarian crisis now lasts

³⁰² Nay, ‘Fragile and failed states: Critical perspectives on conceptual hybrids’ (n 236) 327.

³⁰³ Call (n 301) 305.

³⁰⁴ Monty G. Marshall, ‘Fragility, Instability, and the Failure of States: Assessing Sources of Systemic Risk’ (2008) Working Paper, Council on Foreign Relations Center for Preventive Action 9.

³⁰⁵ UNODC, ‘Global Report on Trafficking in Persons - in the context of armed conflict’ (2018) 23.

³⁰⁶ *ibid* 23, 24.

³⁰⁷ The World Bank Group Strategy for Fragility, Conflict and Violence 2020–2025, 6.

³⁰⁸ The Bank takes its data from internal World Bank estimate, using the FY19 Harmonized List of Fragile Situations. This estimate illustrates what poverty would be like if historical growth rates (rates from 2006–15) continue onto 2030.

³⁰⁹ Report of the Secretary-General at the General Assembly Economic and Social Council, ‘Strengthening of the coordination of emergency humanitarian assistance of the United Nations’ (9 April 2018) UN Doc A/73/78–E/2018/54, para 5.

for more than nine years.³¹⁰ According to ICRC, the scale of non-international armed conflict has more than doubled between 2001 and 2016, from fewer than 30 to more than 70.³¹¹ Many of the complex crises contain mixed elements of conflict, institutional fragility, as well as natural disasters³¹² which for the most part then fuel mass population displacement.³¹³ Natural disasters may also impact the political stability of a State and its capabilities to address threats to human security including human trafficking.³¹⁴ In addition, post-disaster scarcity is also likely to exacerbate existing vulnerabilities of communities with consequent risks to exploitation and trafficking³¹⁵ considering that States have weak institutions and poor capacity.³¹⁶

In recent years, more countries have experienced increasingly complex conflict resulting in the interaction between environmental vulnerability, poverty, violent and fragile contexts.³¹⁷ In 2016, Official Development Assistance (ODA)³¹⁸ totaled 68.2 billion USD in fragile settings.³¹⁹ In 2017, 27.3 billion USD were allocated for humanitarian response and assistance.³²⁰ As one of the leading

³¹⁰ UNOCHA, UN Coordinated Support to People Affected by Disaster and Conflict, 'Global Humanitarian Overview' (2019) 4.

³¹¹ ICRC, 'The Roots of Restraint in War' (ICRC publication, 2018) 13.

³¹² Ministry for Europe and Foreign Affairs, 'France's Humanitarian Strategy 2018-2022' 5 <<https://www.diplomatie.gouv.fr/en/french-foreign-policy/emergency-humanitarian-action/france-s-humanitarian-strategy-2018-2022/>> accessed 15 July 2020.

³¹³ UNOCHA, 'World Humanitarian Data and Trends 2018' 2. See also Zack Bowersox, 'Natural Disasters and Human Trafficking: Do Disasters Affect State Anti-Trafficking Performance?' (2018) 56(1) International Migration 199.

³¹⁴ Bowersox (n 313) 197.

³¹⁵ Anuj Gurung and Amanda D. Clark, 'The perfect storm: The impact of disaster severity on internal human trafficking' (2018) 21(4) International Area Studies Review 302,305.

³¹⁶ Bowersox (n 313) 200.

³¹⁷ UNOCHA (n 310) 13. See also Development Initiatives, 'Global Humanitarian Assistance Report 2018' 10.

³¹⁸ ODA is the key measure used in practically all aid targets and assessments of aid performance

<<http://www.oecd.org/dac/stats/officialdevelopmentassistancedefinitionandcoverage.htm>> accessed 28 February 2019.

³¹⁹ OECD, 'DAC Recommendation on the Humanitarian-Development Peace Nexus' (2019) OECD/LEGAL/5019.

³²⁰ Development Initiatives, 'Global Humanitarian Assistance Report 2018', 10.

donors, the 2019 EU budget for humanitarian aid has reached 1.6 billion euros.³²¹

States institutional fragility is partly linked to the changing nature of warfare that has evolved towards mostly non-international armed conflict. Conflict ranges from conventional warfare³²² to unstructured conflict, irregular civil wars or insurgencies³²³ opposing usually states armed forces and organised non-states armed groups.³²⁴ Warfare today is particularly characterised by the proliferation of armed actors whose aims, beliefs, ideologies and organizational structure may differ.³²⁵ Nevertheless, it is supported by some academics that doctrines on war since the post-Westphalian era after 1989 have 'failed to reflect the amalgam of non-state actors, guerrillas, terrorists and international criminal networks that pursued their causes through military force'.³²⁶ The exponential increase of parties engaged in complex conflicts is best illustrated by the case of Syria with multiple parties to the conflict, numerous opposition groups and armed groups and forces.³²⁷ The plethora of armed actors is explained, in some cases by the occasional recourse from States to rely upon pro-government non-state armed groups, another prominent feature of recent civil wars.³²⁸ As an example, the Nigerian government support local militias and irregular forces³²⁹

³²¹ https://ec.europa.eu/echo/news/eu-adopts-record-budget-humanitarian-aid-2019_en accessed 13 March 2019.

³²² Laia Balcells and Stathis N. Kalyvas, 'Does warfare matter? Severity, duration, and outcomes of civil wars' (2014) 58(8) *Journal of Conflict Resolution* 1390,1391.

³²³ *ibid* 1391.

³²⁴ ICRC, 'Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts' (2008) 11.

³²⁵ ICRC, 'The Roots of Restraint in War' (n 311) 6,8.

³²⁶ George Dimitriu, 'Clausewitz and the politics of war: A contemporary theory' (2018) *Journal of Strategic Studies* 1,13.

³²⁷ ICRC, 'The Roots of Restraint in War' (n 311)14. See also: The Carter Center, 'Syria Countrywide Conflict Report No.5' (2015) 5.

³²⁸ Sabine C. Carey and Neil J. Mitchell, 'Pro-Government Militias and Conflict' (*Oxford Research Encyclopedia of Politics*, 2016) 2.

³²⁹ *ibid* 4,5,6.

in order to deal with the threat of the Islamist extremist group Boko Haram, particularly following the abduction of women and schoolgirls many of which were forced into sexual slavery.³³⁰

The proliferation of non-state actors in conflict settings and contextual complexity makes it difficult to track and address their links to criminal networks and their involvement in trafficking practices. These non-state actors nevertheless often operate in contexts where law and order has collapsed, benefiting thereof from total impunity with regard to serious human rights violations.

The phenomenon of globalisation, characterised by the growth of digital business has also triggered significant socio-economic disparities between and within countries and eroded sovereignty.³³¹ Globalisation and related technology advances serve traffickers business using social media to target migrants who wish to escape their current environment.³³² In fragile contexts where the rule of law is disrupted, these crimes operate with impunity. This occurrence is illustrated by the situation in Libya *vis-à-vis* migrants in transit who are often prey to traffickers, and with no protection from Libyan authorities.

Globalisation has also brought widespread changes in the economic and labour markets which have created new forms of vulnerability.³³³ Globalisation is

³³⁰ Amnesty International, 'Nigeria: Abducted women and girls forced to join Boko Haram attacks' (2015) < <https://www.amnesty.org/en/latest/news/2015/04/nigeria-abducted-women-and-girls-forced-to-join-boko-haram-attacks/>> accessed 3 March 2019.

³³¹ Tatiana Zhidkova, 'Globalization and the Emergence of Violent Non-State Actors: The Case of Human Trafficking' (2015) 9(1) *New Global Studies* 1,3.

³³² <<https://www.independent.co.uk/news/uk/politics/immigration-migration-theresa-may-people-smugglers-facebook-eu-salzburg-summit-a8545736.html>> accessed 23 August 2019. See also < <https://www.globalcitizen.org/en/content/human-trafficking-facebook-adverts-refugees/>> accessed 23 August 2019.

³³³ Roger Plant, 'Combating Trafficking for Labour Exploitation in the Global Economy: The Need for a Differentiated Approach' in Prabha Kotiswaran (eds), *From Sex Panic to Extreme*

perceived as an ambivalent phenomenon especially in places 'plagued by conflict and violence' where for instance unfettered corporates and business activities can develop a web of exploitation.³³⁴ In these instances, fragile States cannot effectively track and regulate the behavior of actors' involved in exploitative abuses.

Furthermore, the global context of insecurity has largely influenced the development policy of multilateral aid.³³⁵ This renewed focus on security finds its origin in the post-Cold War era with the disintegration of the Soviet Union³³⁶ as well as the collapse of Yugoslavia. Last decades have since witnessed a shift regarding international security concerns and the challenge to balance the need for the safety of the individual as well as the maintenance of international peace. The focus on human beings and the emergence of the concept of human security³³⁷ has sought to redefine the latter notion and to encompass broadly the promotion of human development as well as the protection of human rights.³³⁸

Primary responsibility to provide human security lies with States. However, when States are unwilling or unable to act in the context of weak and collapsed situations, the issue of international intervention is raised as a moral

Exploitation: Revising the Law and Governance of Human Trafficking (Cambridge University Press, 2017) 425.

³³⁴ ICRC, 'Humanitarian debate: Law, policy, action Business, violence and conflict' (2012) 94 (887) *International Review of the Red Cross* 881.

³³⁵ Ivica Petrikova and Melita Lazell, 'Multilateral donors and the security-development nexus: discourse and practice in conflict-affected states' (2017) 17(6) *Conflict, Security & Development* 493,494.

³³⁶ Zhidkova (n 331) 12,13. See also Nay Olivier Nay, 'Fragile and failed states: Critical perspectives on conceptual hybrids' (n 246) 326.

³³⁷ Alex Kreidenweis and Natalie F. Hudson, 'More Than a Crime: Human Trafficking as Human (In)Security' (2015) 16 (1) *International Studies Perspectives* 67,71.

³³⁸ Shahrbanou Tadjbakhsh, 'Human Security: Concepts and Implications with an Application to Post-Intervention Challenges in Afghanistan' (2005) N. 117, 118 *Centre d'études et de recherches internationales (CERI) Sciences Politiques* 4,5,7.

responsibility to fill the gap in order to provide collective human security.³³⁹ The events of 9/11 led many countries to adopt counter-terrorism measures.³⁴⁰ By doing so, countries jeopardised human rights through for instance, coercive interrogation, ethnic profiling and preventive arrests.³⁴¹ The rhetoric of weak States being a fertile ground for terrorism and related organised crimes also took hold and became a priority for action, policy and discourse.

Despite decades of multi-dimensional interventions on the part of the international community including conflict resolution, peacebuilding, democratisation, reforms on security sector and other key areas, there is a growing feeling of disillusionment and failure regarding the attainment of securing sustainable peace, and the way to address violence and instability.³⁴² It is nevertheless essential to emphasise that in the context of the security-development nexus, the multilateral aid intervention in particular towards FCAS has been to some extent dictated by the transnational security agendas of Western states.³⁴³ There remains a need for more research on the nexus between state failure, weak states, instability and terrorism.³⁴⁴

Over the past two decades the HT phenomenon has received growing international, regional and domestic awareness and attention in these fragile

³³⁹ *ibid* 10.

³⁴⁰ Edward Newman, 'Weak States, State Failure, and Terrorism' (2007) 19(4) *Journal of Terrorism and Political Violence* 463.

³⁴¹ Benedikt Goderis and Mila Versteeg, 'Human Rights Violations after 9/11 and the Role of Constitutional Constraints' (2012) 41(1) *The Journal of Legal Studies* 131,132.

³⁴² Patrick Meehan, 'What are the key factors that affect the securing and sustaining of an initial deal to reduce levels of armed conflict?' (2018) *UK Stabilisation Unit* 7.

³⁴³ Petrikova and Lazell (n 335) 494.

³⁴⁴ Newman (n 340) 464. See also Godwin Okafor and Jenifer Piesse, 'Empirical Investigation into the Determinants of Terrorism: Evidence from Fragile States' (2018) 29 (6) *Defence and Peace Economics* 697,698.

and conflict ridden contexts.³⁴⁵ Increasing resources are spent on research, policy, advocacy, law enforcement entities, NGOs, and UN networks towards feeding and sensitising the public to the HT narrative with regard to conflict and necessary interventions.³⁴⁶ This has led to the international community's focus and commitment on the building of an anti-trafficking agenda and re-examination of the challenges observed in the implementation of the international legal framework addressing HT in complex contexts. The eradication of HT is a long-time endeavor and requires in part 'changes in attitudes, application of the rule of law and a strong civil society'.³⁴⁷

Hence, the thesis examines in this last section, the nexus between HT and FCAS as well as the contributing factors to exploitative practices and all forms of HT that exist in conflict situations.³⁴⁸

2.5 The intersection between HT and conflict environments

Over the last decade, organised crime and the prevalence of HT have become increasingly linked to fragile settings and contexts of regional volatility and instability.³⁴⁹ The complex intersection between HT and conflict has been researched and acknowledged over the last few years by numerous

³⁴⁵ Elżbieta M. Goździak, 'Empirical Vacuum: In Search of Research on Human Trafficking', in Rosemary Gartner and Bill McCarthy (eds) *The Oxford Handbook of Gender, Sex, and Crime* (Oxford University Press, 2014) 2. See the UN S/RES/2331 (2016) adopted on 20 December 2016 related to the crime of trafficking in persons in armed conflict and post-conflict situations. See also the UN Security Council Meeting of 15 March 2017, SC/12751, addressing an open debate on HT in conflict situations.

³⁴⁶ Anthony Marcus and Edward Snajdr, 'Anti-anti-trafficking? Toward critical ethnographies of human trafficking' (2013) 37 (2) *Dialectical Anthropology* 191.

³⁴⁷ European Court of Auditors, 'EU support to fight human trafficking in South/South-East Asia' (2017) Special Report 9.

³⁴⁸ Cherif Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability' (2016) 59(4) *Law and Contemporary Problems* 9.

³⁴⁹ Women, Peace and Security: Study submitted by the Secretary-General pursuant to Security Council resolution 1325 (2000) (UN publication, 2002)17 para. 64.

stakeholders.³⁵⁰ Many scholars emphasise that the trafficking industry is fuelled by armed conflict.³⁵¹ Empirical research has demonstrated links between armed conflict and increasing vulnerability to ‘certain forms of forced labour, modern slavery, human trafficking and child labour’.³⁵² HT feeds on conditions of vulnerability that could include the following issues: economic, social, ethnic, religious exclusion, poverty, political instability,³⁵³ displacement. These extend to crisis situations in which HT flourishes because vulnerable persons in such circumstances tend to rely on negative coping mechanisms, adopting thereby risky survival strategies.³⁵⁴ This is illustrated by the situation of Rohingyas who have been persecuted by the Myanmar military and armed forces on account of their ethnicity particularly in Rakhine state.³⁵⁵ These multidimensional factors exposed parts of the Rohingya community to evidenced practices of coercion and exploitation from trafficking networks.³⁵⁶ Many were smuggled to Bangladesh and found caged in the jungle between the Thailand-Malaysia border where subsequent mass graves were discovered.³⁵⁷

³⁵⁰ Luca Raineri and Francesco Strazzari, ‘Organised crime and fragile states African variations’ (2017) European Union Institute for Security Studies (EUISS) 1.

³⁵¹ Bassiouni, Rothenberg, Higonnet, Farenga and Invictus, ‘Addressing International Human Trafficking in Women and Children for Commercial Sexual Exploitation in the 21st Century’ (n 209) 482.

³⁵² <<https://delta87.org/resources/thematic-overviews/conflict-humanitarian-settings/>> accessed 18 November 2019.

³⁵³ Alison Siskin and Liana Sun Wyler, ‘Trafficking in Persons: U.S. Policy and Issues for Congress’ (2013) US Congressional Research Service 7.

³⁵⁴ IOM, Report ‘Addressing Human Trafficking and Exploitation in Times of Crisis-Evidence and Recommendations for Further Action to Protect Vulnerable and Mobile Populations’ (2015) 31.

³⁵⁵ Joris van Wijk, ‘Bangladesh and Rohingya Refugees; navigating international protection and national security’ (2017)12(1) Newsletter Criminology and International Crimes. See also <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24991&LangID=E>> accessed 29 February 2020.

³⁵⁶ Aizat Khairi, ‘Supply Chain and Human Trafficking of Rohingya Refugees in Malaysia’ (2019) 9(2) International Journal of Innovative Technology and Exploring Engineering 4561,4563.

³⁵⁷ Human Rights Watch, ‘Thailand: Mass Graves of Rohingya Found in Trafficking Camp’ (2015)<<https://www.hrw.org/news/2015/05/01/thailand-mass-graves-rohingya-found-trafficking-camp>> accessed 29 February 2020.

In addition, academics and policymakers have cited evidence to establish that armed actors resort to exploitative practices taking varying forms: sexual slavery,³⁵⁸ forced marriage, trafficking for the purpose of forced labour,³⁵⁹ forced recruitment as tactics of warfare³⁶⁰ and sources of revenue.³⁶¹ HT as part of organised crime is present in the unprecedented scale of human mobility associated with displaced persons in conflict, 65 million in 2015 alone.³⁶²

The contribution of international and special tribunals in adjudicating on the prohibition of crimes of sexual violence is significant. The term 'conflict-related sexual violence' encompasses 'trafficking in persons for the purpose of sexual violence or exploitation, when committed in situations of conflict'.³⁶³ This was first acknowledged by the International Criminal Tribunal for former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) prosecuting crimes related more specifically to sexual violence and enslavement practices during war time.³⁶⁴

³⁵⁸ Alys McAlpine, Mazeda Hossain and Cathy Zimmerman, 'Sex trafficking and sexual exploitation in settings affected by armed conflicts in Africa, Asia and the Middle East: systematic review' (2016)16(1) 34 *BMC International Health and Human rights* 1,8.

³⁵⁹ Aimee Comrie, 'At the Crossroads: Evidential Challenges in the Investigation and Prosecution of Trafficking Persons for Sexual Exploitation and Sexual Violence in Situations of Conflict' (2019) 1 *Journal of Trafficking and Human Exploitation* 121,122.

³⁶⁰ The International Institute for Strategic Studies (IISS), 'Armed Conflict Survey 2017' < <https://www.iiss.org/publications/armed-conflict-survey/2017/armed-conflict-survey-2017/acs2017-03-essays-2> > accessed 18 November 2019.

³⁶¹ Ariel I. Ahram, 'Sexual Violence, Competitive State Building, and Islamic State in Iraq and Syria' (2019) 13(2) *Journal of Intervention and State building* 180,187. See also the Report of the UN Secretary-General, 'Conflict Related Sexual Violence' (2019) UN Doc S/2019/280, para 14, p.6.

³⁶² Volker Türk and Madeline Garlick, 'From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees' (2016) 28(4) *International Journal of Refugee Law* 549, 657: 'In 2015 the number of migrants worldwide has reached more than 244 million. 'However, there are roughly 65 million forcibly displaced persons, including over 21 million refugees, 3 million asylum seekers and over 40 million internally displaced persons'.

³⁶³ UN Secretary-General, 'Conflict Related Sexual Violence' (n 361) para 4, p.3.

³⁶⁴ Comrie (n 359) 124. See Phumzile Mlambo-Ngcuka, 'Foreword' in Serge Brammertz and Michelle Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (OUP, 2016). See Serge Brammertz, 'Preface' in Serge Brammertz and Michelle Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (OUP, 2016) p. IX. See also *Prosecutor v*

The Rome Statute of the International Criminal Court (ICC) addresses trafficking within the context of enslavement as a crime against humanity and identifies related practices such as sexual slavery that can amount to war crimes. In particular, the ICTY referred to the ICC in the *Kunarac* case, with regard to enslavement as a crime against humanity in customary international law. As examined in chapter 4, the case relates to the fate of Bosnian Muslim women from the municipality of Foca captured and enslaved for the purposes of servitude and sexual exploitation³⁶⁵ by Bosnian Serbian Forces.³⁶⁶ Sexual atrocities and other forms of violence also inflicted on men were reported during the conflict in the former Yugoslavia.³⁶⁷ Recent accounts of male exploitation are increasingly surfacing and being researched in South Asia,³⁶⁸ in Africa and the Middle East.³⁶⁹

However, there is still a need to craft a model to prosecute the perpetrators of crimes of 'conflict-related sexual violence' in particular from ISIS with regard to the sexual enslavement of Yazidi women, or from Boko Haram with the sexual

Dragoljib Kunarac, Radomir Kovač, and Zoran Vuković (Judgment) IT-96-23-T and IT-9623/1, T Ch (22 February 2001) paras. 24,25.

³⁶⁵ Clare Frances Moran, 'Human Trafficking and the Rome Statute of the International Criminal Court' (2014) 3 *The Age of Human Rights Journal* 32,39.

³⁶⁶ *Prosecutor v Kunarac et al.* (n 364) para.32, 37, 542,543.

³⁶⁷ Sandesh Sivakumaran, 'Sexual Violence Against Men in Armed Conflict' (2007) 18(2) *The European Journal of International Law* 253,254.

³⁶⁸ *ibid* 259. See John Frederick, 'Sexual Abuse and Exploitation of Boys in South Asia – A Review of Research Findings, Legislation, Policy and Programmes Responses' (2010) UNICEF p.V. See Ellen Anna Philo Gorris, 'Invisible victims? Where are male victims of conflict-related sexual violence in international law and policy?' (2015) 22(4) *European Journal of Women's Studies* 412,421,422, 423. See also the UN Secretary-General Report on Sexual Violence in Conflict (14 March 2013) UN Doc A/67/792–S/2013/149, p.16, para.73.

³⁶⁹ Report of the UN Secretary-General, 'Conflict Related Sexual Violence' (n 361) para 19 at 6.

servitude of Nigerian girls or from the Lord's Resistance Army with the trafficking of children exploiting them as child soldiers.³⁷⁰

The UN system through the work of the Special Rapporteur on Trafficking in Persons and other related bodies recognise that HT in all its forms is increasingly characterised as a feature of armed conflict.³⁷¹ As a measure of a growing mobilisation against trafficking in persons in conflict situations, the UN Security Council which had focused in the last decades on global threats to peace and security, identified in 2015 HT as both a cause and consequence of conflict and insecurity.³⁷² In this regard, quantitative research established that between 2000 and 2017, the UNSC issued 1113 Resolutions of which 35% refer to various forms of organised crimes.³⁷³ Transnational organised crimes including HT impact on global peace and constitute a threat to human security³⁷⁴ which may undermine governments' legitimacy, their legal system³⁷⁵ and impact its societal institutions.

Hence, the UN Security Council President 'condemns in the strongest terms reported instances of trafficking in persons in areas affected by armed conflict'.³⁷⁶ The first UNSC resolution on HT³⁷⁷ was adopted in December 2016

³⁷⁰ Halleh Seddighzadeh, 'The Onset of Global Violent Extremism and Its Nexus with Human Trafficking' in John A. Winterdyk and Jackie Jones (eds), *The Palgrave International Handbook of Human Trafficking* (Palgrave MacMillan, Cham, 2019) 2,5.

³⁷¹ Report of the Special Rapporteur on trafficking in persons, especially women and children (3 March 2016) UN Doc A/HRC/32/41, paras 12, 14 p.4.

³⁷² UNSC Open Debate and Resolution on Human Trafficking of 20 November 2017 < <http://www.whatsinblue.org/2017/11/open-debate-and-resolution-on-human-trafficking-1.php#>> accessed 12 December 2017.

³⁷³ The Global Initiative Against Transnational Crime, 'Organized Crime and its role in contemporary conflict – An analysis of UN Security Council Resolutions' (2018) 1.

³⁷⁴ Pati, 'Human Trafficking: An Issue of Human and National Security' (n 4) 151.

³⁷⁵ See for example OECD, 'The State's Legitimacy in Fragile Situations: Unpacking Complexity' (2010).

³⁷⁶ Security Council Condemns Human Trafficking in Strongest Terms, Unanimously Adopting Resolution 2331 (20 December 2016) UN Doc SC/12647.

³⁷⁷ UNSC Resolution 2331 (20 December 2016) UN Doc S/RES/2331.

and was the outcome of the work and reports of the UN Secretary-General on trafficking in persons in armed conflict pursuant to resolution 2331.³⁷⁸ This was linked to subsequent resolutions by the UNSC condemning the slave trade of migrants in Libya in Dec 2017.³⁷⁹

At a policy level, the UNGA adopted the New York Declaration for Refugees and Migrants. The objective of this Declaration was to address the protection needs of vulnerable individuals, displaced communities³⁸⁰ forced to embark on perilous journeys and often prey to human trafficking.³⁸¹ The Declaration noted that forced movements often result from escaping 'armed conflict, poverty, food insecurity, terrorism, or human rights violations and subsequent persecution',³⁸² environmental threats, economic disintegration. These parameters are usually the core drivers that characterise complex conflicts, collapsed State institutions and fractured societies.³⁸³ In addition, HT can be partly fueled by some recipient States who, in response to often irregular forced movements, may impose ever more restrictive migration policies. This exposes individuals to both criminal

³⁷⁸ Report of the Secretary-General on trafficking in persons in armed conflict pursuant to Security Council resolution 2331 (2016) (10 November 2017) UN Doc S/2017/939.

³⁷⁹ UN Security Council (7 December 2017) UN Doc SC/13105. See also 'Migrants Being Sold as Slaves', CNN, 13 November 2017

< <https://edition.cnn.com/videos/world/2017/11/13/libya-migrant-slave-auction-lon-orig-md-ejk.cnn>> accessed 18 November 2017

³⁸⁰ Luz Estella Nagle, 'How Conflict and Displacement Fuel Human Trafficking and Abuse of Vulnerable Groups. The Case of Colombia and Opportunities for Real Action and Innovative Solutions' (2013) 1(2) Groningen Journal of International Law 1, 18.

³⁸¹ UNGA Res. A/RES/71/1 (adopted 19 September 2016) New York Declaration for Refugees and Migrants in 28 (4) International Journal of Refugee Law (2016) para.1, 9.

³⁸² *ibid*, para. 9.

³⁸³ International Centre for Migration and Policy Development (ICMPD), 'Targeting Vulnerabilities, the Impact of the Syrian War and Refugee Situation on Trafficking in Persons: A Study of Syria, Turkey, Lebanon, Jordan and Iraq' (2015). See also UNRWA Commissioner General Statement to the Fourth Committee of the UNGA of 4th November 2014. See UNHCR, 'The Central Mediterranean Route: working on the Alternatives to Dangerous Journeys' (2017) 6.

networks and smuggling practices³⁸⁴ and precarious travel conditions whereby they find themselves in even more vulnerable conditions to exploitation.³⁸⁵

Protracted conflicts in various parts of the globe where law and order are weak exacerbate vulnerability to various forms of trafficking. Numerous recent examples include Syria, Iraq, Nigeria, Libya. Another example pertains to Afghanistan with the sexual exploitation of young boys through the practice of *Bacha Bazi*. Such practice is exacerbated in a context of defective rule of law, societal custom, and judicial system.³⁸⁶ Similarly in Lebanon, cases of young boys forcibly recruited by ISIL were trafficked into the Syrian Arab Republic.³⁸⁷

In fragile settings, weak capacity of the State may result in poor domestic law enforcement of legal norms including anti-trafficking laws. The lack of state capacity also imposes financial strain to afford the heavy costs of anti-trafficking efforts, such as the training of skilled front-line personnel.³⁸⁸ Weak state capacity may be coupled with corrupt practices and collusion with organised criminal actors, within government structures, who contribute to facilitate a wide range of criminal activities.³⁸⁹ Traffickers and corrupt officials are often able to embed themselves and flourish within an unstable environment, resorting to HT

³⁸⁴ Danilo Mandić, 'Trafficking and Syrian refugee smuggling: Evidence from the Balkan route' (2017) 5(2) *Social Inclusion* 28.

³⁸⁵ Trafficking and Human Smuggling: A European Perspective' (2000) 38 (3) *International Migration, Special Issue* 34. See UNHCR, IOM, 'Strategy to Address Human Trafficking, Kidnappings and Smuggling of Persons in Sudan Strengthening Alternatives to Onward Movements' (2015-2017) 2,3. See also the exploitation of Syrian refugees in Lebanon exploited for organs trafficking <<http://www.bbc.com/news/magazine-39272511>> accessed 26 April 2017.

³⁸⁶ Rabia Akhtar, 'The Neglected Boys of War: Trapped in a Vicious Cycle of Slavery and Sexual Abuse' (2019) 3 *Journal of Trafficking and Human Exploitation* 179,182.

³⁸⁷ UN Secretary General Report (18 May 2018) UN Doc A/72/865–S/2018/465, 15 para.99.

³⁸⁸ Robert G. Blanton, Shannon Lindsey Blanton and Dursun Peksen, 'Confronting human trafficking: The role of state capacity' (2018) 37(4) *Conflict Management and Peace Science* 471,475, 476.

³⁸⁹ UNODC, 'The Globalization of Crime A Transnational Organized Crime Threat Assessment' (2010) 27.

as additional source of finance for their operations and official positions. Corruption plays therefore a significant role in the trafficking process³⁹⁰ enabling perpetrators to circumvent prosecution³⁹¹ which is very difficult to address when it involves law enforcement officials.³⁹² Research has established that States who are better at addressing the crime of trafficking, are more likely to experience a shorter conflict.³⁹³

Other factors that feed the nexus between HT, fragility and conflict relate to the situation of societal collapse where discrimination and marginalisation occur against communities who may already experience poor education and economic insecurity. In these instances, one aspect concerns access difficulties, poor infrastructure and inadequate institutional structures which pose significant problems for reporting mechanisms and effective protection of vulnerable groups.³⁹⁴ In conflict contexts, there is frequently a lack of trust towards state officials and law enforcement personnel from segments of civil society who may have experienced a high level of violence and human rights abuses. Victims of HT often experience a combination of shame, fear, and stigma as a result of abuses suffered often in a climate of impunity.³⁹⁵ This highlights the mistrust of any type of authority especially in conflict situations where perpetrators can be parties to the armed conflict. In these situations, recourse to sexual violence is often exercised through means of trafficking, as

³⁹⁰ Sofia Jonsson, 'The Complex Relationship between Police Corruption and Sex Trafficking in Origin Countries' (2019) 5(2) *Journal of Human Trafficking* 112.

³⁹¹ *Ibid* 112. See also Seo-Young Cho, 'Modeling for determinants of human trafficking: An empirical analysis' (2015) 3(1) *Social Inclusion* 4,8.

³⁹² Jonsson (n 390) 122.

³⁹³ Bowersox (n 313) 267.

³⁹⁴ FCASs have been linked to weak or ineffective political, economic, and societal institutions.

³⁹⁵ Akhtar (n 386) 187.

a weapon of war, exemplified by the case of Libya³⁹⁶ or Eastern Democratic Republic of Congo.

At a societal level, the narrative of HT in conflict settings has become a sensitive and high-profile issue that has attracted worldwide commitments at the highest level. For instance, Pope Francis relying on social media culture³⁹⁷ created in the Vatican, the 'Migrants and Refugees Section'.³⁹⁸ Pope Francis regularly addresses the issue of HT which 'threatens not only individuals but the basic values of society and of international security and justice'.³⁹⁹ Under the encouragement of Pope Francis, the Church provides support to victims of HT and actions to overcome HT through in part the implementation framework of the *Pastoral Orientations*.⁴⁰⁰ Former US President Obama emphasised that the 'fight against human trafficking is one of the great human rights causes of our time'.⁴⁰¹ French President Macron has denounced the failure from the international community to combat HT.⁴⁰² In support, there has been a growth

³⁹⁶ C oman Kenny and Nikita Malik, 'Trafficking Terror and Sexual Violence: Accountability for Human Trafficking and Sexual and Gender-Based Violence by Terrorist Groups under the Rome Statute' (2019) 52 Vanderbilt Journal of Transnational Law 43,45.

³⁹⁷ Paulina Guzik, 'Communicating migration – Pope Francis' strategy of reframing refugee issues' (2018) 3(2) Church, Communication and Culture 129.

³⁹⁸ *ibid* 129.

³⁹⁹ Pope Francis <<http://www.catholicnewsagency.com/news/to-fight-human-trafficking-one-of-pope-francis-core-commitments-36763/>> accessed 11 March 2016. See Pati (n 4) 29. See also The Migrants and Refugees section, 'Pastoral Orientations on Human Trafficking' (2018).

⁴⁰⁰ Pastoral Orientations on Human Trafficking Vatican (n410)

⁴⁰¹ US President Obama statement: <<https://www.whitehouse.gov/issues/foreign-policy/end-human-trafficking>> accessed 11 March 2016.

⁴⁰² <<https://www.theguardian.com/world/2017/nov/26/emmanuel-macron-visits-africa-human-trafficking-slavery>> accessed 27 November 2017. See also <<https://www.theguardian.com/world/2017/nov/26/emmanuel-macron-visits-africa-human-trafficking-slavery>> accessed 27 November 2017

in major media campaigns exemplified by the CNN Freedom Project⁴⁰³ as well as the BBC's focus on 'human trafficking and smuggling'.⁴⁰⁴

Since the UNSC Resolution 2388 in 2017, there is growing awareness of the nexus between trafficking practices and conflict environments. This is despite the fact that previous to that date, there was limited empirical analysis and reliable data on HT⁴⁰⁵ in conflict.⁴⁰⁶ In 2015, IOM noted⁴⁰⁷ that in fragile settings and often emergency contexts, counter-trafficking measures still may not be envisaged as lifesaving and therefore not considered as a priority in the various protection responses provided to vulnerable individuals in humanitarian responses.⁴⁰⁸

Further, In the course of the last two years almost all the multilateral development banks have prepared or are preparing strategic frameworks for engagement in FCAS. These include the new World Bank Strategy (2020) which mentions, as an example:

“Illicit trafficking and criminal networks have benefitted from greater mobility and interconnectedness, and, in many contexts, this exacerbates FCV challenges. Elite capture, poverty, and inequality are

⁴⁰³ <<https://www.endslaverynow.org/cnn-freedom-project>> accessed 30th December 2017.

< <https://edition.cnn.com/interactive/2018/specials/freedom-project/>> accessed 2 April 2019.

⁴⁰⁴ The BBC runs a regular column on HT

<<https://www.bbc.co.uk/search?q=human+trafficking>> accessed 12 July 2020

⁴⁰⁵ Nagle (n 380) 21.

⁴⁰⁶ Bassiouni, Rothenberg, Higonnet, Farenga and Invictus, 'Addressing International Human Trafficking in Women and Children for Commercial Sexual Exploitation in the 21st century' (n 209) 418.

⁴⁰⁷ IOM, 'Addressing Human Trafficking and Exploitation in Times of Crisis- Evidence and Recommendations for Further Action to Protect Vulnerable and Mobile Populations' (2015) 3.

⁴⁰⁸ *ibid* 3.

*associated with increases in a range of illicit activities, including trafficking, corruption, and illicit financial flows”.*⁴⁰⁹

Moreover, the World Bank and Asian Development Bank (ADB) also highlight the importance of establishing strategic partnerships with bilateral agencies, global and regional MDBs and UN agencies. The ADB has established such partnerships on tackling fragility, vulnerability, disaster risk management, climate change, conflict and violence, displacement, and gender equality, among others. The ADB’s new strategy follows on from multiple projects to address HT in FCAS. Most importantly, and recalling that the EU is the world’s biggest donor of development assistance, the NDICI-Global Europe programme earmarks 79.46 billion of euros for cooperation with third countries outside the European Union for 2021-2027 addresses global, trans-regional and emerging threats: notably threats to public security and safety, including health pandemics, man-made and natural disasters; terrorism, violent extremism, organised crime and illicit trafficking (including trafficking in human beings).⁴¹⁰

Hence, part II examines the fact that despite the increasing awareness and legal concern to addressing HT with efforts made by some countries to implement international law,⁴¹¹ domestic enforcement mechanisms may ‘evidence lack of focus’.⁴¹² Hence, besides a legal approach to HT, civil society

⁴⁰⁹ The World Bank Group Strategy for Fragility, Conflict and Violence 2020–2025 (n 89) 8.

⁴¹⁰ European Commission Guidelines for the Programming of the Neighbourhood, Development and International Cooperation Instrument (NDICI) 2021-2027 (2021) 24.

⁴¹¹ UNODC, ‘International Framework for Action To Implement the Trafficking in Persons Protocol’ (2009) 5.

⁴¹² Bassiouni, Rothenberg, Higonnet, Farenga and Invictus (n 209) 418.

and community-based organisations play a pivotal role in linking HT victims to many forms and mechanisms of protection at a domestic or international level.

2.6 Summary

This chapter has explored the links between HT and incidence of instability, fragility, and conflict situations as well as complex political contexts with the focus on understanding fragile environments in which HT can prevail and thrive. The nature of warfare has evolved towards mostly non-international armed conflict, ranging from conventional warfare to unstructured conflict, irregular civil wars, or insurgencies, bringing in the participation of non-states armed groups, some of which are responsible for increasing the incidence of HT. FCAS have pre-occupied donor countries since the early 2000s with successive armed conflicts starting with Afghanistan and Iraq to Syria most recently.

The issue of human security and with it the complex phenomenon of globalisation is exacerbated by innovative and digital transformation. This fast-evolving technology has also arguably accelerated the occurrence of exploitation as well as compromising the means to enforce legal protection against HT practices, particularly in fragile settings.

The analysis of the interaction between HT and conflict environments confirms the impact on human security, moreover, constituting an international threat at a global level. This was complemented by the rhetoric of weak states being a fertile ground for terrorism and related organised crimes, specifically following 9/11. However, despite decades of the international community's multi-dimensional interventions including conflict resolution, peacebuilding, reforms on security sector and other key areas, there is an overall growing feeling of

disillusionment and failure regarding the attainment of securing sustainable peace, and the way to address violence and instability. Concurrently, it is essential to emphasise that interventions in FCAS have for some been guided by Western transnational security agendas. Humanitarian interventions are initiated by powerful States are at times motivated by selfish national interests. This includes recent European opposition to 'migration' which concerns many victims of trafficking.

Over the last decade, the concept of 'fragile State' has become the core label used by donors and international assistance to legitimate their interactions and interventions towards recipient countries, poor and devastated by conflicts. There are significant challenges and contention regarding delimitating symptoms and causes of fragility which can appear sometimes confused and underline a 'complex array of interdependent factors. Part of the current debate on fragile states relates also to the limits and gaps of fragility measurement and subsequent concerns on the frameworks and methodologies to measure fragility. These measurement criteria tend to conclude simplistically, similar fragility levels and settings which do not capture the entire picture of fragility and the variety or specificities on the ground. The chapter also confirms that in fragile contexts, normative mechanisms of protection against HT practices are challenged as the traditional role of the State in its duty to protect is compromised. However, mechanisms of protection can be complemented by the interactions of donor governments, and other multi-actors involved, including civil society organisations and local communities.

To conclude despite the growing understanding of trafficking practices in conflict environments, limited empirical analysis and unreliable data on HT in

conflict still prevail, as well as uncertainties to characterise and identify HT. The nexus between HT and conflict has been acknowledged early on by the work of the ICTY, the ICTR and the SCSL prosecuting crimes related to sexual violence and enslavement practices during war time. However, the assumption remains therefore, that in fragile settings and emergency contexts, counter-trafficking measures may still not be envisaged as lifesaving and therefore is not considered as a priority in the various protection responses provided to vulnerable individuals.

The next chapter explains the research process and identifies the rationale for the selected combination of methodological approaches guiding the different phases of the thesis. Starting from the desk-based research to the analysis of valid and reliable data of the field work undertaken for the single case study on Palestine. The choice of a single case study on Palestine is also justified as a means to obtain an in-depth understanding of HT. In addition, to capture an in-depth understanding of Palestine, its institutions, its legal system, various stakeholders, civil society. Chapter 3 also presents the difficulty to undertake field research in hostile and conflict environments. The chapter explores therefore the specific challenges of conflict settings that impact both on the research design and on the conduct of the research.

Chapter 3 Research Methodology

3.1 Introduction

The primary purpose of this chapter is to explain the tailor-made methodological framework consisting of a selection and combination of approaches and tools adopted and why they are appropriate for the thesis. The methodology adopted recognises the sensitive nature of HT within the fragile and conflict affected context of Palestine. The chapter further explains the particular challenges experienced with regard to the research approach and how they have been overcome.

The analysis of the challenges and limitations in implementation of a protective legal framework in FCAS required a combination of methodological tools. The research combines an in-depth field research and qualitative methodologies through a single case study analysis. A mixed methods approach to the research in the Palestine case enables a dialogue between the methods, each contributing to address the research question.⁴¹³

In addition, each of the methods chosen captures different aspects of the HT phenomenon and taken together generate a clearer picture. In particular, tools for contextual analysis, including legal and political economy analysis can be very helpful to understand the context for action and the incentives and motives

⁴¹³ Kai Thaler, 'Mixed Methods Research in the Study of Violence and Conflict' (2011) Presentation at the 6th General Conference of the European Consortium on Political Research (ECPR), University of Iceland 12. See also Jose F. Molina-Azorin, 'Mixed methods research: An opportunity to improve our studies and our research skills' (2016) 25 *European Journal of Management and Business Economics* 37.

of different stakeholders. The research approach has been enriched by borrowing from other disciplines.⁴¹⁴

The chapter is organised into five sections. Section 3.2 introduces the research philosophy approach. Section 3.3 the justification for the qualitative methods as a selected research methodology and the choice of a single case study. Section 3.4 addresses some of the complex issues in research associated with working in FCAS; in particular, the methodological challenges of researching HT; the ethical concerns; the risk of personal bias; lastly the specific security parameters incorporated as part of the field work in Palestine. Section 3.5 deals with the phasing of implementation of the research. The concluding section 3.6 provides a brief recapitulation of the main issues presented in this chapter.

3.2 Research philosophy approach

The research journey commences with thoughts concerning the research philosophy. This forms the basis of the research involving the choice of research strategy, methods, the formulation of the problem, data collection, processing, and analysis. Research discipline is described as ‘a systematic, socially organised quest for new and better insight’.⁴¹⁵ This is linked to the essential questions: ‘What to research’ and ‘how to research’ based upon the researcher’s project and crucial underpinnings of ‘why research and why this research?’

⁴¹⁴ Lee Epstein and Gary King, ‘Empirical Research and the Goals of Legal Scholarship: The Rules of Inference’ (2002) 69 *University of Chicago Law Review* 1. See also John Baldwin and Gwynn Davis, ‘Empirical Research in Law’, in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies*, (Oxford University Press, 2003) 881.

⁴¹⁵ National Committee for Research Ethics in Norway, ‘Guidelines for Research Ethics in the Social Sciences, Law and the Humanities’ (2004) 8.

Research must be founded on a formal, rigorous, and explicit methodological path.⁴¹⁶ However, precise choice of methodology varies according to the phenomenon under examination. The thesis therefore considers the most appropriate ways in which data about HT can be researched, collected, analysed, and interpreted in particular in conflict and fragile affected contexts. This contextual parameter frames the choices of methodology rooted in both epistemological and ontological approaches.

Epistemology is concerned with the nature of knowledge itself, its possibilities and scope; seeking means to understand the basis on which human knowledge is acquired. It is ultimately about defining the most appropriate ways of acquiring the knowledge that will help in dealing with the complexity of HT and how to get to the truth around HT as well as to make sense of the research findings. The ontological approach enables the examination of 'what might exist' in other words the nature of reality.⁴¹⁷ In this research, the ontology approach might be construed as what are the real facts around HT? Does HT exist in the situation observed, and if so, how are facts manifested and in what forms? These two philosophical approaches give rise to a key distinction between the two main research philosophies of positivism and interpretivism.

Positivism has been established in the natural sciences and based on a belief that the world is external and can only be measured by objective, rigorous hypothesis testing and experimental logic. Positivism has long influenced the physical and social sciences, dominated by empirical studies and logic. The

⁴¹⁶ Yin (n168) 3.

⁴¹⁷ Elizabeth Jackson, 'Choosing a Methodology: Philosophical Underpinning' (2013) 7(1) Practitioner Research in Higher Education Journal 52.

emphasis is on the use of quantitative methods.⁴¹⁸ The term 'empirical' suggests that evidence about the world ought to be based on observation or experience. A positivist quantitative approach in this instance would rely upon the use of very structured questionnaires and on the availability of validated numeric data. However, the social science community has recognised some limitations in gaining a 'truly objective understanding' through mainly measurement approaches.⁴¹⁹ Post-positivism development therefore revealed a wider openness towards other methodological approaches such as qualitative methods. The latter enables the gathering of multiple perspectives from participants and mitigates the concept of objective reality and of only one truth. Post-positivism reflects the position that the reality can only be captured through the use of multiple methods and is more creative. Data is scarce in Palestine. This is due mainly because of the lack of understanding of what constitutes HT, the perception that HT is a taboo subject associated with sexual practices, and the general restrictions on field research especially in Gaza because of the imposed closure.

The use of mixed research methods is relevant. In-depth interviews, observations, understanding of social interactions are appropriate in order to make sense of the findings and to understand as well as explain the complexity of HT.

⁴¹⁸ Rolf Johansson, 'Case Study Methodology' Keynote speech at the International Conference "Methodologies in Housing Research" organised by the Royal Institute of Technology in cooperation with the International Association of People-Environment Studies (2003) 6.

⁴¹⁹ Chris Gratton and Ian Jones, *Research Methods for Sports Studies* (Routledge, 2nd edn, 2010) 26.

As a complement, interpretivist or 'phenomenological' approaches are often used to focus on studying and understanding people and their institutions. Interpretivist approaches generally adopt a qualitative analytical framework, one that usually emphasises words rather than quantification in the collection and analysis of data.⁴²⁰ This approach can take data from observation, reflection, and unstructured interviews. The research design process presented in this chapter evolved towards an interpretivist approach. The latter recognises the essentially subjective matter and sensitive content of the topic, relying as well on the deeper engagement of the researcher with the subject matter.

The research approach therefore adopts a primarily qualitative research design, based on empirical methods. The research conducts doctrinal, and library-based research to investigate the international legislation addressing HT as well as the legal system in Palestine. Part of this non-empirical research includes the review of literature on HT, on FCAS and HT in conflict settings, personal observations on HT in FCAS in order to enhance analysis.

3.3 Justification for the qualitative methods research methodology

Designing a research project is the process of identifying the potential different frameworks for the collection and analysis of the data.⁴²¹ The qualitative approach is identified as the most suitable methodology to generate an in-depth understanding of HT and to generate a global picture of Palestine, its institutions, actors, representatives of the civil society, and its legal system. It is also posited that qualitative research is the most relevant and useful approach

⁴²⁰ Alan Bryman and Emma Bell, 'Business Research Methods (Oxford University Press, 2nd edn, 2007) 731.

⁴²¹ *ibid* 39.

for investigating and understanding the specific human rights issues of HT in an FCAS, especially where quantitative data is scarce and likely unreliable.

The choice of a qualitative approach combines the review and analysis of primary sources and secondary law sources. The research includes personal correspondence with key informants, semi-structured interviews, focus group discussions with key interlocutors, completed by personal observations.

In order to address the research question, the thesis commences with the selection of doctrinal and theoretical components in order to analyse the existing international legal framework addressing HT that can be applied domestically, encompassing the challenges of implementing international legal commitments in fragile and conflict settings. Both doctrinal and theoretical legal writings and analysis 'account for almost the entire corpus of legal scholarship. Only a tiny fraction is devoted to the gathering of *new* facts about how law operates and affects us'.⁴²² Hence, the research begins with a comprehensive review and examination of primary sources regarding the legal framework for HT which is mostly contained in part II. Primary sources are also reviewed whilst analysing the case study of Palestine in part III. This review is complemented by the selection of secondary sources such as journals, academic articles, policy documents, UN and NGO reports and other relevant literature on HT. In addition, literature on HT in conflict with selected materials on FCAS are also provided. This review phase helped fine tune the research approach and detailed the design of the single case study approach. In view of the prolific amount of primary and secondary sources on HT, the research targeted key resources, key authors, and some selected domestic legislation as well as

⁴²² Peter H. Schuck, 'Why don't Law Professors Do More Empirical Research?' (1989) 39 *Journal of Legal Education* 323,329.

scholarly articles and reports particularly relevant to the study, rather than covering literature throughout the whole field of HT. This targeted strategy aimed at keeping the thread and relevance to the research and avoid descending into a mainly descriptive general overview.

3.3.1 Qualitative research design

‘Qualitative research fundamentally depends on watching people in their own territory and interacting with them in their own language, on their own terms. As identified with sociology, cultural anthropology, and political science, among other disciplines, qualitative research has been seen to be “naturalistic” (research conducted in its natural context, i.e.: the field) “ethnographic” (holistic in its anthropologic term) and participatory.’ (the subject plays an active part in this process).⁴²³ Furthermore, the aim in any qualitative approach is to “engage in research that probes for deeper understanding rather than examining surface features’ (Johnson, 1994).⁴²⁴

‘Qualitative’ is also described as a kind of social inquiry shaped by people’s experience of the world they live in, and their interpretation of it.⁴²⁵ In addition, a qualitative approach is designed to explore and capture overall social

⁴²³ According to Kirk and Miller in Lisa Webley, ‘Qualitative Approaches to Empirical Legal Research’ in Peter Cane and Herbert Kritzer (eds), *Oxford Handbook of Empirical Legal Research* (OUP 2012) 1.

⁴²⁴ Marie C. Hoepfl, ‘Choosing Qualitative Research: A Primer for Technology Education Researchers (1997) 9(1) Journal of Technology Education 47.

⁴²⁵ Chapter 1, ‘The Nature of Qualitative Research: Development and Perspectives’ 3 in <https://www.blackwellpublishing.com/content/BPL/Images/Content_store/Sample_chapter/9780632042844/001-024%4B1%4D.pdf> accessed 15 July 2020.

constructs through people's attitudes, feelings, beliefs and make sense of the social reality the researcher is seeking to analyse and describe.⁴²⁶

On the above basis, the qualitative approach in this research is appropriate to obtain systematic and in-depth investigation among identified persons and key stakeholders from Palestinian civil society to express their views, knowledge and understanding of HT practices. The following questions were considered: How is HT identified, perceived, and dealt with in the Palestinian society? What is the extent of the understanding from the Palestinian civil society of the HT legal definition? How can the legal framework for protection against such human rights violations be implemented in a fragile environment? During this investigation process, the choice of participants was important as their contribution leads to a greater understanding of the HT phenomenon observed. Thus, the sampling criteria was crucial to the validity of the research which was undertaken based on the 'snowball' technique.

After initial discussions with Palestinians including academics, the method of face-to-face interviews was identified as the primary data source. Focus Group Discussions (FGDs) were also regarded as a complementary method to the semi-structured one-to-one interviews, in order to generate discussion, information and corroborate opinions. FGDs support ways 'in which people in conjunction with one another construe the general topics in which the researcher is interested'.⁴²⁷ FGDs can encourage greater feedback, and help capture the interaction of views, feelings, beliefs, attitudes, reactions as they

⁴²⁶ Jane Ritchie and Jane Lewis, *Qualitative Research Practice: A Guide for Social Students and Researchers* (SAGE, 2013). Preface XIV.

⁴²⁷ Bryman and Bell (n 420). See also Laurence Lessard-Phillips and Silvia Galandini, 'Focus Groups as research method' (2014) in GMCVO Third Sector Research Network meeting <https://www.gmcvo.org.uk/system/files/focus_groups_presentation_lessard-phillips_galandini.pdf> accessed 15 July 2020.

emerge from a group discussion. The latter could complement the data obtained using other approaches such as individual interviews.⁴²⁸

The first field visit to Palestine in July 2016 confirmed this proposition. This initial mix of consultees through informal focus group discussions generated a fruitful exchange of views, attitudes and experiences as well as mutually gauging the level of consensus on HT understanding, practices, and potential ways to address the phenomenon in Palestine. The choice of a small group to consult with, was preferred as this enabled a focused space with some time to express opinions and involvement regarding HT and related practices.⁴²⁹ This was helpful for planning the main interviewing phase as well as for finetuning the research approach. In addition, FGDs fits well in Palestine due to cultural practices of acquaintanceship between potential participants who would therefore cover a broad range of experiences and opinions on the topic.

3.3.2 Justification of the adoption of the single case study methodology

The choice of the case study approach often features qualitative research methods and vice versa.⁴³⁰ Case studies

⁴²⁸ Anita Gibbs, 'Focus Groups' (1997) 19 Social Research Update. <<http://sru.soc.surrey.ac.uk/SRU19.html>> accessed 15 July 2020.

⁴²⁹ David L. Morgan, Focus Groups as Qualitative Research: Planning and Research Design for Focus Groups (1997) 14. < http://www.twu.edu/downloads/qualitative-inquiry/Morgan_1997_Focus_groups_as_qualitative_research.pdf> accessed 15 July 2020.

⁴³⁰ Crispin Coombs, 'Coherence and transparency: some advice for qualitative researchers' (2017) < http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0103-65132017000100324> p.4 accessed 10 September 2019.

'...can address a wide range of questions that ask why, what, and how of an issue and assist researchers to explore, explain, describe, evaluate, and theorize about complex issues in context...'.⁴³¹

The thesis adopts a single case study (SCS) research design in order to obtain a more thorough understanding and interpretation of the HT phenomena within a social group and within its natural setting. The research acknowledges the challenge of selecting a SCS which carry both benefits and potential limits. Advocating a SCS can capture the incidence or prevalence of a phenomenon in a specific context and community in greater detail, involving in this instance violations of human rights and occurrence of HT practices. Some benefits of choosing the SCS for Palestine have practical considerations: Access to one single place among the list of FCAS is less costly logistically and limits additional security risks for the researcher while gathering data in the field. In addition, a SCS generates a large but more manageable amount of data from multiple sources of evidence which can be comprehensively analysed in order to strengthen the research findings and conclusions.

Moreover, a focus on a SCS can generate high-quality theory as well as enabling a deeper understanding of the exploring subject and provide more thorough and rich data of the phenomenon observed. The latter is supported by the techniques of interviews, observations, documents analysis, fieldnotes. A SCS can certainly capture details where context is complex where the phenomenon of HT is hidden in social layers and difficult to access.

⁴³¹ Helena Harrison, Melanie Birks, Richard Franklin & Jane Mills, 'Case study research: foundations and methodological orientations' (2017) 18 (1) Forum Qualitative Social Research 1,15.

As noted by Yin, the rationale for a single case study is where the case represents an *extreme* case or a *unique* case.⁴³² Palestine presents both characteristics in terms of the combination of complex political and legal system as well as the impact on the ground of being an occupied territory since 1967. The construction of Palestine as a single political and national entity has far reaching historical roots and was subject to internal political divisions fuelled during the British mandate, further compromised by the 1947 UN partition, then influenced by both the Egyptian and Jordanian rules. These combined parameters contributed to characterise Palestine as an FCAS and as such has been amenable to different types of external intervention. In this respect, Palestine as an *extreme* and *unique* case justifies the examination of how internal actors embed state building interventions in the context of state fragility. These combine the attempt to consolidate an effective rule of law which manifest challenges to implement and enforce international human rights obligations including the anti-HT legal obligations Palestine has committed to.

The thesis highlights that the implementation of the Palermo Protocol encompass the support and the interaction of international humanitarian law (IHL) and international human rights law (IHRL), international refugee law (IRL), international criminal law (ICL) and international labour law (ILL). These legal frameworks through their specific international instruments and mechanisms can mitigate the focus of the Palermo Protocol on law enforcement and provide wider protection with potential remedies.

⁴³² Yin (n 168) 47.

Access to key interlocutors and materials was nevertheless facilitated by the researcher's personal knowledge and experience of Palestine since 1999. The research acknowledges the weaknesses regarding the use of a SCS. Principally, the criticism relates to difficulties to generalise research findings and theories from a single case study of a broad phenomenon and from a relatively narrow research context. However, Yin suggests the idea of 'fittingness' instead of generalisability which should be considered as 'indeterminate, relative and time- and context-bound'.⁴³³ A second criticism is that it is also challenging to generate reliable evidence resulting from the SCS analysis. However, Landman notes the costs and benefits of comparative methods available to the field of human rights, highlighting global comparisons, few-country comparisons, and single case studies. Landman supports the use of a SCS noting that whilst the scope for empirical generalisation is reduced, SCS offers the opportunity 'to concentrate on the contextual particularities' of the single setting and can 'contribute to larger theoretical and empirical problems'.⁴³⁴ The research supports this argument and the choice to explore the HT phenomenon in Palestine, emphasising therefore the relative importance of context and its impact. To this end, 'the term 'context' comes from a Latin root meaning 'to knit together' or 'to make a connection'. Contextualizing entails linking observations to a set of relevant facts, events, or points of view that make possible research and theory that form part of a larger whole.'⁴³⁵

⁴³³ Yin (n 168) 62.

⁴³⁴ Todd Landman, *Studying Human Rights*, (London, Routledge, 2006) 67.

⁴³⁵ Aaron Zhi Cheng, Angelika Dimoka, Paul A. Pavlou, 'Context may be King, but generalizability is the Emperor!' (2016) 31 *Journal of Information Technology* (2016) 257,262.

3.4 The particular and complex challenges of research in FCAS

Field research in a conflict environment presents specific challenges and risks⁴³⁶ that can undermine research objectives. The research design therefore considered the challenges arising out unstable research settings. The researcher takes the view that it is also vitally important to be clear about the ethics of working in conflict and fragility, therefore the following section discusses at length the challenge faced.

Literature on the ethics and conduct of fieldwork in conflict and post conflict environments is an under researched and neglected area and guidelines for researchers in challenging and risky environment need to be expanded⁴³⁷ Hence, 'the research process in conflict-affected spaces around the world is rarely reflected in current academic guidelines and ethical frameworks on doing fieldwork'.⁴³⁸ Research methods in conflict zones therefore requires heightened sensitivity to an everchanging context.⁴³⁹ Main sets of challenges are practical, methodological and ethical.⁴⁴⁰ These challenges were considered prior to

⁴³⁶ Martini Santschi, 'Conducting Research in Conflict-Affected Contexts: Reflections on South Sudan' in 'A Conflict Sensitive Approach to Field Research Doing Any Better?' (2017) 12 (5) Swiss Academies Reports 27.

⁴³⁷ Susanna P. Campbell, 'Literature Review Ethics of Research in Conflict and Post Conflict Environments' (2010) Graduate Center, University of New York 1. See also Susanna P. Campbell, 'Ethics of Research in Conflict Environments' (2017) 2(1) Journal of Global Security Studies 89, 90. Timothy Longman, Conducting Research in Conflict Zones: Lessons from the African Great Lakes Region in Dyan Mazurana, Karen Jacobsen and Lacey Andrews Gale (eds), *Research Methods in Conflict Settings: A View from Below* (Cambridge, Cambridge University Press, 2013) 254,274.

⁴³⁸ Althea-Maria Rivas and Brendan Ciarán Browne, Experiences in researching conflict and violence: Fieldwork interrupted (Bristol University Press, 2018) 1.

⁴³⁹ Dyan Mazurana, Lacey Andrews Gale, and Karen Jacobsen, 'A View from Below: Conducting Research in Conflict Zones' in (eds) Althea-Maria Rivas and Brendan Ciarán Browne, Experiences in researching conflict and violence: Fieldwork interrupted (Bristol University Press, 2018) 12.

⁴⁴⁰ Jonathan Goodhand, 'Research in conflict zones: ethics and accountability' (2000) 8 Forced Migration Review 12. See also Elizabeth Jean Woods, 'The Ethical Challenges of Field Research in Conflict Zones' (2006) 29 Qualitative Sociology 373. See also more recent guidance from IOM: 'Counter trafficking in emergencies: information management guide' (2020).

concluding the research design and entailed thorough preparation including an assessment of risks.

3.4.1 Practical and methodological concerns

FCAS and zones of conflict exhibit some common features such as ongoing and widespread violence, generalised or localised fighting, poor or collapsed institutions and infrastructure, human rights abuses with very often impunity due to a lack of functioning rule of law and consequently law enforcement. These settings of fragility and conflict can persist for years, such are the examples. of Afghanistan, Palestine, Sri Lanka, Myanmar, Sudan and South Sudan, Syria, Yemen, or Somalia who remained without a government for more than twenty-five years. Research is nevertheless conducted in these contexts despite obvious security risks in accessing conflict areas and difficulties to reach certain communities.⁴⁴¹ In these circumstances researchers need to develop beforehand a sound understanding of the patterns and dynamics of conflict which includes local knowledge.⁴⁴² Wood emphasises:

‘Field research in conflict zones is challenging for both methodological and ethical reasons. In conflict zones, the usual imperatives of empirical research (to gather and analyse accurate data to address a relevant theoretical question) are intensified by the absence of unbiased data from sources such as newspapers, the partisan nature of much data compiled by organisations operating in the conflict zone, the difficulty of establishing what a representative sample would be and carrying out a

⁴⁴¹ Kristina Simion, ‘Practitioner’s Guide – Qualitative and Quantitative Approaches to Rule of Law Research’ (2016) INPROL International Network to Promote the Rule of Law 1,7.

⁴⁴² Goodhand (n 440) 12.

study of that sample, and the obvious logistical challenges. Similarly, the ethical imperative of research ('do no harm') is intensified in conflict zones by political polarization, the presence of armed actors, the precarious security of most residents, the general unpredictability of events, and the traumatization through violence of combatants and civilians alike'.⁴⁴³

Awareness of specific ethical challenges and ongoing assessment of security risks are paramount to understand what impact research can have on identified participants and on the wider conflict-affected communities. Firstly, the two concepts of risk and vulnerability are distinct but strongly interact. Risk refers to the probability of harm that may occur and therefore requires the researcher to adopt a rigorous approach to assessing risks.⁴⁴⁴ Vulnerability 'refers to persons who are not in a position to evaluate risk'.⁴⁴⁵

'Even with research practices and protocols tailored to specific field conditions, inevitably field researchers rely on their judgment in interpreting those norms. Yet very often academic training does a poor job preparing us for field research, particularly in conflict zones'.⁴⁴⁶

Thorough preparation is therefore required prior to operating in the field. For instance, to be familiar through news reports and other published sources of the studied area; be aware of security issues and the different levels of risks.⁴⁴⁷

⁴⁴³ Woods (n 440) 373.

⁴⁴⁴ Joan E. Sieber and Martin B. Tolich, *Planning Ethically Responsible Research* (SAGE Publications, 2013).

⁴⁴⁵ *ibid.*

⁴⁴⁶ Woods (n 440) 384.

⁴⁴⁷ David Romano, 'Conducting Research in the Middle East's Conflict Zones' (2006) 39(3) *Political Science and Politics* 439.

Furthermore, it is recommended to be flexible, to adapt the selected research methods and design to the security risks. Contacts with interviewees require adaptation of interview techniques as some participants may be assessed to have experienced trauma in such a volatile and conflict context.⁴⁴⁸

The Covid-19 pandemic has further heightened the problems associated with access to FCAS. The need to carry out research in areas considered insecure and inhabited by potentially extremely vulnerable individuals, e.g., Syria has led researchers to study conflict-affected settings remotely. This has sparked recent interest in the methods and tools that can support remote working.⁴⁴⁹

Ethical Concerns, the ‘Do No Harm’ Principle, and Risk Management

The etymology of ethics relates to the word *ethos* in Greek referring to morals, customs, habits, attitudes. The concept of ethics is a complex construct made of values and beliefs.

*‘Research ethics refers to a complex set of values, standards and institutional schemes that help constitute and regulate scientific activity’.*⁴⁵⁰

This is generally based on accepted moral and ethical principles. Ethical consideration and behaviour in the conduct and practice of research are paramount. They constitute safeguards aiming at protecting the rights of

⁴⁴⁸ Woods (n 440) 373.

⁴⁴⁹ Yazan Douedari, Merzat Alhaffar, Diane Duclos, *et al.* ‘We need someone to deliver our voices’: reflections from conducting remote qualitative research in Syria’ (2021). 15 (28) Conflict and Health 2.

⁴⁵⁰ National Committee for Research Ethics in Norway, ‘Guidelines for Research Ethics in the Social Sciences, Law and the Humanities’ (2006) 4.

contributors to the research various phases and preserve their privacy and testimonies.⁴⁵¹ Researchers have an ethical commitment towards the participating community, its environment, and its cultural sensitivity in order to conduct meaningful research based on integrity. Cultural insensitivity and unethical practice can therefore lead not only to harming individuals but even to the withdrawal of support for social scientific research.⁴⁵²

Codes of research ethics involving human subjects initially concerned medical experiments in the era of modern science. The Nuremberg code marks the condemnation of Nazi medical experiments and became the foundation of ethical principles and rights with regard to research involving human subjects.⁴⁵³ The 1979 Belmont Principles still constitute the framework for research on human subjects and outline the need for respect for persons, beneficence, and justice. Ethics includes respect for human subjects but goes beyond this consideration and varies in terms of character and emphasis.⁴⁵⁴ This research ensured that respect for ethics was not just considered during the literature review phase but was omnipresent throughout the entire research process and was fundamental during the interview phase.

Furthermore, it is essential as a researcher to be aware of the applicable codes of practice issued by various professional entities, research institutes as well as scholarly organisations. This research was therefore designed in line with

⁴⁵¹ Anna Traianou, 'The Centrality of Ethics in Qualitative Research' in Patricia Levy (eds), *The Oxford Handbook of Qualitative Research* (OUP 2014).

⁴⁵² Mark Israel and Ian Hay, *Research Ethics for Social Scientist: Beyond regulatory compliance* (SAGE publication, 2nd edn 2006) 4.

⁴⁵³ W. Lawrence Neuman, *Social Research Methods: Qualitative and Quantitative Approaches* (Pearson New International Edition, 7th edn, 2014) 157.

⁴⁵⁴ David E. Mac Nabb, *Research Methods for Political Science: Quantitative and Qualitative Methods* (London: Routledge, 2015) 67.

Exeter University's ethical guidelines as well as with the concordat of UK Universities promoting that

'good research is underpinned by appropriate ethical, legal and professional frameworks, obligations and standards; a culture of integrity and good governance'.⁴⁵⁵

Ethics therefore combines a complex set of principles and theoretical foundations attached to the following notions of respect, trust between researcher and participants which constitutes 'the foundation of successful cross-cultural collaborative research',⁴⁵⁶ moral values and standards, integrity, transparency, quality, honesty, impartiality, empathy.⁴⁵⁷

All ethical parameters affecting the research were considered in the design of the research approach and accord with the commonly accepted ethical principles of autonomy, beneficence, non-maleficence, confidentiality, and integrity, approved by the University of Exeter Research Ethics Committee. The overriding ethical parameter is the potential risk of harm that can be caused in the course of seeking and gathering sensitive information. This is the case of researching on HT combined with the sensitive location of Palestine.

The assessment of harm depends on the nature of the research as well as the context and the environment in which the research operates.⁴⁵⁸ Emphasis is

⁴⁵⁵ Bryman and Bell (n 420) 131. See Code of Good Practice in the Conduct of Research (University of Exeter, version 6, 2017). See also <<http://www.universitiesuk.ac.uk/policy-and-analysis/Pages/research-policy.aspx> >accessed 10 July 2015.

⁴⁵⁶ Meredith Gibbs, 'Toward a Strategy for Undertaking Cross-Cultural Collaborative Research' (2011) 14 (8) Society & Natural Resources 684.

⁴⁵⁷ <<http://www.esrc.ac.uk/funding/guidance-for-applicants/research-ethics/our-core-principles/>> accessed 15 July 2020.

⁴⁵⁸ Sarah Shaw and Geraldine Barrett, 'Research governance: regulating risk and reducing harm?' (2006) 99 Journal of the Royal Society of Medicine 14.

placed on accountability and ethical conduct to assess whether ‘the potential benefits of a particular research project in terms of important knowledge gained are proportionate to the potential physical and/or psychological harm it might cause’.⁴⁵⁹ The research supported honesty at all stages of the research process: ‘if we act honestly and honourably, people may rely on us to recognize their needs and sensitivities and consequently may be more willing to contribute openly and fully to the work we undertake’.⁴⁶⁰

The other component of ethical conduct relates to the protection of participants and to ensure not to cause harm and risks to persons involved in the research process. However, the assessment of the probability or severity of harm is difficult to estimate.⁴⁶¹ As an example, harm can occur for instance through insensitive and intrusive questions during interviews. Hence, this was carefully considered when designing the questionnaires. The issue of protection is linked to the commitment from researchers not to divulge the identity of the sources of information. Although in certain circumstances this could be overridden for serious issues at stake such as child abuse.⁴⁶²

Conducting empirical qualitative research on HT is a sensitive, potentially dangerous and harmful process. It may entail seeking information from trafficked persons and/ or from a close environment that constitute an extremely vulnerable category of population, and difficult to approach.⁴⁶³ As a researcher,

⁴⁵⁹ *ibid* 14.

⁴⁶⁰ Mark Israel and Ian Hay, *Research Ethics for Social Scientists* (SAGE publication Online, 2nd edn 2006) 3. See also Sarah Banks, ‘Ethics’ in Saul Becker, Alan Bryman and Harry Ferguson (eds), *Understanding Research for Social Policy and Social Work. Themes, Methods and Approaches* (Bristol University Press, 2012) 60.

⁴⁶¹ < <http://www.ethicsguidebook.ac.uk/How-is-risk-defined-66> > accessed 15 July 2020.

⁴⁶² Bank (n 460) 60.

⁴⁶³ Goździak, ‘Empirical Vacuum: In Search of Research on Human Trafficking’ (n 345) 622.

this implies establishing a trusting relationship with individuals, agencies, organisations that provide services to victims of HT. Trust contributes to collecting reliable information that will ultimately lead to findings. As noted by Bryman, 'harm can entail a number of facets'.⁴⁶⁴ Physical and psychological harm could potentially occur due to more in-depth questions in the course of interviews and provoke emotionally charged reactions. In this situation, physical harm can take the form of intimidating threats towards the researcher which can lead to interrupt all interaction and to curtail the interview. Inquiring about HT in the complex setting of Palestine can potentially involve or compromise some influential personalities in Palestinian society, including for instance, security, law enforcement personnel and politicians. Stress and anxiety on the participant can also be caused by the fear that his/her testimony and views on HT in Palestine will be indirectly disclosed and will harm his/her professional reputation and/or his/her current employment. Another potential interviewee's fear is to be perceived as being disloyal to the Palestinian community by disclosing facts about sensitive issues.

In view of the above, specific precautions were woven into the detailed research design, as discussed below. These precautions were fastidiously observed to avoid harm or adverse repercussions as a result of interviewees' participation in the research project.

⁴⁶⁴ Bryman and Bell (n 420) 133.

Maintaining security awareness in the field

Ensuring security awareness requires the researcher to develop a specific ethical consciousness and adopt a security management framework. The author has lengthy experience of working in FCAS and is familiar with the need for 'Operational Security Management in Violent Environments'.⁴⁶⁵ Whilst in the field, daily monitoring of security briefings and advice were obtained through the following means: Firstly, by being registered as an academic researcher with the British Consulate in Jerusalem and reading security updates provided by the FCO as well as security updates provided through the University.⁴⁶⁶ In addition, daily UN security updates were accessed in Palestine and provided by the United Nations Department of Safety and Security (UNDSS) guidance on security in Palestine.⁴⁶⁷ Wider security considerations require research supervisors to be informed of the fieldwork details including the dates, locations and dates of interviews. Security and safety precautions also entail careful choice of location in the conduct of field research. Hence, all interviews took place in official premises such as NGOs and international agencies offices. Lastly, interviews involving Palestinian Officials took place in government premises. At no stage were interviews conducted in public places or any other potentially exposing location.

During the field research phase, contact was maintained with UK and French mobile telephones backed up with a local network mobile. During fieldwork, the

⁴⁶⁵ ODI, 'Operational security management in violent environments' (2010) 8 Good Practice Review (ODI, Humanitarian Practice Network) < http://odihpn.org/wp-content/uploads/2010/11/GPR_8_revised2.pdf > accessed 15 July 2020.

⁴⁶⁶ <<https://www.gov.uk/foreign-travel-advice/israel>> accessed 10 July 2015.

⁴⁶⁷ <<https://trip.dss.un.org/dssweb/traveladvisory.aspx>> (Access through UN staff login) accessed 10 July 2015.

researcher maintained regular contact with university supervisors. While in Palestine, local advice given by NGOs and other UN professionals was considered. Ultimately, flexibility proved necessary when dealing with sensitive interviews that were on occasion postponed or even cancelled. At all stages, the researcher was aware that when an interview was perceived as problematic or could pose security risks, the researcher could curtail at any time.⁴⁶⁸ As an example, during the second field visit in July 2017, security concerns were heightened following the outbreak of clashes in Jerusalem. This led the researcher to cancel interviews to be held in this area.⁴⁶⁹

3.4.2 Ethics in the Design Process

Responsibility and respect have been implemented through a rigorous process ensuring that any information disclosed follows recommended safeguards. An information sheet was given physically in advance to interview participants in order to inform them, of the nature of the project and of the potential risks arising from their participation. In particular, emotional accounts and opinions that they may regret later to have disclosed. This information sheet is attached in Annex A. Before obtaining the oral consent to interview, a thorough oral explanation was given, as to what the interview entails with emphasis on the nature of the

⁴⁶⁸ Besides multiple training courses on risk and security awareness training previously undertaken in the researcher's professional career, further recent training has been undertaken on risk assessment and understanding of harm in Exeter University. Attendance on 20th of April 2016 for one-to-one meetings on general risk assessment principles, including risk assessment in research projects and fieldwork planning. Insurance documentation was completed and all relevant Exeter University International Travel Forms and specific Risk Assessment Forms.

⁴⁶⁹ See Chapter 9, Outcomes of the second Field visit to Palestine (13th July to 28th July 2017) .

questions raised. This process is based on the ethical framework of Exeter University that promotes rigour, respect, and responsibility.

The nature and the purpose of the project was made clear to the participant and their voluntary consent with the possibility to withdraw at any stage of the interview. The issue of safety in this interview phase is paramount and was therefore discussed with the interviewee. Anonymity and confidentiality are the cornerstones of the interview and explanation was provided to the interviewee as to how such parameters are safeguarded.

Confidentiality and anonymity arrangements were made as follows. Two scenarios were foreseen to ensure confidentiality and anonymity and dealt with accordingly. Firstly, based on the oral consent given by the participant, the interview was recorded then transcribed while the researcher was still based in the field. This enabled amendments, changes or additional information participants might wish to provide following the interview. Secondly, where there was no record of the interview because the participant did not consent, written notes were taken in the course of the exchange and were amendable after the interview process. Both field notes and transcripts do not mention personal identifiers. In the context of the sensitive issue that HT entails, it was expected that some participants, for security concerns and confidentiality reasons may object to sign a document. However, this has not been the case. Regarding interviews conducted over skype, the same requirements were put in place.

In the process of preparing the transcript of the recorded and non-recorded interviews, the participant's identities were referred to by age, gender, and

where there was no objection referred to as specific NGOs, UN, and Government personnel. However, there is no mention of their roles and positions, unless their consent to disclose their identities were given. Furthermore, contact details of participants were kept separate from the interview transcripts. This list was compiled separately with the names and contacts linked to raw data by numerical or alphabetical key and safely stored via Exeter University server.

Because of the sensitive and exposing nature of HT, it was decided that prospective participants would not take part in the design, execution or reporting process of the study despite the tendency and temptation to engage more with participants in the design and subsequently build a highly reflective participatory design process. However, because participants are pivotal in providing an essential resource and unique contribution to the research analysis, they influenced the shaping of further questions.

In terms of feedback, the participants were asked to review again the transcript of their own interview at the end. Participants were therefore aware of their right to amend and/or remove statements they made. This proved time consuming but the process guaranteed respect for the authenticity and adequacy of participant statements. For practical considerations coupled with security considerations and confidentiality, interviewees were not given a copy of the interview. Participants were able to communicate solely through the researcher's university contact details in the eventuality of withdrawing or modifying any statement that was made or simply be reassured about the confidentiality and anonymity of her/his participation. No interviewees subsequently withdrew.

3.4.3 Storage of sensitive information

Written statements from the interviews, including field notes as well as any electronic data compiled during this process, were immediately transferred, safely stored through the University of Exeter Virtual Private Network connection (VPN), to secure U drive files on Exeter University server. This technology process guarantees that any confidential information sent between the local Internet Service Provider (ISP) and the University of Exeter network is secure. The recorded and the non-recorded interviews, transcribed shortly after the interviews were also exclusively and securely stored on the University of Exeter's server, through the VPN connection. No data was kept on portable devices and/or USB keys. Specialist computer advice was sought on all aspects of secure storage to minimise the chance of error when working in the field.

3.4.4 Detailed design of questionnaire

This section details the form of interviews, interview guide, observation guidelines, the use of field memos and the research journal. The questionnaire was built and developed iteratively, initially based upon preliminary analysis that emerged out of exploratory discussions held during the first field visit in 2016. The questionnaire was also designed partially in response to the findings from the primary and secondary sources reviews. The first iteration of the questionnaire was piloted with international development colleagues and local Palestinian consultants, resulting in new questions, eliminating extraneous data. Shortening of the overall questionnaire allowed for a more flexible approach with opportunities for the interviewee to digress as needed. The questionnaire included specific questions gauging the interviewee's

understanding of HT, its legal meaning as well as the knowledge of the international legal framework to combat HT. The introduction to the questionnaire endeavoured to present HT as a world-wide phenomenon, and to gather evidence on the situation in Palestine visa vis HT. The Palestinian legal framework and the domestic legal implementation of international human rights commitments was also a core part of the questionnaire. Annex C contains the final forms of the core questionnaires.

The 'target population', the list of participants is attached at Annex B. The list represents a wide range of individuals across Palestinian civil society, international donors and agencies that are operating in Palestine and its areas, including the UN and EUPOL COPPS (European Union Coordinating Office for Palestinian Police Support). Similarly, Palestinian law enforcement authorities such as prosecuting authorities including the civil police, directors from various human rights agencies and NGOs such as SAWA, Al-Haq Women Studies Center, WCLAC, National Society for Law and Democracy (NGO based in Gaza).

3.4.5 Analysis of interviews and FGDs

The priority for the researcher is to attempt to identify 'what is going on'. The process of research design essentially provides the framework for evidence to answer the research question. There are a number of components that form part of the research interpretation. The tools available for analysis include data input, coding, raw transcripts, triangulation. Data analysis constitutes the most complex phase of qualitative research which requires a systematic and

transparent approach in order to communicate meaningful as well as useful results.⁴⁷⁰

Thematic analysis was chosen as ‘a method that works both to reflect reality and to unpick or unravel the surface of ‘reality’’.⁴⁷¹ Thematic analysis is a useful research tool providing a rich and detailed, nevertheless complex account of data.⁴⁷² Furthermore, thematic analysis involves

*‘searching across a data set - be that a number of interviews or focus groups, or a range of texts - to find repeated patterns of meaning’.*⁴⁷³

This method demonstrates analytical rigour throughout the different phases of the data interpretation. The data *corpus* was complemented by the literature review, questionnaires design, other sources such as reports, news, and media reports, notes from conferences, meeting notes taken over an extended time period, personal observations, and correspondence. All this complementary data fed the process of selecting patterns with the subsequent identification in a second phase of emergent themes from both the interviews and FGD transcript notes. However, one of the pitfalls of thematic analysis is that researchers may tend to revert to using their questions to participants as the identified themes.⁴⁷⁴ Hence, the researcher was aware of this risk.

The steps used to abstract information from the interviews and FGD were very similar to that proposed by Maguire and Delahunt⁴⁷⁵ based in turn on a six-

⁴⁷⁰ Nowell, L.S, Norris, J.M, White, D.E and Moules, N.J, ‘Thematic Analysis: Striving to Meet the Trustworthiness Criteria’ (2017) 16 International Journal of Qualitative Methods 1.

⁴⁷¹ Virginia Braun and Victoria Clarke, ‘Using thematic analysis in psychology’ (2006) 3(2) Qualitative Research in Psychology 77,81.

⁴⁷² *ibid* 78.

⁴⁷³ *ibid* 86.

⁴⁷⁴ *ibid* 85,86.

⁴⁷⁵ Moira Maguire and Brid Delahunt, ‘Doing a Thematic Analysis: A Practical, Step-by-Step Guide for Learning and Teaching Scholars’ (2017) 8(3). AISHE-J 3354.

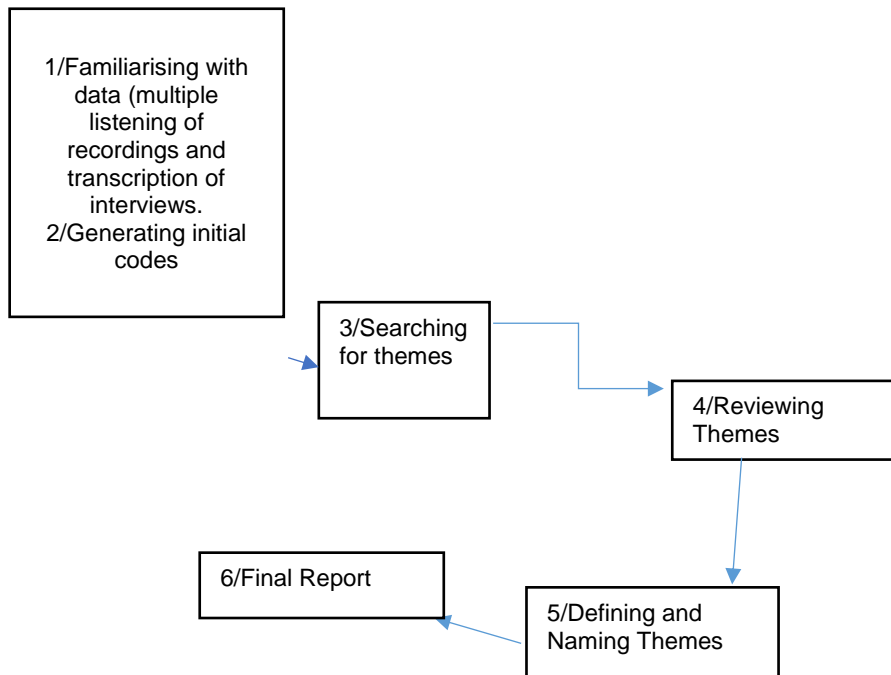
phase guide to thematic analysis suggested by Braun and Clarke and illustrated below.⁴⁷⁶

Table 3.1: Braun & Clarke’s six-phases framework undertaking thematic analysis

Step 1: Become familiar with the data,	Step 4: Review themes,
Step 2: Generate initial codes,	Step 5: Define themes,
Step 3: Search for themes	Step 6: Write-up.

The thematic analysis follows a basic model as set out below in figure 3.1

Figure 3.1 Thematic Analysis Process



⁴⁷⁶ Braun and Clarke (n 471) 86.

3.5 Phasing of field research

The implementation of the research entailed four phases:

Phase 1 consisted of gaining an initial picture and knowledge of the subject matter in Palestine. This commenced with a thorough doctrinal review of the Palestinian legal system with the analysis of relevant legal texts and parts of the Palestinian legislation available in English. The review included selected UN, NGO, reports, and academic articles. This required a contextual analysis of the historical and legal background of Palestine. The contextual background provides an understanding of the current Palestinian-Israeli situation and its influence on Palestine's international legal and human rights commitments. The research investigated key issues such as the lack of legal harmonisation and identified impediments to the implementation of international legal obligations.

Phase 2 was the preliminary field visit to Palestine in July 2016, to explore through the 'why', 'how', and 'what', the research question. This scoping field visit was intended to explore the overall Palestinian legal framework *in situ* as well as Palestine's international human rights obligations and the challenges to their implementation. More specifically: this stage of the research sought initial feedback from Palestinian human rights practitioners and other key persons/institutions on the priority and necessity of researching HT in Palestine. This visit aimed also at sensitising key interlocutors to the question of HT and how this practice is interpreted, reported, documented, and experienced among Palestinian society. The research investigated the initial understanding of how and what can be done to build legally and practically an anti-trafficking agenda that enables effective protection of Palestinian people vis a vis such practices.

The first field visit was a time to build trust and establish a reliable network among stakeholders' communities within Palestinian society including human rights organisations, government departments, law enforcement agencies, lawyers, judges, NGO and other international institutions, academics. This wide spectrum of support encouraged the examination of HT from many viewpoints and professional perspectives. This provided a more comprehensive understanding of the research process. The first visit assessed the respective value of participation in workshops, face to face discussions, individual interviews, and focus groups discussions bringing stakeholders together. In sum, the first visit contributed to an understanding of the challenges faced in the field as well as grounding the detailed research in phases 3 and 4.

Phase 3 entailed three further field visits in July 2017, May, and July 2018. The objectives were two-fold: the conduct of twenty formal interviews with identified individuals that were divided into two visits to Palestine. The third visit in phase 3 concluded with a formal FGD gathering various stakeholders on the question of HT presenting the international legal framework and the current legal situation of Palestine vis a vis human trafficking. The latest visit was additionally used to validate findings from previous visits. Analysis of the data collected during the field visits, FGDs and interviews is set out in chapter 9. It is important to provide an update on the follow-up of overall interviews to assess the steps towards the implementation of the Protocol beyond the last visit in July 2018. Early 2020, the review of the 2011 draft penal code was interrupted by the Coronavirus pandemic and the declaration of a state of emergency, similarly to the draft decree-law concerning the protection of the family from violence. The

CEDAW Committee in August 2020, following-up from the concluding observations on its initial report confirms the creation of a national team and working mechanism to review the 2011 draft Palestinian penal code in accordance with the international standards.⁴⁷⁷ However, there is no mention on the state of advancement of the anti-trafficking legislation or national plans to address the phenomenon of trafficking, and surprisingly, the CEDAW in 2020 makes no reference to the issue of trafficking despite its concern in its concluding observations in 2018.⁴⁷⁸

Phase 4 presents the final analysis, synthesis and triangulation of evidence and findings. This phase was the analytical synthesis of evidence gained through the review of primary documentation and the field work, the field notes, the journal entries, and multiple interviews. The final triangulation of findings was concluded at the end of 2019.

In total there were 37 interviews carried out over the course of the fieldwork

3.6 Summary

This chapter has presented the rationale of 'what' and 'why' particular methods and approaches were chosen to optimise the research outcomes through systematic, valid, and reliable data collection and analysis. Understanding philosophical concepts and related paradigms help to frame the quest for knowledge most related to the research question and the process by which the development of that knowledge is constructed and organised throughout the

⁴⁷⁷ CEDAW/C/PSE/FCO/1, 'Information received from the State of Palestine on follow-up to the concluding observations on its initial report' of 19 August 2020, para 11.p.4.

⁴⁷⁸ CEDAW/C/PSE/CO/1 of 25 July 2018, para.28, p.9.

research. Furthermore, the research philosophy adopted enabled the recognition of assumptions about the researcher's views and representation of society and the world. This underpins the research strategy as well as the methodology and methods chosen. Specifically, the research philosophy adopted has considered the most appropriate ways in which data about HT can be researched, collected, analysed, and interpreted.

The chapter explains why the research selects a combination of methodological approaches, hence mixed methods research. The research adopts a primarily qualitative approach combining a doctrinal approach, and analysis of primary documentation, including personal correspondence with key informants. The choice of a single case study on Palestine is justified to generate an in-depth understanding of HT and to capture a holistic picture of Palestine, its institutions, actors, representatives of the civil society as well as its legal system. Practical considerations have been highlighted: Access to one single place among the long list of FCAS is less costly logistically and limits additional security risks for the researcher while gathering data in the field.

Lastly, the chapter highlights the complexity of undertaking field research in hostile environments more generally in FCAS and sets out the inherent challenges of conflict settings that impact both on the research design and on the conduct of the research. The requirement for high standards of ethical conduct is detailed throughout the research process and is therefore tailored for fragile contexts such as the case study of Palestine.

Part II – Comprises chapters 4, 5 and 6. It attempts to clarify the definition of HT, discussing the challenges of the interaction of its legal concepts. This section examines the framework of human rights law, refugee law, humanitarian law, criminal law, and labour law and how these branches of international law address HT.

Chapter 4 Challenges of the HT Definition and the Interconnection of its Legal Concepts

4.1 Introduction

The purpose of this chapter is to analyse and clarify the challenges posed by the definition of HT highlighting the multi-faceted nature of this crime. The key issue concerns the definition, which is related to the interrelation between trafficking, slavery, sexual slavery, enslavement, and forced labour legal concepts. These concepts overlap but form nevertheless distinct legal concepts in international law and some such as enslavement and sexual slavery are codified offences within statutes of international judicial institutions. It is therefore difficult to determine the legal status of HT *per se* in international law as well as the choice of domestic or supra-national level of criminal enforcement to aim for, in order to address effectively this crime.⁴⁷⁹ To that end, the chapter provides some judicial interpretations of HT by examining selected judgments from international, regional and domestic courts: the International Criminal Tribunal of the former Yugoslavia (ICTY), the Inter-American Court of Human

⁴⁷⁹ Wilt (n 7) 299.

Rights, the European Court of Human Rights and some domestic courts such as France and Australia, who have all engaged with the crime of HT. The selected jurisprudence demonstrates how the HT legal definition contributes to blurring the boundaries between initially distinct legal concepts of slavery, forced labour and trafficking. This issue is discussed in further detail in chapter 6.

The analysis presented here highlights the difficulties faced by States even more significantly in fragile settings, with regard to both the understanding and interpretation of the HT legal definition which subsequently impact on its domestic implementation and on the prosecution of this crime.

Section 4.2 presents a brief historical account of the construction of the HT legal framework and its legal definition explaining the context in which the multi-faceted HT phenomenon evolved to become a global concern with shifting narratives and priorities.

Section 4.3 examines the HT legal definition and the interrelation between HT with the slavery, enslavement and forced labour legal concepts and the justification to consider HT under the jurisdictional realm of international criminal law.

Lastly section 4.4 addresses some weaknesses and advancement arising from the Palermo Protocol. Instrument which remains instrumental in consolidating the anti-HT agenda.

4.2 Historical development of the HT legal framework towards the enactment of the Palermo Protocol

HT raised international concern in the early 1900s through what was described as the 'immoral' phenomenon of white women being trafficked within and away from dire economic conditions in Europe or North America to developing countries or colonies for prostitution.⁴⁸⁰ The foundation of anti-trafficking legislation and the HT concept emerged with the 1904 International Agreement for the Suppression of 'White Slave Traffic'.⁴⁸¹ This instrument addressed the procurement of women and girls for 'immoral purposes or life'.⁴⁸² This was followed by four subsequent international trafficking instruments⁴⁸³ suggesting already the notion of exploitation occurring through an abusive recruitment process.⁴⁸⁴ Hence, at a very early stage the essential components of HT are expressed. In addition, this first agreement laid the basis for the protection of trafficking victims through their repatriation to their country of origin and their possible care by charitable institutions or private persons.⁴⁸⁵ This instrument and subsequent anti-trafficking legislation built a comprehensive framework prohibiting trafficking albeit equating it as a prostitution related activity.⁴⁸⁶ The added-value of the ensuing 1910 International Convention for the Suppression

⁴⁸⁰ Michelle O.P. Dunbar, 'The past, present and future of international trafficking in women for prostitution' (2000) 8 Buffalo Women's Law Journal 103,107. See Ray (n 2) 101,102. See also Fitzpatrick (n 69) 1143, 1144.

⁴⁸¹ International Agreement for the Suppression of the "White Slave Traffic," 18 May 1904, 1 L.N.T.S. 83, *entered into force* 18 July 1905.

⁴⁸² *Ibid* Article 14.

⁴⁸³ The 1910 Convention, Art. (1) and (2). The 1933 Convention (n 37) Art. (1). The 1949 Convention (n 9) Art.1(1).

⁴⁸⁴ Siller, 'Human Trafficking in International Law Before the Palermo Protocol' (n 21) 422,428.

⁴⁸⁵ International Agreement for the Suppression of the "White Slave Traffic" (n 488) Articles (3) and (4).

⁴⁸⁶ Mattar, 'Incorporating the Five Basic Elements of a Model Ant trafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention' (n 65) 7.

of the 'White Slave Traffic' was to establish punishment for the traffickers and requesting States parties to criminalise the trafficking offence in their domestic legislation.⁴⁸⁷ The 1921 International Convention for the Suppression of the Traffic in Women and Children recognised for the first time trafficking of children of both sexes in its Article 2.⁴⁸⁸

The 1933 International Convention for the Suppression of the Traffic in Women of Full Age provides that consent is not a defence to the crime of trafficking.⁴⁸⁹ The 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of Prostitutions for Others⁴⁹⁰ affirms in its Preamble that the traffic in persons for the purpose of prostitution is incompatible with the dignity and worth of the human person and again explicitly equates trafficking with prostitution. This latter instrument introduces for the first time the element of exploitation. All these instruments laid the foundation of what is understood today as HT⁴⁹¹ as well as the dynamics which shaped its contemporary contours and the language used to define it.⁴⁹²

The early anti-trafficking legal framework focused exclusively on prostitution, expanding later to the broader discourse of sexual exploitation.⁴⁹³ This continued to be the predominant narrative of HT during the eighties, promoted and advocated for by some women's organisations as well as radical and 'abolitionist feminists' who supported the eradication of the sex industry

⁴⁸⁷ Articles 1, 2, 3 of the International Convention for the Suppression of the "White Slave Traffic," May 4, 1910. 252; 98 UNTS 101.

⁴⁸⁸ Article 2 of the 1921 International Convention for the Suppression of the Traffic in Women and Children (9LNTS 415) revised 20 October 1947 (53 UNTS 13).

⁴⁸⁹ The 1933 Convention (n 38).

⁴⁹⁰ The 1949 Convention (n 38).

⁴⁹¹ The 1949 Convention (n 38) Article 1(2). See Gallagher, *The International Law of Human Trafficking* (n 23) 15.

⁴⁹² Allain, 'White Slave Traffic in International Law' (n 21) 1.

⁴⁹³ OHCHR, Fact Sheet N.36, 'Human Rights and Human Trafficking' (2014) 3.

because of its oppressive treatment of women.⁴⁹⁴ This feminist movement has been described as a ‘moral crusade’⁴⁹⁵ campaigning against sex trafficking especially in the USA where sex trafficking, prostitution, and pornography were all targets of policy attention.

In the nineties, HT was brought back onto the international arena in milestones events such as the 1993 World Conference on Human Rights in Vienna⁴⁹⁶ and the 1995 World Conference on Women in Beijing.⁴⁹⁷ The sexual exploitation and morality narratives of trafficking were gradually shifting towards including other forms of exploitation such as slavery and forced labour suggesting the interconnection between these exploitative practices.

‘Evidence of the shift away from the emphasis on sex work is the International Labour Organization’s (ILO) Protocol of 2014 to the Forced Labour Convention, 1930 (Forced Labour Protocol) which, in part, recognises debt bondage, human trafficking and other forms of modern slavery as all forms of forced labour.’⁴⁹⁸

This shift was also linked to concurrent crucial economic, social, and security priorities⁴⁹⁹ as well as a growing concern to integrate a human rights-based

⁴⁹⁴ Sanja Milivojevic and Sharon Pickering (n 105) 585,586,587. See the CATW (Coalition Against Trafficking in Women) < <https://catwinternational.org> > accessed 16 July 2020. See also Weitzer, ‘The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade’ (n 105) 447,450.

⁴⁹⁵ Weitzer (n 105) 448.

⁴⁹⁶ See paras 18 and 38 of the Vienna Declaration and Programme of Action Adopted by the 1993 World Conference on Human Rights.

⁴⁹⁷ Goździak, ‘Empirical Vacuum: In Search of Research on Human Trafficking’(n 345) 2. See also paras 99, 107 (q) of the Report of the Fourth World Conference on Women in Beijing (1995), A/CONF.177/20/Rev.1.

⁴⁹⁸ Nicola Piper, Marie Segrave and Rebecca Napier-Moore, ‘Editorial: What’s in a Name? Distinguishing forced labour, trafficking and slavery’ (2015) 5 Anti-Trafficking Review. See also Elizabeth M. Bruch, ‘Models Wanted: The Search for an Effective Response to Human Trafficking’ (2004) 40 (1) Stanford Journal of International Law 1,6.

⁴⁹⁹ Claudia Aradau, *Rethinking Trafficking in Women: Politics out of Security* (Palgrave MacMillan, 2008) 12, 13.

approach to HT. HT as a human right issue is recognised in the Preamble and article 2 (b) of the Palermo Protocol stating the need to protect and respect the human rights of victims.⁵⁰⁰ The question of a human rights framework⁵⁰¹ as a complementary approach to the predominant criminal justice approach⁵⁰² to deal with HT is addressed in chapters 5 and 6.

The widening agenda of migration, labour exploitation and transnational crimes has emphasised the ‘composite nature of the HT phenomenon’. The variety and magnitude of the phenomenon justified a plethora of counter-trafficking initiatives, legal norms⁵⁰³ and the engagement of multiple actors including intergovernmental organisations, States, NGOs, civil society, and academics.⁵⁰⁴ The growing global concern with HT also precipitated a need for reliable, good quality data as well as a rigorous evaluation of impact of counter trafficking interventions.⁵⁰⁵

⁵⁰⁰ Preamble and article 2(b) of the Palermo Protocol (n 9). See also Atak and Simeon (n 7) 1024.

⁵⁰¹ Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (Martinus Nijhoff Publishers, 2006) 35.

⁵⁰² Atak and Simeon (n 7) 1021.

⁵⁰³ Some International Human Rights Treaties acknowledged the issue of trafficking: See art.35 of the Convention on the Rights of the Child, adopted on 20 November 1989, 1577, UNTS 3: “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form”. The Optional Protocols to the Convention on the Rights of the Child addressing the sale of children, child prostitution, child pornography as well as, on the involvement of children in armed conflict. See also art.3 of the ILO Convention N. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, prohibiting forced or compulsory recruitment of children for use in armed conflict, adopted 17 June 1999, 2133, UNTS. 161; See art. 6 of the Convention on the Elimination of All Forms of Discrimination Against Women, adopted 18 December 1979, 1249, UNTS 13. See art.3 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted 7 September 1956, 266 UNTS 3.

⁵⁰⁴ Sanghera (n 103) 21.

⁵⁰⁵ Anne T. Gallagher and Rebecca Surtees, ‘Measuring the Success of Counter-Trafficking Interventions in the Criminal Justice Sector: Who decides-and how?’ (2012) 1 *Anti-Trafficking Review* (2012) 24. See also Jacqueline Bhabha, ‘Looking Back, Looking Forward: The UN Trafficking Protocol at Fifteen’ (2015) 4 *Anti-Trafficking Review* 3, 12.

Criminal justice was the main concern expressed in response to the dominant international security, human security, and migration agendas of the late nineties.⁵⁰⁶ These considerations were the reflect of a changing world with new crimes of an international dimension. In addition, migration to Western Europe during this period was a partial result of rising unemployment in some parts of Central and Eastern Europe combined with the collapse of the former Soviet Union and a more attractive market economy in the West.⁵⁰⁷ This ultimately led to the drafting of the Palermo Protocol supplementing the UN Convention against Transnational Organized Crime.⁵⁰⁸ As mentioned in section 1.2, HT is a complex and multifaceted phenomenon, especially with the involvement of transnational organized criminal groups. As part of the UNTOC, the Palermo Protocol was therefore created to reflect the international community's political will and action to combat 'the enormous growth of transnational organized crime'.⁵⁰⁹ Through this strong law enforcement tool, addressing HT was combining 'traditional crime control measures to investigate, prosecute and punish offenders with measures to protect trafficked persons'.⁵¹⁰

⁵⁰⁶Kofi Annan addressed the issues of human security and intervention in the context of the genocide in Rwanda, the conflicts in Kosovo and East Timor. Speech at the UNGA, 20 September 1999.

<http://www.un.org/press/en/1999/19990920.sgsm7136.html>

accessed 7 May 2015. See also Anne T. Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 Human Rights Quarterly 976.

⁵⁰⁷ John Salt, 'Trafficking and Human Smuggling: A European Perspective' (2000) International Migration Issue 2000/1, p.40

⁵⁰⁸ Palermo Protocol (n 9).

⁵⁰⁹ Elżbieta M. Goździak & Kathleen M. Vogel, 'Palermo at 20: A Retrospective and Prospective' (2020) 6(2) Journal of Human Trafficking 111. See also Ian Tennant, 'The Promise of Palermo, A Political History of the UN Convention against Transnational Organized Crime (The Global Initiative Against Transnational Organized Crime, 2020) 3, 12.

⁵¹⁰ Dimitri Vlassis, 'The United Nations Convention against Transnational Organized Crime and its Protocols: A New Era in International Cooperation' (2001) The International Centre for Criminal Law Reform and Criminal Justice Policy 97.

Other contributory factors to the elaboration of the Palermo Protocol included the case of Argentina facing internal problems with the trafficking of minors and their push for a new Convention against trafficking in minors.⁵¹¹ This was in addition to the contribution of prominent figures such as the Italian Judge Falcone who played a significant part through his crusade against organised crimes by the Mafia.⁵¹²

4.3 Challenges in understanding the HT legal definition

Prior to 2000, the term 'trafficking' had been inserted in various international instruments as well as UN documents⁵¹³ without being defined, although the approach of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) placed the prohibition of trafficking as a distinct criminal category alongside prostitution.⁵¹⁴ There were various reasons for this absence of a comprehensive definition. The first pertained to the inability of the international community to reach a consensus with regard to the constitutive elements of trafficking, its nature and its end result or impact.⁵¹⁵ Secondly, HT was still inextricably linked to prostitution, irregular migration and

⁵¹¹ Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (n 506) 1004.

⁵¹² Dimitri Vlassis, 'The United Nations Convention against Transnational Crimes and its Protocols: A new era in International Cooperation' in *The Changing Face of International Criminal Law, Selected Papers* (2001) The International Centre for Criminal Law Reform and Criminal Justice Policy 76.

⁵¹³ See article 6 of the CEDAW (n 10). See articles 6 and 16 General recommendation Committee on the Elimination of Discrimination against Women, 'General Recommendation No.19' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty' (1994) UN Doc HRI/GEN/1/Rev.1 A/47/38. See also article 35 of the Convention on the Rights of the Child (n 11). See also the Human Rights Committee, 'General Comment No. 28' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty' (2000) UN Doc CCPR/C/21/Rev.Add.10, para 12.

⁵¹⁴ Anne T. Gallagher, 'Two Cheers for the Trafficking Protocol' (2015) 4 *Anti-Trafficking Review*, 14, 32. See also Fredette (n 47) 101,111.

⁵¹⁵ Gallagher, 'Two Cheers for the Trafficking Protocol' (n 514) 15.

human or 'people' smuggling.⁵¹⁶ Third, the growing wish to address other types of exploitation besides sexual exploitation.⁵¹⁷ It is posited lastly, that the lack of a consensual definition ultimately reflected at the time

'the marginal place of trafficking within the international human rights system and the associated reluctance of States to tie themselves to specific and detailed rules'.⁵¹⁸

The HT discourse for instance in Asia has been constructed in part upon a mythology of trafficking widely propagated by media and upon a legacy of a dominant discourse based on non-empirically verified assumptions that trafficking affects primarily women and girls.⁵¹⁹ This is despite current empirical evidence that citizen and foreign-born children and adolescents trafficked for labour and sexual exploitation are also of concern.⁵²⁰

During the last fifteen years, the anti-HT campaign has resembled a 'bandwagon' that anyone could join.⁵²¹ 'Scholars have also jumped into the fray, calling on States to marshal human rights law, tax law, trade law, tort law, public health law, labour law and even military to combat this growing international crime and human rights violation'.⁵²² This mixed response to HT fed anti-

⁵¹⁶ Gallagher, *The International Law of Human Trafficking* (n 23) 68. See also Frank Laczko and Marco A. Gramegna (n 51) 180.

⁵¹⁷ See para 22 of the Report of the Special Rapporteur on violence against women, its causes, and consequences, Ms. Radhika Coomaraswamy, 'on trafficking in women, women's migration, and violence against women, submitted in accordance with Commission on Human Rights resolution 1997/44' (29 February 2000) UN Doc E/CN.4/2000/68.

⁵¹⁸ Anne T. Gallagher, 'Two Cheers for the Trafficking Protocol' (n 514) 16.

⁵¹⁹ Elżbieta M. Goździak, 'Low hanging fruit: Domestic minor sex trafficking v. foreign-born trafficked children' (2015) in <<https://elzbietaGozdziaK.wordpress.com/tag/foreign-born-trafficked-children/>> accessed 21 February 2016.

⁵²⁰ Prabha Kotiswaran, 'Protocol at the Crossroads: Rethinking anti-trafficking law from an Indian labour law perspective' (2015) 4 *Anti-Trafficking Review* 33, 55.

⁵²¹ Janie A. Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108(4) *The American Journal of International Law* 609,649.

⁵²² *ibid* 609.

trafficking responses and strategies that failed to provide a 'universal and consistent understanding of the practices that fall within the parameter of trafficking' despite the coming into force of the Palermo Protocol.⁵²³ The definitional confusion was exacerbated further within the informal working group of the Ad Hoc Committee during the fourth and the fifth session of the Protocol negotiations.⁵²⁴ The working group inserted into exploitative practices the legal concepts of slavery, forced labour, practices similar to slavery, and servitude which therefore drew international instruments on slavery and forced labour into consideration.⁵²⁵ The interpretation of the intention of the drafters was to provide a non-exhaustive legal definition of HT in order to consider specific history, political systems, cultural determinants and context which influence the assessment of trafficking and what constitute exploitative practices. This consideration was meant to encourage effective domestic implementation of the Palermo Protocol and improve harmonisation between different jurisdictions worldwide. However, subsequently, the UN Working Group on Trafficking in Persons identifies

*'a lack of conceptual clarity with respect to the definition of trafficking as an obstacle to the effective implementation of the international legal framework around trafficking persons, and its national equivalents'.*⁵²⁶

⁵²³ Anne T. Gallagher, 'The International Legal Definition of "Trafficking in Persons": Scope and Application' in Prabha Kotiswaran (eds), *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery* (Cambridge University Press, 2017) 104.

⁵²⁴ Fourth (8-12 March 1999) and Fifth session (4-15 October 1999) of the Ad Hoc Committee in *Travaux Préparatoires for the Organized Crime Convention and Protocols* 332-335.

⁵²⁵ Marjan Wijers, 'Purity, Victimhood and Agency: Fifteen years of the UN Trafficking Protocol' (2015) 4 *Anti-Trafficking Review* 67. See also the *Travaux Préparatoires for the Organized Crime Convention and Protocols* 347.

⁵²⁶ UNODC, 'The Role of 'Consent' in the Trafficking in Persons Protocol' (2014) Issue Paper, 16.

Furthermore, this bears consequences on the appropriate level of criminal law enforcement whether domestic, regional, or international, in order to prosecute HT.⁵²⁷ Other contextual parameters that overshadow both the understanding and discourse on HT relate to the emphasis of a criminal justice response towards HT. This focus highlights perceived security threats posed by illicit migration flows within the nexus of international criminal networks pursuing sexual and labour exploitation. HT is therefore categorised by the UN and many States as a transnational crime, in parallel with drug trafficking and terrorism.⁵²⁸ This response chimes with the restrictive immigration policies implemented by many countries in an attempt to stem perceived uncontrolled migratory flows. This emphasis is to the detriment of the status of HT victims as well as of their human rights and protection needs.

The above interconnected issues feed the lack of clarity of the definition, potentially challenging the domestic interpretation and implementation of the HT legal framework.⁵²⁹

The next section analyses the challenges raised within the HT legal definition characterised by the relationship between slavery, enslavement and forced labour legal concepts.

⁵²⁷ Siller, ‘Modern Slavery’ Does International Law Distinguish between Slavery, Enslavement and Trafficking?’ (n 31) 405. See Wilt (n 7) 299. See also Michael Dottridge, ‘Trafficked and Exploited: The Urgent Need for Coherence in International Law’ in Prabha Kotiswaran (eds), *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery* (Cambridge University Press, 2017) 63.

⁵²⁸ Kamala Kempadoo, ‘Abolitionism, Criminal Justice, and Transnational Feminism: Twenty-first-century Perspectives on Human Trafficking’ in Kamala Kempadoo, Jyoti Sanghera, Bandana Pattanaik (eds), *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights* (2nd edtn, Routledge, 2016).

⁵²⁹ Piper, Segrave and Napier-Moore (n 498) 1.

4.4 The relationship between the HT legal concepts

This section examines the impact of the interconnection between the distinct legal concepts of HT, slavery, enslavement, servitude and forced labour.⁵³⁰

These legal concepts are separately identified forms of exploitation under Article 3 of the Palermo Protocol.⁵³¹ The term ‘interconnected’ adopted in the thesis is preferred and emphasises that these legal concepts are interrelated. However, the research may employ the terms ‘conflation’ and ‘entanglement’ when referring to scholars arguments.

This HT ‘conflation’ discourse is present in the anti-trafficking agenda through the flexible use of terminology by those engaged in the anti-trafficking debate. This reflects partly the Palermo Protocol’s malleability regarding the various domestic interpretations of HT.⁵³² The concepts of HT, forced-labour, slavery, enslavement and to some extent ‘people smuggling’ are part of the popular discourse, omnipresent in the HT narrative. They are often interchangeably used by governments,⁵³³ academics, practitioners, the UN, civil society organisations, journalists under the following umbrella terms: modern-day

⁵³⁰ Forced labour of children is reported to occur for armed groups Boko Haram, the LRA and ISIL see UNSC S/PRST/2015/25 of 16 December 2015.

⁵³¹ Nicole J. Siller, *Trafficking in Persons under International Law and its Incorporation within Enslavement as a Crime against Humanity* (University of Groningen, 2017) 420.

⁵³² Kotiswaran, ‘Protocol at the Crossroads: Rethinking anti-trafficking law from an Indian labour law perspective’ (n 520) 34, 39.

⁵³³ President Obama in a presidential proclamation in December 2015 announced January 2016 as ‘National Slavery and Human Trafficking Prevention Month’, to culminate in the annual celebration of National Freedom Day on February 1. President Obama notes “millions of men, women, and children around the globe, including here at home, are subject to modern-day slavery: the cruel, inhumane practice of human trafficking”.

<<https://www.whitehouse.gov/the-press-office/2015/12/31/presidential-proclamation-national-slavery-and-human-trafficking>> accessed 16 July 2020.

slavery,⁵³⁴ modern slavery, 'modern slave trade',⁵³⁵ modern or contemporary form of slavery.⁵³⁶

HT has therefore attracted various interpretations, overlapping perspectives⁵³⁷ and initiatives. Kotiswaran notes:

*'...the anti-trafficking legal field is saturated with legal rules, norms, guidelines, policies, action plans, indicators and reports that derive from overlapping international, regional and domestic legal regimes and corresponding intergovernmental organisations such as the United Nations Office on Drugs and Crime (UNODC) and the International Labour Organization (ILO), to name a few...'*⁵³⁸

The United States played a leading role in the international community commitment to combat anti-trafficking. The Obama administration encouraged the US government as well as other countries to shift the anti-trafficking agenda, from a sexual exploitation focus and crime control issue⁵³⁹ towards the linkage of forced labour, trafficking, and slavery into one over-arching concept.⁵⁴⁰ As an ongoing illustration of combining the above concepts, the US Government

⁵³⁴ Ramona Vijayarasa and Jose Miguel Bello y Villarino, 'Modern-Day Slavery: A Judicial Catchall for Trafficking, Slavery and Labour Exploitation: A Critique of Tang and Rantsev' (2012) 8(2) *Journal of International Law and International Relations* 36,38, 39.

⁵³⁵ Julia O'Connell Davidson, 'New slavery, old binaries: human trafficking and the borders of 'freedom' (2010) 10 (2) *Global Networks* 244, 261. See also Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (n 521) 609.

⁵³⁶ UNODC 'Combating Trafficking in Persons in Accordance with the Principles of Islamic Law' (United Nations Publication, 2010) 7. See also Yasmine Rassam, 'Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law' (1999) 39 *Virginia Journal of International Law* 304,305.

⁵³⁷ Anne T. Gallagher and Paul Holmes, 'Developing and Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line' (2008) 18(3) *International Criminal Justice Review* 318,336.

⁵³⁸ Kotiswaran, 'Protocol at the Crossroads: Rethinking anti-trafficking law from an Indian labour law perspective' (n 520) 33,55.

⁵³⁹ Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (n 521) 615, 619.

⁵⁴⁰ Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (n 521) 619.

uses interchangeably the term HT with modern slavery as expressed in the 2019 Trafficking in Persons Report.⁵⁴¹ The US considers that:

*“trafficking in persons” and “modern slavery” to be interchangeable umbrella terms that refer to both sex and labor trafficking’.*⁵⁴²

Another example relates to the UK legislative responses to slavery and human trafficking through the Modern Slavery Act⁵⁴³ which encompasses provisions against slavery’, servitude, forced or compulsory labour⁵⁴⁴ and ‘human trafficking’ in one comprehensive legal document that prohibits all forms of contemporary slavery.⁵⁴⁵ This Act reflects the conflation of trafficking, slavery, and related practices under the umbrella term of ‘modern slavery’.⁵⁴⁶

Another example pertains to the explanatory report of the Council of Europe Convention on Action against Trafficking in Human Beings which stipulates that: ‘trafficking in human beings, with the entrapment of its victims, is the modern form of the old worldwide slave trade’.⁵⁴⁷ The conflation approach also extends to various international institutions such as the OSCE also equating HT to modern-day slavery.⁵⁴⁸ Law enforcement international bodies such as

⁵⁴¹ US Trafficking in Persons report (2019) 3.

⁵⁴² *ibid* 3.

⁵⁴³ Modern Slavery Act 2015.

⁵⁴⁴ *ibid* (chapter 30) part one –Offences, section 1.

⁵⁴⁵ *ibid*, HT is dealt with in section 2 of the Act.

⁵⁴⁶ Yvonne Eloise Mellon, ‘Exploring Modern Slavery and the Modern Slavery Act 2015: How does the Framing of Modern Slavery Limit the Efficacy of Legal and Policy Responses to Human Trafficking and Slavery’ (University of Liverpool, 2018) 12.

⁵⁴⁷ Explanatory Report of the Council of Europe Convention on Action against Trafficking in Human Beings (n 60) para.1.

⁵⁴⁸ OSCE, ‘Combating Trafficking as Modern-Day Slavery: A Matter of Non-Discrimination and Empowerment’ (2012) Annual Report of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings.

Interpol interpret HT to constitute 'modern-day slavery'.⁵⁴⁹ Similarly, UN institutions interchangeably use different terminology to designate HT.

This intertwined rhetoric of HT and modern-day slavery has become ubiquitous reflecting the combination of various legal elements of the HT definition in common parlance. However, 'modern day slavery' is not a legal term under international law but this has not prevented governments, academics, practitioners referring to it.⁵⁵⁰

While some academic positions acknowledge the importance of the legal contours of the concepts at stake to maintain an adequate and consistent judicial response,⁵⁵¹ the diversity of approaches to 'exploitation' challenges the adoption of a common core understanding of the HT constituents.⁵⁵² In this regard, HT encompasses a wide range of exploitative practices, of which slavery and slavery-like practices are part of, and may expand further in the future.⁵⁵³ Hence, the expansion of the exploitation concept reflects as previously mentioned the intention of drafters to leave to 'legislators around the world to incorporate the definition of trafficking into their domestic legal orders'⁵⁵⁴ according to their legal understanding of exploitation. Secondly, this reflects the visionary analysis of drafters from the Ad Hoc Committee⁵⁵⁵ whose purpose was in part to elaborate a comprehensive instrument on HT. The

⁵⁴⁹ See <<http://www.interpol.int/Crime-areas/Trafficking-in-human-beings/Trafficking-in-human-beings>> accessed 28 September 2015.

⁵⁵⁰ Siller, "Modern Slavery' Does International Law Distinguish between Slavery, Enslavement and Trafficking?" (n 31) 406.

⁵⁵¹ Fiona David, 'When it Comes to Modern Slavery, do Definitions Matter?' (2015) 5 Anti-Trafficking Review 152.

⁵⁵² Gallagher and Holmes (n 537) 337.

⁵⁵³ OHCHR, Fact Sheet N.36, 'Human Rights and Human Trafficking' (n 493) 1.

⁵⁵⁴ Allain, *The Law and Slavery: Prohibiting Human Exploitation* (n 66) 272.

⁵⁵⁵ The Ad Hoc Committee was established by the General Assembly Resolution 53/111 of 9 December 1998. The Committee was tasked with drafting an international convention against transnational organized crime and its three protocols.

Committee inserted the sentence: ‘exploitation shall include, at a minimum’⁵⁵⁶ concerned with not prescribing an exhaustive list of exploitative practices in order to ‘ensure that unnamed or new forms of exploitation would not be excluded’.⁵⁵⁷ However, the many forms of exploitation need to meet the level necessary ‘to be considered as fitting within the definition of trafficking in persons’ and ‘must reach a certain severity threshold’.⁵⁵⁸ Relying on the interpretation of the Palermo Protocol and the use of the sentence including ‘at a minimum’, the thesis supports the Ad Hoc Committee’s views in favour of a non-exhaustive list of exploitative practices in order to allow for the inclusion of further practices which may emerge over the years. In addition, the thesis supports the interconnection of the HT legal concepts enabling the interaction for instance of the international legal framework of human rights, criminal and labour laws. This position is widely advocated by academics and institutions such as some UN bodies as a judicial way to ensure more effective protection of vulnerable persons trapped in HT.⁵⁵⁹ In particular, the inclusion of slavery in the definition of HT may offer ‘an avenue to the prosecution of the offence as a crime against humanity’.⁵⁶⁰ In effect, the conflation process is not only rhetorical, but is also present in legal discourse. In particular, the interconnection or entanglement of these legal concepts with enslavement may

⁵⁵⁶ UNODC, *Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (n 59) 344.

⁵⁵⁷ *ibid* 344.

⁵⁵⁸ Siller, ‘*Trafficking in Persons under International Law and its Incorporation within Enslavement as a Crime against Humanity*’ (n 531) 120.

⁵⁵⁹ David, ‘When it Comes to Modern Slavery, do Definitions Matter?’ (n 551) 151. See Tavakoli (n 70) 78. See also Mohamed Y. Mattar, ‘The International Criminal Court (ICC) Becomes a Reality: When Will the Court Prosecute the First Trafficking in Persons Case?’ (2002) *The Protection Project* 1. See also Atak and Simeon (n 7) 1020.

⁵⁶⁰ Atak and Simeon (n 7) 1020. Tom Obokata, ‘Trafficking of Human Beings as a Crime Against Humanity: Some Implications for the International Legal System’ (n 95) 445, 446.

elevate HT's legal qualification as a serious crime. This is the subject of growing concern⁵⁶¹ and would enable perpetrators of HT accountable under international criminal law on the basis of 'converging characteristics between HT and enslavement'.⁵⁶² Such a route would be conditional that the crime of HT satisfies the requirement *chapeau* contextual elements of crimes against humanity. However international trafficking prosecution has not yet occurred. The issue is examined further in chapter 6.

There remain objections to conflation in what is considered as legally inaccurate⁵⁶³ and support the separation of HT legal concepts even though they are evidently interrelated.⁵⁶⁴

The key criticism is that 'conflating trafficking and forced labour with slavery risks implicitly *raising* the threshold for what counts as trafficking'⁵⁶⁵ although other views believe that this would 'elevate trafficking to the position of a peremptory norm of international law'.⁵⁶⁶ In addition, conflation can undermine an effective application of the distinct legal regimes of slavery, forced labour and trafficking.⁵⁶⁷ This is in consideration that each legal component of modern day slavery practices is 'separately defined under international law, subject to

⁵⁶¹ Tom Obokata, 'Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System' (n 95) 445. Wilt (n 7). M.Y. Mattar, 'The International Criminal Court (ICC) Becomes a Reality: When Will the Court Prosecute the First Trafficking in Persons Case?' (2002) The Protection Project.

⁵⁶² Nicole Siller, 'The Prosecution of Human Traffickers? A Comparative Analysis of Enslavement Judgments Among International Courts and Tribunals'(2015) 2(3) European Journal of Comparative Law and Governance 236.

⁵⁶³ Janie A. Chuang, 'The Challenges and Perils of Reframing Trafficking as 'Modern-Day Slavery' (2015) 5 Anti-Trafficking Review 146. J. Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff Publishers, 2013), 272-289. Wilt (n 7).

⁵⁶⁴Atak and Simeon (n 7) 1023. See also Wilt (n 7) 297. See Tavakoli (n 70) 85.

⁵⁶⁵ Chuang, 'The Challenges and Perils of Reframing Trafficking as 'Modern-Day Slavery'' (n 563) 146.

⁵⁶⁶ Tavakoli (n 70) 97.

⁵⁶⁷ Chuang, 'The Challenges and Perils of Reframing Trafficking as 'Modern-Day Slavery''(n 563) 146, 147.

separate legal frameworks and overseen by separate international institutions'.⁵⁶⁸ In this respect, the example of the Australian Criminal Code indicates that the Australian domestic legislation contains distinct criminal law on slavery, servitude, forced labour and HT.⁵⁶⁹ However, this is in contrast with many States who adopted the HT, slavery, servitude and forced labour definitions without explaining them as well as the meaning of exploitation in their criminal legislation.⁵⁷⁰ This was the situation for instance with the domestic French legislation up until the case of *CN v France*.⁵⁷¹ The applicants, two sisters, French nationals, were born in Burundi. Following the 1993 civil war during which their parents were killed, they came to France in 1994 and 1995 respectively, with the help of their aunt and uncle, Burundi nationals living in France. They lived with the family and were obliged to perform domestic chores and were victims of daily physical and verbal harassment. The ECHR concluded that *C.N.* was held in servitude since she had felt that her situation was unchanging and unlikely to alter. Servitude was aggravated forced or compulsory labour performed under threat of being returned to Burundi. The ECHR reiterated the violation of Article 4 in respect of *C.N.* with regard to the State's positive obligation, requiring France to put in place an adequate legislative and administrative framework that prohibit and punishes servitude,

⁵⁶⁸ Chuang, 'The Challenges and Perils of Reframing Trafficking as 'Modern-Day Slavery'' (n 563) 146.

⁵⁶⁹ Vladislava Stoyanova, 'Article 4 of the ECHR and the Obligation of Criminalising Slavery, Servitude, Forced Labour and Human Trafficking' (2014) 3(2) Cambridge Journal of International and Comparative Law 407,438. See also Division 270 and 271 of the Australian Criminal Code Act 1995.

⁵⁷⁰ Stoyanova, 'Article 4 of the ECHR and the Obligation of Criminalising Slavery, Servitude, Forced Labour and Human Trafficking' (n 569) 433.

⁵⁷¹ *CN and V v France* (Judgment) European Court of Human Rights, Chamber No 67724/09 (11 October 2012).

slavery and forced labour.⁵⁷² This was subsequently done⁵⁷³ and treated separately from the offence of HT although the recent definition of HT in the French criminal code now encompasses slavery and forced labour.⁵⁷⁴

4.5 Analysis of the slavery legal concept and its interaction with the HT legal concept

Slavery constitutes one of the forms of exploitation for the purpose of trafficking as incorporated in the Palermo Protocol, hence, the thesis supports the confirmation that HT represents ‘the wider legal concept, encompassing slavery as a subset’.⁵⁷⁵ It is worth recalling that the UN Working Group on Trafficking in Persons emphasised at the time that

*‘the existing international legal definitions of slavery and forced labour are directly relevant to interpreting their substantive content within the context of the Trafficking in Persons Protocol’.*⁵⁷⁶

The UN Office of the High Commissioner for Human Rights was previously explicit in conflating the legal concepts of slavery, forced labour and trafficking when referring to the concept of contemporary forms of slavery.⁵⁷⁷

These legal concepts carry within themselves the potential for overlapping⁵⁷⁸ and conflation. For instance, slavery, which is prohibited under customary

⁵⁷² *ibid* para 105.

⁵⁷³ Code Pénal, Article 224-1 B Créé par la Loi n°2013-711 du 5 août 2013 - art. 3.

⁵⁷⁴ Code Pénal, Article 225-4-1. Article 225-4-1 Modifié par la Loi n°2013-711 du 5 août 2013 - art. 1.

⁵⁷⁵ Wilt (n 7) 303.

⁵⁷⁶ UNODC, Issue Paper: The concept of ‘Exploitation’ in the Trafficking in Persons Protocol (n 48) 7.

⁵⁷⁷ OHCHR, Fact Sheet No.14, Contemporary Forms of Slavery (1991).

⁵⁷⁸ María Fernanda Perez Solla, ‘Slavery and Human Trafficking International Law and the Role of the World Bank (2009) SP Discussion Paper N. 0904, 7. See also Wilt, ‘Trafficking in Human Beings: A Modern Form of Slavery or a Transnational Crime?’ (n 67) 4.

international law, is embedded into the Palermo Protocol along with other forms of human exploitation. as:⁵⁷⁹ The 1926 Slavery Convention describes slavery in its article 1 as: ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’.⁵⁸⁰ The 1926 Slavery Convention has emphasised initially the property law paradigm with regard to the slavery concept but nevertheless, finds limitations of slavery as a ‘status’ nowadays, based on the universal prohibition of the legal classification of individuals as property.⁵⁸¹

However, people can be reduced to the ‘condition’ of slavery. This legal assessment is linked with the understanding, on a case by case basis, as to whether ‘powers attaching to the right of ownership’ are exercised so as to establish that the control over a person is tantamount to possession.⁵⁸² This ‘possession’ characteristic is the outcome of an academic research project: the Bellagio-Harvard Guidelines which aimed at clarifying the legal understanding of slavery linked to the notion of property.⁵⁸³ Possession can take various forms such as physical and psychological control.⁵⁸⁴ With these components of control accompanied usually by the use of force and coercion, the Palermo Protocol goes further by including deception, the abuse of power and vulnerability. All these elements are present in the assessment to characterise slavery which demonstrates their intertwining within the HT definition. Hence,

⁵⁷⁹ Kevin Bales, ‘Slavery in its Contemporary Manifestations’ in Jean Allain (eds), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (OUP 2012) 282.

⁵⁸⁰ Article 1 of the Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253.

⁵⁸¹ Siller, ‘“Modern Slavery” Does International Law Distinguish between Slavery, Enslavement and Trafficking?’ (n 31) 411.

⁵⁸² Guidelines 3 and 5 of the 2012 Bellagio-Harvard Guidelines on the Legal Parameters of Slavery.

⁵⁸³ *ibid*, guidelines 5.

⁵⁸⁴ *ibid*, guidelines 4(f).

following this legal assessment, if the element of 'control tantamount to possession' does not exist, none of the 'powers attaching to the right of ownership' could ever escalate to the condition of slavery'.⁵⁸⁵

With regard to the understanding of slavery and HT in international instruments, this is illustrated by the Rome Statute of the International Criminal Court (ICC) which indicates that slavery and sexual slavery⁵⁸⁶ are proscribed in the statute as both a crime against humanity⁵⁸⁷ and a war crime.⁵⁸⁸ The definition of slavery is clearly embedded in the definition of the crime of 'enslavement'.⁵⁸⁹ The concept of 'enslavement' appeared for the first time during the 1945 Nuremberg Trials⁵⁹⁰ and was described in the 1996 Draft Code of Crimes against the Peace and Security of Mankind.⁵⁹¹ The crime of 'enslavement' is proscribed as a crime against humanity in the Rome Statute and is defined as:

'the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children'.⁵⁹²

The description of 'enslavement' in the Rome Statute extends to include acts of trafficking. The jurisdiction of the Court does not criminalise HT *per se* as a self-

⁵⁸⁵ Siller, "Modern Slavery' Does International Law Distinguish between Slavery, Enslavement and Trafficking?" (n 31) 411.

⁵⁸⁶ Article 7.2(g) of the Rome Statute of the International Criminal Court (adopted on 17 July 1998, entered into force 1 July 2002) 2187 UNTS 38544.

⁵⁸⁷ *ibid* Article 7.1 (g).

⁵⁸⁸ *ibid* Articles 8.2 (b) (xxii) and 8.2 (e) (vi). See also Corrie (n 31) 286.

⁵⁸⁹ Jean Allain, 'The Definition of 'Slavery' in General International Law and the Crime of Enslavement within the Rome Statute' (2007) Guest Lecture Series of the Office of the Prosecutor 17. See also Article 7.2(c) of the Rome Statute of the International Criminal Court (n 586).

⁵⁹⁰ M. Cherif Bassiouni, 'Enslavement as an International Crime', (1991) 23 New York University Journal of International Law and Politics 445,503.

⁵⁹¹ Draft Code of Crimes against the Peace and Security of Mankind with commentaries (1996) UN/Doc.A/51/10, article 18 on Crimes against humanity para (10) 48.

⁵⁹² Rome Statute of the International Criminal Court (n 586).

standing criminal offence⁵⁹³ but uses ‘the language of what would come to be the official title of the Palermo Protocol, bringing the possible application of this instrument into the orbit of international judicial consideration’.⁵⁹⁴ The inclusion of HT within the description of the crime of enslavement contributes therefore to considerable discussion among scholars and legal practitioners regarding the overlap between HT, slavery and enslavement.⁵⁹⁵

4.6 Analysis of the forced labour legal concept and its interaction with the HT legal concept

The understanding of HT and its intersection with forced labour, by the International Labour Organisation (ILO) is manifest in its various legal instruments. With regard to the forced or compulsory labour concept, the ILO Forced Labour Convention of 1930 defines it as ‘work or service exacted by governments or public authorities as well as to forced labour exacted by private bodies and individuals, including slavery, bonded labour and certain forms of child labour’.⁵⁹⁶ In 2014 the ILO adopted the Protocol of 2014 to the 1930 Forced Labour Convention taking into account that the context and the various forms of forced or compulsory labour have evolved. Thus, the interconnectedness of HT with forced labour is confirmed: ‘trafficking in persons for the purposes of forced or compulsory labour, which may involve sexual exploitation, is the subject of growing international concern’.⁵⁹⁷

⁵⁹³ Tavakoli (n 70) 78.

⁵⁹⁴ Allain, ‘No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol’ (n 50) 144.

⁵⁹⁵ Gallagher, *International Law of Human Trafficking* (n 23) 215,216. See also Wilt (n 7) 334.

⁵⁹⁶ The 1930 ILO Convention concerning Forced or Compulsory Labour (ILO No. 29) (adopted 28 June 1930, entered into force 1 May 1932) 39 UNTS 55, Article 2(1) and ILO Convention No. 105 Abolition of Forced Labour Convention (adopted 25 June 1957, entered into force 17 January 1959).

⁵⁹⁷ Preamble of the Protocol of 2014 to the 1930 Forced Labour Convention 1930.

An additional example of the expansion of exploitative practices, concerns the guidance of the 2011 EU Directive which adopt a broader definition of trafficking to encompass exploitative trafficking practices for the purpose of forced begging.⁵⁹⁸

*‘Forced begging’ should be understood as a form of forced labour or services as defined in the 1930 ILO Convention No 29 concerning Forced or Compulsory Labour’.*⁵⁹⁹

Therefore, the exploitation of forced begging

*‘falls within the scope of the definition of trafficking in human beings only when all the elements of forced labour or services occur’.*⁶⁰⁰

The conceptual interconnection of HT with slavery, enslavement as well as forced labour may in some instances provide an effective route towards criminal prosecution of HT as a serious crime.⁶⁰¹ For example, in conflict situations, trafficking committed by terrorists and extremists groups such as the Islamic State, ISIL/Da’esh, Boko Haram, the Lord’s Resistance Army or Al-Shabaab may amount to a war crime and crimes against humanity. These qualifications were suggested by the UN Secretary General.⁶⁰² Meanwhile, the Prosecutor of the International Criminal Court (ICC) assesses the feasibility for cases to be

⁵⁹⁸ European Parliament and of the Council, Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA [2001] OJ L 101/1, para. (11).

⁵⁹⁹ *ibid* para (11).

⁶⁰⁰ *ibid* para (11).

⁶⁰¹ Atak and Simeon (n 7) 1020. See also Tavakoli (n 70) 85.

⁶⁰² Secretary-General's remarks at Security Council debate on Trafficking in Persons in Conflict Situations, <<https://www.un.org/sg/en/content/sg/statement/2017-11-21/secretary-generals-remarks-security-council-debate-trafficking>> accessed 9 November 2019.

brought before the ICC in relation to crimes against migrants such as human trafficking occurring in Libya.⁶⁰³ This is examined further in chapter 6.

The ‘conflation’ or interrelation of these legal concepts is explicit in a few selected judicial decisions from international and regional courts as well as domestic courts and examined below. In specific described contexts, acts of trafficking cannot be disconnected from slavery and enslavement practices which therefore tend to evidence ‘the disintegration of the legal boundaries between slavery and trafficking’.⁶⁰⁴

4.7 ‘Entanglement’ or interconnection of HT, slavery, enslavement, forced labour in international jurisprudence

The first illustration of this entanglement pertains to the judgment of the *Kunarac* case by the trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY). This case involved Muslim women and young girls who were kept in houses, apartments, and detention centres in the city of Foca (Bosnia and Herzegovina). They were then transferred to other locations, raped, or kept in servitude by members of Bosnian Serb forces and subject to other forms of sexual violence between the period of 1992 and 1993.⁶⁰⁵

The Trial Chambers held that the indictment charges met the legal requirement of ‘enslavement’:

⁶⁰³ Julia Crawford, ‘Could the ICC address human trafficking as an international crime?’ (2019) < <https://www.justiceinfo.net/en/tribunals/icc/41684-could-icc-address-human-trafficking-international-crime.html> > accessed 9 November 2019. See also the Statement of the ICC Prosecutor to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011) (8 May 2019) para. 23 < <https://www.icc-cpi.int/Pages/item.aspx?name=180508-otp-statement-libya-UNSC> > accessed 15 November 2019.

⁶⁰⁴ Nicole Siller, ‘The Prosecution of Human Traffickers? A Comparative Analysis of Enslavement Judgments Among International Courts and Tribunals’ (n 562) 236, 239.

⁶⁰⁵ The facts of the case are summarised in Atak and Simeon (n 7) 1033.

*‘the actus reus of the violation is the exercise of any or all of the powers attaching to the right of ownership over a person’, and the “mens rea of the violation consists in the intentional exercise of such powers’.*⁶⁰⁶

Thus, the Trial Chambers established that the circumstances of the case constitute a crime against humanity under customary international law.⁶⁰⁷

With regard to the component of HT, the Rome Statute codification links the practice of trafficking in persons and enslavement without clarifying the actual substantive legal relationship between the two.⁶⁰⁸ Enslavement in the Statute is described to mean: ‘The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty’.⁶⁰⁹ The HT component is present in the Statute under a footnote expanding on the contextual elements of enslavement as a crime against humanity.⁶¹⁰ The inclusion of HT in the definition of enslavement leads to academic comment on

⁶⁰⁶ *Prosecutor v Kunarac* (n 364) para.540.

⁶⁰⁷ *ibid* para. 539.

⁶⁰⁸ Nicole J. Siller, ‘The Prosecution of Human Traffickers? A Comparative Analysis of Enslavement Judgments Among International Courts and Tribunals’ (n 562) 241. ‘It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children’, inserted in footnote 11 of Art. 7(1)(c), Elements of Crimes of the International Criminal Court, (adopted by the Assembly of State Parties First Session, 3-10 2002) ICC-ASP/1/3 (part II-B) UN Doc PCNICC/2000/1/Add.2 (2000).

⁶⁰⁹ Art. 7(1)(c), Elements of Crimes of the International Criminal Court (n 608).

⁶¹⁰ This is the footnote 11 of the Elements of Crimes of enslavement, Art. 7(1)(c), Elements of Crimes of the International Criminal Court (n 608): ‘It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children’.

*'the possible application of the HT instrument into the orbit of international judicial consideration'*⁶¹¹

and has 'undeniably blurred the conceptual borders between enslavement and trafficking in human beings'.⁶¹² In its interpretation of the circumstances of the *Kunarac* case, the Tribunal included broad elements of slavery such as the control of an individual's autonomy, fear of violence, psychological oppression, exaction of forced labour.⁶¹³ In this regard,

'not only the Trial Chamber identified trafficking as indicia of slavery, but many of the characteristics of trafficking were separately identified as indicia of slavery, such as the restriction or control of autonomy, the exaction of forced or compulsory labour and prostitution'.⁶¹⁴

Other examples relate to the jurisprudence of the European Court of Human Rights in the *Rantsev*⁶¹⁵ and the overruled *Siliadin*⁶¹⁶ cases which add further evidence of the substantive links between slavery and HT. Both cases addressed the legal concept of slavery involving acts of trafficking under article 4 of the European Convention on Human Rights which states that 'no one shall be held in slavery or servitude or required to perform forced or compulsory labour'.⁶¹⁷

⁶¹¹ Allain, 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol' (n 50) 117.

⁶¹² Wilt (n7) 305.

⁶¹³ *Prosecutor v Kunarac* (n 364) paras. 542, 542, 543.

⁶¹⁴ Tavakoli (n 70) 87.

⁶¹⁵ *Rantsev v Cyprus and Russia* (n 2).

⁶¹⁶ *Siliadin v France* App no 73316/01 (ECHR, 26 July 2005).

⁶¹⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No.005 (European Convention on Human Rights) article 4.

The *Siliadin* case is based on Article 4 of the ECHR in the context of contemporary forms of slavery and concerns a fifteen-year-old girl who was brought by a relative from Togo to France by means of deceit and was compelled to work in a family who confiscated her papers and subsequently deprived her from freedom of movement. The Court looked exclusively at France's failure to put in place adequate criminal-law provisions to prevent and effectively punish the perpetrators of these acts.⁶¹⁸ However, the judgment at the time fell short of addressing the positive obligations of States in relation to the protection of victims of trafficking and did not consider a broad definition of slavery to include trafficking and forced labour.⁶¹⁹ In assessing whether there had been a violation of Article 4 of the European Convention on Human Rights, the Court concluded that although the applicant was deprived of her autonomy, she was not held in slavery under the 'classic' meaning of exercising on her, a genuine right of legal ownership as described in the 1926 Slavery Convention.⁶²⁰ The applicant's treatment nevertheless amounted to acts of 'servitude' and 'forced or compulsory labour' prohibited under Article 4 (1) and (2) of the European Convention on Human Rights.⁶²¹ At the time of the judgment, there was no specific offences of slavery, servitude or forced or compulsory labour in the French penal code and,

⁶¹⁸ *Siliadin V. France* (n 616) para.131.

⁶¹⁹ *Tavakoli* (n 70) 87.

⁶²⁰ *Siliadin V. France* (n 616) para. 122.

⁶²¹ *Siliadin v France* (n 616) para.122.

‘...even less a definition that was sufficiently specific and flexible to be adapted to the forms those practices now take. Nor was there any legislation as to trafficking of humans...’.⁶²²

With regard to the *Rantsev* jurisprudence, the facts of the case involved a Russian woman moving to Cyprus to work as an artiste in a cabaret. Ms Rantsev left her place of work after three days. The club manager requested the police to arrest her on the basis that she illegally stayed in the country. The police made no investigation into whether Ms Rantsev had been trafficked and subject to sexual exploitation as a cabaret artist. The cabaret owner was told however to bring her to the immigration office the day after. Ms Rantsev was then locked in a flat by the owner and found dead in the street the following morning.

The Court in the *Rantsev* case concluded that acts of trafficking are based on the slavery elements of control, coercion, exploitative aims and represent the exercise of powers attached to ownership. Furthermore, the Court described trafficking as a phenomenon that treats human beings as commodities to be sold and bought and put to forced labour.⁶²³ The Court therefore ruled, although it is argued that the Court failed to explain⁶²⁴ that trafficking within the meaning of Article 3 of the Palermo Protocol and Article 4 (a) of the Convention on Action against Trafficking in Human Beings,⁶²⁵ falls under the scope of Article 4 of the European Convention.⁶²⁶ The innovation of this judicial decision is that the

⁶²²Andrea Nicholson, ‘Reflections on *Siliadin v. France*: slavery and legal definition’ (2010) 14(5) *The International Journal of Human Rights* 705,708.

⁶²³ *Rantsev v Cyprus and Russia* (n 2) para. 280.

⁶²⁴ Gallagher, *The International Law of Trafficking* (n 23) 189.

⁶²⁵ *Rantsev v Cyprus and Russia* (n 2) para. 281.

⁶²⁶ Article 4 (a) of the Council of Europe Convention on Action against Trafficking in Human Beings (n 14).

Court applied the *Kunarac's* enlarged interpretation of enslavement and considered that HT fell within the scope of Article 4 of the European Convention on Human Rights despite the absence of express reference to trafficking in this Convention. However, the Court argues that the ECHR is a living instrument, and as such should be 'interpreted in the light of present-day conditions'.⁶²⁷ Furthermore, the Court's assessment referred to the *Siliadin* case and overruled the classical interpretation it had espoused previously in 2005.⁶²⁸ The Court did not find it necessary to examine whether the treatment suffered by the applicant constituted 'slavery', 'servitude' or 'forced or compulsory labour'. In summary, the Court held that Cyprus violated Article 4 of the European Convention by not affording protection against trafficking and exploitation and furthermore failed to take the necessary measures to protect the victim against such acts.⁶²⁹

Another case *L.E. v. Greece* submitted to the ECHR involved a Nigerian national recognised as a victim of HT who was forced into prostitution in Greece. The applicant was required to wait 'more than nine months after informing the authorities of her situation before the justice system granted her that status'.⁶³⁰ The Court held that Greece violated Article 4 (prohibition of slavery and forced labour) imposing positive obligations concerning the protection of victims of trafficking. The Greek authorities were capable of

⁶²⁷ *Rantsev v Cyprus and Russia* (n 2) para. 276. See also Roza Pati, 'Trading in Humans: A new Perspective' (2012) 20 *Asia Pacific Law Review* 135,152.

⁶²⁸ Roza Pati, 'States' Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in *Rantsev v. Cyprus and Russia*' (2011) 29 *Boston University International Law Review* 79,81.

⁶²⁹ *Rantsev v Cyprus and Russia* (n 2), conclusions of the Court, p. 75.

⁶³⁰ *L.E. v. Greece* (Judgment) European Court of Human Rights No 71545/12 (21 January 2016)1.

providing the applicant with practical and effective protection under Article 351 of the Greek Criminal Code.⁶³¹

4.8 ‘Entanglement’ or interconnection of HT with slavery, servitude in domestic jurisprudence

The *Tang* case was the first jury conviction on slavery and sexual servitude offences before the High Court under Australia’s Criminal Code. This case was ‘praised for offering redress for crimes that are typically difficult to prosecute at the national level’.⁶³² The facts of the case ‘more closely resembled elements of the crime of human trafficking, within the concept of slavery’.⁶³³ The case of *Tang* involved five Thai nationals who were consensually recruited to come to Australia to work as prostitutes under the understanding that once they paid off their debt, they would earn money on their own account. Upon their arrival to Australia, their passports were confiscated by their recruiter who obtained their visas illegally. The victims were under the control of both the recruiter and the brother owner. They were restricted in the premises where they worked without earning money for themselves and feared constantly detection from the immigration authorities.⁶³⁴ The *Tang* case although not explicitly addressing HT and its relationship with slavery⁶³⁵ represents the first criminal conviction for slavery offences under the Australian Criminal Code Act. This case provided the High Court of Australia with an opportunity to interpret the legal content and boundaries of slavery in Australia, interpreting ‘slavery’ broadly and in a manner

⁶³¹ *ibid* 2,3.

⁶³² *Vijayarasa and Bello y Villarino* (n 534) 40.

⁶³³ *Vijayarasa and Bello y Villarino* (n 534) 42.

⁶³⁴ *The Queen v Tang (2008) High Court of Australia HCA 39* (28 August 2008) 39.

⁶³⁵ Wilt, ‘Trafficking in Human Beings: A Modern Form of Slavery or a Transnational Crime?’(n 67) 1.

consistent with international law.⁶³⁶ To this end, the High Court ‘accepted that more subtle forms of control and possession rather than physical threats and force can be used to establish ‘slavery’ under the *Criminal Code*.’⁶³⁷ Furthermore, the High Court referred to the *Kunarac* case with regard to elements indicative of slavery such as control of movements, control of physical environment, psychological control, and measures taken to prevent or deter escape.⁶³⁸ In complement, the case was analysed with the consideration of HT which commonly operates in conjunction with, or as part of, slavery.⁶³⁹ Judges confirmed therefore that ‘the close connection between human trafficking and ‘slavery’ serves to reinforce the extremely serious nature of such ‘slavery offences’.⁶⁴⁰

This reasoning was followed by the *Kovacs* case⁶⁴¹ which involves acts of trafficking for the purpose of domestic servitude. A woman from the Philippines was brought by a couple to Australia through a sham marriage with a friend of the couple. The young woman found herself trapped in domestic labour and her passport was confiscated. She was sexually abused by the husband. This case-law expands on the anti-slavery jurisprudence and the High Court’s decision of *Tang* by analysing how the concept of slavery defined in the Australian Criminal Code can address other slavery-like practices such as domestic servitude.⁶⁴²

⁶³⁶ Irina Kolodizner, ‘R v Tang: Developing an Australian Anti-Slavery Jurisprudence (2009) 31(3) Sydney Law Review 487, 497.

⁶³⁷ Bronwyn Byrnes, ‘Beyond Wei Tang: Do Australia’s human trafficking laws fully reflect Australia’s international human rights obligations?’ (speech delivered at Workshop on Legal and Criminal Justice Responses to Trafficking in Persons in Australia: Obstacles, Opportunities and Best Practice, 9 November 2009).

⁶³⁸ The Queen v Tang (n 634) para.28, p.12.

⁶³⁹ The Queen v Tang (n 634) para. 116, p.33.

⁶⁴⁰ The Queen v Tang (n 634) para. 117, p.33.

⁶⁴¹ *R v Kovacs Supreme Court of Queensland - Court of Appeal QCA 417* (23 December 2008).

⁶⁴² *ibid* 51. See also Andreas Schloenhardt and Jarrod Jolly, ‘Honeymoon from hell: human trafficking and domestic servitude in Australia’ (2010) 32 Sydney Law Review 671, 672.

In a practical way, the *Kovacs* decision broadens the application of the relevant offences to wider forms of trafficking beyond exploitation in the commercial sex industry and addressing specifically trafficking for the purpose of domestic servitude.⁶⁴³

The analysis of a selected judicial decisions suggests that some courts at the domestic (France and Australia), regional (ECHR) and international (International Criminal Court) level seem to adopt a broad interpretation of slavery and HT by supporting their mutual interrelation and also with enslavement and forced labour. This jurisprudential illustration through a few landmark cases highlights that some elements of these legal concepts overlap⁶⁴⁴ such as HT, slavery, and enslavement although they do not equate in their entirety.⁶⁴⁵

The perceived justification for the entanglement of HT, slavery, enslavement and forced labour pertains ultimately to the overall concern for States through their domestic legislation to ensure adequate protection of HT victims against perpetrators.⁶⁴⁶ Another reason is the need for strengthening legal mechanisms against HT in the context of worldwide developments and ‘the changing nature of criminality’.⁶⁴⁷ One other pressing reason justifying this judicial stand is that many States in order to implement the obligations arising from the Palermo Protocol have directly inserted the international definition of HT and the

⁶⁴³ Schloenhardt and Jolly (n 642) 675.

⁶⁴⁴ Siller, ‘The Prosecution of Human Traffickers? A Comparative Analysis of Enslavement Judgments Among International Courts’ (n 562) 236-261.

⁶⁴⁵ Wilt, ‘Trafficking in Human Beings: A Modern Form of Slavery or a Transnational Crime?’ (n 67) 1.

⁶⁴⁶ David, ‘When it Comes to Modern Slavery, do Definitions Matter?’ (n 551) 151.

⁶⁴⁷ Tom Obokata, ‘Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System’ (n 95) 445, 458.

definitions of slavery, servitude and forced labour without further establishing the distinction of the elements of HT crime within their domestic legislation.⁶⁴⁸ This is nevertheless, to the exception of the Australian Criminal Code which contain well-articulated criminal law legislation on slavery, servitude, forced labour and HT.⁶⁴⁹

As previously mentioned, one possible prosecutorial approach would therefore be to elevate HT to the category of 'serious crime'⁶⁵⁰ or 'international crime'.⁶⁵¹ To this end there is an ongoing concern that HT's current international legal framework *vis a vis* prosecution needs reconsideration.⁶⁵² In particular, the analysis of trafficking in human beings to possibly qualify as a crime against humanity is discussed further in chapter 6. This eventual inclusion would bring the crime of HT a step further into the realm of international criminal law and more precisely into the jurisdictional scope of the International Criminal Court.⁶⁵³ In so doing, this would complement national and regional criminal justice responses to HT. At a regional level, the European Court for Human Rights considers that the enactment of domestic criminal law and offences can act as deterrence.⁶⁵⁴ The latter term relates to the moral authority attributed to the ICC⁶⁵⁵ which is exercised through the conduct of significant investigations

⁶⁴⁸ Stoyanova, 'Article 4 of the ECHR and the Obligation of Criminalising Slavery, Servitude, Forced Labour and Human Trafficking' (n 569) 442.

⁶⁴⁹ Stoyanova, 'Article 4 of the ECHR and the Obligation of Criminalising Slavery, Servitude, Forced Labour and Human Trafficking' (n 569) 438.

⁶⁵⁰ Tom Obokata, 'Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System' (n 95) 445.

⁶⁵¹ Tavakoli (n 70) 84, 85.

⁶⁵² Tavakoli (n 70) 77.

⁶⁵³ Wilt (n 66) 1.

⁶⁵⁴ *Branko Tomasic and Others v Croatia* (Judgment) European Court of Human Rights, Chamber, Application No 46598/06 (15 January 2009) para 49. Deterrence is reiterated in the case: *Opuz v Turkey* (Judgment) European Court of Human Rights, Third Chamber, Application No. 33401/02 (9 June 2009) para 128.

⁶⁵⁵ Corrie (n 31) 302.

and prosecutions.⁶⁵⁶ This is combined with the ICC's other deterrent function to prevent the occurrence of serious and grave crimes.⁶⁵⁷ The next section analyses some limitations as well as the positive outcomes brought about by the Palermo Protocol.

4.9 The 2000 Palermo Protocol: mixed outcomes

The 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol) came into force to supplement the UN Convention against Transnational Organized Crime (Convention against Transnational Crime) with the creation of an internationally recognised definition of trafficking in persons. All the previous related international instruments on trafficking failed to explicitly define the offence of HT.⁶⁵⁸ Hence, the adoption of the first comprehensive international legal definition on HT⁶⁵⁹ laid out the basis for some consistency despite as we examined, the legal debates on the entanglement of HT with slavery, enslavement and forced labour which impact on the judicial consideration of HT.

As noted, one of the main objectives of the Palermo Protocol was to provide a consistent and, agreed legal definition in order to improve coherence between different jurisdictions worldwide and to bring about international cooperation as well as an effective domestic implementation of the Palermo Protocol. This is considering the intention to provide at the same time a non-exhaustive definition

⁶⁵⁶ Corrie (n 31) 302.

⁶⁵⁷ Preamble of the Rome Statute of the International Criminal Court (n 586).

⁶⁵⁸ Siller, 'Modern Slavery' Does International Law Distinguish between Slavery, Enslavement and Trafficking?' (n 31) 416.

⁶⁵⁹ Kelly E. Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children' (2001) 8(2) Human Rights Brief 30,31.

with regard to the reality of a variety of exploitation.⁶⁶⁰ In particular, the core aspects of the HT definition such as ‘exploitation’ and ‘forms of coercion’ are not specifically explained in the Protocol. Hence, implementation guidance is therefore provided to States who adopt either an over extensive or, alternatively, a restrictive interpretation of HT.⁶⁶¹ For example, the US adopts a narrow interpretation of the Protocol; the Philippines maintains a focus on sex tourism; Serbia draws attention to HT in armed conflict and the Dominican Republic addresses pornography as well as forced marriage in its HT interpretation.⁶⁶²

However, the perceived weak outcome of the Palermo Protocol is that the ‘exploitation’ concept is variably interpreted domestically according to cultural, social, political, legal contexts. Critics of the Protocol suggest therefore that this flexible construct gives rise to significant differences in domestic legislative approaches⁶⁶³ that may impact the overarching objectives to criminalise acts of trafficking and to protect victims’ rights.

Understandably, the very absence of an exhaustive definition within the Palermo Protocol has propelled a proliferation of both guiding and interpretative

⁶⁶⁰ Tom Obokata, ‘Human Trafficking in Africa’ in Charles C. Jalloh, Kamari M. Clarke & Vincent O. Nmeielle (eds), *The African Court of Justice and Human and Peoples’ Rights in Context: Development and Challenges* (Cambridge University Press, 2019) 538.

⁶⁶¹ UNODC, ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’ (n 48) 255 para.18. UNODC, ‘The Concept of ‘Exploitation’ in the Trafficking in Persons Protocol’ (n 48) 6.

⁶⁶² Mattar, ‘Incorporating the Five Basic Elements of a Model Ant trafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention’ (n 65) 12.

⁶⁶³ Conference of the Parties to the United Nations Convention against Transnational Organized Crime, CTOC/COP/WG.4/2015/4, Working Group on Trafficking in Persons, ‘Key concepts of the Trafficking in Persons Protocol, with a focus on the United Nations Office on Drugs and Crime issue papers on abuse of a position of vulnerability, consent and exploitation’ (25 August 2015) para.3.

policy documents⁶⁶⁴, soft laws,⁶⁶⁵ and case law from international jurisdictions. This proliferation as examined in further detail in chapter 5, contributes to some confusion and overlapping but nevertheless manifests support to the implementation of the Palermo Protocol. The jurisprudential contribution in particular, brought forward States positive obligations with regard to victims' human rights, to prevent, protect and prosecute acts of trafficking.⁶⁶⁶

Context is paramount and implementation challenges vary widely. States because of their specific history, political systems, cultural determinants, and context, will prioritise and interpret certain aspects and conceptions in their assessment of trafficking and of what constitute exploitative practices. Hence, one 'best practice' legal approach would be unhelpful. To this end, the thesis examines the definition of trafficking as enabling the inclusion of more forms of exploitation which may cover a wider variety of contexts and especially fragile settings.

Moreover, there is no implementation mechanism such as a treaty monitoring body contained within the Palermo Protocol in order to measure the Protocol compliance and its enforcement requiring the criminalisation of trafficking. However, the adoption in 2018 of the establishment of the Mechanism for the Review of the Implementation of the United Nations Convention against

⁶⁶⁴ UNODC, 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto' (n 48). See also UNODC Issue Paper 'The Concept of 'Exploitation' In the Trafficking in Persons Protocol' (n 48).

⁶⁶⁵ The 2002 United Nations High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking (E/2002/68/Add.1). See also UNODC, 'Model Law against Trafficking in Persons' (2009).

⁶⁶⁶ Ryszard Piotrowicz, 'Smuggling and Trafficking of Human Beings' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar Publishing, 2014) 140. See also Conny R.J.J Rijken and Dagmar Koster, 'A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice' (2008) 19 <<https://ssrn.com/abstract=1135108>> accessed 10 October 2019.

Transnational Organized Crime and the Protocols thereto may partly improve the implementation of the Palermo Protocol. This is despite ongoing resistance with 'giving UN bodies a robust role in overseeing domestic criminal justice systems'.⁶⁶⁷ Currently, the review process does not provide for country visits which could for instance accelerate the drafting or passing of anti-trafficking legislation and the monitoring on the ground of the implementation and enforcement of anti-trafficking norms.⁶⁶⁸

With regard to the various domestic legislative approaches of exploitation, it is therefore important to consider the particularities of countries' individual legal systems.⁶⁶⁹ However, these particularities should not affect the core of human rights instruments as well as the letter and spirit of the Palermo Protocol that States committed to. It is axiomatic that the Protocol implementation will be inconsistent due to variable cultural, social, political contexts which manifest different domestic issues and priorities. 'There may be intrinsic value in seeking to safeguard political legal and cultural diversity, even if it leads to different outcomes'.⁶⁷⁰ Furthermore, Nelken argues that the implementation of the Palermo Protocol 'actually needs to be different if contexts and challenges are different' and that 'there may be intrinsic value in seeking to safeguard political legal and cultural diversity, even if it leads to different outcomes'.⁶⁷¹ Hence, different culture understandings and approaches to human rights norms and by

⁶⁶⁷ Cecily Rose, 'The Creation of a Review Mechanism for the UN Convention Against Transnational Organized Crime and Its Protocols' (2020) 114(1) *American Journal of International Law* 63.

⁶⁶⁸ *ibid* 66.

⁶⁶⁹ Mattar, 'Incorporating the Five Basic Elements of a Model Anti trafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention' (n 65) 3.

⁶⁷⁰ David Nelken, 'Human Trafficking and Legal Culture' (2010) 43 *Israeli Law Review* 479, 501.

⁶⁷¹ *ibid* 501.

extension to HT are one of the factors that has an impact on implementation. This is verified in chapter 9 regarding the cultural understanding of HT in Palestine. An example of variable cultural attitudes and interpretation of human rights norms reside in the fact that States at the stage of ratification can enter reservations as established under the Vienna Convention on the Law of Treaties⁶⁷² with an international human rights instrument if the latter conflicts with national Constitutions and domestic laws. In other words, universal standards can be adapted legally according to States political and cultural contexts. However, reservations ultimately must be compatible with the object and purpose of human rights treaties. The issue of compatibility of a reservation with the essence of a human rights treaty, pertains for instance to the reservation made on the legal effect of the provisions in article 2 of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) by the Arab Republic of Egypt. Even if reservations are explicitly authorised in article 28 of the CEDAW,⁶⁷³ Egypt is willing to comply with the content of article 2 'from the same instrument, provided that such compliance does not run counter to Islamic Sharia law'.⁶⁷⁴ The latter may have intended to neutralise crucial parts of the Convention by subjecting it to Islamic law, as have the Maldives, Kuwait, Iraq, and other Islamic countries.⁶⁷⁵

⁶⁷² The Vienna Convention on the Law of Treaties, (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS Art. 2 para 1(d).

⁶⁷³ CEDAW (n 10).

⁶⁷⁴ Reservation made upon ratification of the CEDAW
<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#EndDec > accessed 19 July 2020.

⁶⁷⁵ William A. Schabas, 'Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child' (1997)3 (1) William and Mary Journal of Women and the Law 84.

As a parallel example and with regard to the implementation of civil and political rights, the issue of compatibility has been emphasised by the UN Human Rights Committee in its General comment N.24, which suggest that it ‘falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant’.⁶⁷⁶ The Committee believes that States should establish the compatibility of a reservation with the object and purpose of the Covenant and it must be established objectively by reference to legal principles.

The Palermo Protocol continues to be praised for being an effective tool for international and mutual legal assistance and cooperation.⁶⁷⁷ This enthusiasm is evidenced by one hundred and seventy-eight States that have become party to the Protocol as of September 2020.⁶⁷⁸ Cooperation among States has fostered a sense of legal obligation and accountability *vis-à-vis* their legal commitment to combat trafficking in persons. Article 1(1) of the Protocol reads that this instrument shall be interpreted together with the Convention against Transnational Organized Crime.⁶⁷⁹ Consideration was given to the various levels of development prevalent in countries and the focus was on strengthening technical cooperation activities in order to assist countries in enhancing the capacity of their criminal justice systems. On that basis it is asserted that:

⁶⁷⁶ Martin Sheinin, ‘Human Rights Treaties and the Vienna Convention on the Law of Treaties -Conflict or Harmony?’ in Venice Commission (eds), *The Status of International Treaties on human rights* (Council of Europe publishing, 2005) 6.

⁶⁷⁷ Laura L. Shoaps, ‘Room for Improvement: Palermo Protocol and the Trafficking Victims Protection Act’ (2013) 17(3) *Lewis and Clark Law Review* 932.

⁶⁷⁸ <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=en> accessed 10 September 2020.

⁶⁷⁹ The United Nations Convention against Transnational Organized Crime (n 26).

'the fight against organized crime primarily comes down to forceful action on the part of local and national governments. Without such action, organized crime cannot be tackled effectively at the local level, and international cooperation will also fail. Indeed, successful international cooperation in combating organized crime requires strong local government'.⁶⁸⁰

In that sense, one of the positive outcomes of the Protocol is to bring into focus the obligation as per its Article 9(4) which clearly creates a shared responsibility to prevent trafficking in origin countries. This is exemplified in the case-law of the European Court of Human Rights through the *Rantsev* case. The Court addresses the scope of States' duties over trafficking offences which relates to effective cooperation obligations between States under article 4 of the ECHR.⁶⁸¹

The Palermo Protocol continues to shape countries' legal response to HT based on mutual cooperation and the consolidation of a global anti-trafficking legal framework which developed with the support of other international and regional legal instruments addressing various forms of human exploitation.⁶⁸²

⁶⁸⁰ Cyrille Fijnaut 'Searching for Organized Crime in History' in Letizia Paoli (eds), *The Oxford Handbook of Organized Crime* (Oxford University Press, 2014).

⁶⁸¹ *Rantsev v Cyprus and Russia* (n 2) para.289.

⁶⁸² Article 6 of the Convention on the Elimination of All Forms of Discrimination Against Women, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women which enable individual complaints; article 35 of the Convention on the Rights of the Child (CRC); the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Pornography; the ILO Worst Forms of Child Labour Convention No 182; the Rome Statute of the International Criminal Court; the Slavery Convention; article of the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery; article 4 of the European Convention on Action Against Trafficking in Human Beings; article 2(b) of the 1994 Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará); the 1994 Inter-American Convention on International Traffic in Minors; and the 1997 SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution.

This consolidation is partly the result of the worldwide involvement of NGOs lobbying governments on behalf of HT victims,⁶⁸³ of international organisations, academics, communities and survivors of HT all working together towards the building of a more complete and wider picture of HT.⁶⁸⁴

This worldwide effort nevertheless does not appear to have reduced the incidence of HT⁶⁸⁵ and related to that, there are relatively few criminal prosecutions and convictions worldwide under human trafficking legislation, especially in weak and war-torn countries.⁶⁸⁶ The low number of convictions is due to a variety of factors: One reason being the ongoing difficulty to identify trafficked persons. This is also combined with ‘the recent articulation of the specific offence of human trafficking, the lack of established case law, a certain lack of knowledge or under-use of the offence of trafficking by law enforcement authorities’.⁶⁸⁷

Lastly, the Palermo Protocol mainly focuses on the criminalisation of traffickers which is originally the core aspect of the HT legal framework.⁶⁸⁸ As examined in section 4.3 and further in chapter 5, the narrow lens of trafficking as a criminal justice issue is to the detriment of providing adequate human rights protection for victims of trafficking.⁶⁸⁹ This weakness has been complemented by a human

⁶⁸³ Hyland (n 659) 30.

⁶⁸⁴ US Trafficking in Persons Report 2019, 2

⁶⁸⁵ Jonathan Todres, ‘Widening Our Lens: Incorporating Essential Perspectives in the Fight Against Human Trafficking’ (2011) 33 Michigan Journal of International Law 53,54.

⁶⁸⁶ UNODC, ‘The International Legal Definition of Trafficking in Persons: Consolidation of research findings and reflection on issues raised’ (2018) 25,26. See also John Cooper Green, ‘A Proposal Leading to an International Court to Combat Trafficking in Human Beings’ (2011) Paper 13 Third Annual Interdisciplinary Conference on Human Trafficking 3

⁶⁸⁷ Atak and Simeon (n 7) 1021.

⁶⁸⁸ Palermo Protocol (n 9) article 5. See article 18 of the Council of Europe Convention on Action against Trafficking in Human Beings (n 14). See also Atak and Simeon (n 7) 1024.

⁶⁸⁹ Chuang, ‘The Challenges and Perils of reframing Trafficking as ‘Modern-Day Slavery’ (n 563) 148.

rights framework reinforcing therefore the Protocol's objectives in its Preamble and Article 2 (b) to aim in part to protect victims of trafficking with full respect of their human rights.⁶⁹⁰

In this regard the weakness of the Palermo Protocol was overcome with in part the emergence of other legal instruments such as the 2005 Council of Europe Convention on Action Against Trafficking in Human Beings⁶⁹¹ explicitly stating that trafficking in human beings constitutes a violation of human rights.⁶⁹² In addition, efforts to compensate the lack of human rights provisions in the Palermo Protocol *vis à vis* trafficked persons are evidenced by the recourse to soft laws. For instance, the 2002 UNCHR Recommended Principles and Guidelines on Human Rights and Trafficking emphasise that the protection of all human rights should be 'at the centre of any measures taken to prevent and end trafficking'.⁶⁹³ The 2010 United Nations Global Plan of Action to Combat Trafficking in Persons promotes a human rights based approach to HT.⁶⁹⁴ Similarly the 2018 UNCHR Principles and Guidelines on human rights protection of migrants in vulnerable situations emphasise the human rights and protection needs of trafficked persons.⁶⁹⁵ Reports of the Special Rapporteur on Trafficking in Persons, especially Women and Children⁶⁹⁶ and the 2006

⁶⁹⁰ Palermo Protocol (n 9) Preamble and article 2 (b).

⁶⁹¹ Mattar, 'Incorporating the Five Basic Elements of a Model Anti trafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention' (n 65) 5: 'The European Convention goes beyond the U.N. Protocol and, in particular, enhances the protection granted to victims of trafficking'.

⁶⁹² European Convention on Action against Trafficking in Human Beings (n 14).

⁶⁹³ The 2002 United Nations High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking (n 665) p1.

⁶⁹⁴ United Nations Global Plan of Action to Combat Trafficking in Persons, UNGA A/RES/64/293 (12 August 2010) para (d) 4.

⁶⁹⁵ OHCHR, Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations (2016) 2.

⁶⁹⁶ The Special Rapporteur produces an Annual Report and has done so since 2004. These are available from <<http://www.ohchr.org/EN/Issues/Trafficking/Pages/Annual.aspx>> accessed 19 July 2020.

UNICEF guidelines on child trafficking state that respect and protection of human rights standards applicable to children will be at the forefront of any action undertaken in relation to children victims of human trafficking.⁶⁹⁷

4.10 Summary

The early anti-trafficking legal framework focused exclusively on prostitution, expanding then to the broader discourse of sexual exploitation which continued to be the predominant narrative of HT in the eighties. However, the sexual exploitation and morality narratives of trafficking were gradually shifting towards including other forms of exploitation. This shift associated HT with other specific practices such as slavery, enslavement and forced labour suggest the interconnection between these exploitative practices. The widening agenda of migration, labour exploitation and transnational crimes contributed to emphasise the composite nature of the HT phenomenon.

The HT definition encompasses slavery, forced labour carrying each a distinct legal definition⁶⁹⁸ which are nevertheless interrelated. The interconnection of concepts is debated in the academic sphere. This is perceived by some to undermine an effective application of the distinct legal regimes of slavery, forced labour and trafficking and therefore goes some way to grasp the emerging complexity and interconnectedness of HT. This is also perceived as impacting on the interpretation and domestic implementation of the wide-range HT phenomenon. To this end the Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the

⁶⁹⁷ UNICEF Guidelines on the Protection of Child Victims of Trafficking (2006).

⁶⁹⁸ Siller, "Modern Slavery' Does International Law Distinguish between Slavery, Enslavement and Trafficking?" (n 31) 407.

Protocols indicate that the intention of the drafters was to integrate slavery along with other forms of HT considering how these concepts would interact and at the same leaving space for interpretation in compliance with international law.⁶⁹⁹

The thesis supports the interconnection of the HT legal concepts as well as judicial means to ensure more effective protection of vulnerable persons trapped in HT, especially with regard to the current context of growing conflict affected situations in the world. In particular, the inclusion of slavery in the definition of human trafficking may offer ‘an avenue to the prosecution of the offence as a crime against humanity’. The interconnection of the HT legal concepts and more specifically with slavery and enslavement led for instance to discussions among the International Law Commission as to include HT into the proposal of a non-exhaustive list of peremptory norms of general international law (*jus cogens*).⁷⁰⁰ Other views object to the conflation of the HT legal concepts of what is considered legally inaccurate and support their separation. ‘Conflating trafficking, forced labour with slavery risks implicitly *raising* the threshold for what counts as trafficking’.⁷⁰¹

The analysis of selected domestic, regional, and international jurisprudence, points to the disintegration of the legal boundaries between slavery, enslavement, forced labour and trafficking.

⁶⁹⁹ UNODC, ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’ (n 48) para.18. See also UNODC ‘Combating Trafficking in Persons in Accordance with the Principles of Islamic Law’ (n 541) 4.

⁷⁰⁰ International Law Commission, Seventy-first session. Provisional summary record of the 3462nd meeting 11 June 2019, p.8.

⁷⁰¹ Chuang, ‘The Challenges and Perils of Reframing Trafficking as ‘Modern-Day Slavery’ (n 563) 146.

The objective of the Palermo Protocol was to provide a consistent definition on HT. However, its drafters provided a non-exhaustive legal definition in order to improve harmonisation in different jurisdictions worldwide and to bring about international cooperation as well as an effective domestic implementation of the Palermo Protocol. Context is paramount and implementation challenges vary widely. States because of their specific history, political systems, cultural determinants, and context will prioritise and interpret certain aspects and conceptions in their assessment of trafficking and of what constitute exploitative practices. Hence, one 'best practice' legal approach would be unhelpful.

This has been perceived as a weakness propelling a proliferation of guiding and interpretative policy documents, soft laws, and case law from international jurisdictions. However, this involvement manifests support to the implementation of the Palermo Protocol for an effective protection against HT. The jurisprudential contribution in particular, brought forward States positive obligations with regard to victims' human rights, to prevent, protect and prosecute acts of trafficking.

The narrow lens of the Palermo Protocol originally intended as a criminal justice issue has been complemented by a human rights framework, reinforcing therefore one of the Protocol's objectives to provide protection to HT victims.

To conclude, despite weaknesses and remaining definitional controversies, the Protocol has provided an agreed normative description of HT that incorporates at the core, elements of criminalisation and some elements of human rights protection for HT victims. Furthermore, this instrument enabled the building of a meaningful anti-trafficking legal framework whilst recognising that a uniformed

and static definition cannot grasp the complexity of all political, legal, cultural and social fabrics. Mattar suggests that:

'there is no model legislation that may be applied by all countries regardless of the particularities of their individual legal systems'.⁷⁰²

The HT legal framework is therefore at a crossroad for implementation purposes in order to address specific protection needs of individuals including persons forced to flee their countries and increase legal accountability against HT abuses. In this regard, there has been and there is a prolific counter-trafficking involvement in policy development, legal research, and efforts for the implementation of the Palermo Protocol. However, in practice, irrespective of the forms of exploitation involved, investigations, prosecutions and convictions at a domestic level remain challenging⁷⁰³ specifically in weak and war-torn countries.⁷⁰⁴ The case study of Palestine in chapter 9 examines at the ground level these challenges to implementation.

Hence, in evolving complex and fragile settings, the increasing occurrence of HT in connection with situations of fragility, conflict and violence suggest the need for a wider protective legal framework to address the various forms of HT and contexts in which such practices take place. Wider protection including recourses available for HT victims can be provided through the applicability and the interaction of the various branches of international law examined further in chapter 5 and 6.

⁷⁰² Mattar, 'Incorporating the Five Basic Elements of a Model Anti trafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention' (n 65) 3.

⁷⁰³ UNODC, 'The International Legal Definition of Trafficking in Persons: Consolidation of research findings and reflection on issues raised' (n 694) 25,26.

⁷⁰⁴ Green (n 686) 3.

Chapter 5 The Applicable International Legal Framework for Victims of HT, International Human Rights Law, Refugee Law and Humanitarian Law

5.1 Introduction

Chapters 5 and chapter 6 analyse how the various branches of international law address the multidimensional and complex HT phenomenon to enable judicial and quasi-judicial remedies for HT victims.

The split into two chapters of the following five legal regimes has been made to ease the reading and assist understanding of structure.

HT legal components are addressed variably by some of the different legal regimes. HT is not comprehensively addressed by any of these legal regimes, but they do address constituent elements of the practice. Consequently, it is necessary to examine separately how each of these legal regimes deals with HT practices in terms of their interpretation and how protection of HT victims and remedies is provided under the application of each of these regimes. Each legal framework can impose legal obligations on States for the protection of HT victims and therefore mitigate the inherent weakness of the Palermo Protocol on both the human rights protection of HT victims and the right to a remedy.

The two chapters examine then how the legal framework of international human rights law, refugee law, humanitarian law, criminal law and labour law complement each other to offer a wider protection framework against HT. Accordingly, a human rights based approach to HT suggests the interaction with one another of these various legal regimes as a complex 'constellation of

systems⁷⁰⁵ capable to encompass a multi-perspective approach also with labour and criminal perspectives.⁷⁰⁶ The latter being concerned with the protection of HT victims and prosecution of traffickers/perpetrators.

Chapters 5 and 6 examine the legal regimes: IHL, IHR, IRL, ICL and ILL individually demonstrating nevertheless that they are deeply linked in substance based on the multifaceted legal contents of HT and interact in view of specific protection and redress each legal regime may provide *vis à vis* some of HT legal constituents. They interact when for instance human rights violations constitute serious crimes under international criminal law, which may occur in situation of conflict and refugee crisis situations. Such settings enable the intervention of all these legal regimes to varying degrees. Evidently, the ILL legal framework comes in support when the nature of human rights violations is related to forced labour exploitation, slavery, servitude practices.

Human rights law, refugee law, humanitarian, labour law, criminal law when addressing HT offer a combination of hard and soft law frameworks.⁷⁰⁷ The present analysis will therefore rely on a wide range of soft law norms such as UN General Assembly Resolutions, UN General Comments, decisions, and interpretations of UN Treaty bodies,⁷⁰⁸ UN Guidelines that contribute to the

⁷⁰⁵ Aaron Xavier Fellmeth, *Paradigms of International Human Rights Law*, (Oxford Scholarship online, 2016)1. See also Fitzpatrick (n 69) 1147.

⁷⁰⁶ Jonathan Todres, 'Human Rights, Labor, and the Prevention of Human Trafficking: A Response to A Labor Paradigm for Human Trafficking', (2013) 60 *UCLA Law Review* 156.

⁷⁰⁷ Soft law is understood as 'as those nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct' in Andrew T. Guzman and Timothy L. Meyer, *International Soft Law* (2010) 2(1) *Journal of Legal Analysis* 171,174.

⁷⁰⁸ ICCPR General Comment No. 29, UN Doc. CCPR/C/21/Rev.1/Add.11 (31 August 2001) Article 4: Derogations during a State of Emergency. Human Rights Committee conclusions, CCPR/C/0/78/1SR (21 August 2003) para. 11

human right framework addressing HT,⁷⁰⁹ landmark international tribunals decisions.⁷¹⁰

The first section of chapter 5 examines the instrumental role of human rights law and subsequently emphasises the limits of the international human rights' legal framework in dealing on its own with the protection against HT practices. Section 5.3 reviews the legal protection against HT afforded under refugee law arising from complex humanitarian crises. Section 5.4 presents the added-value and challenges of the international humanitarian legal framework enabling the protection of individuals vulnerable to HT in fragile and complex settings.

5.2 The instrumental role of human rights law in the legal framework addressing HT

A human rights-based approach represents a conceptual framework which relies on international human rights standards meant to promote and protect human rights. A human rights-based approach brings the victims to the centre of the anti-trafficking agenda.⁷¹¹ This approach advocates for entitlement to assistance and protection to the trafficked persons and to their human rights.⁷¹² The recourse to this framework requires the identification and analysis of the human rights violated as well as to address States' obligations under international human rights law in order to find appropriate remedies and redress

⁷⁰⁹ Ryszard Piotrowicz, 'The Legal nature of Trafficking in Human Beings'(2009) 4 Intercultural Human Rights Review 175.

⁷¹⁰ ICJ, *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004).

⁷¹¹ Conny Rijken and Dagmar Koster, 'A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice' (2008) 8,9.

⁷¹² Preamble of the Palermo Protocol (n 9). See also OHCHR, 'The 2002 Recommended Principles and Guidelines on Human Rights and Human Trafficking' (n 665) p.1.

prohibited practices. The focus on the States' positive obligations is instrumental to strengthen the protection of HT victims.⁷¹³ A human rights-based approach includes therefore the scope of the responsibility and identification of a comprehensive range of States obligations to exercise due diligence to prevent, protect and prosecute acts of trafficking. States also have to ensure the safeguards of HT victims' human rights⁷¹⁴ which includes the obligation to provide remedies for HT victims.⁷¹⁵

To that end, the section examines specific human rights violated by HT followed by an assessment of what treaty rules apply to HT and the application of these rules by human rights bodies in their jurisprudence. Thereafter, the section addresses how States combine their focus on crime control with a human rights consciousness⁷¹⁶ mainly through the examination of their positive obligations. The section examines available judicial recourses against HT.

Lastly, the section questions whether international human rights law provides effective mechanisms of accountability and how this human rights framework may be limited in its reach and in its ability on its own to curb HT practices.

5.2.1 Specific human rights violated by HT

HT includes a web of human rights violations: sexual exploitation, slavery, servitude and forced labour. 'Violations of human rights are both a cause and a

⁷¹³ Rijken and Koster, 'A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice' (n 711) 19.

⁷¹⁴ Ryszard Piotrowicz, 'Smuggling and Trafficking of Human Beings' (n 666) 140.

⁷¹⁵ Anne T. Gallagher, 'The right to an effective remedy for victims of trafficking in persons: A Survey of International Law and Policy' (2010) Paper submitted for the expert consultation convened by the UN Special Rapporteur on Trafficking in Persons, especially women and children, Ms. Joy Ngozi Ezeilo on: "The right to an effective remedy trafficked person" p.3.

⁷¹⁶ Fitzpatrick (n 69) 1146, 1165.

consequence of trafficking in persons'.⁷¹⁷ As examples, the UN Working Group on Contemporary Forms of Slavery emphasises that 'transborder trafficking of women and girls for sexual exploitation is a contemporary form of slavery and constitutes a serious violation of human rights'.⁷¹⁸ Similarly, the 2005 Miami Declaration of Principles on Human Trafficking corroborates that 'trafficking in persons is a human rights violation that constitutes a contemporary form of slavery'.⁷¹⁹

The most recurrent infringement of human rights endured by victims of HT are the right not to be held in slavery or servitude,⁷²⁰ the right to liberty and security,⁷²¹ the right to freedom of movement,⁷²² the right to work which is freely chosen and accepted,⁷²³ the right to be free from cruel, inhumane and degrading treatment,⁷²⁴ the prohibition of forced labour.⁷²⁵ These basic rights are significantly affected by HT⁷²⁶ despite being enshrined in various international legal, regional instruments as well as in domestic laws and through

⁷¹⁷ Guideline 1 of the 2002 United Nations High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking (n 665) 5. See Conny Rijken and Edffie de Volder, 'The struggle of the European Union to realize a human rights-based approach to trafficking in human beings' (2009) 25(49) Connecticut Journal of International Law 49, 52. See also Dominika Borg Jansson, *Modern Slavery – A Comparative Study of the Definition of Trafficking in Persons* (Brill Nijhoff, 2014) 56,57.

⁷¹⁸ Report of the UN Working Group on Contemporary Forms of Slavery, on its twenty-third session. Sub-Commission on Prevention of Discrimination and Protection of Minorities, 50th Session. E/CN.4/Sub.2/1998/14, para 4.1 at 24.

⁷¹⁹ The Miami Declaration of Principles on Human Trafficking (10 February 2005) para.1.

⁷²⁰ Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253. Article 5(1) of the European Convention on Human Rights (n 617).

⁷²¹ Article 3 of the Universal Declaration of Human Rights (n 124). See also article 5(1) of the European Convention on Human Rights (n 617).

⁷²² The right to freedom of movement is enshrined in article 12 of the International Covenant on Civil and Political Rights (n 173).

⁷²³ Article 6 (1) of the International Covenant on Economic, Social and Cultural Rights (n 173).

⁷²⁴ Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

⁷²⁵ Article 2(1) of the 1930 Convention concerning Forced or Compulsory Labour (ILO No. 29) (n 596).

⁷²⁶ Rijken and Koster, 'A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice' (n 711) 20.

the interpretation of UN Human Rights Treaty Committees by way of general comments, guidelines and procedures.⁷²⁷ In addition, some of these human rights infringed by the practice of HT have characteristics of non-derogable rights and 'sacrosanct rights'⁷²⁸ which cannot be limited or suspended under any circumstance and are considered as the cornerstone of the protection of human rights.⁷²⁹ Such is the case for freedom from slavery and servitude,⁷³⁰ freedom from torture or cruel, inhuman and degrading treatment.⁷³¹

The following sub-section offer a more detailed assessment of what treaty rules apply to HT and explain how human rights bodies have applied these in their jurisprudence.

5.2.2 Human rights treaties and other related instruments applicable to HT

The human rights legal framework relevant to HT entails the application of various international and regional instruments⁷³² as well as the application of 'soft laws' that are intended to be morally compelling.⁷³³ As non-exhaustive

⁷²⁷ The UN Human Rights treaty monitoring bodies such as the Human Rights Committee that monitor the implementation of the International Covenant on Civil and Political Rights (n 173) the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination against Women, the Committee against Torture, the Committee on the Rights of the Child.

⁷²⁸ Teraya Koji, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights', 12 *European Journal of International Law* (2001) 921.

⁷²⁹ Article 4(1), (2) of the International Covenant on Civil and Political Rights (n 173).

⁷³⁰ Ryszard Piotrowicz, 'States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations' (2012) 24(2) *International Journal of Refugee Law* 181,182.

⁷³¹ Article 3, 4 of the European Convention on Human Rights (n 617); articles 5(2), 6 of the American Convention on Human Rights 1969, OAS Treaty Series No 36; article 5 of the African Charter on Human and Peoples' Rights 1981, 1520 UNTS 363; articles 8(1), (2), 7 of the International Covenant on Civil and Political Rights (n 173).

⁷³² Article 5 of the 1950 European Convention on Human Rights (n 617). Article 6 of the 1969 American Convention on Human Rights, OAS Treaty Series N.36. Article 5 of the African Charter on Human and Peoples' Rights, 1520 UNTS 363.

⁷³³ As an example, the 2002 United Nations High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking (n 665). See also article 2 of the 1993 UN Declaration on the Elimination of Violence against Women.

examples, some of the most widely important human rights instruments addressing HT are the Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights,⁷³⁴ the 1966 International Covenant on Economic, Social and Cultural Rights,⁷³⁵ the Convention on the Elimination of All Forms of Discrimination Against Women,⁷³⁶ the Convention on the Rights of the Child,⁷³⁷ the 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography,⁷³⁸ the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.⁷³⁹ Regional human rights instruments contain similar prohibition: The 2005 European Convention on Action against Trafficking in Human Beings,⁷⁴⁰ the 2000 Charter of Fundamental Rights in the European Union,⁷⁴¹ the American Convention on Human Rights,⁷⁴² the 2002 South Asian Association for Regional Cooperation, Convention on Preventing and Combating Trafficking in Women and Children for Prostitution.⁷⁴³

This human rights framework also includes other sources of international law such as customary international law, general principles, the case-law of judicial bodies that are applicable to HT. The HR framework encompasses for instance

See also commentary to Principle 5 of the World Health Organisation Guiding Principles on Human Cell, Tissue, and Organ Transplantation.

⁷³⁴ Articles 7,8 (1), (2) of the International Covenant on Civil and Political Rights (n 173).

⁷³⁵ Article 6 of the International Covenant on Economic, Social and Cultural Rights (n 186).

⁷³⁶ Article 6 of the CEDAW (n 10).

⁷³⁷ Convention on the Rights of the Child (n 11) article 35.

⁷³⁸ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (n 12) Preamble.

⁷³⁹ G.A Res. 45/158 of 18 December 1990, Preamble.

⁷⁴⁰ The Council of Europe Convention on Action against Trafficking in Human Beings (n 14).

⁷⁴¹ Charter of Fundamental Rights of the European Union (2000/C 364/01) art 5 (3).

⁷⁴² The American Convention on Human Rights (n 15) art 5 (1), (2), art 6 (1), (2).

⁷⁴³ <<http://evaw-global-database.unwomen.org/en/countries/asia/india/2002/south-asian-association-for-regional-cooperation>> accessed 4 November 2019.

some European legislation such as the Qualification Directive 2011/36/EU of the European Parliament and Council on preventing and combating trafficking in human beings and protecting its victims.⁷⁴⁴ In addition, quasi legal norms referred as 'soft laws' are also protective for HT victims. These relate for instance to the Office of the High Commissioner for Human Rights (OHCHR) Recommended Principles and Guidelines on Human Rights and Human Trafficking;⁷⁴⁵ the UNICEF Guidelines on the Protection of Child Victims of Trafficking;⁷⁴⁶ the Criminal Justice Responses to Trafficking in Persons: ASEAN Practitioner Guidelines;⁷⁴⁷ the UNHCR Guidelines on international protection: The application of article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked.⁷⁴⁸ Further rules applicable to HT relate to UN resolutions, Human Right Council recommendations⁷⁴⁹ as well as reports and findings provided by international human rights mechanisms such as the various UN treaty bodies⁷⁵⁰ and other special procedures.

⁷⁴⁴ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA.

⁷⁴⁵ The 2002 United Nations High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking (n 665).

⁷⁴⁶ Guidelines on the Protection of Child Victims of Trafficking, UNICEF Technical Notes (2006).

⁷⁴⁷ ASEAN Ad-Hoc Working Group on Trafficking in Persons, 25 June 2007

⁷⁴⁸ Guidelines on International Protection n.7 of 7 April 2006 HCR/GIP/06/07.

⁷⁴⁹ A/HRC/RES/32/3 of 2016 on protecting victims of trafficking and people at risk of trafficking, especially women and children in conflict and post-conflict situations. A/HRC/RES/33/7 on unaccompanied migrant children and adolescents emphasising their particular risk to trafficking, other abuse and exploitation.

⁷⁵⁰ Human Rights Committee, 'Concluding Observations: Israel' (18 August 1998) UN Doc. CCPR/C/79/Add.93, para.16.

5.2.3 Application of treaty rules by human rights bodies jurisprudence addressing HT

HT victims may approach the 'closer to home' regional human rights systems.

The latter have

'the capacity to couple universal human rights norms and principles with sensitivity and responsiveness to the social and cultural particularities of a region'.⁷⁵¹

Other human rights recourses relate to the procedure of individual communications before relevant UN treaty bodies on the requirement that domestic remedies have been exhausted.

Despite the scale of the HT problem, international rulings on the responsibility of States in relation to HT practices have been scarce with the slight exception of the European Court of Human Rights (ECtHR). Hence, the thesis focuses in priority on this regional mechanism. Both the Community Court of Justice of the Economic Community of West African States (ECOWAS Court) and the Inter-American Court of Human Rights (IACHR) took similar approach to ECHR. In 2016, IACHR for the first time explicitly addressed the 'responsibility of a State for violating its human rights obligations arising from the prohibition human trafficking and its related exploitative conducts: slavery, servitude and forced labour'.⁷⁵²

⁷⁵¹ Mohamed Y. Mattar, 'Article 43 of the Arab Charter on Human Rights: Reconciling National, Regional, and International Standards' (2013) 26 Harvard Human Rights Journal 91.

⁷⁵² Valentina Milano, 'Human Trafficking by Regional Human Rights Courts: An Analysis in Light of Hacienda Brasil Verde, The First Inter-American Court's Ruling in this Area (2018) 36 Revista Electronica de Estudios Internacionales 3.

An overview of the existing regional human rights judicial systems in Europe,⁷⁵³ the Americas⁷⁵⁴ and Africa⁷⁵⁵ is undertaken with an emphasis as mentioned above on the European system with its landmark and inspiring jurisprudence for the Americas and African regional systems. These three are well-functioning mechanisms and established models in the human rights sphere⁷⁵⁶ They demonstrate some degree of successful performance in addressing human rights violations with effective enforcement mechanisms.⁷⁵⁷ These human rights judicial mechanisms have a track record in holding States accountable for such infringement either through their own actions or by allowing human rights violations to occur and failing to prevent them.⁷⁵⁸

The section therefore will not examine the Arab and Asian human rights system as currently regional judicial recourses and litigation are not available before them. The regional human rights system in the Middle East is in its infancy as it lacks enforcement mechanisms as well as an individual complaint recourse⁷⁵⁹ and does not yet provide effective protection measures against HT practices despite Article 9 of the Arab Charter explicitly prohibiting slavery, HT and forced labour.⁷⁶⁰ Similarly, the Asian human rights system is at its early stage of development. The nascent ASEAN Intergovernmental Commission on Human

⁷⁵³ European Convention for the Protection of Human Rights and Fundamental Freedoms (n 613).

⁷⁵⁴ Organization of American States (OAS), Convention on Human Rights (n 15) Art. 46(1)(a).

⁷⁵⁵ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) Arts. 50, 56(5).

⁷⁵⁶ Armis Sadri, 'The Arab human rights system: achievements and challenges' (2019) 23(7) *The International Journal of Human Rights* 1167.

⁷⁵⁷ *ibid* 1167.

⁷⁵⁸ International Justice Resource Center, *Regional Systems* (2017).

<<https://ijrcenter.org/regional/>> accessed 21 October 2019.

⁷⁵⁹ Konstantinos D. Magliveras and Gino Joseph Naldi, 'The Arab Court of Human Rights: a Study in Impotence' (2016) 29(2) *Revue Québécoise de droit international* 147, 151. See also Mohammed Y. Mattar, 'Article 43 of the Arab Charter on Human Rights: Reconciling National, Regional, and International Standards' (n 761) 93.

⁷⁶⁰ Article 10 (1) and (2) of the Arab Charter (n 17).

Right (AICHR) does contribute to human rights enforcement as well as to regionally address HT and promote the implementation of the ASEAN Convention Against Trafficking in Persons, Especially Women and Children.⁷⁶¹ Efforts which may pave the way towards establishing a regional judicial system.⁷⁶²

Legal recourses provided by the European human rights system:

Judicial remedy of human rights violations and more specifically HT practices can be exercised before the European Court of Human Rights in violations of the Convention for the Protection of Human Rights and Fundamental Freedoms,⁷⁶³ of the European Convention against Trafficking in Human Beings⁷⁶⁴ and of other related international instruments such as the Palermo Protocol.⁷⁶⁵

This is exemplified by the judgement of *Rantsev v. Cyprus and Russia*,⁷⁶⁶ previously mentioned. Despite the absence of legal analysis and explanation of what constitutes HT and how its elements relate to the particular facts,⁷⁶⁷ the

⁷⁶¹ Abubakar Eby Hara, 'The struggle to uphold a regional human rights regime: the winding role of ASEAN Intergovernmental Commission on Human Rights (AICHR)' (2019) 62(1) *Revista Brasileira de Política Internacional* 1.

⁷⁶² Chang-Ho Chung, 'The Emerging Asian-Pacific Court of Human Rights in the Context of State and Non-State Liability' (2016) 57 *Harvard International Law Journal* 44,45. See also Liberty Asia, 'ASEAN & ACTIP: Using a Regional Legal Framework to Fight a Global Crime' (2017) 8. < <https://globalinitiative.net/asean-actip-using-a-regional-legal-framework-to-fight-a-global-crime/>> accessed 29 October 2019.

⁷⁶³ Convention known as the European Convention of Human Rights (n 613).

⁷⁶⁴ The 2005 Council of Europe Convention on Action against Trafficking in Human Beings (n 14).

⁷⁶⁵ Palermo Protocol (n 9).

⁷⁶⁶ *Rantsev v Cyprus and Russia* (n 2).

⁷⁶⁷ Vladislava Stoyanova, 'Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case' 30(2) *Netherlands Quarterly of Human Rights* (2012) 163,172,194. See also *Rantsev v. Cyprus and Russia* (n 2) para. 282: 'the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes "slavery", "servitude" or "forced and compulsory labour". Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention'.

ECHR recognises the prevalence and ‘proliferation’⁷⁶⁸ of trafficking at an international level and ‘the need for measures to combat it’.⁷⁶⁹ The Court considers that trafficking falls within the scope of Article 4 of the Convention, within the meaning of Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the United Nations Convention against Transnational Organised Crime, Article 4(a) of the Council of Europe Convention on Action against Trafficking in Human Beings.⁷⁷⁰

Furthermore, the Court addressed HT as a human rights violation and required the State to comply to a broad spectrum of obligations as set out in the European Convention against Trafficking in Human Beings.⁷⁷¹ Hence, the ECHR in this case, ordered Russia and Cyprus to compensate the family of the victim based on the violation of procedural obligations to investigate the alleged trafficking⁷⁷² as well as not to have afforded the victim with practical and effective protection against trafficking and exploitation in general.⁷⁷³

A more recent example of recourse before the ECHR relates to the case of *Chowdury et Autres v. Grèce*.⁷⁷⁴ This case concerns forty-two Bangladeshi men recruited without work permits to collect strawberries in a farm in Greece. They lived in degrading conditions, working twelve hours every day without being paid and were supervised by armed guards. When a group of 100 to 150

⁷⁶⁸ *Rantsev v. Cyprus and Russia* (n 2) para 279.

⁷⁶⁹ *Rantsev v. Cyprus and Russia* (n 2) paras. 277-278.

⁷⁷⁰ *Rantsev v. Cyprus and Russia* (n 2) para. 281.

⁷⁷¹ Valentina Milano, ‘The European Court of Human Rights’ Case Law on Human Trafficking in Light of *L.E. v Greece*: A Disturbing Setback?’ (2017) 17 Human Rights Law Review 701,707.

⁷⁷² *Rantsev v. Cyprus and Russia* (n 2) paras 5, 11 p.86.

⁷⁷³ *Rantsev v. Cyprus and Russia* (n 2) para. 8 p.86.

⁷⁷⁴ *Affaire Chowdury et Autres v. Grèce*, Requête no 21884/15 (CEDH, 30 mars 2017).

workers requested their salaries to the employer, one of the armed guards opened fire, seriously injuring 30 of them. The employers and the armed guard were initially arrested and tried for attempted murder and trafficking but were finally acquitted from the charge of HT and were ordered to pay an insignificant financial penalty.⁷⁷⁵ The Court developed the reasoning of *Rantsev* by reiterating that the facts of the case are consistent with the definition of human trafficking in Article 3 (a) of the Palermo Protocol, therefore fell within the scope of Article 4(a) of the Council of Europe Convention on Action against Trafficking in Human Beings and went further to explicitly rule that forced labour constitutes one form of exploitation subsumed by the definition of trafficking.⁷⁷⁶

The Court also held that the State had ‘failed in its obligations to prevent the situation of human trafficking, to protect the victims, to conduct an effective investigation into the offences committed and to punish those responsible for the trafficking’.⁷⁷⁷

Legal recourses provided by the Inter-American human rights system:

Concerning the inter-American human rights system, the American Convention on Human Rights provides procedural rules that enable individual’s complaint over that of a State as long as it is filed in a timely manner that domestic remedies have been exhausted and that the complaint is not pending in another court. However, the Inter-American Commission on Human Rights can receive

⁷⁷⁵ Valentina Milano, ‘Human Trafficking by Regional Human Rights Courts: An Analysis in Light of Hacienda Brasil Verde, The First Inter-American Court’s Ruling in this Area’ (n 752) 1,10.

⁷⁷⁶ *Chowdury et Autres c. Grèce* (n 774) paras.100,101.

⁷⁷⁷ Press Release Registrar of the Court, ECHR 112 (2017) 30.03.2017 <https://ec.europa.eu/anti-trafficking/case-law/chowdury-and-others-v-greece-0_en> accessed 2 May 2020.

complaints if the domestic legislation does not provide protection for the rights violated or if the victim was prevented to access domestic remedies.⁷⁷⁸

With regard to effective judicial remedy against HT before the Inter-American human rights system, in 2016 the Inter-American Court of Human Rights (IACHR) ruled its first case on HT and slavery, *Brasil Verde Workers v. Brazil*, inspired by the ECtHR's case law and specifically the *Rantsev v Cyprus and Russia* case and the *Chowdury and Others v Greece*. The case concerns hundreds of workers held under slavery-like conditions in a private-owned livestock farm located in the north of Brazil. A first group of forty three men were rescued by the Ministry of Work in 1997 followed by eighty five men rescued in 2000.⁷⁷⁹ This is the first time that the IACHR established State's responsibility for violating its human rights obligations arising from the prohibition of HT, slavery, slavery-related practices and forced labour⁷⁸⁰ based on articles 6(1) and 6(2) of the American Convention of Human Rights. These rights form part of the non-derogable rights mentioned in article 27(2) of the cited Convention.⁷⁸¹ Most importantly, the Court examined with clarity the constituent elements of HT, in particular the relationship between slavery and trafficking.⁷⁸²

⁷⁷⁸ Inter-American Commission on Human Rights, 'Petition and Case System' (2010) 8.

⁷⁷⁹ *Case of the Hacienda Brasil Verde Workers v. Brazil*, Judgment of 20 October 2016, Series C No. 318 (only available in Spanish). The case was primarily submitted to the Inter-American Commission of Human Rights in 1998 and the Commission filed the case before the IACHR in March 2015.

⁷⁸⁰ Milano, 'Human Trafficking by Regional Human Rights Courts: An Analysis in Light of Hacienda Brasil Verde, The First Inter-American Court's Ruling in this Area' (n 772) 3.

⁷⁸¹ Milano, 'Human Trafficking by Regional Human Rights Courts: An Analysis in Light of Hacienda Brasil Verde, The First Inter-American Court's Ruling in this Area' (n 772) 16. *Case of the Hacienda Brasil Verde Workers v. Brazil* (n 779) para.243.

⁷⁸² Milano, 'Human Trafficking by Regional Human Rights Courts: An Analysis in Light of Hacienda Brasil Verde, The First Inter-American Court's Ruling in this Area' (n 772) 18,19.

Legal recourses provided by the African human rights system:

As regards the African human rights system, a number of relevant instruments form the basis for HT's adjudication. These encompass the 1981 African Charter on Human and Peoples' Rights⁷⁸³ establishing the African Commission on Human and Peoples' Rights which places on States an obligation to protect victims of human rights violations and HT.⁷⁸⁴ The African Court on Human and Peoples' Rights which complement the quasi-judicial mandate of the Commission, enables possible recourse to individuals either directly or indirectly through the Commission.⁷⁸⁵ The ECOWAS Community Court of Justice (ECCJ) mandated since 2005 to adjudicate on human rights violations acts to some extent as a regional human rights Court.⁷⁸⁶ Other legal basis for HT litigation relate to Article 29 of the 1990 African Charter on the Rights and Welfare of the Child⁷⁸⁷ and in particular the Article 4(g) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.⁷⁸⁸ In practice, litigation before the African regional system with regard to slavery, slavery-like practices and HT has been very scarce. This mainly relates to the difficulty for victims to access these mechanisms. The scarcity of litigation

⁷⁸³ African Charter on Human and Peoples' Rights (n 755).

⁷⁸⁴ International Federation of Human Rights (FIDH), 'Practical Guide -The African Court on Human and Peoples' Rights towards the African Court of Justice and Human Rights' (2010) 56.

⁷⁸⁵ See Article 5 of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, 9 June 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III). See International Federation of Human Rights (FIDH) (n 793) 5. See also Frans Viljoen, *International Human Rights Law in Africa* (Oxford 2nd edn 2012) 420,424.

⁷⁸⁶ Horace S. Adjohoun, 'The ECOWA Court as a Human Rights Promoter? Assessing Five Years' Impact of the Koraou Slavery Judgment' (2013) 31(3) *Netherlands Quarterly of Human Rights* 342,346.

⁷⁸⁷ African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) OAU Doc. CAB/LEG/24.9/49.

⁷⁸⁸ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) The Maputo Protocol.

extends for the same reason to other regional human rights Courts.⁷⁸⁹ Nevertheless, an example of a successful human rights ruling before the ECCJ Court⁷⁹⁰ on slavery and slavery-like practices concerned the *Hadijatou Mani Koraou v Niger* case.⁷⁹¹ The facts relate to the sale, purchase and sexual abuse of a Nigerian girl who was subjected to daily rape, harsh labour and forced marriage with her former master. The ECCJ Court addressed the domestic judiciary's failure to condemn slavery⁷⁹² as well as the State's lack of compliance to its human rights obligations through the payment of financial compensation accorded to the victim.⁷⁹³ In addition, this jurisprudence through human rights litigation contributed to give more content to the scope of States' positive obligations with regard to the prohibited practices of slavery, slavery-like practices and HT.⁷⁹⁴ This landmark judicial response addressing State responsibility with regard to HT victims may be enhanced by the emerging African Court of Justice and Human Rights⁷⁹⁵ which will have the competence to prosecute HT crimes.⁷⁹⁶

As for recourses exercised before UN human rights mechanisms, the legal basis of HT complaints is generally contained in Article 8 of ICCPR, Article 6 of

⁷⁸⁹ Helen Duffy, 'Litigating Modern Day Slavery in Regional Courts: A Nascent Contribution' (2016) 14(2) *Journal of International Criminal Justice* 376,400.

⁷⁹⁰ The ECOWAS Community Court of Justice (ECCJ) mandated since 2005 to adjudicate on human rights violations acting therefore to some extent as a regional human rights Court. See Adjolohoun (n 786) 346.

⁷⁹¹ ECOWAS Court, *Hadijatou Mani Koroua v. The Republic of Niger* (27 October 2008) ECW/CCJ/JUD/06/08.

⁷⁹² Duffy (n 789) 390.

⁷⁹³ Adjolohoun (n 786) 346.

⁷⁹⁴ Duffy (n 789) 403.

⁷⁹⁵ The 2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, not yet into force.

⁷⁹⁶ Tom Obokata, 'Human Trafficking in Africa' in Charles C. Jalloh, Kamari M. Clarke & Vincent O. Nmehielle (eds), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (Cambridge University Press, 2019) 530. See Chang-Ho Chung (n 762) 46,47.

the International Covenant on Economic, Social and Cultural Rights, Article 6 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) or Article 35 of the Convention on the Rights of the Child (CRC).

Examples of decisions adopted by some UN treaty-monitoring bodies concern the case of *Osayi Omo--Amenaghawon v Denmark*.⁷⁹⁷ The facts of the case relate to a Nigerian woman victim of HT forced to work as a prostitute in Denmark. The author testified against her traffickers during criminal proceedings in a Danish court and was exposed to death threats by the relatives of her traffickers if she returned to Nigeria.⁷⁹⁸ The Human Rights Committee (HRC) found that Denmark violated articles 6 and 7 of the ICCPR for failing to grant asylum to a victim of trafficking exposed to serious risks of retaliation. The Committee, however, did not pronounce itself on the violation of article 8 which prohibits slavery.

With regard to the examination of HT complaints before the CEDAW Committee, up until October 2018, only six communications were based on violations of Article 6 prohibiting trafficking practices, out of 130 individual communications lodged against State Parties.⁷⁹⁹ For instance, in the case of *Zhen Zhen Zheng v The Netherlands*,⁸⁰⁰ three dissenting members of the CEDAW Committee considered that Netherland had infringed Article 6 of the CEDAW Convention and requested 'a more gender-sensitive approach to due

⁷⁹⁷ *Osayi Omo-Amenaghawon v. Denmark*, UN Human Rights Committee (15 September 2015) UN Doc CCPR/C/114/D/2288/2013.

⁷⁹⁸ *ibid* paras 2.3,2.4.

⁷⁹⁹ The Human Trafficking Legal Centre, 'Using the Optional Protocol under CEDAW to Combat Human Trafficking (2018) 11,22.

⁸⁰⁰ CEDAW/C/42/D/15/2007, 26 October 2009, Dissenting Opinion paras 10–12.

diligence in the case of trafficked women that demands recognition of their victimhood and particular vulnerability'.⁸⁰¹ The Netherlands failed in its duty to identify the applicant as a trafficking victim and to provide her with assistance and access to adequate legal remedies.⁸⁰² More recently another example of inadmissible communication before the CEDAW Committee concerns a Mongolian woman failing to substantiate the sexual slavery element of her claim for asylum in the Netherlands under article 3 and 6 of the CEDAW Convention.⁸⁰³ In addition, the Committee could not conclude that there is no effective legal system to protect women in Mongolia against gender based violence⁸⁰⁴ which includes sexual slavery.

These quasi-judicial processes do not have enforcement mechanisms. Decisions of the various Committees are not binding under international law but may influence States behaviour. For instance, Article 24 of the CEDAW commits States to 'adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized' as well as Article 7(4) of the Optional Protocol which recommends that States 'shall give due consideration to the views of the Committee'.⁸⁰⁵ In addition, the Spanish Supreme Court recently established that 'the views expressed by UN Human Rights Treaty Bodies in individual complaints are binding on the State'.⁸⁰⁶ If

⁸⁰¹ Loveday Hodson, 'Women's Rights and the Periphery: CEDAW's Optional Protocol' (2014) 25(2) *The European Journal of International Law* 561,573.

⁸⁰² Milano, 'The European Court of Human Rights' Case Law on Human Trafficking in Light of *L.E. v Greece: A Disturbing Setback?*' (n 771) 818.

⁸⁰³ Para.6.7, Communication No. 39/2012 of the CEDAW Committee, CEDAW/C/57/D/39/2012 of 12 March 2014.

⁸⁰⁴ Paras.6.10,6.1, Communication No. 39/2012 of the CEDAW Committee, CEDAW/C/57/D/39/2012 of 12 March 2014

⁸⁰⁵ < <https://www.ejiltalk.org/supreme-court-of-spain-un-treaty-body-individual-decisions-are-legally-binding/>> accessed 5 May 2020.

⁸⁰⁶ Koldo Casla, 'Supreme Court of Spain: UN Treaty Body individual decisions are legally binding' (2018)

followed by other domestic courts this jurisprudence stand could lead to a greater use of the UN individual redress mechanisms by HT victims.

5.2.4 States obligations *vis-à-vis* HT

The scope of States obligations with regard to human rights is ‘both negative and positive in nature, imposing not only a State duty to abstain from interfering with the exercise of the right, but also to protect the right from infringement by third parties’.⁸⁰⁷ More specifically, positive obligations suggest that States take action to ensure the enjoyment and protection of human rights. Conversely, negative obligations require States to refrain from interfering in the exercise of rights.⁸⁰⁸

With regard to HT, The 2002 Recommended Principles on Human Rights and Human Trafficking suggest that the States have the responsibility under international law to act ‘with due diligence to prevent trafficking, to investigate and prosecute traffickers

and to assist and protect trafficked persons.’⁸⁰⁹ In the late eighties, the Inter-American Court of Human Rights in its case-law *Velasquez Rodriguez v. Honduras* recalls that States have an obligation to act with due diligence to

<<https://www.universal-rights.org/blog/supreme-court-of-spain-un-treaty-body-individual-decisions-are-legally-binding/>> accessed 29 October 2019.

⁸⁰⁷ Dinah Shelton and Ariel Gould, ‘Positive and Negative Obligations Dinah Shelton in *The Oxford Handbook of International Human Rights Law* (OUP 2013) 563.

⁸⁰⁸ Jean-François Akandji-Kombe, ‘Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights’ (2007) *Human Rights Handbook* No 7, p. 5.

⁸⁰⁹ The 2002 Recommended Principles and Guidelines on Human Rights and Human Trafficking (n 665) para 2.

prevent violations of human rights.⁸¹⁰ More in relation to HT practices, legal instruments within the Inter-American Human Rights System such as the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women⁸¹¹ requires States parties to apply due diligence to protect women from violations of human rights including acts of trafficking.⁸¹² This approach echoes the European human rights system which provides possible adjudication and remedy to victims of human rights and exploitative practices by addressing States legal obligations *vis à vis* these victims. For instance, the case *Siliadin v. France*⁸¹³ illustrates the inadequacy of the French domestic criminal legal framework with regard to the practical and effective protection against treatment prohibited by Article 4 of the European Convention on Human Rights. In this case, the Court took the opportunity to assert States' positive obligations *vis à vis* slavery and related practices which by considering the facts and circumstances could constitute the crime of HT.⁸¹⁴ The Court however limited its approach on the positive obligation to put in place adequate criminal law provisions.⁸¹⁵ This approach was subsequently broadened by the

⁸¹⁰ Inter-American Court of Human Rights, case *Velasquez Rodriguez v. Honduras*, Judgment of 29 July 1988. para. 172 p.32.

⁸¹¹ Article 7 of chapter III of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (9 June 1994) (Convention of Belem do Para).

⁸¹² Article 2 (b) of Chapter I of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (n 811).

⁸¹³ *Siliadin v. France* (n 616). A Togolese national came to France in 1994 with the intention to study, alleged that she was forced to work instead as a domestic servant in a private household in Paris. Her passport was confiscated. She worked approximately 15 hours a day without leaves and being paid over a period of several years. The applicant alleged that she was held in domestic slavery. The Court found that the applicant worked for years, without respite or remuneration, and against her will.

⁸¹⁴ Duffy, (n 789) 380. See Rijken and Koster, 'A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice' (n 711) 22. See Piotrowicz, 'States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations' (n 730) 190. See also Holly Cullen, '*Siliadin v France*: Positive Obligations under Article 4 of the European Convention on Human Rights' (2006) 6(3) Human Rights Law Review 585,590, 592: The case is referred to as trafficking of children.

⁸¹⁵ *Siliadin v. France* (n 616) paras 130–149.

2010 *Rantsev* judgment, identifying a wider range of positive obligations encompassing victim protection and preventive actions.⁸¹⁶

States positive obligations provide therefore a safeguard to ensure the practical and effective protection of the rights of HT victims which suggest the liability of the State if the crime of HT is not legally addressed.⁸¹⁷ In this regard, the European Court of Human Rights (ECHR) issued the first international pronouncement through the already cited *Rantsev* decision, establishing that trafficking is a severe human rights violation that creates wide-ranging positive obligations for States. This ECHR case-law remains the most significant because of the clarification of the nature and scope of the positive obligations of the State with regard trafficking. In particular, the added value of this international jurisprudence articulates the importance of legal accountability for HT through the obligations to apply criminal law measures to prosecute and punish traffickers.⁸¹⁸

This landmark and embryonic jurisprudence to some extent⁸¹⁹ was further developed by the ECHR through *L.E. v Greece*,⁸²⁰ *J. and Others v Austria*,⁸²¹ *Chowdury et Autres c. Grèce*⁸²² where in all cases the Court found States responsible for violating article 4 the European Convention on Human Rights in

⁸¹⁶ Milano, 'The European Court of Human Rights' Case Law on Human Trafficking in Light of *L.E. v Greece: A Disturbing Setback?*' (n 771) 705. See also Judgment *Rantsev v. Cyprus and Russia* (n 621) para 285.

⁸¹⁷ Rijken and Koster, 'A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice' (n 711) 23.

⁸¹⁸ Duffy, (n 788) 376.

⁸¹⁹ Valentina Milano, 'The European Court of Human Rights' Case Law on Human Trafficking in Light of *L.E. v Greece: A Disturbing Setback?*' (n 771) 703: this ruling failed to 'contribute to the development of the standards identified in *Rantsev*'.

⁸²⁰ *L.E. v Greece* Application No 71545/12, Merits and Just Satisfaction, 21 January 2016. The State of Niger was found to fail to comply to its obligation under article 4, to protect the female applicant and to conduct an effective investigation into HT she was subjected to.

⁸²¹ *J. and Others v Austria* Application No 58216/12, Merits and Just Satisfaction, 17 January 2017.

⁸²² *Chowdury et Autres c. Grèce* (n 774).

relation to human trafficking. This inspired the case-law of the Inter-American Court of Human Rights' (IACHR) on human trafficking and slavery which specifically examined States' positive obligation to prevent and prohibit HT practices in the already cited case of *Hacienda Brasil Verde Workers v. Brazil*.⁸²³ The IACHR for the first time comprehensively emphasises the responsibility of States' duties in relation to human trafficking.⁸²⁴

States therefore have a 'responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers as well as to assist and protect trafficked persons'.⁸²⁵ Hence, how the normative framework can be implemented in FCAS to provide protection would be the combination of independent judicial institutions, effective national human rights institutions (NHRIs), CSO, an engaged civil society,⁸²⁶ communities. All may be conducive for the State to comply to its human rights obligations and reinforce domestic enforcement efforts regarding HT. In support to the implementation of States positive obligations,⁸²⁷ NHRIs therefore may advocate for the adjudication of trafficking practices. Adding to this, national rapporteurs

⁸²³ Case of *the Hacienda Brasil Verde Workers v Brasil* Judgment, 20 October 2016, Series C No 318.

⁸²⁴ Valentina Milano, 'Human Trafficking by Regional Human Rights Courts: An Analysis in Light of Hacienda Brasil Verde, The First Inter-American Court's Ruling in this Area' (n 752) 3.

⁸²⁵ The primacy of human rights, para 2 of the United Nations High Commissioner for Human Rights, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (n 665).

⁸²⁶ GRETA (Group of Experts on Action against Trafficking in Human Beings), 8th General Report on GRETA's Activities (2018) para 205, p.67. See also UNICEF Innocenti Research Centre, 'South Asia in Action: Preventing and Responding to Child Trafficking – Analysis of Anti-Trafficking Initiatives in the Region' (2009) 35.

⁸²⁷ See UNGA Res 48/134 (4 March 1944) UN Doc A/RES/48/134: National institutions for the promotion and protection of human rights, the Principles relating to the Status of National Institutions (The Paris Principles), 3(b), 3(c).

combined with national referral mechanisms can also enhance legislative and policy developments.⁸²⁸

5.2.5 Challenges of the human rights regime to provide effective protection against HT

The primary purpose of human rights litigation is the victim-centered approach.⁸²⁹ Secondly, human rights adjudication contributes to ensure that States meet their obligations of effective investigation, prosecution as well as to provide remedies for victims.⁸³⁰ To this end, most international and regional human rights treaties explicitly recognise a right to remedy for human rights violations as well as a right of access to remedies. Hence,

*‘remedies are a critical aspect of the international legal response to trafficking, confirming the status of trafficked persons as victims of crime and victims of human rights abuse’.*⁸³¹

The obligation to protect the victims of HT derives from a general duty imposed on States as recalled by the International Covenant on Civil and Political Rights (ICCPR), to

*‘ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.’*⁸³²

⁸²⁸ GRETA (Group of Experts on Action against Trafficking in Human Beings), 8th General Report on GRETA’s Activities (n 825) para 58 p.28.

⁸²⁹ Duffy, (n 789) 377.

⁸³⁰ Duffy, (n 789) 377.

⁸³¹ Gallagher, ‘The right to an effective remedy for victims of trafficking in persons: A Survey of International Law and Policy’ (n 715) 2.

⁸³² Article 3(a) of the International Covenant on Civil and Political Rights (n 173).

The UN Human Rights Council as well as the Special Rapporteur on Trafficking in Persons extend this provision to HT victims.⁸³³ Similar provisions are found in Article 13 of the European Convention on Human Rights;⁸³⁴ in Article 25 of the American Convention on Human Rights⁸³⁵ as well as in Article 7 of the African Charter.⁸³⁶ However, one of the main challenges arising from the practical application of the international human rights' legal regime concerns the effective accessibility to human rights mechanisms by the ones in most need of protection.⁸³⁷ The lack of access to international accountability procedures pertains to the extreme vulnerability and invisibility of HT victims.⁸³⁸ Victims can be physically trapped, traumatised or fearing to report to any authorities, as they often come from countries where they mistrust police authorities.⁸³⁹ These hindrances may be mitigated by the presence of CSOs on the ground or grassroots communities who once alerted can act on behalf of victims of human rights violations and lodge complaints before relevant cited judicial and quasi-judicial bodies. As example in 2014, seven cases were represented by NGOs out of twenty-three individual cases brought before the CEDAW Committee⁸⁴⁰ based on Article 2 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

⁸³³ A/HRC/RES/20/1 of 18 July 2012, Trafficking in Persons, Especially Women and Children: Access to Effective Remedies for Trafficked Persons and Their Right to an Effective Remedy for Human Rights Violations. See also A/66/283 of 9 August 2011 Trafficking in Persons, Especially Women and Children: Note by the Secretary General, para.12 p.4.

⁸³⁴ Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (n 613).

⁸³⁵ Article 25 of the American Convention on Human Rights (n 15).

⁸³⁶ African Charter on Human and Peoples' Rights (n 754).

⁸³⁷ Duffy (n 789) 376.

⁸³⁸ Valentina Milano, 'Human Trafficking by Regional Human Rights Courts: An Analysis in Light of Hacienda Brasil Verde, The First Inter-American Court's Ruling in this Area' (n 752) 6.

⁸³⁹ Valentina Milano, 'The European Court of Human Rights' Case Law on Human Trafficking in Light of L.E. v Greece: A Disturbing Setback?' (n 771) 717.

⁸⁴⁰ Loveday Hodson, 'Women's Rights and the Periphery: CEDAW's Optional Protocol' (2014) 25(2) The European Journal of International Law 575.

Furthermore, the representation by CSOs on behalf of human rights victims is developing through the European Human Rights System as illustrated by the case-law *Center for Legal Resources on Behalf of Valentin Câmpeanu v. Romania*.⁸⁴¹ The Romanian NGO Centre for Legal Resources lodged a criminal complaint against the State in breach of its human rights obligations which encompassed a lack of adequate remedies concerning people with disabilities.⁸⁴² In this case the ECHR refers to the relevant jurisprudence of the Inter-American Commission on Human Rights that examined cases brought by NGOs on behalf of direct victims based on Article 23 of the Rules of Procedure of the Inter-American Commission on Human Rights.⁸⁴³ The latter is exemplified by the case *Gomes Lund Et Al. (Guerrilha do Araguaia) v. Brazil* whereby the petition is presented by the Center for Justice and International Law (CEJIL), Human Rights Watch Americas, in the name of disappeared persons and their next of kin. This case was brought in the context of the *Guerrilha do Araguaia* as a result of the military dictatorship in Brazil during the period of 1964 to 1985.⁸⁴⁴

With regard to HT victims in Asia and the Middle East regions, the Optional Protocol to the CEDAW may be the only complaint mechanism available for redress after exhausting domestic remedies as both regions do not offer yet regional human rights judicial recourses.⁸⁴⁵

⁸⁴¹ ECHR case-law *Center for Legal Resources on Behalf of Valentin Câmpeanu v. Romania*. (Application no. 47848/08) Judgment 17 July 2014.

⁸⁴² *ibid* para 151.

⁸⁴³ Article 23, Presentation of Petitions, Rules of Procedure of the Inter-American Commission on Human Rights. See para. 70

⁸⁴⁴ Inter-American Court of Human Rights, case *Gomes Lund et Al. ("Guerrilha do Araguaia") v. Brazil* Judgment of 24 November 2010 (*Preliminary Objections, Merits, Reparations, and Costs*).

⁸⁴⁵ The Human Trafficking Legal Centre, 'Using the Optional Protocol under CEDAW to Combat Human Trafficking (2018) 7.

Another challenge regarding the availability of human rights litigation relates to the proliferation of adjudicatory mechanisms and regimes which may present as a 'forum duplication'.⁸⁴⁶ This proliferation can confuse victims of HT in need of pressing redress. This may also contribute to the submission of successive or parallel complaints before various bodies or mechanisms whether these are universal, regional, judicial, or quasi-judicial.⁸⁴⁷

The availability of judicial remedy can be affected in fragile and conflict contexts. In such environments, the vulnerability and remoteness of individuals trapped in situations of exploitative practices may be aggravated by the unwillingness, inability or incapacity of the State to provide judicial remedies and therefore protection against human rights, thus HT. Additionally, States lack of capacity can be linked to corruption arising from States institutions, policies and practices which hinder law enforcement on trafficking.⁸⁴⁸ A case in point concerns Nigeria where 'the lack of effective laws against trafficking, slavery and the corrupt judicial system in Nigeria' do not guarantee administrative and judicial protection against HT practices.⁸⁴⁹ In this regard, the Inter-American Commission on Human Rights states that corruption and organised crimes have infiltrated high level of government, thereby undermining the State's ability

⁸⁴⁶ Christophe Deprez, 'The Admissibility of Multiple Human Rights Complaints: Strasbourg and Geneva Compared' (2019) 19 (3) Human Rights law Review 517,535.

⁸⁴⁷ *ibid* 517.

⁸⁴⁸ Chris Mensah-Ankrah and Rex Osei Sarpong, 'The Modern Trend of Human Trafficking in Africa and the Role of the African Union (AU)' (2018) Eban Centre for Human Trafficking Studies p.9 <<https://ssrn.com/abstract=3105245>> accessed 29 October 2019.

⁸⁴⁹ Cour Nationale du Droit d'Asile, *Mlle E.*, Décision No. 10012810 (24 March 2015). Following a referral back to the CNDA from the Council of State, the Court granted refugee status to the applicant, victim of HT, based in part on the lack of protection from the State of Nigeria.

to fight trafficking and resulting in trafficking practices being tolerated and facilitated by States authorities.⁸⁵⁰

Other fragile contexts are illustrated by Afghanistan, the Central African Republic, Iraq, Somalia, South Sudan, the Syrian Arab Republic, and Yemen. In these countries, government institutions and services, societal structures have largely collapsed because of armed conflict and generalised violence.⁸⁵¹ Political instability, civil unrest, and 'disruption of traditional community life'⁸⁵² can all contribute to low levels of State's accountability and liability regarding the prohibition of exploitative practices. The absence of protection and judicial recourses impact further on the vulnerability of individuals who cannot seek legal redress and protection from failing States⁸⁵³ creating therefore a vicious circle.

Another limitation to access to judicial remedies relates to forced migration contexts. Individuals are often exposed to a vacuum in protection directly related to challenges of identifying victims of HT in such complex migration flows.⁸⁵⁴ The difficulty in identifying trafficked persons raises issues as immigration policies are based on arrest, detention, possibly prosecution and deportation of irregular migrants. HT victims are crucially at risk to be confused

⁸⁵⁰ Inter-American Commission on Human Rights, 'Human Mobility Inter-American Standards' (2015) 32.

⁸⁵¹ OECD, 'States of Fragility, Understanding Violence' (OECD Publishing, Paris, 2016) 25.

⁸⁵² The Protection Project, 'Understanding Trafficking in Persons in the MENA Region: The Causes, the Forms, the Routes, and the Measures to combat a Serious Violation of Human Rights' (2013) 7.

⁸⁵³ UNSC, 'Prevention, Protection, Prosecution Stressed as Security Council Holds Open Debate on Human Trafficking, Modern Slavery, Forced Labour in Conflict Situations' (15 March 2017) Press Release SC/12751, para.5.

<<https://www.un.org/press/en/2017/sc12751.doc.htm>> accessed 10 August 2020.

⁸⁵⁴ HRC, Report of the Special Rapporteur on trafficking in persons, especially women and children to the Human Rights Council to the 38th Session of the Human Rights Council (17 May 2018) UN Doc A/HRC/38/45, para 3,4 at 1.

with this category.⁸⁵⁵ This context has created tension between increasing immigration control with deterrence policies⁸⁵⁶ and the respect for a human rights based approach enabling access to legal and judicial protection. The lack of adequate identification contributes to the failure of providing HT victims legal assistance and obstruct their right to judicial remedy.⁸⁵⁷

5.2.6 Conclusion

HT constitutes serious and multiple human rights violations. A human rights-based approach to HT relies on international human rights standards meant to promote and protect the human rights of HT victims. The recourse to this human rights framework requires the identification, the analysis of the human rights violated and to address States' obligations under international human rights law in order to find appropriate remedies and redress prohibited practices. The focus on the State's positive obligations is therefore instrumental to strengthen the protection of HT victims. Victims of human rights and HT can therefore exercise judicial and quasi-judicial recourses before various human rights regimes at a regional or universal level once domestic remedies have been sought. The regional human rights judicial systems of Europe, the Americas and Africa are well-functioning mechanisms and established models. They demonstrate some degree of successful performance in addressing human rights violations with effective enforcement mechanisms. This is except the Arab and Asian human rights regimes which are still at their infancy. However,

⁸⁵⁵ HRC, Report of the Special Rapporteur trafficking in persons, especially women and children, on her mission to Jordan' (8 June 2016) UN Doc A/HRC/32/41/Add.1, p.12,13.

⁸⁵⁶ Thomas Gammeltoft-Hansen, 'International Refugee Law and Refugee Policy: The Case of Deterrence Policies' (2014) 27(4) Journal of Refugee Studies 575.

⁸⁵⁷ Gallagher, 'The right to an effective remedy for victims of trafficking in persons: A Survey of International Law and Policy' (n 715) 2.

HT litigation remains quantitatively limited under these regimes. Nevertheless, the European, African, and Inter-American human rights regimes developed some landmark jurisprudence on the scope and content of States positive obligations with regard to the prohibited practices of slavery, slavery-like practices, and HT. The scarcity so far of successful decisions on HT also concerns the relevant bodies of the UN human rights regime such as the Human Rights Committee or the CEDAW Committee. This is partly explained by the fact that UN quasi-judicial process does not have enforcement mechanisms and decisions of the various Committees are not binding under international law. Some domestic courts such as the French Conseil d'Etat confirms for instance that findings from the Human Rights Committee are not binding.⁸⁵⁸ Others consults the views, general comments, concluding observations and recommendations of various human rights treaty bodies to which form relevant interpretative source to support or reinforce their judicial decisions. A recent example from the Spanish Supreme Court ruled that 'the views expressed by UN Human Rights Treaty Bodies in individual complaints are binding on the State' suggesting however, 'the limited applicability of the Court's reasoning to this specific case'.⁸⁵⁹ The Spanish court reasoning indicates that there is still 'a great deal of variance in practice regarding the explicit invocation of findings of UN human rights treaty bodies in judicial reasoning'.⁸⁶⁰ This judicial stand could nevertheless encourage domestic courts

⁸⁵⁸ 'Il y a lieu de relever que les constatations du Comité des droits de l'homme, organe non juridictionnel institué par l'article 28 du Pacte international sur les droits civils et politiques, ne revêtent pas de caractère contraignant à l'égard de l'Etat auquel elles sont adressées' <<https://www.legifrance.gouv.fr/ceta/id/CETATEXT000026504624>> accessed 15 June 2021.

⁸⁵⁹ Maria de los Angeles Gonzales Carreno v Ministry of Justice, Judgment No. 1263/2018 (2019) 113(3) The American Journal of International Law 591,592.

⁸⁶⁰ Machiko Kanetake, 'UN Human Rights Treaty Monitoring Bodies' (2018) 67 International and Comparative Law Quarterly 201, 228.

to consider UN treaty body materials as normative basis, as well as to contribute to a greater use of the UN individual redress mechanisms by HT victims. This decision 'may be read as a coming-of-age story for the views of UN Treaty Bodies and the recent evolution of the UN human rights treaty architecture to include quasi court functions rather than merely an interesting judgment'.⁸⁶¹

Some challenges to this human rights legal framework relate partly to the proliferation of adjudicatory mechanisms which may present as a 'forum of duplication' in international human rights litigation. This proliferation can confuse victims of HT in need of pressing redress. This may also contribute to the submission of successive or parallel complaints before various bodies or mechanisms whether these are universal, regional, judicial, or quasi-judicial. Another challenge relates to the effective accessibility to human rights mechanisms by the ones in most need of protection. One of the main reasons pertains to the extreme vulnerability, invisibility and sometimes remoteness of HT victims. They can be physically trapped, traumatised, or fearing to report to any authorities. In these instances, the role of civil society organisations is crucial to support more closely and act on behalf of HT victims to seek legal redress.

Challenges may be partly related to the issues of effective implementation, enforcement, and protection mechanisms of the HT human rights framework which may not be available to HT victims in contexts of conflict affected and forced migration movements. In fragile situations, States are often unable and

⁸⁶¹ Başak Çalı, 'UN Treaty Body Views and their Domestic Legal Effects (in Spain): An Alternative Take' (2018) Blog of the International Journal of Constitutional Law < <http://www.iconnectblog.com/2018/09/un-treaty-body-views-and-their-domestic-legal-effects-in-spain-an-alternative-take/>> accessed 14 August 2021.

unwilling mainly due to institutional failures, to fulfil and be accountable for their positive obligations regarding providing judicial remedies, hence protection against HT.

In the context of migration flows which expose risks of trafficking, tensions exist between security concerns of the States and the need to provide international protection rooted in a human rights-based approach. In addition, the lack of adequate identification often contributes to the failure of providing HT victims legal assistance and obstruct their right to remedy. HT victims may therefore face arrest because of their perceived illegal immigration status and risk deportation which goes against the principle of non-refoulement 'requiring States at large not to return people to face the risk of persecution, torture, or other serious violations of fundamental rights'.

The following section addresses the issue of HT from the perspective of the refugee legal framework with the combination of a human rights-based approach which encompasses criminal perspectives.⁸⁶²

5.3 Legal protection against HT provided by refugee law

The section examines the scope of application of international refugee law towards victims of HT and the extent to which this normative framework responds adequately to the specific protection needs of asylum seekers, refugees, or migrants vulnerable to HT.

⁸⁶² Todres, 'Human Rights, Labor, and the Prevention of Human Trafficking: A Response to A Labor Paradigm for Human Trafficking' (n 706) 156.

'Destabilisation and displacement of populations increase individuals' vulnerability to exploitation and abuse through different forms of trafficking'.⁸⁶³ Vulnerability is also heightened by restrictive access to countries of asylum which expose individuals to further risks of exploitation.⁸⁶⁴ Hence, the acute need for protection of HT victims has become one of the striking features of recent migration crises.

5.3.1 HT as a protection issue for UNHCR

The United Nations High Commissioner for Refugees (UNHCR) was created as the global refugee institution by the UN General Assembly in 1950 to provide international protection and promote durable solutions for refugees worldwide such as local integration or resettlement and ultimately the secure 're-establishment of the refugee in his or her community'.⁸⁶⁵ The international protection of refugees, persons displaced and stateless persons⁸⁶⁶ stems from legal and institutional foundations that are based on the 1951 Convention and 1967 Protocol relating to the Status of Refugees.⁸⁶⁷ To the thesis concern, it is important to mention that Article 1D of the 1951 Convention relates to the specific situation of Palestinian refugees who therefore fall under the mandate

⁸⁶³ International Federation of Red Cross and Red Crescent Societies, 'Action to Assist and Protect Trafficked Persons. Guidance for European Red Cross-National Societies on Assistance and Protection to Victims of Human Trafficking (2017) 8.

⁸⁶⁴ UNHCR, 'A guide to international refugee protection and building state asylum systems - Handbook for Parliamentarians N.27' (2017) 73, 82.

⁸⁶⁵ UNGA, Report of the Secretary-General, 'Refugees and Stateless Persons' (26 October 1949) UN Doc A/C.3/527. See also Guy Goodwin-Gill, 'Asylum: The Law and Politics of Change' (1995) 7(1) International Journal of Refugee Law 2.

⁸⁶⁶ The United Nation General Assembly conferred to UNHCR the broader mandate to deal with statelessness in 1995: See Matthew Seet, 'The Origins of UNHCR's Global Mandate on Statelessness' (2016) 28(1) International Journal of Refugee law 8.

⁸⁶⁷ The Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (The 1951 Refugee Convention) and the Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

of UNRWA.⁸⁶⁸ The latter defines Palestine refugees as ‘persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 conflict’.⁸⁶⁹ However, the consequences of a possible dismantling of UNRWA which was under serious threat in 2018, would inevitably lead to the intervention of the general refugee legal framework. In this eventuality, based on Article 1D of the 1951 Geneva Convention, Palestinians under the mandate of UNRWA would ‘*ipso facto* fall under the protection of the international refugee regime’.⁸⁷⁰ Nevertheless, the practicalities of filling this protection gap are not straightforward and will need some time to implement. This eventuality is not discussed further.

Eligibility for refugee status requires the causal link of a well-founded fear of being persecuted on account of one or more of the five 1951 Refugee Convention grounds:⁸⁷¹ race; religion; nationality; membership of a particular social group or political opinion. The person needs to be outside his/her country of origin or habitual residence and is unable or unwilling to avail him/herself of the protection of that country, or to return there, because of fear of persecution.⁸⁷²

Persecution goes beyond the boundaries of the 1951 Geneva Convention and can encompass torture or other serious violations of fundamental human

⁸⁶⁸ UNGA Res 302/IV (8 December 1949) para 7.

⁸⁶⁹ <<https://www.unrwa.org/palestine-refugees>> accessed 31 July 2021.

⁸⁷⁰ Mais Qandeel and Sarah Progin-Theuerkauf, ‘Legal Implications of Dismantling UNRWA: A European Perspective’ 14(3) *Journal of Politics and Law* 98.

⁸⁷¹ UNHCR Guidelines Protection N.12 (2 December 2016) UN Doc HCR/GIP/16/12 para. 32. The 1951 Refugee Convention (n 862) 14. See also James C. Hathaway, ‘The Causal Nexus in International Refugee Law’ (2002) 23 *Michigan Journal of International Law* 207,217.

⁸⁷² Article 1 of the 1951 Convention relating to the Status of Refugees (n 862).

rights⁸⁷³ such as HT.⁸⁷⁴ Since the early 2000s, UNHCR has drawn attention to the responsibility to address HT in refugee situations and acknowledges that HT among other sexual and gender based violence constitute ‘common forms of persecution in many situations of armed conflict and violence’.⁸⁷⁵ This is evidenced by UNHCR doctrinal work through operational Guidelines, Executive Committee’s Conclusions and Notes on International Protection and Annual Reports.⁸⁷⁶ This evolution has therefore received academic attention and support towards broadening the boundaries of international refugee law to include trafficking as a valid form for an asylum claim’.⁸⁷⁷

5.3.2 The normative reach of refugee law regarding HT

There are suggestions that the refugee legal regime experiences normative gaps.⁸⁷⁸ For instance, individuals often find themselves in a situation of ‘legal limbo’ falling on a *prima facie* basis outside the scope of the 1951 Convention protection.⁸⁷⁹ However, these gaps have been complemented by prolific soft

⁸⁷³ Guy S. Goodwin-Gill, ‘The Dynamic of International Refugee Law’ (2014) 25(4) *International Journal of Refugee Law* 651. See Articles 1 (1) and 3 (2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 736).

⁸⁷⁴ UNHCR, ‘A guide to international refugee protection and building state asylum systems - Handbook for Parliamentarians N.27’ (n 864) 73, 82.

⁸⁷⁵ UNHCR Guidelines Protection N.12 (n 871) para 26, p.6.

⁸⁷⁶ UNHCR Policy Development and Evaluation Service, ‘Review of UNHCR efforts to prevent and respond to human trafficking’ (2008) 6.

⁸⁷⁷ Anne T. Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway’ (2009) 49 (4) *Virginia Journal of International Law* 844,845.

⁸⁷⁸ Türk Volker and Rebecca Dowd, ‘Protection Gaps’ in Elena Fiddian-Qasimiyeh, Gil Loescher, Katy Long and Nando Sigona (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (OUP 2014) 1.

⁸⁷⁹ *ibid* 1.

law material from UNHCR guidelines,⁸⁸⁰ from other UN position papers provided by institutions such as UNICEF, OHCHR,⁸⁸¹ EU⁸⁸² and OSCE.⁸⁸³

HT inflicts severe pain and suffering and can be used as a form of persecution perpetrated by State or non-state actors.⁸⁸⁴ Such acts can be 'abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labour, removal of organs, physical beatings, starvation, and deprivation of medical treatment'.⁸⁸⁵

In addition to UNHCR Guidelines, the Palermo Protocol is also a source of interpretative legal guidance for States parties to the Protocol, law enforcement personnel, legal practitioners, including UNHCR and NGOs personnel, all involved with refugee status determination. Guidance is fundamental to assist the identification of the status of persons seeking asylum⁸⁸⁶ as well as to qualify exploitative practices individuals may be victims of. However, protection within the meaning of the 1951 Convention cannot be granted simply by claiming

⁸⁸⁰ UNHCR Guidelines on Gender-Related Persecution, HCR/GIP/02/01 (2002); UNHCR Guidelines on International Protection No. 7: 'The application of Article 1A (2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked' (7 April 2006) UN Doc HCR/GIP/06/07, UNHCR Principles and Guidelines on Human Rights and Human Trafficking (2010) UN Doc HR/PUB/10/2.

⁸⁸¹ The 2002 United Nations High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking (n 665).

⁸⁸² European Union, Brussels Declaration on Preventing and Combating Trafficking in Human Beings (29 November 2002).

⁸⁸³ OSCE, Decision No. 2/03 Combating Trafficking in Human Being, MC.DEC/2/03 (2 December 2003). See also the OSCE Commentary to the OSCE Action Plan to Combat Trafficking in Human Beings PC.DEC/557, the 2005 Addendum Addressing Special Needs of Child Victims of Trafficking for Protection and Assistance PC.DEC/557/Rev.1 and the 2013 Addendum to the OSCE Action Plan to Combat Trafficking in Human Beings: One Decade Later PC.DEC/1107/Corr.1 (OSCE 2015).

⁸⁸⁴ UNHCR, 'Guidelines on International Protection: Gender-related Persecution within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees' (2002) (n 880).

⁸⁸⁵ UNHCR Guidelines on International Protection No. 7 (n 880) para14.

⁸⁸⁶ Olawale Lawal, 'Refugee Rights and the UN Protocols on Human Trafficking and Smuggling' (2019) 3(1) International Journal of Social and Humanities Sciences 12.

vulnerability to HT.⁸⁸⁷ In order to establish a causal link, HT claims need to establish a well-founded fear of persecution based on one or more of the grounds listed in the Convention. Persecution may be the act of non-state actors or the result of the State's failure to provide effective protection because of convention grounds.⁸⁸⁸

However, there are practical limitations to identify HT in asylum claims as HT victims often fear threats, harm, retaliation. HT victims may therefore be unable or unwilling to elaborate on exploitative practices as they may feel intimidated or discouraged from cooperating with law enforcement personnel or any authorities and therefore could withhold crucial information regarding HT practices.⁸⁸⁹

As an example, an Italian Court ruled out an administrative decision rejecting a claim for refugee status of a Nigerian woman subjected to HT practices who was unwilling to provide details of her situation. The Court considered that such reluctance was not conditional to the granting of international protection and established that there was enough evidence of exploitation. This decision corroborates the OHCHR guidelines that protection and care should be unconditional upon the capacity or willingness of trafficked victims to partake in legal proceedings.⁸⁹⁰

⁸⁸⁷ UNHCR Guidelines on International Protection No. 7 (n 880) para.6. See also Jean-Pierre Gauci, 'Relationship Between Asylum and Trafficking' (2013) Encyclopedia of Migration.

⁸⁸⁸ Ryszard Piotrowicz, 'The UNHCR's Guidelines on Human Trafficking' (2008) 20(2) International Journal of Refugee Law 242, 248, 249. UNHCR Guidelines N.12 (n 871) para. 15.

⁸⁸⁹ Jean-Pierre Gauci, 'Why Trafficked Persons Need Asylum' in Jean-Pierre Gauci, Mariagiulia Giuffrè and Evangelia (Lilian) Tsourdi (eds), *Exploring the Boundaries of Refugee Law - Current Protection Challenges* (Brill Nijhoff 2015) 172, 184.

⁸⁹⁰ Tribunale di Messina, ordinanza del 14 luglio 2017, Case N.36/2017

<<http://www.meltingpot.org/Status-di-rifugiata-alla-ragazza-nigeriana-vittima-di.html#.WtXeGYjwbIX>> accessed 17 April 2018. See also OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking (United Nations 2010) para. 8.

Based on UNHCR guidelines⁸⁹¹ supported by judicial decisions of international, regional and domestic courts,⁸⁹² HT claims are usually examined through the lens of ‘membership of a specific social group’ under the 1951 Refugee Convention. If the HT victim does not qualify for refugee status, the person may be eligible for subsidiary protection under the common European asylum legal framework system.⁸⁹³ The recommendation from early UNHCR guidelines is that this convention ground, underdeveloped by the 1951 Convention⁸⁹⁴ is not an umbrella ground that can be used by all individuals fearing persecution. In addition, there is no exhaustive list of what constitutes a ‘particular social group’.⁸⁹⁵ The inclusion nevertheless of new categories or groups of individuals to the ‘membership of a particular social group’ convention ground reflects the evolutive and changing nature of refugee crises linked to the need of strengthening the links between refugee and human rights protection.⁸⁹⁶ The requirement for protection granted to HT victims on this convention ground is

⁸⁹¹ UNHCR, ‘Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees’ (2002) HCR/GIP/02/02.

⁸⁹² UNHCR policy documents related to human trafficking in human beings and case law: <<http://www.refworld.org/thb.html>>. See also the European Database of Asylum Law available at: <<http://www.asylumlawdatabase.eu/en/case-law/france-national-asylum-court-24-march-2015-decision-no-10012810#content>> accessed 21 January 2016. See also Geoff Gilbert, ‘UNHCR and Courts: Amicus curiae ... sed curia amica est?’ (2016) 28(4) *International Journal of Refugee Law*.

⁸⁹³ UNHCR, HCR/GIP/02/02 (n 891) para.11. See also Article 9 of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011.

⁸⁹⁴ Satvinder S. Juss, ‘Recognizing Refugee Status for Victims of Trafficking and the Myth of Progress’ (2015) 34(2) *Refugee Survey Quarterly* 107, 111. See also T. Alexander Aleinikoff, ‘Protected characteristics and social perceptions: an analysis of the meaning of ‘membership of a particular social group’ in E Feller, V Turk, and F Nicholson (eds), *Refugee Protection in International Law: UNHCRs Global Consultations on International Protection* (CUP, Cambridge 2003) 266.

⁸⁹⁵ UNHCR, ‘Guidelines on International Protection: Gender-related Persecution within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees’ (n 880) para 3.

⁸⁹⁶ Alice Edwards, ‘Peter Pan’s fairies and genie bottles UNHCR, the UN human rights treaty bodies and ‘complementary supervision’ in James C. Simeon (ed), *The UNHCR and the Supervision of International Refugee Law* (Cambridge University Press, 2013) 161. See also Florence Malvasio, ‘Droit d’asile et groupe social Protection conventionnelle et protection subsidiaire : complémentarité ou concurrence ? L’exemple de la notion d’appartenance à un certain groupe social’ *Juge Français de l’asile* (2012) 8.

based on the expression of the 'immutability' and the social perception characteristics: common characteristic that 'is innate, unchangeable or otherwise fundamental to identity, conscience or the exercise of one's human rights'.⁸⁹⁷

The French National Court of Asylum since 2015 confirms in its judgments the existence of a social group for female victims of human trafficking. Asylum-seekers from Nigeria were subjected to various rituals on their bodies, to sexual exploitation and death threats in Europe if they attempt to leave the network.⁸⁹⁸

The Court considers that trafficked victims would be in danger upon return to Nigeria as well as being accused of prostitution which is illegal and would be ostracised by the community. Hence, the Court grants refugee status based on the membership of a specific social group' convention ground with evidence provided by the victims to attempt exiting the trafficking network.⁸⁹⁹ Similarly, the UK Asylum and Immigration Tribunal held that in the context of Moldovan society, a woman who has been trafficked for the purposes of sexual exploitation is a member of a particular social group. The group in question being 'former victims of trafficking for sexual exploitation'.⁹⁰⁰ Conversely, the US Courts have adopted a narrow interpretation of what constitute a particular

⁸⁹⁷ UNHCR, HCR/GIP/02/02 (n 891) para.11. See *Moldova v. Secretary of State for the Home Department*, CG [2008] UKAIT 00002, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority (26 November 2007)

<<http://www.refworld.org/docid/47837c902.html>> para 112 (a) (ii).

⁸⁹⁸ Cour Nationale du Droit d'Asile, *Mlle E.*, Décision No. 10012810 (24 March 2015) 9,10.

⁸⁹⁹ European Database of Asylum Law, 'France: National Court of Asylum decides on definition of particular social group for victims of human trafficking' (10 April 2015)

<<http://www.asylumlawdatabase.eu/en/content/france-national-court-asylum-decides-definition-particular-social-group-victims-human>> accessed 19 April 2018. See also UNHCR, Volker Türk, 'Protection Conventionnelle et protection subsidiaire, complémentarité ou concurrence ? L'exemple de la notion d'appartenance à un certain groupe social' (29 October 2012) 14 <<https://www.refworld.org/docid/512e09b22.html>> accessed 13 August 2020.

⁹⁰⁰ United Kingdom: Asylum and Immigration Tribunal/Immigration Appellate Authority, 'SB (PSG - Protection Regulations – Reg 6) *Moldova v. Secretary of State for the Home Department*' (n 899).

social group which is inconsistent with UNHCR legal guidance. The US Courts require the criteria of ‘social visibility’ in addition to the requirement of ‘common innate characteristics’.⁹⁰¹ This position is thereby not aligned with the ‘immutability’ approach adopted by other States such as Canada, New Zealand, and the United Kingdom.

In sum, victims of trafficking through the individual procedure of refugee status determination may be entitled to refugee status based, as explored above, on the ‘membership of a particular social group’ conventional ground. However, it is unrealistic that given the broader nature of migratory movement and increasing humanitarian crises, all trafficked victims be granted individual refugee entitlements.

5.3.3 Conclusion

International human rights norms that interact with refugee law are regarded as mutually broadening the conventional refugee framework. The international human rights law regime seems to offer a wider spectrum of protection as it enables to include refugees but also asylum seekers and any other persons in need of protection.⁹⁰² Meanwhile, the refugee regime has contributed ‘to the development of standards for the protection of refugees in international human

⁹⁰¹ Reasoning followed by the US Court of Appeals, Second Circuit in the *Lushaj v. Holder* case (2010).

⁹⁰² Vincent Chetail, ‘Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law’ in Ruth Rubio Marin (eds), *Human Rights and Immigration* (Oxford Scholarship Online, 2014) 69. See also Vincent Chetail, ‘Armed Conflict and Forced Migration: A Systematic Approach to International Humanitarian Law, Refugee Law, And International Human Rights Law’ in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford Handbooks Online 2014) 703: “Contrary to the common belief of many humanitarian and refugee law specialists, the most specific norm is not always the most protective one. In fact, rather the contrary is true”.

rights instruments'.⁹⁰³ Hence, the evolving concepts of complementary and other subsidiary forms of protection are particularly relevant to HT situations⁹⁰⁴ in an increasing 'mixed-migration' context⁹⁰⁵ and coupled with other issues such as environmental and economic.⁹⁰⁶

The scope of application of international refugee law towards victims of HT and the extent to which this legal framework responds adequately to the protection needs of individuals vulnerable to HT has been examined, in particular through 'the membership of a particular social group'. However, the refugee legal regime and specifically the individual refugee status determination process reveals normative and practical gaps. This is the case for migrants that fall outside the traditional scope of the 1951 Convention⁹⁰⁷ who nevertheless have well founded needs to seek protection, as is the case for HT victims. These deficits have been complemented by prolific soft law material, in particular subsequent UNHCR guidelines⁹⁰⁸ other UN position papers provided by agencies such as UNICEF, OHCHR,⁹⁰⁹ IOM⁹¹⁰ and OSCE.⁹¹¹ In addition, this

⁹⁰³ Corinne Lewis, *UNHCR and International Refugee Law: From Treaties to Innovation* (First published 2012, Routledge, 2014) 30.

⁹⁰⁴ Kelly Karvelis, 'The Asylum Claim for Victims of Attempted Trafficking' (2013) 8(2) *Northwestern Journal of Law & Social Policy* 274, 278.

⁹⁰⁵ Alexander Betts, 'Towards a 'Soft Law' Framework for the Protection of Vulnerable Irregular Migrants' (2010) 22(2) *International Refugee Law* 209, 210. See also Volker and Dowd (n 878). See also UNHCR, 'Guidelines on International Protection N.12 (n 871) p. 1.

⁹⁰⁶ Betts (n 905) 210.

⁹⁰⁷ Betts (n 905) 209.

⁹⁰⁸ UNHCR Guidelines on Gender-Related Persecution, HCR/GIP/02/01 (n 872); UNHCR Guidelines The application of Article 1A (2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked, HCR/GIP/06/07 (2006), UNHCR Principles and Guidelines on Human Rights and Human Trafficking, HR/PUB/10/2.

⁹⁰⁹ OHCHR, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (2002) (n 665).

⁹¹⁰ IOM and EU, 'Brussels Declaration on Preventing and Combating Trafficking in Human Beings' (18 September 2002) on Trafficking in Human Beings' (7 December 2002) MC.DEC/2/03.

⁹¹¹ Decision No. 2/03 Combating Trafficking in Human Being, MC.DEC/2/03 (2 December 2003). See also the 2015 OSCE Commentary to the OSCE Action Plan to Combat Trafficking in Human Beings PC.DEC/557, the 2005 Addendum Addressing Special Needs of Child Victims of Trafficking for Protection and Assistance PC.DEC/557/Rev.1 and the 2013 Addendum to the

includes the support of case-law: judicial decisions and the interaction of UNHCR with international, regional, and domestic courts⁹¹² supplemented by academic contributions covering the field of HT mainly inspired by human rights law.⁹¹³

However, challenges still remain as to the effectiveness and implementation of protection against HT even under combined legal regimes. As an example, during the asylum process, a victim of HT may be successful in her/his refugee claim and be granted legal protection but this 'protection' may not be practically effective without the concrete support and assistance of NGOs and other support mechanisms afforded to victims of HT throughout the whole process.⁹¹⁴

Through the Palestinian case study, it is demonstrated in part III, that grass-roots and advocacy responses initiated by civil society organisations contribute more practically and effectively to the implementation of protection. The next section examines the contribution of international humanitarian law to the legal framework addressing HT.

5.4 International humanitarian law framework addressing HT

This section analyses the legal protection provided by international humanitarian law (IHL) against HT practices in the light of its interaction with

OSCE Action Plan to Combat Trafficking in Human Beings: One Decade Later PC.DEC/1107/Corr.1.

⁹¹² UNHCR policy documents related to human trafficking in human beings and case law: <<http://www.refworld.org/thb.html>>. See also the European Database of Asylum Law available at: <<http://www.asylumlawdatabase.eu/en/case-law/france-national-asylum-court-24-march-2015-decision-no-10012810#content>> accessed 21 January 2016. See also Geoff Gilbert, 'UNHCR and Courts: Amicus curiae ... sed curia amica est?' (2016) 28(4) International Journal of Refugee Law 623,624.

⁹¹³ UNHCR Guidelines on International Protection No. 7 (n 880).

⁹¹⁴ In France, Loi n° 2015-925 du 29 juillet 2015 related to the reform of the droit d'asile provides amendments of chapter III du titre II du livre VII of the Code de l'entrée et du séjour des étrangers et du droit d'asile : Art.11 para 8. Art. L.723-5: the asylum-seeker can be assisted by a lawyer or an NGO personnel during the refugee status interview process. For instance, the following NGOs: ECPAT, The Comité Contre l' Esclavage Moderne (CCEM), France Terre d'Asile (FTDA).

IHRL which provide additional protection to victims of armed conflicts.⁹¹⁵ The interaction of IHL with international criminal law (ICL) comes also in support with the enforcement of IHL by criminalising serious violations of IHL.⁹¹⁶ The section examines subsequently the challenges to the implementation and enforcement of IHL and their impact on addressing HT crimes.

In order to fall within the scope of application of IHL, HT must take place in the context of, or associated with an armed conflict. In this regard, HT in conflict areas frequently involve sexual exploitation, forms of enslavement, forced labour and forced military recruitment.⁹¹⁷ This relates for instance to the exploitation of children in conflict situations, forcibly recruited to be used as combatants held under slavery and in some cases coerced to sexual services.⁹¹⁸ Armed conflict can lead to forced displacement and migration which may trigger further vulnerability and exposure to sexual violence⁹¹⁹ and exploitation.

In addition, and in order to establish accountability for serious crimes which may include HT, the characteristics of the nature of armed conflict is fundamental as

⁹¹⁵ Marko Milanović, 'Norm Conflicts, International Humanitarian Law, and Human Rights Law' in Orna Ben-Naftali (eds), *International Humanitarian Law and International Human Rights Law* (Oxford University Press, 2011) 96. See also Sir Christopher Greenwood, 'Human Rights and Humanitarian Law - Conflict or Convergence' (2010) 43(1) *Case Western Reserve Journal of International Law* 495. Noam Lubell, 'Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate' (2007) 40 (2) *Israel Law Review* 648,654. See also Orna Ben-Naftali, *International Humanitarian Law and International Human Rights Law* (Oxford University Press, 2011) 5,6.

⁹¹⁶ Kubo Mačák, *Internationalized Armed Conflicts in International Law* (Oxford University Press 2018) 4.

⁹¹⁷ James Cockayne and Summer Walker, 'Fighting in Conflict Human Trafficking. 10 Ideas for Action by the United Nations Security Council (2016) IV. See also, UNSC Resolution 2331 (20 December 2016) UN Doc S/RES/2331.

⁹¹⁸ UNICEF, 'Guide to the Optional Protocol on the Involvement of Children in Armed Conflicts' (2003) 3,19.

⁹¹⁹ Report of the Secretary-General on conflict-related sexual violence (15 April 2017) UN Doc SC S/2017/249 1. See also the Report of the Special Rapporteur on trafficking in persons, especially women and children (5 August 2016) UN Doc A/71/303, p.7,8.

more armed conflicts today involve non-state armed groups.⁹²⁰ This is exemplified by conflicts with the presence of non-state actors in Syria, Iraq, South Sudan, Libya or Yemen where sexual violence and related HT practices are prevalent.⁹²¹ For instance, in the situation of non-international conflict, it is paramount to determine State responsibility for the widespread violations of human rights and international humanitarian law as well as to determine the criminal liability *vis a vis* members of armed opposition groups and whether to consider them members of armed forces or civilians.⁹²² However, it is generally accepted that IHL treaty and customary rules apply and are binding on all parties whether they are States or not.⁹²³ To this end, customary international humanitarian law places individual criminal responsibility on all persons who commit serious crimes⁹²⁴ including those that possess limited international legal personality and referring to non-states actors.⁹²⁵

The Lieber Code was one of the early codifications of modern IHL⁹²⁶ which initiated the first broad principles of humanity applicable in times of war, distinguishing between 'combatants' and 'non-combatants'.⁹²⁷ This primary codification was the basis for the development of the Hague Regulations

⁹²⁰ Ezequiel Heffes, Marcos D. Kotlik, Manuel J. Ventura, *International Humanitarian Law and Non-State Actors: Debates, Law and Practice* (Asser Press, 2019) 197.

⁹²¹ Gloria Gaggioli, 'Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law' in 'Sexual violence in armed conflict' (2014) 96(894) *International Review of the Red Cross* 503, 504.

⁹²² Jean-Marie Henckaerts, 'Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict' (2005) 87(857) *International Review of the Red Cross* 175, 190.

⁹²³ Jann K. Kleffner, 'The applicability of international humanitarian law to organized armed groups' (2011) 93 (882) *International Review of the Red Cross* 443,444.

⁹²⁴ Henckaerts (n 922) 197.

⁹²⁵ Kleffner (n 923) 443,445.

⁹²⁶ Instructions for the Government of Armies of the United States in the Field (Lieber Code). 24 April 1863.

⁹²⁷ Theodor Meron, *War Crimes Law Comes of Age: Essays* (Oxford University Press, 1998) 141.

concerning the conduct of war of belligerent parties to the conflict as well as permissible means and methods of warfare. This was followed by the Four 1949 Geneva Conventions⁹²⁸ and their Additional Protocols of 1977.⁹²⁹ These latter instruments focus on the protection to all war victims, wounded soldiers, prisoners of war and civilians⁹³⁰ in order to safeguard the international humanitarian principles and considerations of humanity.⁹³¹ In addition to the treaty laws of IHL which cover various aspects of warfare, a large part of IHL rules derive from customary international law applicable to all parties in conflict irrespective of whether States have ratified international humanitarian treaty laws.⁹³² Nevertheless, the distinction between international armed conflict and non-international armed conflict are subject for the former to rules set out in the Four Geneva Conventions and Additional Protocol I. A more restricted set of rules apply to the latter and are provided by article 3 common to the Four Geneva Conventions as well as by Additional Protocol II. However, in practice

⁹²⁸ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (III) (12 August 1949) 75 UNTS 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287.

⁹²⁹ The first two Additional Protocols were adopted in 1977 and the third in 2005. They are Protocols additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts of 1977 (Protocol I); Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts of 1977 (Protocol II); Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the Adoption of an Additional Distinctive Emblem of 2005 (Protocol III).

⁹³⁰ Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict (Additional Protocol No. I) (8 June 1977) 1125 UNTS 3) and Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflict (Additional Protocol No. II (8 June 1977) 1125 UNTS 609).

⁹³¹ Jean Pictet, 'Commentary: The Fundamental Principles of the Red Cross' (1979) International Federation of Red Cross and Red Crescent Societies 4. See also Greenwood (n 915) 496, 497.

⁹³² Henckaerts (n 922) 177, 187. See the list of Customary Rules of International Humanitarian Law applicable in international armed conflict and non-international armed conflict, p.198.

clear cut classification does not consider the varying nature of the conflicts as was the case for the armed conflicts in the former Yugoslavia. A more detailed discussion of these approaches is beyond the purview of the research.

The *Tadic* jurisprudence of the former ICTY reinforced by the statute of the International Criminal Court, in its article 8, para. 2 (f)⁹³³ suggests a definition of a non-international armed conflict:

*‘an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’.*⁹³⁴

The International Committee for the Red Cross (ICRC) reflecting on the ICTY legal opinion specified the threshold of intensity requirements applicable to both international and internal armed conflict:

*‘protracted armed confrontations occur between governmental armed forces and the forces of one or more-armed groups, or between such groups arising on the territory of a State party to the Geneva Conventions. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organization’.*⁹³⁵

⁹³³ Article 8 para.2 (f) from the Rome Statute of the International Criminal Court (n 586).

⁹³⁴ ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70

⁹³⁵ ICRC, ‘How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?’ ICRC Opinion Paper, March 2008, 2,4,5 < <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>> accessed 2 March 2018.

5.4.1 Legal protection provided by IHL against HT

The doctrinal examination of prohibitions of practices assimilated to HT highlights that HT *per se* has not been expressly prohibited neither regulated under IHL.⁹³⁶ However, elements of the HT definition such as slavery, was prohibited as early as the Lieber Code.⁹³⁷ To this end, in 1864 Article 42 of the Lieber Code asserted that ‘the law of nature and nations has never acknowledged slavery’.⁹³⁸ The Code also prohibited practices of enslavement and rape⁹³⁹ which indicated awareness and concern at an early stage of sexual violence during armed conflicts. The Third Geneva Convention of 1949 related to international armed conflict indirectly refers to sexual violence by providing that women prisoners of war ‘shall be treated with all regard due to their sex’.⁹⁴⁰ The Fourth 1949 Geneva Convention expressly details various forms of sexual violence: ‘women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault’.⁹⁴¹

With regard to international armed conflict, the 1977 Additional Protocol I to the 1949 Geneva Conventions prohibits outrages upon personal dignity, in particular ‘humiliating and degrading treatment, enforced prostitution and any form of indecent assault’, ‘at any time and in any place whatsoever, whether committed by civilian or by military agents’.⁹⁴² Additional provisions protect

⁹³⁶ Gallagher, *The International Law of Human Trafficking* (n 23) 209.

⁹³⁷ General Orders No. 100: The Lieber Code, Section II: articles 42 and 43.

⁹³⁸ *ibid* Article 42.

⁹³⁹ *ibid* Articles 43,44, 47, 58.

⁹⁴⁰ Article 14 of the Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949 (GC III).

⁹⁴¹ Article 27 of the Fourth Geneva Convention.

⁹⁴² Article 75 (2) (b) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (n 930) .

women from sexual violence such as 'rape, enforced prostitution'⁹⁴³ as well as children from 'any form of indecent assault'.⁹⁴⁴

Article 3 common to the four Geneva Conventions regulates conflicts not of an international character, alluding to sexual violation and prohibiting 'outrages upon personal dignity, in particular humiliating and degrading treatment'.⁹⁴⁵ In complement, Additional Protocol II of 1977 lists specific prohibitions: 'rape, enforced prostitution or indecent assault'.⁹⁴⁶ These prohibitions extend to 'all persons affected by armed conflict' 'when they do not, or no longer, participate directly in hostilities'⁹⁴⁷ without distinction between women and men.⁹⁴⁸ Furthermore, taken from both the 1926 Slavery Convention as well as the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practises Similar to Slavery, the Additional Protocol II reinforces the prohibition 'of practices comparable to slavery, such as ...the purchase of wives and the exploitation of child labour'.⁹⁴⁹

Trafficking for the purpose of sexual exploitation including sexual slavery is part of other serious forms of sexual violence for which there is no exhaustive list

⁹⁴³ Article 76 (1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (n 930).

⁹⁴⁴ Article 77 (1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (n 930) .

⁹⁴⁵ Article 3 (c) Article 3 Common to the Four Geneva Conventions.

⁹⁴⁶ Article 4, Sub-paragraph ' (e) 'Outrages upon personal dignity 'of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

⁹⁴⁷ Paragraph 1, 'General principle of humane treatment ' of the of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (n 930).

⁹⁴⁸ Gaggioli (n 921) 513.

⁹⁴⁹ ' Sub-paragraph ' (f) 'Slavery and the slave trade' of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. See also ICRC, 'Rule 94. Slavery and Slave Trade' < https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule94#Fn_A9C0FAD0_00003> accessed 27 April 2020.

and is directly or indirectly linked to a conflict.⁹⁵⁰ It is recognised that ‘rape and other forms of sexual violence’ constitute grave breaches or serious violations of the Geneva Conventions including common article 3 of the 1949 Geneva Conventions in situations of both international and non-international armed conflicts.⁹⁵¹

HT is encompassed under the most serious crimes of concern to the international community: enslavement and other forms of sexual violence such as rape and sexual slavery used as methods of warfare.⁹⁵² Such crimes can amount to the characterisation of war crimes and crimes against humanity as well as genocide⁹⁵³ which are addressed by the international criminal legal framework of the ICC and *ad hoc* Tribunals.

IHL in times of armed conflict usually applies concurrently with other branches of law which all operate simultaneously as complementary sources of legal protection⁹⁵⁴ for victims of international humanitarian law and human rights law violations.⁹⁵⁵ Whilst IHL and IHRL may have different purposes they are nevertheless part of a whole legal system that forms international law.⁹⁵⁶

The objective is therefore to legally characterise reprehensive behaviour violating human rights and humanitarian principles.⁹⁵⁷ Elements of the specific

⁹⁵⁰ UN SC S/2017/249 of 15 April 2017 (n 919) 1.

⁹⁵¹ Gaggioli, ‘Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law’ (n 921) 529.

⁹⁵² Gallagher, *The International Law of Human Trafficking* (n 23) 210. see also Human Rights Watch, ‘Shattered Lives: Sexual Violence During the Rwandan Genocide and Its Aftermath’ (1996).

⁹⁵³ UNSC, Res 2388 (n 128) 3.

⁹⁵⁴ Report of the Commission of Inquiry on Lebanon, A/HRC/3/2 23 November 2006 para.64.

⁹⁵⁵ Chetail, ‘Armed Conflict and Forced Migration: A Systematic Approach to International Humanitarian Law, Refugee Law, And International Human Rights Law’ (n 894) 701.

⁹⁵⁶ Greenwood (n 915) 504.

⁹⁵⁷ Kim Thuy Seelinger, ‘Domestic accountability for sexual violence: The potential of specialized units in Kenya, Liberia, Sierra Leone and Uganda’ (2015) 96(894) *International Review of the Red Cross* 539,544.

crimes need to be contained in the domestic criminal legislation⁹⁵⁸ in order to ensure effective prosecution and conviction of perpetrators. This requires in particular the obligation for States to prosecute various forms of sexual violence in their domestic legal systems⁹⁵⁹ and prohibited by the mentioned IHL treaty provisions (Article 27(2) of Protocol I; Article 4.2(e) of the Additional Protocol II) as well as by customary IHL (Rule 93 of the ICRC study on customary IHL).⁹⁶⁰ Based on these articles, the offences of sexual violence concern enforced prostitution, rape, indecent assault, of which HT may be a part.

Since 2000, the UN Security Council has alerted the international community to crimes of sexual violence in armed conflict.⁹⁶¹ In 2015, the UNSC emphasised the prevalence of HT in situations of armed conflict and the recognition that such violations of human rights may amount to war crimes or crimes against humanity. The UNSC therefore urged member states to tackle the involvement of armed and terrorist groups engaged in organised crimes including HT such

⁹⁵⁸ Stoyanova, 'Article 4 of the ECHR and the Obligation of Criminalising Slavery, Servitude, Forced Labour and Human Trafficking' (n 569) 443.

⁹⁵⁹ ICRC Advisory Service on International Humanitarian Law, 'Prevention and Criminal Repression of Rape and Other forms of Sexual Violence during Armed Conflicts' (2015).

⁹⁶⁰ < <http://www.icrc.org/customaryihl/eng/docs/home>> accessed 2 November 2019.

⁹⁶¹ UNSC Res 1325 (31 October 2000) UN Doc S/RES/1325, para 11 at 3.

as in Libya,⁹⁶² Iraq,⁹⁶³ Syria,⁹⁶⁴ Yemen,⁹⁶⁵ Nigeria.⁹⁶⁶ Practices of forced marriage, sexual exploitation, forced labour, recruitment of child soldiers are occurring *in situ*, or in some areas of control of the non-state party to the conflict.⁹⁶⁷ In these settings the pressing questions are the identification of the parties to the conflict in order to determine the responsibility of HT crimes as well as the applicability of the relevant legal frameworks: IHL, human rights, refugee, international criminal legal regimes that govern particular incidents of violence such as HT.⁹⁶⁸ Lastly, this raises the issue of enforcement of IHL to address HT crimes.

5.4.2 Challenges to the implementation and enforcement of IHL to address HT crimes

'Impunity for sexual violence remains at the heart of the problem in many contexts'.⁹⁶⁹ The term also encompasses trafficking in persons for the purpose

⁹⁶² UNSC 'Security Council Presidential Statement Condemns Slave Trade of Migrants in Libya, Calls upon State Authorities to Comply with International Human Rights Law' (7 December 2017) Press Release SC/13105

< <https://www.un.org/press/en/2017/sc13105.doc.htm> > accessed 2 March 2018.

⁹⁶³ UN Independent International Commission of Inquiry on the Syrian Arab Republic (15 June 2017) UN Doc A/HRC/32/CRP.2, "'They came to destroy': ISIS Crimes Against the Yazidis": 'ISIS forcibly displaced Yazidi civilians into Syria', p. 4, 6. See also UNAMI/OHCHR, 'A Call for Accountability and Protection: Yazidi Survivors of Atrocities Committed by ISIL' (2016) 14.

⁹⁶⁴ UN Independent International Commission of Inquiry on the Syrian Arab Republic (15 June 2016) UN Doc A/HRC/32/CRP.2 (n 963) 3: The report examined the crimes ISIS committed against the Yazidi community and selling women and girls on markets and holding them in sexual slavery in Syria. 3.

⁹⁶⁵ Amnesty International News Reports 28 February 2017:

< <https://www.amnesty.org/en/latest/news/2017/02/yemen-huthi-forces-recruiting-child-soldiers-for-front-line-combat/> > accessed 2 March 2018.

⁹⁶⁶ Austrian Red Cross/ACCORD, 'Nigeria: COI Compilation on Human Trafficking' (2017) 25, 26, 57.

⁹⁶⁷ OHCHR,

< <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17011&LangID=E> > accessed 23 August 2017. See also UNSC S/Res/2388 of 21 November 2017 (n 128).

⁹⁶⁸ As an example, the applicability of multiple legal regimes may be useful for the situation of Yemen with regard to Ethiopian migrants held into torture camps by Yemeni traffickers with the government authorities' complicity. Human Rights Watch Report, 25 May 2014

< <https://www.hrw.org/report/2014/05/25/yemens-torture-camps/abuse-migrants-human-traffickers-climate-impunity> > accessed 1 March 2018.

⁹⁶⁹ Vincent Bernard and Helen Durham 'Sexual Violence in Armed Conflict: From Breaking the Silence to Breaking the Cycle' (2015) 96 (894) International Review of the Red Cross 427,432.

of sexual violence or exploitation, when committed in situations of conflict.⁹⁷⁰ Hence, examination at the international and domestic jurisdictional level of the ways IHL can be practically implemented and enforced is paramount.⁹⁷¹ The effective enforcement of IHL exercised by domestic or international tribunals⁹⁷² occur through the prosecution of perpetrators often affiliated with a State or non-state armed group.⁹⁷³ Accordingly, the UNSC, recognising the gravity of HT and associated practices in the context of armed conflict and in violation of international law and humanitarian law, urged member States to prosecute these crimes. At an international level, various UN organs and mechanisms play an influential role in the normative development of IHL to secure its compliance⁹⁷⁴ which partly remedy 'the lack of enforcing mechanisms in the treaties on the laws of war'.⁹⁷⁵ This is illustrated by various interventions of the UNSC since the mid-nineties as armed conflicts are characterised as 'threats to peace and international security'.⁹⁷⁶ The UN intervention is considered to be 'an enforcement measure under the binding authority of Chapter VII' of the UN

⁹⁷⁰ Report of the UN Secretary General, 'Conflict Related Sexual Violence' (n 361) 3.

⁹⁷¹ Silja Vöneky, 'Implementation And Enforcement Of International Humanitarian Law' (2013) in Dieter Fleck (eds), *The Handbook of International Humanitarian Law* (OUP, 3rd edn, 2013) 648.

⁹⁷² 'Sepur Zarco was the first case of conflict-related sexual violence challenged under Guatemala's penal code. It was also the first time that a national court anywhere in the world had ruled on charges of sexual slavery during an armed conflict'

< <http://www.unwomen.org/en/news/stories/2017/10/feature-guatemala-sepur-zarco-in-pursuit-of-truth-justice-and-now-reparations> > accessed 2 March 2018. See also Sarah

Williams, 'The Extraordinary African Chambers in the Senegalese Courts; An African Solution to an African Problem' (2013) 11(5) *Journal of International Criminal Justice* 1139, 1144.

⁹⁷³ Report of the UN Secretary General, 'Conflict Related Sexual Violence' (n 361) 3.

⁹⁷⁴ The UN Security Council can act as a 'as a material organ of the international community for the protection of erga omnes obligations under customary international law' in Marco Roscini, 'The United Nations Security Council and the Enforcement of International Humanitarian Law' (2010) 43(2) *Israel Law Review* 330, 341.

⁹⁷⁵ *ibid* 331, 332.

⁹⁷⁶ Article 39 of the 1945 Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI. Statute of International Criminal Tribunal for Rwanda (8 November 1994, amended 7 July 2009) UN Doc S/RES/955. UNSC S/Res/955 decides the establishment of 'the international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law in Rwanda and neighbouring States'.

Charter.⁹⁷⁷ Furthermore, the UN manifested its practical support to combat HT⁹⁷⁸ by creating specialised tribunals for prosecuting exactions of international humanitarian law and human rights law committed for instance in Rwanda,⁹⁷⁹ Former Yugoslavia,⁹⁸⁰ Sierra Leone,⁹⁸¹ Cambodia.⁹⁸² This enabled over time, the implementation and enforcement of IHL based on the judicial decisions of specialised tribunals⁹⁸³ and opinions of other entities such as the High Court of Justice.⁹⁸⁴

In addition to these judicial accountability mechanisms established by the UN Security Council and the UN General Assembly, there is the contribution of the UN Human Rights Council for instance to investigate on Iraq, Myanmar, South Sudan, the Syrian Arab Republic. Other UN human rights bodies with special procedures such as the Special Rapporteur on Trafficking in Persons⁹⁸⁵ also act as quasi-judicial mechanisms which allow individual remedy.⁹⁸⁶ They are mandated to address conflict-related sexual violence⁹⁸⁷ and have been pivotal in interpreting as well as enforcing the law applicable to armed conflicts with

⁹⁷⁷ Theodor Meron, 'War Crimes in Yugoslavia and the Development of International Law' (1994) 88 (1) *The American Journal of International Law* 79. See also <https://www.un.org/en/sections/un-charter/chapter-vii/>

⁹⁷⁸ UNSC Res 2331 (n 127).

⁹⁷⁹ UNSC acting under Chapter VII S/RES/955 of 8 November 1994.

⁹⁸⁰ UNSC acting under Chapter VII S/Res/808 of 22 February 1993.

⁹⁸¹ The Residual Special Court for Sierra Leone Agreement (Ratification) Act, 2011.

⁹⁸² UNGA A/RES/57/228 B of 22 May 2003. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusions of amendments as promulgated on 27 October 2004, NS/RKM/1004/006).

⁹⁸³ *Prosecutor v Anto Furundžija* (Judgment) IT-95-17/1-T, T Ch (10 December 1998) para 134, 143, 183.

⁹⁸⁴ ICJ, Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, *ICJ Reports* 1996, para.25. ICJ, Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 710) para 106.

⁹⁸⁵ UNGA, Report of the Special Rapporteur on trafficking in persons, especially women and children (5 August 2016) UN Doc A/71/303.

⁹⁸⁶ Dominik Steiger, 'Enforcing international humanitarian law through human rights bodies' (2015) in Heiker Krieger (eds) *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (Cambridge University Press, 2015) 265.

⁹⁸⁷ Report of the UN Secretary General, 'Conflict Related Sexual Violence' (n 361) 9.

emphasis on human rights standards.⁹⁸⁸ Complementing mechanisms in the last fifty years relate also to international fact-finding missions and commissions of inquiry that have become one of the prevailing crisis-response functions⁹⁸⁹ to conflicts situations in the world.⁹⁹⁰ These mechanisms are mandated to establish legal facts by investigating grave breaches of IHL and making recommendations on the compliance to IHL rules.⁹⁹¹ In conflict prevention, resolution and post-reconstruction, some non-judicial bodies have attributes of neutrality and independence such as ICRC through its function of guardian of IHL⁹⁹² and participate therefore to implementing IHL. This implementing function is also promoted on the ground by National Red Cross or Red Crescent Societies and has extended to non-governmental and inter-governmental organisations.⁹⁹³

At a domestic level, member States can comply to the UNSC request to prosecute serious crimes when appropriate measures are adopted in their national legal systems.⁹⁹⁴ International legal obligations binding member States often require corresponding changes in domestic laws, policies, and practices. States need to adjust their domestic legal system in order to incorporate and enforce international rules such as IHL.⁹⁹⁵ However, prerequisite conditions for

⁹⁸⁸ Steiger (n 986) 263,264.

⁹⁸⁹ Federica D'Alessandra, 'The Accountability Turn in Third Wave Human Rights Fact-Finding' (2017) 33(84) *Utrecht Journal of International and European Law* 61,64.

⁹⁹⁰ Shiri Krebs, 'The Legalization of Truth in International Fact-Finding' (2017) 18(1) *Chicago Journal of International Law* 88.

⁹⁹¹ Established by Article 90 of the First Additional Protocol to the Geneva Conventions of 1949. See also Silja Vöneky (n 972) 688.

⁹⁹² Steiger (n 986) 265. See also Yves Sandoz, 'The International Committee of the Red Cross as guardian of international humanitarian law' (1998).

⁹⁹³ Rachel Brett, 'Non-Governmental Human Rights Organizations and International Humanitarian Law' (1998) 324 *International Review of the Red Cross*. See also Silja Vöneky (n 964) 698: Amnesty International, Human Rights Watch, MSF.

⁹⁹⁴ UNSC Res 2388 (n 128) 2. See also Milanović (n 915) 96.

⁹⁹⁵ Sharon Weill, 'Building respect for IHL through national courts' (2014) 895/896 *International Review of the Red Cross* 859,862, 863.

the effective application of IHL by national courts depends on a number of criteria. In particular, the political will of the State concerned. This also imply some degree of State's capacity of ensuring a functioning rule of law and specifically effective domestic justice systems.⁹⁹⁶ More precisely, judicial guarantees have to ensure the respect of the proper administration of justice, including the lawfulness of criminal proceedings which constitute the basic rules of treaty and customary international humanitarian law as well as fundamental human rights.⁹⁹⁷ Furthermore, even when States have incorporated relevant rules into domestic legislation, national courts may have difficulties in applying and enforcing IHL. This is due, in part, to the complex and often bias relationships that manifest between judicial institutions and State actions.⁹⁹⁸ Indeed, the State itself may be a party to the conflict which may result in citizens having a lack of trust in States institutions.⁹⁹⁹ The latter may be reinforced by the inability or the unwillingness from States to prosecute crimes of sexual violence¹⁰⁰⁰ including acts of trafficking. In these instances, States often do not abide by judicial scrutiny. This weakens further the rule of law that relies on an independent, impartial and accessible judiciary to provide practical enforcement of the law.¹⁰⁰¹ This is the case for the situation in Myanmar regarding successive national commissions failing to investigate alleged widespread and/or systematic acts of violence committed against Rohingyas perpetrated

⁹⁹⁶ Declaration on Preventing Sexual Violence in Conflict adopted in London on 11 April 2013, para.2.

⁹⁹⁷ Jelena Pejic, 'The protective scope of Common Article 3: more than meets the eye' (2011) 93(881) *International Review of the Red Cross* 1,23.

⁹⁹⁸ Weill (n 995) 869,870.

⁹⁹⁹ For example: the lack of confidence in the Sudanese judicial system: Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (2005) pursuant to Security Council Resolution 1564 of 18 September 2004, p.6.

¹⁰⁰⁰ Gaggioli (n 921) 533.

¹⁰⁰¹ Weill (n 995) 865, 872.

by Myanmar security forces and armed forces in Rakhine State.¹⁰⁰² When basic infrastructure has broken down, this impacts on the access for victims to law enforcement institutions and on their right to lodge official complaints. Another fundamental aspect relates to the reluctance for victims of HT or of any other human rights violations to interact with domestic courts. This is exemplified by the fear of victims of human rights violations to seek remedies and reparations before Myanmar's national courts considered lacking independence and accountability in the administration of justice.¹⁰⁰³

5.4.3 The proliferation of intervention mechanisms

The aim of fact-finding bodies is to collect evidence of human rights as well as humanitarian violations in conflict and post-conflict settings. Fact finding bodies are also entrusted to encourage domestic accountability as well as enforcement of international legal norms.¹⁰⁰⁴ The role of these bodies evolved to enhance the efforts for criminal accountability of international crimes.

The proliferation of such mechanisms with multifaceted mandates raises underlying question regarding the effectiveness of bodies such as the International Humanitarian Fact-Finding Commission established under Article 90 of the Additional Protocol I of the Geneva Convention.¹⁰⁰⁵

¹⁰⁰² Human Rights Watch, 'Myanmar's Investigative Commissions: A History of Shielding Abusers' (2018). See also <https://www.hrw.org/news/2018/09/18/myanmar-domestic-commissions-rohingya-all-failures> accessed 30 April 2020.

¹⁰⁰³ International Commission of Jurists, 'Achieving Justice for Gross Human Rights Violations in Myanmar: Baseline Study' (2018) 23,24.

¹⁰⁰⁴ Krebs (n 990) 106, 107,134. See also Théo Boutruche, 'Selecting and Applying Legal Lenses in Monitoring, Reporting, and Fact-finding Missions' (2013) Program on Humanitarian Policy and Conflict Research Harvard University 5.

¹⁰⁰⁵ Cristina Azzarello & Matthieu Niederhauser, 'The Independent Humanitarian Fact-Finding Commission: Has the 'Sleeping Beauty' Awoken?' (2018) < <http://blogs.icrc.org/law-and-policy/2018/01/09/the-independent-humanitarian-fact-finding-commission-has-the-sleeping-beauty-awoken/>> accessed 2 March 2018. See also Rob Grace, 'From Design to

As examples of this proliferation the examination of HT in conflict suggests the involvement and possibly overlapping mandates of a number of UN mechanisms such as the Special Representatives of the Secretary-General on Sexual Violence in Conflict, and on Children and Armed Conflict, and in the name of the UN Human Rights Council: the Special Rapporteurs on Trafficking in Persons, Especially Women and Children, and on Contemporary Forms of Slavery as well as on violence against women, its causes and consequences.

Additionally, fact-finding procedures are being activated under the auspices of the UN Security Council, UN Human Rights Treaty bodies, the Inter-American Commission on Human Rights, the Council of Europe's Human Rights Commissioner.¹⁰⁰⁶

The tasks of such bodies raise issues not only of possible overlapping mandates but of conflicting interpretations of established legal norms. This may lead to confusion at the stage of classifying violations with a risk of mixing IHRL and IHL terminology, blurring therefore the boundaries of the main bodies of international law by referring simultaneously to the frameworks of international human rights law, international humanitarian law, international criminal law.¹⁰⁰⁷

This was the case for instance by the International Commission of Inquiry on Côte d'Ivoire which mixed the IHL and IHRL norms referring in particular to 'the

Implementation: The Interpretation of Fact-finding Mandates'(2015) 20 (1) Journal of Conflict and Security Law 32.

¹⁰⁰⁶ Philippe Alston and Sarah Knuckey, *The Transformation of Human Rights Fact-finding* (OUP, 2016) 5.

¹⁰⁰⁷ D'Alessandra (n 989) 61, 65.

right to life and to the physical integrity of protected persons' without defining these legal terms.¹⁰⁰⁸

In addition, these mechanisms can trigger political and emotional bias which mitigate the credibility and impartiality, the very essence for which fact-finding missions were created in 1991.¹⁰⁰⁹ Such was the case for the 2009 United Nations Fact Finding Mission on the Gaza Conflict criticised for its methodological failings as well as its perceived 'one sided approach'.¹⁰¹⁰

However, on balance the added value is that fact finding missions can be cost-effective and rapidly mobilised, could lay the groundwork to inform subsequent prosecutions at the domestic and/or international levels.¹⁰¹¹ Another significant impact on the ground brings awareness to subjects of human rights inquiry.

In this regard,

*'the desire for accountability among affected communities has contributed to more and more human rights groups documenting abuses in the hope that their work might increase demand for criminal trials. This has had the consequence of "popularising" justice'.*¹⁰¹²

Such presence may subsequently facilitate some victims to seek support through grassroots community or CSOs and not remain isolated. However, as

¹⁰⁰⁸ Théo Boutruche, 'Selecting and Applying Legal Lenses in Monitoring, Reporting, and Fact-finding Missions' (n 1004) 18. Report of the International Commission of Inquiry on Côte d'Ivoire (1 July 2011) UN Doc A/HRC/17/48, para.90, p.19.

¹⁰⁰⁹ UNGA, Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security (9 December 1991) UN Doc A/Res/46/59: fact-finding means any activity designed to obtain detailed knowledge of the relevant facts of any dispute or situation which the competent United Nations organs need in order to effectively exercise their functions in relation to the maintenance of international peace and security.

¹⁰¹⁰ Fausto Pocar, Marco Pedrazzi, Micaela Frulli, *War Crimes, and the Conduct of Hostilities: Challenges to Adjudication and Investigation* (Edward Elgar Publishing 2013) 343.

¹⁰¹¹ Alston and Knuckey (n 1006) 7.

¹⁰¹² D'Alessandra (n 989) 61.

mentioned earlier, ‘survivors of conflict-related sexual violence face daunting social and structural reporting barriers’ that prevent their cases from being addressed.¹⁰¹³

5.4.4 Conclusion

The first broad principles of humanity in the law of war were initiated by the Lieber Code, followed by the Hague regulations, and confirmed by the Fourth 1949 Geneva Conventions with its two additional protocols. The classification of the nature of conflict and its parties bears some consequences regarding the individual criminal accountability for serious crimes committed which often encompass trafficking practices in complex environments. In addition, the law of armed conflict may operate simultaneously with other branches of law as complementary sources of legal protection. HT *per se* has not been expressly prohibited neither regulated under IHL. However, the doctrinal examination highlights that some of IHL instruments prohibit enslavement, slavery, and rape practices which all relate to HT. IHL addresses the concept of ‘sexual violence’ referred to in the Geneva Conventions of 1949 and their Additional Protocols of 1977, emphasising the strong links to other patterns of violence in conflict. In sum, trafficking for the purpose of sexual exploitation and sexual slavery are encompassed under serious forms of sexual violence, part of a pattern of violence linked to other violations of IHL.

There are various mechanisms and legal ways through which IHL can be practically implemented and enforced: Judicial and quasi-judicial bodies, such as international criminal court and ad hoc tribunals created under the UN

¹⁰¹³ UNSC Report of the UN Secretary-General, ‘Conflict-Related Sexual Violence’ (29 March 2019) UN Doc S/2019/280 (n 361) p.5.

auspices, UN bodies, all contribute to the enforcement of IHL. Whilst collecting evidence of human rights abuses including HT, fact-finding mechanisms also contribute to criminal accountability and may facilitate victims to seek grassroots support from their community and from human rights organisations.

However, the proliferation of such mechanisms can lead to conflicting legal interpretations and therefore risk blurring the boundaries of the main bodies of international law. Challenges to implementing IHL exist when the rule of law and judicial guarantees are not effective, and when there is a bias relationship between such apparatus and the State. Furthermore, there may be a lack of willingness and capacity on behalf of the State to address crimes of sexual violence. These parameters result in a lack of trust in States institutions. In these instances, other practical legal avenues by which HT can be combatted in the context of armed conflict are in part the criminalisation and policies that exist at the international level and need to be translated at the domestic level. Despite fragile and collapsed contexts, the role of national legal systems remains nevertheless crucial to support accountability for crimes of sexual violence at times of conflict¹⁰¹⁴ as justice ideally needs to be exercised closer to home.

The following chapter 6 examines the additional normative framework addressing HT, through the lens of a complementary approach from international criminal law and labour law interacting not only with IHL but also

¹⁰¹⁴ Seelinger (n 957) 540.

intertwined with international human rights law¹⁰¹⁵ and to some extent with refugee law.

¹⁰¹⁵ Article 21 (3) of the Rome Statute provides that ‘the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights’.

Chapter 6 The Applicable International Legal Framework for Victims of HT: International Criminal Law and International Labour Law

6.1 Introduction

Chapter 6 analyses how the international criminal law framework as well as the international labour law regime address HT in complement to the human rights, refugee and humanitarian legal frameworks examined in chapter 5.

Section 6.2 examines the contribution of international criminal law *vis à vis* HT and its evolution towards assigning individual accountability for the most serious crimes. This section analyses the required legal constituents to prosecute human trafficking committed along with other sexual crimes, as a crime against humanity before the ICC. The section then assesses the role of the ICC's jurisdiction regarding HT prosecutions, presenting the limits of this international justice mechanism that ultimately encourage domestic criminal justice system to provide a justice closer to home. 6.3 is the concluding section.

Section 6.4 presents the contribution of the international labour legal framework in addressing HT for the purpose of forced labour by first examining the interpretation of the forced labour concept in relation to HT. The section then analyses the need to promote a labour-based approach as an added-value to the anti-trafficking legal framework which is complemented by a human rights and criminal law perspectives. Lastly, HT for the purpose of forced labour increasing in the globalised economy is examined.

Section 6.5 concludes with a review of the challenges arising from the application of these various branches of international law in addressing HT.

6.2 The evolution of ICL towards individual criminal accountability for serious violations

The role of international criminal law has evolved since the 1990s to address post conflict justice issues with the establishment of special and temporary tribunals:¹⁰¹⁶ the *ad hoc* tribunals of the former Yugoslavia,¹⁰¹⁷ Rwanda¹⁰¹⁸ and other mixed-model tribunals.¹⁰¹⁹ To this end, the UNSC acting under Chapter VII of the UN Charter gave the authority to such tribunals to prosecute and judge serious violations of international humanitarian law.¹⁰²⁰ Concerned with the ability of the local courts to ensure fair trials and based on the 'compelling international humanitarian interests involved', both the ICTY and the ICTR were given primacy over domestic courts.¹⁰²¹

This emerging international justice system was subsequently followed by the establishment of the International Criminal Court (ICC) in 1998 although the creation of the institution was already contemplated in 1937.¹⁰²² The

¹⁰¹⁶ UNGA/11963 of 18 October 2017 announces the closure of the International Criminal for Former Yugoslavia (ICTY) by the end of 2017

<<https://www.un.org/press/en/2017/ga11963.doc.htm>> accessed 22 November 2017.

¹⁰¹⁷ UNSC Res 808 (22 February 1993) UN Doc S/RES/ 808: Establishment of an *ad hoc* international tribunal for former Yugoslavia.

¹⁰¹⁸ See UNSC Res 955 (8 November 1994) UN Doc S/RES/955.

¹⁰¹⁹ Establishment of a Special Court for Sierra Leone, UN Sierra Leone (16 January 2002) 2178 UNTS 138. The Special Court was endorsed by the UNSC Resolution 1400 (28 March 2002) UN Doc S/RES/1400. See the establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 2, Royal Decree No. NS/RKM/1004/006 (2004) (Cambodia). See also the Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon (15 November 2006) UN Doc S/2006/893.

¹⁰²⁰ Guenaël Mettraux, 'Subject-Matter Jurisdiction and Applicable Law – Customary International Law and Treaty Law?' in *International Crimes and the Ad Hoc Tribunals* (Oxford University Press, 2011) 3.

¹⁰²¹ Mohamed M. El Zeidy, 'From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11 Bis of the Ad Hoc Tribunals' (2008) 57(2) *The International and Comparative Law Quarterly* 403.

¹⁰²² Steven R. Ratner, 'The International Criminal Court and the Limits of Global Judicialization' (2003) 38 *Texas International Law Journal* 446. See also Antonio Cassese, From Nuremberg to Rome: International Military Tribunals to the International Criminal Court, in Professor Antonio Cassese, Professor Paola Gaeta, Mr John R.W.D. Jones (eds), *The Rome Statute of*

International Military Tribunal of Nuremberg in 1945 and the International Military Tribunal for the Far East (Tokyo Tribunal) in 1946 were therefore an achievement of such thinking.¹⁰²³ Along with governments, global networks of civil society organisations (CSOs)¹⁰²⁴ were also supporting the need to confront the criminal accountability of individuals for international crimes.¹⁰²⁵ The latter comprises : war crimes, genocide, crimes against humanity,¹⁰²⁶ including gross human rights violations and wide-scale atrocities.¹⁰²⁷

These international judicial mechanisms may act as a complement to defective domestic criminal justice systems under special circumstances where States are unwilling or unable to carry out their prosecutorial responsibilities.¹⁰²⁸ However, the analysis below suggests that in practice these international accountability mechanisms have resulted in relatively scarce instances of prosecution.¹⁰²⁹

the International Criminal Court: A Commentary (Oxford University Press, 2002) 18. See also Jalloh (n 41) 62.

¹⁰²³ Ratner (n 1022) 446.

¹⁰²⁴ Cherif M. Bassiouni, 'The Future of International Justice' (1999) 11(2) *Pace International Law Review* 309,312,313. Statement of Judge Theodor Meron, President, Mechanism for International Criminal Tribunals, before the UN General Assembly, 18 October 2017 <<http://www.unmict.org/sites/default/files/statements-and-speeches/171018-president-address-ga-en.pdf>> accessed 22 November 2017.

¹⁰²⁵ Bassiouni, 'The Future of International Justice' (n 1024) 312,313. Guenael Mettraux, 'Subject-Matter Jurisdiction and Applicable Law – Customary International Law and Treaty Law?' (n 1020) 3,4. Siller, "Modern Slavery' Does International Law Distinguish between Slavery, Enslavement and Trafficking?' (n 31) 420.

¹⁰²⁶ Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* eds (Cambridge University Press, 2007) 1. See also Andrew Clapham, 'Human Rights and International Criminal Law' in William Schabas (eds), *The Cambridge Companion to International Criminal Law* (Cambridge University Press, 2016) 2.

¹⁰²⁷ Cryer, Friman, Robinson and Wilmshurst (n 1026) 16,17.

¹⁰²⁸ Article 17 of the Rome Statute of the International Criminal Court (n 586). See also Siller, 'The Prosecution of Human Traffickers? A Comparative Analysis of Enslavement Judgments Among International Courts and Tribunals' (n 562) 243.

¹⁰²⁹ Cherif M. Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability' (n 348) 11.

This partly reflects the tension between the need for ‘commonly shared moral and social values of the international community’ and the resistance to interference in States’ own interests and sovereignty.¹⁰³⁰ In this regard, despite the creation of the UN in 1945 and the development of international law-making, issues related to domestic criminal justice remained somehow the ‘domaine réservé’ of States.¹⁰³¹

6.2.1 Assessment of the ICC's jurisdiction over potential HT prosecutions

HT is a crime that offends humanity¹⁰³² and is legally defined for the first time in 2000 by the Palermo Protocol. The Protocol supplements the UN Convention against Transnational Organized Crime to address prevention, suppression, and the duty to prosecute domestically the crime of trafficking¹⁰³³ with cross-border collaboration. However, despite a primary focus on criminal justice response albeit with a human rights dimension,¹⁰³⁴ the Protocol is silent on the nature of the HT crime.¹⁰³⁵

As examined in chapter 4, there is an ongoing discussion among scholars and among international judicial decisions to legally characterise HT as an

¹⁰³⁰ Cherif M. Bassiouni, ‘Perspectives on International Criminal Justice’ (2010) 50(2) *Virginia Journal of International Law* 270,271.

¹⁰³¹ Cecily Rose, ‘The Creation of a Review Mechanism for the UN Convention against Transnational Organized Crime and its Protocols’ (2020) 114(1) *American Journal of International Law* 51,63.

¹⁰³² Tavakoli (n 70).

¹⁰³³ Siller, ‘The Prosecution of Human Traffickers? A Comparative Analysis of Enslavement Judgments Among International Courts and Tribunals’ (n 562) 237.

¹⁰³⁴ See Ryszard Piotrowicz, ‘The Legal Nature of Trafficking in Human Beings’ (n 709) 176, 183.

¹⁰³⁵ Siller, ‘The Prosecution of Human Traffickers? A Comparative Analysis of Enslavement Judgments Among International Courts and Tribunals’ (n 562) 237.

international crime.¹⁰³⁶ Serious crimes or ‘core crimes’ such as crimes against humanity are defined under Article 7 of the ICC Statute and do include ‘enslavement’, ‘sexual slavery’, ‘enforced prostitution’ and ‘any other form of sexual violence of comparable gravity’. The nexus between HT and conflict-related sexual violence is not discussed in the thesis other than to assert that the two are deeply intertwined.¹⁰³⁷ This is the case with the situation of the non-state actor Islamic State (ISIS) abducting women in the midst of conflict, holding them captives and subsequently transferring them to different locations in Iraq and Syria.¹⁰³⁸ Many of them were sold to ISIS fighters and were victims of systematic rape, other sexual abuses as well as forced marriages.¹⁰³⁹ ISIS was therefore involved with HT gaining revenue from this practice.¹⁰⁴⁰

The characterisation of HT as an international crime and specifically placing human trafficking in the category of crime against humanity could enhance enforcement efforts from national governments in their commitments to prosecute HT.¹⁰⁴¹ However, on *prima facie* HT crime has a transnational dimension as endorsed by the Palermo Protocol and requires cooperation

¹⁰³⁶ Tavakoli (n 70) 78. See also Mohammed Y. Mattar, ‘The International Criminal Court (ICC) Becomes a Reality: When Will the Court Prosecute the First Trafficking in Persons Case?’ (2002) The Protection Project.

¹⁰³⁷ Rossella Pulvirenti and Elena Abrusci ‘Prosecuting Trafficking Crimes for Sexual Exploitation in Times of Conflict: Challenges and Perspective’ (2019) 3 Journal of Trafficking and Human Exploitation 98,99.

¹⁰³⁸ Farah Mahmood, ‘Prosecuting Human Trafficking for the Purpose of Sexual Exploitation under Article 7 of the Rome Statute: Enslavement or Sexual Slavery?’ (2019) 3 Journal of Trafficking and Human Exploitation 35,48.

¹⁰³⁹ Amnesty International, ‘<<https://www.amnesty.org/en/latest/news/2014/12/iraq-yezidi-women-and-girls-face-harrowing-sexual-violence/>> accessed 17 May 2020.

¹⁰⁴⁰ Nadia Al-Dayel, Andrew Mumford & Kevin Bales, ‘Not Yet Dead: The Establishment and Regulation of Slavery by the Islamic State’ (2020) Studies in Conflict & Terrorism 5.

¹⁰⁴¹ Christen Price, ‘The Proposed Convention on Crimes Against Humanity and Human Trafficking’ in Morten Bergsmo and SONG Tianying (eds) (Torkel Opsahl Academic EPublisher, 2014) 272.

between States to combat it ¹⁰⁴² as well as imposing the primarily the duty to prosecute traffickers domestically.¹⁰⁴³

In view of both the complexity to legally categorise HT¹⁰⁴⁴ and the legal gap regarding its international codification, more precisely to determine the legal status of HT *per se* in international law, HT's legal nature is therefore examined. This examination is done in the perspective for this crime to be prosecuted before international criminal jurisdictions and particularly in the light of increasing conflict affected contexts. It is however important to emphasise that not all HT crimes can reach the scale to amount to crimes against humanity.

This section of chapter 6 focuses therefore on analysing the required or key elements for HT to be considered as a 'core crime' This is bearing in mind the concern of scholars ongoing discussion 'whether the commission of trafficking in persons could ever meet the *chapeau* elements of crimes against humanity'.¹⁰⁴⁵

Firstly, the examination of the interconnection of HT with other core crimes is exemplified at an early stage with the crime of enslavement, by the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery in relation to the Japanese military activities during world war II. The Tribunal qualified the enslavement of Japanese women as war crimes and crimes against

¹⁰⁴² Pulvirenti and Abrusci (n 1038) 108.

¹⁰⁴³ Siller, 'The Prosecution of Human Traffickers? A Comparative Analysis of Enslavement Judgments Among International Courts and Tribunals' (n 562) 237.

¹⁰⁴⁴ Wilt (n 7) 299. See Bassiouni, Rothenberg, Higonnet, Farenga and Invictus, 'Addressing International Human Trafficking in Women and Children for Commercial Sexual Exploitation in the 21st century' (n 209) 421,426. See also Alice Edwards, 'Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor' (2007) 36(1) Denver Journal of International Law and Policy 9,10,11.

¹⁰⁴⁵ Nicole Siller, "Modern Slavery' Does International Law Distinguish between Slavery, Enslavement and Trafficking?' (n 31) 414.

humanity.¹⁰⁴⁶ In its judgment, the Tribunal did not define what constitutes enslavement, but exactions revealed practices and methods assimilated to trafficking *as per* the Palermo Protocol legal definition.¹⁰⁴⁷

At a later stage, this interconnection becomes normed on the basis that HT is explicitly referred to in the Rome Statute's codification of the ICC under Article 7(2)(c) for the crime of enslavement.¹⁰⁴⁸ The ICC Statute describes the crime against humanity of 'enslavement' to mean:

'the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children'.¹⁰⁴⁹

HT is also referred to in footnote 11 to the first element of enslavement in the Elements of Crimes to the Rome Statute.¹⁰⁵⁰ Additionally, HT is referenced in footnote 18 to the first element of sexual slavery in the Elements of Crimes although not mentioned in the text related to the elements of sexual slavery in the Rome Statute.¹⁰⁵¹ This cross-referencing suggests that HT has an intertwined relationship with both the crimes of enslavement and sexual slavery as enslavement of women and children often occurs through trafficking of a sexual nature.¹⁰⁵² More broadly, international criminal law institutions recognise

¹⁰⁴⁶ Article 2 of the Charter of The Women's International War Crimes Tribunal on Japan's Military Sexual Slavery (Incorporating Modifications Agreed upon During the Hague Meeting, 26-27 October 2000).

¹⁰⁴⁷ The Women's International War Crimes Tribunal, Judgment of 4 December 2001 (PT-2000-1-T) paras. 601- 142.

¹⁰⁴⁸ Corrie (n 31) 286. See also Atak and Simeon (n 7) 1020. Wilt (n 7) 305.

¹⁰⁴⁹ Article 7 1 (a) of the Rome Statute (n 582). Art. 7(2)(c), UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), July 17, 1998,

¹⁰⁵⁰ Elements of Crimes, Article 7(1)(c) (1) of the Rome Statute, footnote 11.

¹⁰⁵¹ Elements of Crimes, Article 7 (1) (g)-2 (1) of the Rome Statute, footnote 18.

¹⁰⁵² Valerie Oosterveld, 'Sexual Slavery and the International Criminal Court: Advancing International Law' (2004) 25 Michigan Journal of International Law 605,634.

that 'sexual slavery is a more specific form of enslavement, essentially, enslavement of a sexual nature'.¹⁰⁵³

However, the inclusion of trafficking in persons, in particular women and children' referring to the elements of the crimes of enslavement continue to bring some confusion. In this regard, there is a temporal discrepancy as the Rome statute was adopted prior to the Palermo Protocol and the meaning of trafficking at the time could not be understood in the light of the 2000 Palermo Protocol.¹⁰⁵⁴

Chapter 4 noted that enslavement incorporates substantively the definition of the crime of slavery¹⁰⁵⁵ which is also a core component of the HT legal definition. In addition, the Trial Chamber of the ICTY in the *Kunarac* case discusses trafficking of human beings in its legal analysis of enslavement practices.¹⁰⁵⁶ The Trial Chamber used the HT component as constituting one of the indicia elements¹⁰⁵⁷ in order to assess evidence of enslavement.¹⁰⁵⁸ This jurisprudential stand highlights the broadening of the concept of enslavement which contributes to the blurring of the boundaries of the crimes of trafficking and enslavement.¹⁰⁵⁹ Even if HT is not an enumerated crime under the ICTY, ICTR, SCSL or ECCC Statutes, the jurisprudence of the Special Court of Sierra

¹⁰⁵³ Siller, *Trafficking in Persons under International Law and its Incorporation within Enslavement as a Crime against Humanity* (n 536) 249.

¹⁰⁵⁴ Stoyanova (n 20) 228.

¹⁰⁵⁵ Article 7 of the 1956 Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. See also Preamble para.4 of the 2012 Bellagio-Harvard Guidelines on the Legal Parameters of Slavery.

¹⁰⁵⁶ *Prosecutor v. Kunarac, Kovač and Vuković* (n 364).

¹⁰⁵⁷ In other words: elements of exploitation constituting enslavement: Harmen van der Wilt, 'Trafficking of Human Beings, Enslavement, Crimes against Humanity: Unravelling the Concepts' (n 7) 304. *Prosecutor v. Kunarac, Kovač and Vuković Case* (n 364) para 542.

¹⁰⁵⁸ *Prosecutor v. Kunarac, Kovač and Vuković case* (n 364) para.542.

¹⁰⁵⁹ Wilt (n 7) 305. Nicole Siller, 'The Prosecution of Human Traffickers? A Comparative Analysis of Enslavement Judgments Among International Courts and Tribunals' (n 562) 260.

Leone and of the Extraordinary Chambers in the Courts of Cambodia for instance have since relied upon these 'indicia' enumerated in the *Kunarac* case in order to establish the occurrence of the crime of enslavement.¹⁰⁶⁰ This is also illustrated by the *Taylor* judgement of the SCSL referring to the conduct of enslavement and sexual crimes committed by Liberian fighters under the control of Charles Taylor. In complement, the *Taylor* judgment footnote 1035 describes that such conduct includes trafficking in persons, in particular women and children, based on the elements of crimes of the Rome Statute.¹⁰⁶¹

However, this interconnection does not mean that the crime of HT *per se* qualifies as a crime against humanity and is *de jure* eligible before the ICC or other international criminal tribunals.¹⁰⁶² In this regard, there are legal constraints for the ICC to prosecute HT requiring the proof of 'widespread or systematic attack directed against any civilian population, with knowledge of the attack'.¹⁰⁶³

Analysis of contextual elements

First of all, the qualification of crimes against humanity does not require a context of an armed conflict or does not need to constitute a military attack.¹⁰⁶⁴

¹⁰⁶⁰ Nicole Siller, 'The Prosecution of Human Traffickers? A Comparative Analysis of Enslavement Judgments Among International Courts and Tribunals' (n 562) 258.

¹⁰⁶¹ Rome Statute of the International Criminal Court, Elements of Crimes, Article 8(2)(b)(xxii) para.420 in the *Prosecutor v. Charles Ghankay Taylor*, 'Trial Judgment', SCSL-03-1-T, of 26 April 2012.

¹⁰⁶² Harmen van der Wilt 'Trafficking in Human Beings: A Modern Form of Slavery or a Transnational Crime?' (n 67). Wilt (n 7) 305, 306.

¹⁰⁶³ Article 7(1) Crimes against humanity of the Rome Statute (n 582).

¹⁰⁶⁴ Elements of Crimes Introduction to crimes against humanity, para. 3. See also Article 3(2) of the Draft on the Prevention and punishment of crimes against humanity (15 May 2019) A/CN.4/L.935. Elements of Crimes to the International Criminal Court, ICC-ASP/1/3 (part II-B) UN Doc PCNICC/2000/1/Add.2 (2000) Art.7(3).

Turning to the examination of key elements for HT to qualify as a core crime entails that committed HT acts would need to satisfy the *chapeau* contextual elements required for crimes against humanity under Article 7(2)(a) of the Rome Statute.¹⁰⁶⁵ In particular, such acts must have been committed pursuant to a State or organisational policy and have occurred in the context of an ‘attack’ on the civilian population.¹⁰⁶⁶

With regard to the ‘attack directed against any civilian population’, Article 7(2)(a) elaborates on its requirement and characteristics as ‘a course of conduct involving the multiple commission of acts referred to in paragraph 1. The attack does not need to be conducted against an entire population of a country or a region but against individuals who form part of a civilian population.’¹⁰⁶⁷

The requirement of ‘multiple commission’ seems to set a quantitative threshold. In this regard the jurisprudence such as the *Katanga* and the *Bemba* cases require rather the occurrence of more than a single isolated incidents or acts as referred to in article 7(1).¹⁰⁶⁸ In the characteristics of HT, it may reasonably be argued that the magnitude of HT is based only on estimates but highlights that this conduct can be carried on a large scale in some instance and worldwide.¹⁰⁶⁹ However, there has to be a nexus between the acts of the perpetrator and the attack required from the *chapeau* element.¹⁰⁷⁰ For instance, HT for the purpose

¹⁰⁶⁵ Nicole Siller, ‘The Prosecution of Human Traffickers? A Comparative Analysis of Enslavement Judgments Among International Courts and Tribunals’ (n 562) 238.

¹⁰⁶⁶ Article 7(1) of the Rome Statute of the International Criminal Court (n 582).

¹⁰⁶⁷ Joshua Aston, *Trafficking of women and children: Article 7 of the Rome Statute* (1st ed., Oxford University Press 2016) 181.

¹⁰⁶⁸ *The Prosecutor v. Germain Katanga* Judgment ICC-01/04-01/07 of 7 March 2014, para. 1101 p.416. See also *The Prosecutor v. Jean-Pierre Bemba Gombo* Judgment ICC-01/05-01/08 of 15 June 2009 para.1 p.2.

¹⁰⁶⁹ Joshua Aston, *Trafficking of women and children: Article 7 of the Rome Statute* (n 1067) 15.

¹⁰⁷⁰ Siller, *Trafficking in Persons under International Law and its Incorporation within Enslavement as a Crime against Humanity* (n 531) 202.

of sexual slavery often involves a chain of individuals from different areas.¹⁰⁷¹ This is exemplified by the acts of HT for the purpose of sexual slavery committed by ISIS that are connected for the common purpose of financing and strengthening their power.¹⁰⁷² Hence, the acts in questions can be described as affiliated and committed as part of the same ‘widespread or systematic attack’.¹⁰⁷³

‘Widespread or systematic’

According to the doctrinal reading of Article 7 (2), the attack must constitute either one of the alternative requirements of widespread or systematic. In the *Akayesu* jurisprudence of the ICTR, ‘widespread’ is defined as a ‘massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims’.¹⁰⁷⁴ Whilst ‘systematic’ refers to be ‘thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources’.¹⁰⁷⁵ In the *Kenyan* decision, “systematic” refers to the “organised nature of the acts of violence and the improbability of their random occurrence”.¹⁰⁷⁶

The concept of systematic is variably characterised as provided by the *Blaškić* ICTY jurisprudence which reiterates from *Kunarac* jurisprudence that a single or limited number of acts on his or her part would qualify as a crime against

¹⁰⁷¹ Oosterveld (n 1053) 637.

¹⁰⁷² Susan Hutchinson, ‘Financing Da’esh with Sexual Slavery: A Case Study in Not Gendering Conflict Analysis and Intervention’ (2020) 5(2) *Journal of Global Security Studies* 379,380. See Al-Dayel, Mumford & Bales (n 1041) 5,7. See also UNAMI/OHCHR Report on the Protection of Civilians in the Armed Conflict in Iraq (1 May – 31 October 2015) 18.

¹⁰⁷³ Siller, *Trafficking in Persons under International Law and its Incorporation within Enslavement as a Crime against Humanity* (n 531) 202.

¹⁰⁷⁴ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, para.580.

¹⁰⁷⁵ *ibid* para.580.

¹⁰⁷⁶ *Situation in the Republic of Kenya* (Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19, PTC II, 31 March 2010, para.96.

humanity, unless those acts may be said to be isolated or random.¹⁰⁷⁷ This argumentation is subsequently followed in other ICTY judgments as detailed in the *Kordić and Čerkez* case. The Trial Chamber in the *Kordić and Čerkez* case accepts that ‘a single isolated act by a perpetrator, if linked to a widespread or systematic attack, could constitute a crime against humanity’.¹⁰⁷⁸ This judgment clarifies this requirement referring to other elements such as ‘the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another’.¹⁰⁷⁹ Another variable of the ‘systematic’ criteria relates to the *Al-Bashir* jurisprudence which defines systematic attack in the Darfur region lasting ‘for well over five years and the acts of violence of which it was comprised followed, to a considerable extent, a similar pattern’.¹⁰⁸⁰

Some international jurisprudence highlight nevertheless that ‘in practice, these two criteria will often be difficult to separate since a widespread attack targeting a large number of victims generally relies on some form of planning or organisation’.¹⁰⁸¹ *Bagilishema* ICTR Trial Chamber corroborates the *Blaskić* ICTY judgment in ‘that the criteria by which one or the other aspect of the attack is established partially overlap’.¹⁰⁸²

¹⁰⁷⁷ *Prosecutor v. Tihomir Blaskić* (Trial Judgement) IT-95-14-T (3 March 2000) paras. 798.

¹⁰⁷⁸ *Prosecutor v. Dario Kordić, Mario Cerkez* (Appeal Judgement) IT-95-14/2-A (17 December 2004) para.94.

¹⁰⁷⁹ *Prosecutor v. Dario Kordić, Mario Cerkez* (Trial Judgement) IT-95-14/2-T (28 February 2001) para.179.

¹⁰⁸⁰ *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Pre-Trial Chamber, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09 (4 March 2009) para.85.

¹⁰⁸¹ *Prosecutor v. Tihomir Blaskić* (Trial Judgement) IT-95-14-T (3 March 2000) para. 207.

¹⁰⁸² International Criminal Tribunal for Rwanda (ICTR). *The Prosecutor v. Ignace Bagilishema* (Trial Judgement) ICTR-95-1A-T (7 June 2001) para.77.

HT in certain contexts can possibly qualify as systematic and widespread in view of some highly organised networks which suggest that traffickers have also in place a planned structure resulting in a wide scale criminal business connecting a number of States. In this regard, the acquisition of victims can be performed according to a plan for the purpose of subjecting those persons into sexual (sexual slavery, forced marriage) or forced labour exploitation.¹⁰⁸³

‘State or organizational policy’

In addition to the necessary threshold examined for HT to be addressed by the mechanisms of the ICC also adopted by the SCSL Statute¹⁰⁸⁴, the Law on ECCC¹⁰⁸⁵, the ICTR Statute,¹⁰⁸⁶ that acts of HT through the crime of enslavement, are part of a ‘widespread or systematic attack directed against any civilian population with the perpetrator’s knowledge of the attack’.¹⁰⁸⁷ In many instances, this may reflect state policy and entails furthermore, a certain degree of ‘organisational policy’¹⁰⁸⁸ perpetrated by a State or its agents.

This requirement has been widely addressed by academics who highlight that the evidence *stricto sensu* of the State or organisational policy threshold appears to be one of the most challenging elements to satisfy as often HT crime

¹⁰⁸³ Siller, *Trafficking in Persons under International Law and its Incorporation within Enslavement as a Crime against Humanity* (n 531) 312.

¹⁰⁸⁴ Article 2 c, Statute of the Special Court for Sierra Leone (‘SCSL’), signed on 16 January 2002.

¹⁰⁸⁵ Article 5, Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (n 985).

¹⁰⁸⁶ Article 3 (c), Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (‘ICTR’), adopted on 8 November 1994, as amended on 14 August 2002.

¹⁰⁸⁷ Article 7 (1) of the Rome Statute of the International Criminal Court (n 586).

¹⁰⁸⁸ Article 7(2) of the Rome Statute (n 586).

is perpetrated by non-state actors.¹⁰⁸⁹ These may be referred as armed groups, organised criminal groups¹⁰⁹⁰ or 'private' actors. With regard to the latter, the international qualification of HT crime would be unable to satisfy the *chapeau* elements required by the Rome Statute, as the circumstances of these acts are committed by private individuals for personal purposes and private gain.¹⁰⁹¹ In addition, some scholars mention that:

*'the vast majority of criminal organizations that engage in HT would by no means meet the threshold. They would simply lack the resources, power and institutional features to carry out large scale attacks on the civilian population.'*¹⁰⁹²

However, non-state actors can present a wider and more structured system such as organised criminal groups or armed groups. In some instances, the later entities may exercise control over a territory and over people in a similar way to that of State actors. The jurisprudence of *Tadic* indicates that crimes against humanity can be committed by an entity in a *de facto* or effective control of an area which enable for the prosecution of criminal networks and organisations affiliated or not with the State. This was evidenced in the *Limat* jurisprudence as the Kosovo Liberation Army (KLA) had *de facto* control over parts of Kosovo.¹⁰⁹³

¹⁰⁸⁹ Lorna Mac Gregor, 'Applying the Definition of Torture to the Acts of Non-State Actors: The Case of Trafficking in Human Beings' (2014) 36 (1) Human Rights Quarterly 210,213.

¹⁰⁹⁰ Nicole Siller, 'The Prosecution of Human Traffickers? A Comparative Analysis of Enslavement Judgments Among International Courts and Tribunals' (n 562) 243.

¹⁰⁹¹ Antonio Cassese, *International Criminal Law* (Oxford University Press, 2008) 54. See also Nicole Siller, *Trafficking in Persons under International Law, and its Incorporation within Enslavement as a Crime against Humanity* (n 531) 208.

¹⁰⁹² Wilt (n 7) para 21, p.307.

¹⁰⁹³ *Prosecutor v. Limaj et al.* (Trial Judgment) IT-03-66-T (30 November 2005) para 214.

These entities evidence therefore an underlying organisational policy.¹⁰⁹⁴ This is particularly the case in conflict settings of hostilities between a State and an armed group or during hostilities between two States. A case in point concerns ISIS. Its 'imperial ambitions show an organization determined to impose its will as a new major player in the region and as a *de facto* state as well'.¹⁰⁹⁵ Furthermore, the 'systemic cultural cleansing' of the Yazidi minority,¹⁰⁹⁶ the systematic and methodical process of enslavement through the transfer and sexual abuse of captured Yazidi women and girls in the Sinjar region of northern Iraq,¹⁰⁹⁷ reflect the high level planning of ISIS in the institutionalisation of a sex slave trade and its spread through the transfers of victims throughout the region, in Turkey as well as in the Gulf Arab States.¹⁰⁹⁸ In this regard, the Independent International Commission of Inquiry on the Syrian Arab Republic reports that: 'the forced displacement and sale of women and girls amount to human trafficking'.¹⁰⁹⁹ Other reports from human rights organisations, media, confirmed that ISIS regulated a whole bureaucracy of sex slavery, publishing pamphlets mentioning prize for the sale of women and the sales contracts were registered in its Islamic courts.¹¹⁰⁰

¹⁰⁹⁴ Cherif M. Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press, 2011) 47.

¹⁰⁹⁵ Fawaz, A. Gerges, 'Introduction: Down the Rabbit Hole and into the History of ISIS' in *ISIS: A History*, (Princeton, Oxford: Princeton University Press, 2016) 4.

¹⁰⁹⁶ *ibid* 31.

¹⁰⁹⁷ Al-Dayel, Mumford & Bales (n 1041) 13.

¹⁰⁹⁸ Samar El-Masri, 'Prosecuting ISIS for the sexual slavery of the Yazidi women and girls' (2018) 22(8) *The International Journal of Human Rights* 1047,1058.

¹⁰⁹⁹ Independent International Commission of Inquiry on the Syrian Arab Republic, "They Came to Destroy": ISIS Crimes Against the Yazidis'. Human Rights Council (15 June 2016) UN Doc A/HRC/32/CRP.2, para 174, p.32.

¹¹⁰⁰ Fawaz, A. Gerges, 'The World According to ISIS' in *ISIS: A History*, (Princeton, Oxford: Princeton University Press, 2016) 31.

The ICC has nevertheless not determined the precise content of the ‘organisation’¹¹⁰¹ and ‘policy’ qualifications.¹¹⁰² This raises the related complex issue of the nature and status of non-state armed groups:

*‘Non-state armed groups are no longer clearly defined entities with distinct political and security agendas similar to those in the late 20th century. Rather, they often operate in the vacuum left by increasingly fragile States, composed of varying combinations of formal and informal armed elements animated by a mixture of motives, including control over natural resources, conduct of criminal activities, and predatory intentions towards the local population’.*¹¹⁰³

The prosecutions at the ICC following post-election violence in 2007¹¹⁰⁴ conducted by non-state armed groups in Kenya highlight that the legal issue of what constitutes organisation and organizational policy was splitting the Pre-Trial Chamber in the examination of the *Kenya* case. Dissenting opinions were expressed adopting for some, a more restrictive interpretation of organisations with characteristics such as: ‘established for a common purpose, over a prolonged period of time’,¹¹⁰⁵ some defining more broadly organisational as to mean a ‘coordinated course of action — of an individual or an aggregate

¹¹⁰¹ United Nations Security Council, *The International Commission of Inquiry on the Central African Republic— Final Report* (22 December 2014) S/ 2014/ 928, para 7.

¹¹⁰² Corrie (n 31) 292.

¹¹⁰³ ICRC, ICRC Strategy 2015–2018 (ICRC 2014) 5.

¹¹⁰⁴ This resulted in the killings of 1100 persons, of 3500 persons injured and the displacement of approximately 350,000 persons: Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law* (Oxford University Press, 2018) 1.

¹¹⁰⁵ Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Situation in the Republic of Kenya (ICC-01/09-19), Pre-Trial Chamber, 31 March 2010, (hereinafter ‘Kenya Decision Pursuant to Article 15’). See Diss. Op. Kaul, J., para. 18 (Mar. 31, 2010). Corrie (n 31) 293.

entity'.¹¹⁰⁶ Other opinions in the *Gbagbo* case do not wish to commit to a specific interpretation of the notion of organisation.¹¹⁰⁷ An example of the variable domestic interpretation of this constitutive element is provided by the French penal code which requires 'a concerted plan' to prove criminal responsibility for crimes against humanity, as opposed to a 'State or organizational policy'.¹¹⁰⁸

The various positions reflect a remaining lack of clarity regarding the interpretation and the scope of the 'state or organizational policy'.¹¹⁰⁹ However, it seems that there is a need to assess the situation on a case by case basis, correlated with the fact that non-state entities have variably different degrees of obligations or personality, organisations and structures.¹¹¹⁰ This is illustrated by the situation in Syria with the Free Syrian Army (FSA) including Al-Qaida and other religious extremists.¹¹¹¹ Another example in Central African Republic considers the Séléka and the anti-Balaka armed groups.¹¹¹²

'Knowledge of the attack'

Lastly, the examination of another core crime' constitutive element relates to the *mens rea* or the 'knowledge of the attack'. The level of intent required is

¹¹⁰⁶ ICC, *Prosecutor v Ruto & Sang* (Decision on Defence Applications for Judgments of Acquittal) Reasons of Judge Eboe-Osuji, para 11.

¹¹⁰⁷ ICC, *Prosecutor v Gbagbo* (Decision on the Confirmation of the Charges of the Prosecutor Against Laurent Gbagbo) ICC-02/11-01/11, PTC I (12 June 2014) para.217.

¹¹⁰⁸ Article 212-1 of the French Penal Code.

¹¹⁰⁹ William A. Schabas, 'State Policy as an Element of International Crimes' (2008) 98 (3) *Journal of Criminal Law & Criminology* 953,972. See also Siller, 'The Prosecution of Human Traffickers? A Comparative Analysis of Enslavement Judgments Among International Courts and Tribunals' (n 562) 243.

¹¹¹⁰ Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law* (Oxford University Press, 2018) 13.

¹¹¹¹ Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (22 February 2012) UN Doc A/ HRC/19/ 69, paras 13, 21.

¹¹¹² United Nations Security Council, The International Commission of Inquiry on the Central African Republic— Final Report, 22 December 2014, S/ 2014/ 928, para 93.

important when imputing criminal liability to traffickers. However, this may not be easy to prove as trafficking implies a chain of events. To this end, the various perpetrators may not be the same throughout the whole trafficking process and may not have the full knowledge of the extent of the crime.

As guidance, Article 7(1) of the Rome Statute precludes that the perpetrator has the knowledge of the attack or knew or was aware of the context in which the crime takes place. Hence, that the conduct was part of the widespread and systematic attack directed against a civilian population.¹¹¹³ However, the ICTY in its *Furundzija* and *Blaskic* jurisprudence follows that:

*‘the author must have known that his conduct would assist the principal in the commission of the offence...It is not necessary that he knew the precise crime that was intended and which in the event was committed.’*¹¹¹⁴

After reviewing the *chapeau* elements of enslavement as a crime against humanity, some conducts of trafficking and particularly in conflict contexts as examined, may fit the material elements constituting enslavement and be raised as crimes to the level of international concern. However, a majority of trafficking cases would not be able to meet the threshold required for the crime against humanity as many occur for the purpose of profit not reflecting an ‘organizational policy’. The recourse to international criminal justice mechanism would be therefore of ‘little use as a means by which to combat the

¹¹¹³ *Prosecutor v. Omar Hassan Ahmad Al Bashir* (Pre-Trial Chamber, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09 (4 March 2009), para.87.

¹¹¹⁴ *Prosecutor v. Tihomir Blaskic* (Trial Judgement), IT-95-14-T (3 March 2000) para.272, p.92,93. *Prosecutor v. Anto Furundzija* (Trial Judgement), IT-95-17/1-T (10 December 1998) para.246, p.94.

overwhelming majority of trafficking cases'.¹¹¹⁵ In these instances, prosecution of such trafficking crimes should be dealt with by domestic criminal justice mechanisms. This is verified in the case of Palestine, as current reported HT incidents would not reach the necessary threshold to be of consideration to the ICC. In addition, HT incidents would primarily be investigated and prosecuted at a domestic level. Secondly, the ICC would need to gather both quantitative and qualitative considerations, relating to the scale, nature, manner of commission and impact of the HT crimes in question in order to identify HT practices as a threat to peace and security, stressing their prevalence in areas affected by conflict.

6.2.2 The limits of international criminal justice with addressing HT as a serious crime

There is, to date no HT prosecution brought before the ICC despite evidence of this crime in some of the States under investigation.¹¹¹⁶ This reflects not only some practical limitations but also the lengthy process the international mechanism is facing. There are a number of challenges whilst proceeding to *in situ* investigations such as the need to obtain States cooperation, ensuring the protection of Court staff during ICC investigations of crime scenes especially in conflict zones,¹¹¹⁷ the protection of witnesses as well as any person interviewed

¹¹¹⁵ Tavakoli, 'A Crime that Offends the Conscience of Humanity: A Proposal to Reclassify Trafficking in Women as an International Crime' (n 70) 81.

¹¹¹⁶ Rossella Pulvirenti and Elena Abrusci 'Prosecuting Trafficking Crimes for Sexual Exploitation in Times of Conflict: Challenges and Perspective' (2019) 3 Journal of Trafficking and Human Exploitation 97, 117.

¹¹¹⁷ Human Rights Center School of Law, 'Beyond Reasonable Doubt, using Scientific Evidence to Advance Prosecution at the International Criminal Court (2012) Report Workshop Berkeley University 4.

or be seen to cooperate with the investigation.¹¹¹⁸ Moreover, there are often limited availability and reliability of sources of evidence. The latter suggest challenges in the collection of victim-witness as well as the linkage of evidence especially with regard to victims and children of sexual violence.¹¹¹⁹

In addition to the above material elements examined to satisfy the qualification of crime against humanity, other considerations that may limit the admissibility of HT crimes before the ICC relate to the principle of complementarity. In particular, whether the situation under scrutiny is primarily being investigated and prosecuted at a domestic level.¹¹²⁰ This is unlike the *ad hoc* tribunals which have primacy over national courts.¹¹²¹ The other consideration regards the assessment of the gravity of the crime that justifies further intervention of the Court based on Article 17(1)(d).¹¹²² This assessment includes both quantitative and qualitative considerations, relating to the scale, nature, manner of commission and impact of the crimes in question.¹¹²³

Lastly, another legal constraint to prosecute HT before the international court relates to the territorial limitation of the ICC jurisdiction to States parties on which the conduct in question occur.¹¹²⁴ This requirement limits the possibility

¹¹¹⁸ Comrie, 'At the Crossroads: Evidential Challenges in the Investigation and Prosecution of Trafficking in Persons for Sexual Exploitation and Sexual Violence in Situations of Conflict' (n 359) 132.

¹¹¹⁹ *ibid* 121,141.

¹¹²⁰ David Tolbert and Laura A. Smith, 'Complementarity and the Investigation and Prosecution of Slavery Crimes (2016) 14 Journal of International Criminal Justice 429,431,432.

¹¹²¹ Art. 9 of the ICTY Statute and Article 8 of the ICTR Statute. See also Bartram S. Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals' (1998) 23 The Yale Journal of International Law 385.

¹¹²² ICC, Policy Paper on Preliminary Examinations (2013) 3.

¹¹²³ Office of the Prosecutor (OTP), 'Policy Paper on Case Selection and Prioritisation' (2016) para.32, p.12.

¹¹²⁴ Article 12 2 (a) of the Rome Statute (n 586). See also the discussion on the 'constructive conduct theory' in relations to the ICC's territorial jurisdiction, enabling an extensive interpretation of the term 'conduct' and its continuing link with the commission of the crime

of international prosecution with regard for instance to the accountability for ISIS crimes against Yazidis as neither Syria nor Iraq are contracting parties to the Rome Statute.¹¹²⁵ In some instances, the territorial limitation can be overruled by the referrals of any State's party to the ICC or by referrals from the UNSC to the ICC, of situations for investigation concerning crimes committed anywhere and by anyone, acting pursuant to its powers under Chapter VII of the UN Charter.¹¹²⁶

However, this mechanism has only been used twice. The first referral was related to the situation in Darfur based on the Resolution 1593 (2005), authorising the ICC to exercise its jurisdiction over crimes such as genocide listed in the Rome Statute committed on the territory of Darfur or by its nationals from 1 July 2002 onwards.¹¹²⁷ The second referral concerned Libya based on the UNSC Resolution 1970 in February 2011. More than nine years following this second referral, the Office of the Prosecutor releases the nineteenth report on its investigations in Libya and 'continues to collect and analyse evidence of grave crimes against migrants' which are related to HT and to assess whether the 'necessary evidentiary and legal requirements are satisfied with a view to potentially bringing a case before the ICC'.¹¹²⁸

< <https://www.ejiltalk.org/article-122a-rome-statute-the-missing-piece-of-the-jurisdictional-puzzle/>> accessed 21 November 2019.

¹¹²⁵ Independent International Commission of Inquiry on the Syrian Arab Republic, "They Came to Destroy": ISIS Crimes Against the Yazidis' (15 June 2016) UN Doc A/HRC/32/CRP.2, para.196, p.36.

¹¹²⁶ Article 13(b) of the Rome Statute (n 586). Catherine Gegout, 'The International Criminal Court: limits, potential and conditions for the promotion of justice and peace' (2013) 34(5) Third World Quarterly 800, 806, 807.

¹¹²⁷ UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593.

¹¹²⁸ Office of the Prosecutor, 'Nineteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970 (2011) paras 30,31.

The UNSC was involved for the first time in 2015 with HT recognising such practices as a threat to peace and security, stressing their prevalence in areas affected by conflict.¹¹²⁹ However, it appears challenging for the Security Council to qualify a situation in which HT crimes on their own constitute a legitimate threat to international peace and security and are accordingly eligible for referral to the ICC. Hence, it may be a stretch to propose that conditions of exploitation through acts of trafficking can be present at the same level cited above with Darfur' genocide and Libya' 'serious and widespread crimes with systematic violations',¹¹³⁰ threat to international peace and security. These acts would therefore have to be intertwined with conflict-related trafficking for the purpose of sexual exploitation and conflict-related sexual violence. In this regard, other referrals could also extend to conflict contexts such as the Lake Chad Basin with Boko Haram, Iraq and Syria as examined earlier, with the Islamic State fighters involved in trafficking and enslaving women from the Christian Yazidi minority.¹¹³¹

In recent years, despite international initiatives from international tribunals and mostly through the ICC referral mechanisms to address atrocity crimes including HT, international criminal justice is faced with the challenge of efficiency as well as credibility.¹¹³² The success of the ICC to promote and

¹¹²⁹ UNSC S/RES/2388 (2017) of 21 November 2017 (n 128) 3.

¹¹³⁰ 'International Criminal Court may investigate migrant-related crimes in Libya' (8 May 2017) <<https://refugeesmigrants.un.org/fr/node/100043287>> accessed 21 April 2018.

Statement by the Prosecutor of the International Criminal Court, Fatou Bensouda (8 May 2017) <http://www.un.org/apps/news/story.asp?NewsID=56712#.WniLZKhl_IU>

accessed 5 February 2018. See also 'Statement of ICC Prosecutor to the UNSC on the Situation in Libya' (9 May 2017) <<https://www.icc-cpi.int/Pages/item.aspx?name=170509-otp-stat-lib>> accessed 5 February 2018. See also, the Report of the Secretary-General on the United Nations Support Mission in Libya (22 August 2017) UN Doc S/2017/726, p.6.

¹¹³¹ <<https://www.theguardian.com/world/2017/jul/25/slaves-of-isis-the-long-walk-of-the-yazidi-women>> accessed 30th December 2017.

¹¹³² International Bar Association Human Rights Institute Report, 'Enhancing efficiency and effectiveness of ICC proceedings: a work in progress' (2011) 16. See also the ICC, 'Third

enforce both international values and mechanisms to deal with violations of human rights relies on effective cooperation¹¹³³ and the goodwill¹¹³⁴ or political will of States to contribute to these prosecutorial tasks. In this regard, it is observed that there is little support in the fight against serious crimes which includes crimes of sexual violence and HT. Hence, one of the limits to the effectiveness and delivery of international criminal justice is linked to the political reluctance¹¹³⁵ from some States to cooperate with the Court.¹¹³⁶ A case in point relates to the reluctance of the Sudan government as well as other governments to cooperate following the warrant arrest against the former Sudan president, Omar Al-Bashir on account of crimes against humanity, genocide and sexual slavery committed during the Darfur conflict.¹¹³⁷

However, with regard to the prosecutorial tasks of the ICC and its complementary function, 'the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success'.¹¹³⁸ Nevertheless, this level of prosecution can be

Court's report on the development of performance indicators for the International Criminal Court' (2017).

¹¹³³ Article 86 of the Rome Statute (n 586). Reluctance on cooperation can be manifested as expressed by Leila Nadya Sadat and S. Richard Carden, 'The New International Criminal Court: An Uneasy Revolution' (2000) 88(3) Georgetown Law Journal 381,444.

¹¹³⁴ Jenia Iontcheva, Nationalizing International Criminal Law: The International Criminal Court as a Roving Mixed Court' (2004) University of Chicago Public Law & Legal Theory Working Paper No. 52, 14.

¹¹³⁵ Iontcheva (n 1134) 14,15. See also Statement by Cherif Bassiouni, "Quite Doubtful" International Criminal Court Will Succeed — The Failures, Challenges, and Future of International Criminal Law' (2010)

<http://www.insidejustice.com/intl/2010/03/31/cherif_bassiouni_international_criminal/> accessed 9 January 2018. See also El-Masri (n 1098) 1059.

¹¹³⁶ South Africa, Jordan, Uganda, the Republic of Chad. Prosecutor Statement to the International Criminal Court to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005) (12 December 2017) < <https://www.icc-cpi.int/Pages/item.aspx?name=171212-otp-stat-UNSC>> accessed 6 January 2018.

¹¹³⁷ Tolbert and Smith (n 1120) 429,433,434.

¹¹³⁸ Statement by Luis Moreno-Ocampo, ICC Office of the Prosecutor, Informal expert paper: 'The principle of complementarity in practice' (16 June 2003).

meaningful especially when criminals have leadership roles. To this end, international justice brings a focus to the symbolic and deterrent effect that the institution may have.

Based on the above observations, the primary responsibility to investigate and prosecute HT remains with States who bear the responsibility to put in place legal safeguards in order to penalise trafficking as well as sexual violence and other related sexual crimes. To illustrate this, the Colombian criminal justice system fails to address illegal armed groups exploiting underage girls and subjecting them to sexual violence.¹¹³⁹ Expectations rely therefore on the ongoing commitment of international civil society organisations to exercise pressure on governments at an international level¹¹⁴⁰ in order to denounce and report on human rights violations including HT. At a domestic level, CSOs can encourage the implementation by States parties of the Rome Statute and its legal provisions¹¹⁴¹ despite the fact that ‘the Statute does not provide for an express obligation to implement its substantive law’.¹¹⁴²

6.3 Conclusion

International criminal law through international judicial mechanisms developed towards individual accountability and to combat impunity of core international crimes. In addition, such construct acts as complement to defective domestic

¹¹³⁹ ABColumbia, ‘Colombia: Women, Conflict-Related Sexual Violence and the Peace Process’ (2013) 1,2.

¹¹⁴⁰ M.Charif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press, 2011) 50.

¹¹⁴¹ Zoe Pearson, ‘Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law’ (2006) 39(2) *Cornell International Law Journal* 243, 276.

¹¹⁴² Kleffner (n 923) 91.

criminal justice systems in situations where States are unable, unwilling to carry out their prosecutorial responsibilities.

HT is a crime that offends humanity. Uncertainty remains as to legally characterise HT *per se* as an international crime. To this end, the section examined whether in some instances HT could reach the *chapeau* contextual elements of crimes against humanity in view of its connection with the crime of enslavement and its nexus with sexual slavery under the Rome Statute of the ICC. Some jurisprudential positions such as the *Kunarac* case subsequently followed by other case law confirm the broadening of the enslavement concept which contributes to the blurring of its boundaries with trafficking. In particular, this would enable the accountability for sexual crimes including HT committed by non-state armed groups presenting a wide and structured organisational system that could meet the threshold required by the Rome Statute. Such is the case for ISIS in its systematic and methodical process of enslavement through the transfer and sexual abuse of captured Yazidi women.

Nevertheless, to date no HT prosecution has been brought before the ICC despite evidence of this crime in some of the States under investigation. This highlights the practical limitations and lengthy process of the international judicial mechanism facing issues of States poor cooperation, difficulties to ensure witness and staff protection, availability, and reliability of sources of evidence. Additional admissibility considerations before the ICC concern the principle of complementarity which gives priority to investigations and prosecutions at a domestic level. This is unlike the *ad hoc* tribunals who have primacy over national courts. The other aspect focuses on the assessment of the gravity of the crime that justifies the intervention of the Court.

A further legal constraint to prosecute HT before the international court relates to the territorial limitation of the ICC jurisdiction to States parties on which the conduct in question occurs. In some instances, this territorial obstacle can be overcome by the referral of any State's party to the ICC or by referrals from the UN Security Council to the ICC under Chapter VII of the UN Charter.

However, these referrals have only been activated twice for Sudan and Libya presenting then a lengthy process of investigation. In view of the latter, this international judicial mechanism does not have the capacity to address the many affected regions where HT and related sexual violence occur.

In sum, the central feature of the ICC is its complementary attribute to defective domestic criminal justice as a back-up mechanism with symbolic and deterring functions which can be meaningful especially when criminals have leadership roles. International criminal justice may somehow be perceived as run by elite institutions impenetrable, geographically, culturally, intellectually and above all too physically remote.

The primary responsibility to investigate and prosecute HT remains with States who bear the responsibility to put in place legal safeguards in order to penalise trafficking as well as sexual violence and other related sexual crimes. Domestic justice mechanisms at a grassroots level are therefore encouraged in order to bring the prosecution process closer to home and victims.

6.4 The contribution of labour law

The examination of the Palermo protocol highlights the 'composite nature of the trafficking phenomenon'. Labour exploitation practices are one constitutive element of the HT legal definition. Labour exploitation with ensuing risks for HT

is 'believed to be one of the fastest growing areas of international criminal activity' and is of increasing international concern.¹¹⁴³ A recent contribution of the labour legal framework that enables identification of exploitative practices is provided by the 2014 Protocol to the 1930 ILO Convention and addresses the implementation gaps of the 1930 Convention. Hence, this framework can provide protection to individuals trapped in some form of moral and physical coercion, such as the practice of domestic servitude, debt bondage.

International Labour law (ILL) also interacts with the other legal regimes examined, such as the human rights law-based approach to HT in view of serious human rights violations affecting victims of trafficking in human beings for the purpose of forced labour. The interaction with IHRL refers to the 1956 Supplementary Convention on the Abolition of Slavery in the ILO 1957 Convention N.105 and 1999 Convention N.182 considering that: 'forced or compulsory labor can lead to conditions similar to Slavery'.¹¹⁴⁴ This echoes as well with IHL norms, in particular Additional Protocol II to the Geneva Convention which declares the prohibition of 'slavery and the slave trade in all their forms at any time and in any place whatsoever'.¹¹⁴⁵ Not addressing the contribution of international labour law in the understanding of an important constituent of the HT definition, and not considering its interaction with the other chosen legal regimes as described above, would leave a legal gap in the

¹¹⁴³ Elżbieta M. Goździak and Kathleen M. Vogel, 'Palermo at 20: A Retrospective and Prospective' (2020) 6(2) *Journal of Human Trafficking* 109, 111.

¹¹⁴⁴ ILO 1957 Convention No.105 concerning the abolition of forced labor, in the Preamble. See also ILO 1999 Convention No. 182 on the Worst Forms of Child Labour, article 3: 'For the purposes of this Convention the term 'the worse forms of child labor' comprises: (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom, and forced or compulsory labor, including forced or compulsory recruitment of children for use in armed conflict'.

¹¹⁴⁵ Article 4(2) (f) of the 1977 Additional Protocol II to the Geneva Convention of 1949 relative to the protection of victims of non-international armed conflicts.

protection of individuals trapped in some form of moral and physical coercion, such as the practice of debt bondage.

6.4.1 Introduction to labour law

The 1930 International Labour Organisation (ILO) Convention is one of the eight 'core' ILO Conventions that defines forced or compulsory labour as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.¹¹⁴⁶

In 1957, the adoption of the 105 ILO Convention prohibits forced labour referring in its Preamble to the 1926 and 1956 Slavery Conventions.¹¹⁴⁷ The emerging legal framework addressing forced labour was inspired at an early stage by the Preamble and Article 5 of the 1926 Slavery Convention.¹¹⁴⁸ In this regard, this marked the 'close historical and institutional relationship' of the concepts of slavery and forced labour¹¹⁴⁹ which currently prevails. The forced labour concept interrelated with slavery found its way for instance in the 1966 International Covenant on Civil and Political Rights¹¹⁵⁰ as well as in the 1950 European Convention on Human Rights.¹¹⁵¹ All these instruments therefore modelled the early definitions of the prohibitions on forced labour and slavery.¹¹⁵²

¹¹⁴⁶ Art. 2.1 the 1930 ILO Convention (n 596).

¹¹⁴⁷ ILO Convention No. 105 Abolition of Forced Labour Convention (n 596).

¹¹⁴⁸ Preamble and Article 5 of the 1926 Slavery Convention (n 580).

¹¹⁴⁹ Lee Swepston, 'Forced and compulsory labour in international human rights law' (2014) International Labour Organization 7.

¹¹⁵⁰ Article 8 of the International Covenant on Civil and Political Rights (n 189).

¹¹⁵¹ Article 4 of the European Convention on Human Rights (n 617).

¹¹⁵² ILO, 'Forced Labour and Human Trafficking - Casebook of Court Decisions' (2009) 9.

Subsequently, the 2014 Protocol to the 1930 Forced Labour Convention¹¹⁵³ was adopted in order to address implementation gaps in the ILO standards. The 2014 Protocol Preamble paid special attention to eliminate HT for the purpose of labour exploitation, to prevention, victim protection, compensation measures. Furthermore, the instrument recognised that the forms and context of forced or compulsory labour have changed.¹¹⁵⁴ The focus evolved therefore towards the private economy sector and towards migrants presenting high risks of being exploited.¹¹⁵⁵ As a complement, the 2016 New York Declaration addresses the issue of forced labour with regard to refugees and migrants in large movements at risk of being trafficked and subjected to forced labour.¹¹⁵⁶

As examined in chapter 4 , prior to the coming into force of the Palermo Protocol in 2000, the early anti-trafficking legal framework focused almost exclusively on prostitution, expanding later, to the broader discourse of sexual exploitation.¹¹⁵⁷ The shift away from the sexual exploitation and morality narratives was then prompted by the Palermo Protocol extending the scope of exploitation to include forced labour and other related practices that are: services, slavery or practices similar to slavery, domestic servitude.¹¹⁵⁸ This evolution reflected the interconnection between HT exploitative practices¹¹⁵⁹ with economic, social,

¹¹⁵³ Donald K. Anton, 'Introductory Note to the Protocol of 2014 to the Forced Labour Convention, 1930 (I.L.O.)' (2014) 53 *International Legal Materials* 1227, 1228.

¹¹⁵⁴ Preamble para.9 of the Protocol (Po29) of 2014 to the 1930 Forced Labour Convention (n 124).

¹¹⁵⁵ Preamble para.9 of the Protocol (Po29) (n 124).

¹¹⁵⁶ The 2016 New York Declaration for Refugees and Migrants (3 October 2016) UNGA A/RES/71/1, para.35.

¹¹⁵⁷ OHCHR, Fact Sheet N.36, 'Human Rights and Human Trafficking' (n 493) 3.

¹¹⁵⁸ Article 3(a) of the Palermo Protocol (n 9) 38. Janie Chuang, 'Beyond a Snapshot: Preventing Human Trafficking in the Global Economy' (2006) 13(1) *Indiana Journal of Global Legal Studies* 152. See also Todres, 'Human Rights, Labor, and the Prevention of Human Trafficking: A Response to A Labor Paradigm for Human Trafficking' (n 706) 147.

¹¹⁵⁹ Bruch (n 498) 6.

and security priorities.¹¹⁶⁰ The HT legal framework was thus, progressively widening towards the incorporation of a labour approach, recognising as mentioned previously the ‘composite nature of the trafficking phenomenon’.¹¹⁶¹ Consequently, the need to involve the ILO and its supervisory bodies in broader international compliance efforts became paramount.¹¹⁶²

In this regard, the 2014 Protocol to the 1930 Forced Labour Convention emphasises the incidence of HT for the purpose of labour exploitation which includes sexual exploitation and urges actions worldwide against all forms of exploitation.¹¹⁶³ Comprehending trafficking in persons for the purposes of forced or compulsory labour relies not only on the international labour law which is not a self-contained regime but is complemented by the human rights, refugee, humanitarian and criminal legal frameworks as examined in chapter 5 and the first part of chapter 6.

Since the entry into force of the Palermo Protocol, increasing numbers of countries have criminalised HT and amended their domestic legislation.¹¹⁶⁴ For example, Israel and Paraguay amended their Criminal Codes to include labour exploitation within the definition of HT.¹¹⁶⁵ However, trafficking for forced labour

¹¹⁶⁰ Aradau (n 499) 12, 13.

¹¹⁶¹ Gallagher, ‘*The International Law of Human Trafficking*’ (n 23) 8.

¹¹⁶² Anne T. Gallagher and Joy Ngozi Ezeilo ‘The UN Special Rapporteur on Trafficking: A Turbulent Decade in Review (2015) 37(4) Human Rights Quarterly 913,934.

¹¹⁶³ Preamble para.9 of the Protocol Po29 (n 124). See also ILO Global Estimates of Modern Slavery: Forced Labour and Forced Marriage (2017) 30.

¹¹⁶⁴ Mohammed Y. Mattar, ‘Incorporating the Five Basic Elements of a Model Anti trafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention’ (n 65) 5,6. See also Philip Hunter, ‘Human Trafficking & Global Supply Chains: A Background Paper. Prepared for the expert meeting convened by the UN Special Rapporteur on trafficking in persons, especially women and children, Ms. Joy Ngozi Ezeilo’ (12-13 November 2012) 7.

¹¹⁶⁵ ILO, ‘Strengthening action to end forced labour’ (2014) International Labour Conference, 103rd Session Report IV, para 196, p.55.

and slavery remain unaddressed in some unstable parts of the world.¹¹⁶⁶ This is partly because different legislative approaches to the concept of exploitation have led to considerable difficulties in identifying exactly what constitutes trafficking for forced labour.¹¹⁶⁷ Consequently, interpretation often remains still at the discretion of the judiciary.¹¹⁶⁸

As examples, trafficking for the purpose of forced labour can take many exploitative forms: the captivity of workers sold to captains on the high seas in Thai fishing boats, living in inhumane conditions and away from the coasts for years;¹¹⁶⁹ Bolivian workers trafficked to Brazil in the construction sector.¹¹⁷⁰ In Russia, HT for the purpose of forced labour is prevalent in the areas of construction, textile, domestic services, seasonal agriculture.¹¹⁷¹ Very often, victims of physical and psychological abuses¹¹⁷² are trapped in a remote location with identity documents confiscated and the fear of being reported to immigration or law enforcement authorities.¹¹⁷³

Exploitation of individuals' labour has attracted increasing concern and attention in the media and the international aid community.¹¹⁷⁴ However, estimates of the scale of persons trafficked in labour related issues require

¹¹⁶⁶ Joshua Aston, '*Trafficking of women and children: Article 7 of the Rome Statute*' (n 1067) 7.

¹¹⁶⁷ UNODC, 'The concept of 'Exploitation' in the Trafficking in Persons Protocol' (n 48) 108.

¹¹⁶⁸ ILO, '*Forced Labour and Human Trafficking Casebook of Court Decisions – A Training Manual for Judges, Prosecutors and Legal Practitioners*' (2009) 3.

¹¹⁶⁹ Nicola Jägers and Conny Rijken, '*Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations*' (2014) 12(1) *Northwestern Journal of International Human Rights* 47.

¹¹⁷⁰ Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences (2015) UN Doc A/HRC/30/35, p.10.

¹¹⁷¹ US Department of State, *Trafficking in Persons Report* (2016) 316.

¹¹⁷² Kadriye Bakirci, '*Human trafficking and forced labour: A criticism of the International Labour Organisation*' (2009) 16(2) *Journal of Financial Crime* 160,162.

¹¹⁷³ OSCE, '*A Summary of the Challenges on Addressing Human Trafficking of Labour Exploitation in the Agricultural Sector in the OSCE Region*' (2009) 36.

¹¹⁷⁴ UNODC, '*Global Report on Trafficking in Persons*' (2016) 1,8.

methodological improvement. Reliable statistics¹¹⁷⁵ and accurate numbers through actual counts of individuals being trafficked are in practice too difficult to report.¹¹⁷⁶ The ILO nevertheless reports that there are approximately 24.9 million victims living under threat and coercion of forced labour.¹¹⁷⁷

This section therefore examines primarily the interpretation of the forced labour concept in relation to HT. The section then analyses the necessity to promote a labour-based approach as an added-value to the anti-trafficking legal framework which is complemented by a human rights and criminal law perspectives. Lastly, HT for the purpose of forced labour in a globalised economy is examined.

6.4.2 The interpretation of the forced labour concept in relation to HT

According to the Palermo Protocol definition, trafficking for the purpose of 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'.¹¹⁷⁸ Yet, there is a significant lack of clarity regarding the scope of forced labour specifically in the context of HT.¹¹⁷⁹ In addition, the term 'modern slavery' has confused the matter further. In this regard, various forms of coercion such as HT, slavery, subjection to forced labour prohibited in major international instruments are often employed as umbrella terms to designate modern slavery.¹¹⁸⁰ This

¹¹⁷⁵ Elżbieta M. Goździak and Micah N. Bum 'Data and Research on Human Trafficking: Bibliography of Research-Based Literature' (n 87) 43.

¹¹⁷⁶ Goździak, 'Empirical Vacuum: In Search of Research on Human Trafficking' (n 345) 4.

¹¹⁷⁷ ILO, Global Estimates of Modern Slavery: Forced Labour and Forced Marriage (n 1164) 22.

¹¹⁷⁸ Article 3 (a) of Palermo Protocol (n 9).

¹¹⁷⁹ UNODC, 'The concept of 'Exploitation' in the Trafficking in Persons Protocol' (n 48) 109.

¹¹⁸⁰ Jägers and Rijken (n 1169) 48. See also Justine Nolan and Gregory Bott, 'Global supply chains and human rights: spotlight on forced labour and modern slavery practices' (2018) 24(1) Australian Journal of Human Rights 44,47.

suggests that the parameters of forced labour are variably interpreted and usually not well established in domestic law and practice.¹¹⁸¹ States parties to the Palermo Protocol have therefore either crafted their own interpretation of the forced labour element or integrated it literally into their domestic legislation. All depends on the labour conditions prevailing in the countries as well as sensitivities around forced labour issues.¹¹⁸²

It remains that forced labour and HT are often amalgamated even though some forms of forced labour practices are not considered trafficking such as forced prison labour.¹¹⁸³ Conversely forced marriage as a form of HT does not automatically constitute forced labour.¹¹⁸⁴ 'While most victims of trafficking end up in forced labour, not all victims of forced labour are in this situation as a result of trafficking.'¹¹⁸⁵ The difficulty to draw the line between 'trafficking for forced labour' from the offense of 'forced labour' nevertheless bears consequences for the identification and prosecution of such practice. This adds to another difficulty related to the hidden nature of the practice.¹¹⁸⁶

The concept of 'exploitation' refers to an action and treatment prejudicial, physically, and psychologically harmful to a person. For instance, trafficking for labour exploitation generally suggests debt bondage, the removal of identity

¹¹⁸¹ UNODC, 'The concept of 'Exploitation' in the Trafficking in Persons Protocol' (n 48) 108,109.

¹¹⁸² UNODC, 'The concept of 'Exploitation' in the Trafficking in Persons Protocol' (n 48) 108,109.

¹¹⁸³ ILO, 'Strengthening action to end forced labour' (n 1166) International Labour Conference, 103rd Session Report IV, para.8 at 2,3.

¹¹⁸⁴ Diane Frey and Chris Fletcher, 'Protocol to ILO Convention N.29: A Step Forward for International Labour Standards' Human Rights Brief (2015) 2. See also ILO, 'Strengthening action to end forced labour' (n 1166) para.8 at 3.

¹¹⁸⁵ ILO, 'Fighting Human Trafficking: The Forced Labour Dimensions' (2008) available < http://www.ilo.org/global/docs/WCMS_090236/lang--en/index.htm > accessed 29 November 2019.

¹¹⁸⁶ Nolan and Bott (n 1180) 47.

documents or intimidation and threats.¹¹⁸⁷ However, exploitation is not literally and exhaustively defined in the Palermo Protocol.¹¹⁸⁸ This has created ‘a major cause of definitional fluidities’¹¹⁸⁹ resulting in leaving States to incorporate various additional types of exploitative practices beyond the HT definition and according to cultural parameters.¹¹⁹⁰ This is the case for instance for Dominican Republic with forced marriage and illegal adoption.¹¹⁹¹ Another example relates to the exploitation of begging which is identified by the European Union as well as the Belgium Penal Code¹¹⁹² as a form of forced labour or services and part of the HT phenomenon.¹¹⁹³ Turkey focuses on the exploitation for the purpose of forced prostitution and forced labour.¹¹⁹⁴

6.4.3 The added-value of a labour-based approach complemented by a human rights and criminal law perspectives for an effective protection against HT

Before the creation of the UN system in 1945, the ILO based on the 1944 Philadelphia Declaration, was already committed to ensure that all people have the right to pursue their material well-being in conditions of freedom and

¹¹⁸⁷ Jill E.B. Coster van Voorhout, ‘Human trafficking for labour exploitation: Interpreting the crime’ (2007) 3(2) Utrecht Law Review 44,50.

¹¹⁸⁸ Article 3 of the Palermo Protocol (n 9).

¹¹⁸⁹ Gallagher, *The International Law of Human Trafficking* (n 23) 49.

¹¹⁹⁰ UNODC, ‘The concept of ‘Exploitation’ in the Trafficking in Persons Protocol’ (n 48) 22. UNODC, Mohammed Y Mattar, ‘Combatting Human Trafficking in Accordance with the Principles of Islamic Law’ (UNODC, 2009) 4.

¹¹⁹¹ The 2003 Law on Human Smuggling and Trafficking (Law 137-03).

¹¹⁹² The case of begging as a form of forced labour in the context of HT is also picked up in the Belgium Penal code; modified in 2013. See also Myria Centre Fédéral Migration, ‘Rapport Annuel Traite et Trafic Des Êtres Humains 2016 : Des Mendiants Aux Mains De Trafiquants’ 30.

¹¹⁹³ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011, on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA [2001] OJ L 101/1, para 11.

¹¹⁹⁴ Article 80 of the Turkish Criminal Code, Law Nr. 5237 Passed On 26.09.2004 (Official Gazette No. 25611 of 12 November 2004).

dignity.¹¹⁹⁵ The ILO has been widely acknowledged as one of the competent and practical organs that has a day to day involvement in human rights.¹¹⁹⁶ The ILO focused on the protection from forced labour and more recently extended its focus to address HT through the 2014 Protocol to the 1930 ILO Convention. This attention was complemented by Trade Union initiatives addressing corporate legal accountability against labour trafficking in the global economy.¹¹⁹⁷

The essence of the 2014 Protocol is to address the implementation gaps of the 1930 Convention. This instrument reiterates to States parties the need for prevention, protection and remedies essential to the elimination of forced labour, and specific actions against HT for the purpose of forced labour.¹¹⁹⁸ Furthermore, ILO Recommendation No. 203 supplements the 2014 Protocol and provides further legal guidance on the implementation of States obligations and enforcement of their national legislations.¹¹⁹⁹ Implementation at the domestic level is therefore exemplified by States developing national policy and plans of action aimed at deterring causal effects that lead to chains of trafficking. This underlines in part the necessity for various stakeholders to work together

¹¹⁹⁵ The Philadelphia Declaration concerning the Aims and Purposes of the International Labour Organisation (adopted by the Conference at its 26th Session, 10 May 1944) II (a).

¹¹⁹⁶ Scott Sheeran and Sir Nigel Rodley, 'The broad review of international human rights law' in Scott Sheeran and Sir Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013) 343.

¹¹⁹⁷ Zuzanna Muskat-Gorska, 'Human Trafficking and Forced Labour Mapping Corporate Liability Standards' in P. Kotiswaran (ed.), *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery* (Cambridge: Cambridge University Press, 2017) 455,456.

¹¹⁹⁸ The Protocol (Po29) (n 124) Article 1, art 3 (1). See also Lee Sweepston, 'Trafficking and Forced Labour: Filling in the Gaps with the Adoption of the Supplementary ILO Standards' in P. Kotiswaran (ed.) *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery* (Cambridge: Cambridge University Press, 2017) 395.

¹¹⁹⁹ Forced Labour (Supplementary Measures) Recommendation, No. 203 (11 June 2014).

based on a multi-disciplinary approach, encompassing awareness, prevention, early identification, and prosecution of such labour exploitative patterns.¹²⁰⁰

The labour-based and human rights approach have therefore become paramount to detect certain forms of works and particularly low-skilled work that are unregulated and exempt from labour inspection.¹²⁰¹ This is particularly important with the prevalence in recent years of global corporations being engaged with HT practices that have prompted legal responses attempting to address corporate liability against these human rights violations.¹²⁰²

There are increasing interactions between the regime of international labour law and other branches of law and in particular the human rights legal framework.¹²⁰³ The labour-based approach combined with a human rights-based approach contributes to the building of a protective framework against exploitative labour practices. Labour rights form part of the body of human rights and have further been supplemented by international and regional human rights treaties. For example, Article 8 of the International Covenant on Civil and Political Rights 1966 provides for the prohibition of slavery, servitude as well as forced labour, and similar provisions can be seen in Article 4(2) of the 1950 European Convention on Human Rights, in Article 6 (2) of the 1969 American

¹²⁰⁰ Various stakeholders are: 'labour inspectors, law enforcement services, social workers, immigration officers, public prosecutors, employers, employers' and workers' organizations, non-governmental organizations, and other relevant actors' para.13 (d) of Recommendation N.203 (n 1200).

¹²⁰¹ OSCE, Conference Report, 'Prevention of Trafficking for Labour Exploitation in Supply Chains' 13.

¹²⁰² Silvia Rodríguez-López, 'Criminal Liability of Legal Persons for Human Trafficking Offences in International and European Law' (2017) 1(1) *Journal of Trafficking and Human Exploitation* 95, 101.

¹²⁰³ Franz Christian Ebert and Martin Oelz, 'Bridging the gap between labour rights and human rights: The role of ILO law in regional human rights courts' (2012) *International Institute for Labour Studies* 1,3. See also Tara M. Parente, 'Human Trafficking: identifying forced labor in multinational corporations & the implications of liability' (2014) 11(1) *Revista de Direito Internacional* 147.

Convention on Human Rights 1969. Referring for instance to the following legal instruments: the 1930 Forced Labour Convention,¹²⁰⁴ the 1999 Child Labour Convention,¹²⁰⁵ the Palermo Protocol,¹²⁰⁶ States have the duty to prosecute and criminalise acts of labour exploitation qualified as HT practices.

With regard to the judicial approach, by reference to ILO standards and related human rights instruments, human rights courts can increase the quality, the legitimacy and the authority of these bodies when dealing with labour issues.¹²⁰⁷ As evoked previously, the regional human rights treaties in the European,¹²⁰⁸ Inter-American¹²⁰⁹ and African system prohibit forced labour. Hence, human rights courts constitute

*'additional mechanisms for the protection and enforcement of labour rights. These are yet to be fully exploited by trade unions and labour rights organizations'.*¹²¹⁰

As an example, the Inter-American Court of Human Rights sanctioned labour-related human rights and developed its case-law on forced labour by invoking directly the ILO instruments, reports and comments of the ILO supervisory bodies.¹²¹¹ In particular the recent case of *Hacienda Brasil Verde Workers v Brazil*,¹²¹² presented in chapter 4, is the IACHR's first international ruling addressing the responsibility of a State with regard to HT, slavery and the

¹²⁰⁴ ILO 1930 Convention (n 596) Article 25.

¹²⁰⁵ Article 3 (a) of the 1999 Child Labour Convention (No. 182).

¹²⁰⁶ Articles 4 and 5 of the Palermo Protocol (n 9).

¹²⁰⁷ Ebert and Oelz (n 1203) 3.

¹²⁰⁸ Article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (n 613).

¹²⁰⁹ Article 6(1) of the ACHR (n 15).

¹²¹⁰ Ebert and Oelz (n 1203) 13.

¹²¹¹ Ebert and Oelz (n 1203) 7.

¹²¹² *Hacienda Brasil Verde Workers v Brazil*, Judgment of 20 October 2016, Series C No. 318 (Hacienda Brasil Verde) (only available in Spanish).

situation of forced labour.¹²¹³ Similarly, the ECHR ruled for the first time that the elements in the *Chowdury* case amounted to both forced labour and trafficking. To this end, the Court applied to these both interconnected concepts the broad range of positive obligations corresponding to prevention, protection, and prosecution.¹²¹⁴ The facts of the *Chowdury* case concerned forty-two Bangladeshi nationals who were recruited to work on a strawberry farm in Greece and were promised wages which were never paid. They worked long hours under the supervision of armed guards and lived in precarious conditions without running water and toilets. The workers went on strike a couple of times but resumed their work as they were afraid to never be paid. Following the recruitment of other migrants, the Bangladeshi nationals demanded their wages. One of the armed guards opened fire and many were seriously injured.¹²¹⁵

The criminal justice response is one other possible remedy.¹²¹⁶ In this regard, the criminal approach to forced labour is developed in the case law of international and domestic tribunals. For instance, The Trial Chamber of the International Criminal Tribunal for Former Yugoslavia, in the *Kunarac* jurisprudence which was detailed in chapter 4 and in the former section of chapter 6 ruled that enslavement incorporated elements of forced labour.¹²¹⁷ At a domestic level, the Larvik District court of Norway in the case *C., I. v. Z.*

¹²¹³ Valentina Milano, 'Human Trafficking by Regional Human Rights Courts: An Analysis in Light of Hacienda Brasil Verde, The First Inter-American Court's Ruling in this Area' (n 752) 3.

¹²¹⁴ Valentina Milano, 'Human Trafficking by Regional Human Rights Courts: An Analysis in Light of Hacienda Brasil Verde, The First Inter-American Court's Ruling in this Area' (n 752) 29.

¹²¹⁵ *Affaire Chowdury et Autres c. Grèce* (n 774).

¹²¹⁶ Roger Plant, 'Combating Trafficking for Labour Exploitation in the Global Economy: The Need for a Differentiated Approach' (n 333) 435.

¹²¹⁷ *Prosecutor v Kunarac* (n 364) para.26, 542.

found a Romanian father who brought his children for the purpose of begging, guilty of human trafficking for the purpose of labour exploitation under the Norwegian Criminal Code Section 224 (4) cf. (1) (b).¹²¹⁸ Another case concerns *Bachpan Bachao Andolan v. Union of India [UOI] and Ors* brought before the Supreme Court in India. The case relates to the trafficking of children, forcefully detained to work in circuses, victims of physical and emotional abuses and deprived access to their families.¹²¹⁹

A forward-thinking approach emphasising a labour perspective in the anti-trafficking policy 'include extensive protective and preventative measures to complement the crime-fighting aspects of the HT definition'.¹²²⁰ Prevention of HT infers that one focus could be on the root causes of what fuels HT and in particular, the need to improve *inter alia* economic conditions that prevail in fragile countries.¹²²¹ Prevention entails that States increase labour protection for workers at risk of coercive exploitation.¹²²² Prevention is therefore paramount with the prevalence in recent years of global corporations being engaged with HT practices. This also prompted legal responses attempting to address corporate liability against these human rights violations.¹²²³

¹²¹⁸ < <https://sherloc.unodc.org/cld/case-law-doc/traffickingpersonscrimetype/nor/2013/13-149986med-larv.html?tmpl=old>> accessed 29 November 2019.

¹²¹⁹ The Supreme Court of India, Writ Petition (C) No. 51 of 2006, Decided On: 18.04.2011. *Bachpan Bachao Andolan Vs. Union of India (UOI) and Ors.*

¹²²⁰ Kara Abramson, 'Beyond Consent, Towards Safeguarding Human Rights' (2003) 44 Harvard International Law Journal 473,500.

¹²²¹ *ibid* 500.

¹²²² Chuang, 'The Challenges and Perils of reframing Trafficking as 'Modern-Day Slavery' (n 563) 149.

¹²²³ Silvia Rodríguez-López, 'Criminal Liability of Legal Persons for Human Trafficking Offences in International and European Law' (n 1202) 95, 101.

6.4.4 Addressing HT for the purpose of forced labour in a globalised economy

The inclusion of exploitation through forced labour in the HT discourse has enabled a wider commitment and legal accountability from various stakeholders who participate in labour markets. This encompasses the private sector through corporations and business companies benefiting from cheap labour and services that may be obtained through trafficked persons and supply chains.¹²²⁴ In the context of a globalised economy and production systems, international businesses have links across countries including FCAS, and may generate HT's occurrence within global supply chains.¹²²⁵

The growing influence of multinational corporations worldwide has therefore led to the development of an international regulation regime in order to address the human rights accountability of such entities with regard to supply-chain exploitation and forced labour.¹²²⁶ The legal accountability stems also from the States' obligations to prevent, prosecute HT, and protect victims.¹²²⁷ This requires from States to exercise more scrutiny and transparency¹²²⁸ towards business entities. Their corporate social responsibility and legal accountability

¹²²⁴ Muskat-Gorska (n 1197) 443.

¹²²⁵ Anna W. Shavers, 'Human Trafficking, The Rule of Law, and Corporate Social Responsibility' (2012) 9(1) South Carolina Journal of International Law and Business 39,41. See also Silvia Rodríguez-López, 'Perpetrators or Preventers? The Double Role of Corporations in Child Trafficking in a Global Context' (2018) 8(1) Oñati Socio-legal Series 145,151.

¹²²⁶ Ashley Feasley, 'Eliminating Corporate Exploitation: Examining Accountability Regimes as Means to Eradicate Forced Labor from Supply Chains' (2016) 2(1) 21.

¹²²⁷ OSCE Conference Report, 'Prevention of Trafficking for Labour Exploitation in Supply Chains' (2016) 3.

¹²²⁸ Requirement of businesses to publish a statement either detailing steps they have taken to ensure that slavery and human trafficking are not taking place in their operations and supply chain or that it has taken no such steps, as per the United Kingdom's Modern Slavery Act (2015) part.6 54 (1) and (4) 42.

need to be encouraged¹²²⁹ as well as their responsibility to respect all recognised human rights.¹²³⁰

Hence, as a practical undertaking, a number of non-binding principles and guidelines have been adopted, most notably, the 2011 OECD Guidelines for Multinational Enterprises which highlights human rights due diligence of enterprises.¹²³¹ The 2011 UN Guiding Principles on Business and Human Rights in conjunction with regional and domestic legislation have suggested specific goals and objectives to address human rights violations within the corporate world.¹²³² These approaches contribute to the dissemination of awareness among the business world and to develop with the support of business entities a more protective employment legislation.¹²³³

Dissemination of these frameworks at all levels of civil society, and most specifically at grassroots level can also reach consumers globally and raise their awareness about ethical consumerism as well as understanding the ramification and consequences of supply chains that may encourage HT.¹²³⁴

Examples of key economic sectors where individuals are often trafficked include the construction work, the fishing industry, agricultural and domestic sectors. In extreme conditions, corporations, small businesses can be in direct violation of international law and specifically *jus cogens* norms prohibiting

¹²²⁹ Hunter, 'Human Trafficking & Global Supply Chains' (n 1164) 8.

¹²³⁰ Nicola Jägers and Conny Rijken, 'Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations' (n 1169) 55.

¹²³¹ OECD Guidelines for Multinational Enterprises (OECD Publishing, 2011) paras 45,46 at 34.

¹²³² UN Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) A/HRC/17/31.

¹²³³ Hila Shamir, 'A Labour Paradigm for Human Trafficking' (2012) 60 (76) UCLA Law Review 76,81.

¹²³⁴ Trace-Partners and Annie Pijnenburg, *Handbook - TRACE-ing human trafficking: Handbook for policy makers, law enforcement agencies and civil society organisations* (Trace, 2016) 14.

conditions equating slavery which qualify as HT for the purpose of forced labour. For instance, a case of trafficking including slavery, forced labour and inhumane treatment was brought by Adhikary survivor, before the US Federal Court against Kellogg Brown & Root. A US military contractor in Iraq and its Jordanian sub-contractor Daoud and Partners were holding twelve Nepalese workers with their passports confiscated. These workers were sent to the Iraqi war zone to work in hazardous conditions for the maintenance of military equipment. Most of the workers were subsequently captured by insurgent groups and executed.¹²³⁵

However, the complexity in ensuring accountability of multinational entities is in part due to the difficulty to identify practices of trafficking and forced labour and to gather evidence from within the corporate business models. In many instances evidence is hard to garner due to massive global production chains. States in which such exploitative practices occur often have difficulties to establish the liability of legal persons. This is because of the complex structure of these businesses having multiple subcontracting or outsourcing arrangements in various locations where supply chains are established.¹²³⁶ Furthermore, the legal link between the instigators of HT practices and the main company may be difficult to establish especially when individuals are subcontracted from abroad in extensive supply chains. In addition, domestic laws applying to the company may not have the jurisdiction to bring the case forward when the offence is committed abroad. As a result, in practice, there are very few legal instances where companies have been prosecuted for labour

¹²³⁵ *Adhikari v. Daoud & Partners*, 697 F.Supp.2d 674,679-81 (S.D.Tex.2009) August 2008.

¹²³⁶ Rodríguez-López, 'Perpetrators or Preventers? The Double Role of Corporations in Child Trafficking in a Global Context' (n 1225) 153.

trafficking at an international level or regional level such as in Europe.¹²³⁷ A corroborative example of complex supply chains systems exploiting migrants' workers relates to Nike Corporation. In 2008, the company was exposed using forced labour in a supply factory in Malaysia. Recruiting agents were based in Myanmar, Vietnam, and Bangladesh. The exploited workers whose passports were withheld lived and worked in appalling conditions.¹²³⁸

6.4.5 Conclusion to international labour law

The key difficulty is to draw the line between 'trafficking for forced labour' from the offence of 'forced labour' which bears consequences for the identification and prosecution of such practice. However, to encourage prosecutions and convictions, arguments in the HT literature are in favour of an extensive interpretation of forced labour. Using the labour law approach in terms of labour conditions and practices can assist in the building of more protective policy and regulations against risks of HT at international, regional, and domestic levels. Understanding and utilising ILO standards and instruments by international Courts and regional human rights systems can increase their capability when dealing with labour exploitation amounting to HT practices.

There is a consistent body of international law protecting workers' rights, capable of encouraging synergy between regional human rights systems and international labour law. A labour-based approach encompassing the ILO instruments and mechanisms, as part of anti-trafficking policy, contributes to

¹²³⁷ Muskat-Gorska (n 1197) 451. See also Rodríguez-López, 'Criminal Liability of Legal Persons for Human Trafficking Offences in International and European Law' (n 1202) 96.

¹²³⁸ <<https://www.oxfam.org.au/2008/07/forced-labour-by-nike-supplier/>> accessed 12 March 2018.

protective, pragmatic, and preventative measures. Nevertheless, this needs to be complemented by a criminal law enforcement perspective.

Unfortunately, trafficking for forced labour continues to spread around the world partly as a result of the growing influence of multinational corporations. The rapidly globalising economy with international businesses spreading worldwide is linked to HT's occurrence within global supply chains. This has necessitated States to ramp up their scrutiny and transparency of these entities and to encourage greater corporate social responsibility and legal accountability. Accountability of these multinational entities is, in practice, hard to achieve and raises difficulties to identify risks of trafficking and forced labour occurring within the corporate models. States experience difficulty in establishing the liability of legal persons because of the complex structure of these businesses with their multiple subcontracting or outsourcing arrangements in various locations where supply chains are established.

Prevention of HT could focus on the root causes that fuel HT and partly on economic conditions that prevail especially in FCAS. Prevention also entails the need to increase protection of workers and migrants against HT and coercive exploitative practices, through in part, the dissemination of the international regulation regime within the corporate world as well at grassroots level. This requires the involvement of many stakeholders, of governments that already have an active role in preventing HT, including in recent years, the business community.

6.5 Overall conclusion chapters 5 and 6

6.5.1 General

Chapters 5 and 6 examined how the multidimensional HT phenomenon is addressed through international human rights law, international refugee law, international humanitarian law, international criminal law, and international labour law. Thus, the objectives of chapters 5 and 6 were twofold: Through the examination of the applicability and interaction of these branches of international law, firstly, how do they contribute individually and collectively to shape the international legal framework against HT in order to provide effective protection against these practices.

Secondly, the analysis identified challenges arising from the normative international framework dealing with HT that may impact HT victims seeking protection and redress. These challenges include the proliferation of adjudicatory mechanisms in international human rights litigation. This proliferation can confuse victims of HT in need of pressing redress. The latter may contribute to the submission by HT victims of successive or parallel complaints before various bodies or mechanisms whether these are universal, regional, judicial, or quasi-judicial.

However, another related challenge concerns the practical accessibility to human rights mechanisms by the ones in most need of protection. One of the main reasons pertains to the extreme vulnerability, invisibility and sometimes remoteness of HT victims. They can be physically trapped, traumatised, or fearing to report to any authorities. In these instances, the role of civil society

organisations is crucial to support and act on behalf of HT victims to seek legal redress.

Challenges may also be partly related to the issues of effective implementation, enforcement, and protection mechanisms of the HT human rights framework which may not be available to HT victims in contexts of conflict affected and forced migration movements. In fragile situations, States are often unable and unwilling due to institutional failures to fulfil and be accountable for their obligations regarding providing judicial remedies, hence protection against HT. In migration contexts, there are tensions between security concerns of States and the need to provide international protection to HT victims. In addition, the failure to identify HT victims among migrants exposes them to arrest and deportation with risks upon return of persecution, torture, or other serious violations of fundamental rights.

HT constitutes common forms of persecution in many situations of armed conflict and violence that generate refugee flows. HT has therefore become UNHCR's responsibility to provide protection through its refugee status determination process. HT claims are examined through the lens of 'membership of a specific social group'. However, there are challenges in establishing the well-founded fear of persecution as HT victims fear threats, harm, retaliation. HT victims are often intimidated and discouraged from cooperating with law enforcement authorities as well as during the refugee determination procedures. As a result, HT victims may withhold crucial information for the assessment of their refugee claims.

However, victims of HT who cannot be legally qualified as refugees under the 1951 Convention may be entitled to other forms of protection referred to as 'complementary'. The complementary protection regimes of refugee law emerged from the application of human rights law for persons who need international protection. The human rights legal regime functions as a complementary normative framework to the refugee status determination process and has become indissociable from refugee law. In this regard normative gaps of the refugee legal regime are complemented by the recourse to human rights soft law.

With regard to the applicability of IHL concerning HT, the law of armed conflict prohibits enslavement, slavery, and rape practices. However, the current legal gap is that HT *per se* has not been expressly prohibited neither regulated under IHL. IHL addresses instead the concept of 'sexual violence' in the Geneva Conventions of 1949 and their Additional Protocols of 1977, emphasising the strong links to other patterns of violence in conflict. In sum, trafficking for the purpose of sexual exploitation and sexual slavery are encompassed under serious forms of sexual violence, part of a pattern of violence linked to other violations of IHL.

There are various mechanisms and legal ways through which IHL can be practically implemented and enforced: The judicial decisions of domestic courts, specialised Tribunals; the International Criminal Court focusing on a specific set of 'atrocities crimes' for which combatants may be prosecuted. In addition, other mechanisms such as the quasi-judicial functions of UN Human Rights Treaty bodies with special procedures: the Special Rapporteur on Trafficking in Persons emphasising on human rights standards, fact-finding

mechanisms collecting evidence of human rights abuses including HT, also contribute to criminal accountability and help victims to seek grassroots support from their community and from human rights organisations. However, the proliferation of these mechanisms can lead to conflicting legal interpretations and therefore risk blurring the boundaries of the main bodies of international law.

Challenges to implementing IHL are nevertheless observed when the rule of law and judicial guarantees are not effective, when there is a bias relationship between such apparatus and the State. Furthermore, there may be a lack of willingness and capacity on behalf of the State to address crimes of sexual violence. These parameters lead to a lack of trust in States institutions. In these instances, other practical legal avenues by which HT can be combatted in the context of armed conflict are in part the criminalisation and policies that exist at the international level and translated at the domestic level. The role of national legal systems remains therefore crucial to support accountability for crimes of sexual violence at times of conflict, as justice ideally needs to be exercised closer to home.

HT is characterised by the UNSC as a threat to peace and security in conflict situations. Hence, the examination of practical complementary support is provided by the international criminal legal framework regarding HT. In certain rule of law contexts when judicial procedures are unavailable or ineffective mainly because of FCAS, the crime of HT may be addressed within the realm of international jurisdictions.

The legal framing of HT poses challenges as this crime is not a self-standing offence under international criminal law. HT definition is intertwined with other legal concepts such as slavery, sexual slavery and enslavement incorporated in the Rome Statute of the ICC. This interconnection does not mean that the crime of HT qualifies as a crime against humanity and is eligible before the ICC or other international criminal tribunals. There are legal requirements for HT acts to satisfy the *chapeau* contextual elements characterising crimes against humanity under Article 7(2)(a) of the Rome Statute. There is still an academic debate as to whether HT practices in certain contexts, in particular conflict, may reach the threshold of a serious crime. However, some landmarks jurisprudence such as the *Kunarac* case confirm the broadening of the enslavement concept to include trafficking. This expansion would enable in particular the accountability for sexual crimes including HT committed by non-state armed groups presenting a wide and structured organisational system that could meet the threshold required by the Rome Statute. Such is the case for ISIS in its systematic and methodical process of enslavement through the transfer and sexual abuse of captured Yazidi women.

Nevertheless, to date no HT prosecution has been brought before the ICC despite evidence of this crime in some of the States under investigation. This highlights the practical limitations and lengthy process of the international judicial mechanism facing issues of States poor cooperation, difficulties to ensure witness and staff protection, availability, and reliability of sources of evidence. In addition, further legal constraint to prosecute HT before the international court relates to the territorial limitation of the ICC jurisdiction to States parties on which the conduct in question occurs. In some instances, this

territorial obstacle can be overcome by the referral of any State's party to the ICC or by referrals from the UN Security Council to the ICC under Chapter VII of the UN Charter. However, these referrals have only been activated twice for Sudan and Libya presenting lengthy process of investigation. In view of the latter, such international judicial mechanism does not have the capacity to address the many affected regions where HT and related sexual violence occur.

The complementary approach proposed by the ICC nevertheless will not substitute for the advancement of a criminal judicial system that brings justice closer to home and closer to victims. On this basis, the role of domestic judicial legal systems remains crucial to support and enforce accountability for HT crimes. To this end, States bear the primary responsibility to prosecute HT as well as put in place legal safeguards in order to penalise trafficking, sexual violence, and other related sexual crimes.

The multifaceted aspects of HT were lastly examined from the perspective of the labour legal framework. One of the challenges is to draw the line between 'trafficking for forced labour' from the offense of 'forced labour' which bears consequences for the identification and prosecution of such practice. Trafficking for forced labour continues to spread around the world partly as a result of the growing influence of multinational corporations. These global supply chains are often located in fragile environment. This raises another challenge of legal accountability of multinational entities which are in practice, hard to achieve. This is coupled with the difficulties to identify practices of trafficking and forced labour within these corporate models. Nevertheless, a labour-based approach as part of an anti-trafficking policy is paramount towards protective, pragmatic,

and preventative measures which complement the law enforcement perspective.

6.5.2 The issue of Legal Regimes Interaction

The analysis of the various legal frameworks includes some limitations arising from the concurrent applicability and potential overlapping, duplication or dissonance between these branches of law as well as their implementation in fragile environments.¹²³⁹ In this regard, the engagement of various bodies and institutions prompts a critical examination regarding the interaction of existing mechanisms and bodies such as fact-finding missions, UN Special Rapporteurs in particular the Special Rapporteur on contemporary forms of slavery, including its causes and consequences and the Special Rapporteur on trafficking in persons, especially women and children.¹²⁴⁰ In sum, the whole issue of the legal regimes interactions is, as Young points out a 'risky undertaking', it is complex and requires an understanding of the boundaries and relationships between regimes and how they overlap on issues of global concern, such as HT.¹²⁴¹ This is potentially another very significant area of research beyond the scope of this thesis.

The interplay of the different legal regimes and the complexities in applying the varying regimes in parallel to a particular situation has vexed legal minds

¹²³⁹ Marco Sassoli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' in Orna Ben-Naftali (eds), *International Humanitarian Law and International Human Rights Law* (Oxford University Press, 2011) 70. Noam Lubell, 'Challenges in applying human rights law to armed conflict' (2005) 87 (860) *International Review of the Red Cross* 738.

¹²⁴⁰ Rob Grace, 'From Design to Implementation: The Interpretation of Fact-finding Mandates' (n 1005) 20,27.

¹²⁴¹ Margaret A. Young, 'Introduction: The Productive Friction between Regimes in M. Young (Ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2021) 1.

without leading to a definitive solution, though all would agree that there needs to be a well-coordinated application of international law to support implementation. A number of frameworks exist to support the development of an understanding with regard to application. Two frameworks are discussed here which can shed light on the interplay of regimes; these are the principle of *lex specialis*, where specific law displaces the more general law, and the principle of complementarity.

In the complex case of Palestine, it would seem impossible to compartmentalise one aspect of the various legal regimes when it relates to HT, rather the different legal norms complement each other mutually. In general, humanitarian law over human rights law is the *lex specialis* in situations of conduct of hostilities, and in the situation of Occupation.¹²⁴² The principle of complementarity could also be useful in the Palestine case study in the sense that the added value of the different regimes is there for the protection of individuals; the regimes influence and reinforce each other mutually. However, in practice it is complicated and possibly more so in connection with tackling HT in FCAS.

The thesis examined the legal regimes: IHL, IHLRL, IRL, ICL and ILL individually demonstrating that they are deeply linked in substance. They interact when for instance human rights violations constitute serious crimes under international criminal law, which may occur in situation of conflict and refugee crisis situations. Such settings enable the intervention of all these legal regimes to varying degrees. Evidently, the ILL legal framework comes in support when the nature of human rights violations is related to forced labour exploitation.

¹²⁴² Cordula Droege, 'The interplay between international humanitarian law and international human rights law in situations of armed conflict' (2007) 40(2) *Israeli Law Review* 310-355.

The relationship between ICL and IHRL is given effect under Article 21(3) of the Rome Statute which enables the ICC to consider ‘internationally recognised human rights’. Another example evidencing the regimes’ interaction between IHRL, IHL and ICL relates to the work of human rights bodies and specific UN mechanisms such as special rapporteurs, fact-finding missions, inquiry commissions, that collect information on the ground, and evidence of human rights violations.

IHRL comes in support to IHL norms where the latter do not explicitly address all aspects of the HT definition. However, acts of HT are often associated with violations of international humanitarian law linked to situations of conflict. UNSC Resolution 2331 confirms, implicitly, the applicability and interaction with IHRL, IRL, ILL, ICL, recalling that HT in areas affected by armed conflict and post-conflict situations

‘can be for the purpose of various forms of exploitation, including exploitation of the prostitution of others or other forms of sexual exploitation, forced labour, slavery or practices similar to slavery, servitude or the removal of organs...can affect children, displaced persons including refugees.’¹²⁴³

Serious human rights breaches can lead to the involvement of ICL through the opening of investigations by the ICC. As an example, with regard to HT, the Office of the Prosecutor to the ICC has begun focusing on HT, with a particular interest in investigating trafficking crimes in Libya.¹²⁴⁴

¹²⁴³ UNSC, S/RES/2331 (n 127) 1.

¹²⁴⁴ <<https://www.icc-cpi.int/Pages/item.aspx?name=180509-otp-stat-UNSC-lib>> accessed 3 August 2021.

The analysis presented in these two chapters has therefore outlined the multiplicity of areas of law that can be brought to bear to address HT in differing situations. In FCASs one or more of these frameworks may apply for the benefit of victims. Conversely, the profusion of legal options, recourse and mechanisms may prove confusing.

The overall analysis indicates that the contribution of civil society actors to both enhance the protection of human rights including reaching HT victims and to support criminal justice system with the focus of a justice closer to home, has become a necessary complement in governance at local and international level. This is examined further in chapter 7. Chapters 5 and 6 shape the approach to examining the implementation aspects of the legal framework addressing HT. This is treated in part III with the focus on FCAS, beginning with the next chapter 7.

Part III Implementation of the Legal Framework addressing HT and its Limitations

Chapter 7 Challenges to implementation arising out of the HT and human rights legal framework

7.1 Introduction

International law has become a central part of domestic legal systems with an increasing number of national Constitutions incorporating international legal norms.¹²⁴⁵ The involvement of international law in domestic affairs relates to the convergence of foreign and domestic issues such as migration, terrorism, or other international problems which for many have domestic roots.¹²⁴⁶

A modern conception of international law defines it therefore, 'as, in part, regulating the conduct of States toward their own citizens'.¹²⁴⁷ In this regard, commitment to domestic implementation is crucial to international law compliance and effectiveness'.¹²⁴⁸ The research acknowledges the diversity of approaches in domestic legal systems regarding international law which concern treaty-making procedures as well as the status and the interpretation of treaties in domestic law.¹²⁴⁹

¹²⁴⁵ William W. Burke-White, 'International Legal Pluralism' (2004) 25 Michigan Journal of International Law 963, 966.

¹²⁴⁶ Anne-Marie Slaughter and William Burke-White, 'The Future of International Law Is Domestic (or, The European Way of Law)' (2006) 47(2) Harvard International Law Journal 327, 328.

¹²⁴⁷ *ibid* 331.

¹²⁴⁸ Pierre-Hugues Verdier and Mila Versteeg, 'International Law in National Legal Systems: An Empirical Investigation' (2015) 109(3) The American Journal of International Law 514.

¹²⁴⁹ Verdier and Versteeg (n 1232) 514. See Odile Ammann, *Domestic Courts, and the Interpretation of International Law -Methods and Reasoning Based on the Swiss Example* (Brill/Nijhoff 2020) 27.

Part III explores how international law is addressed in domestic legal systems through the aspect of implementation and how States comply or not to their international legal obligations. The focus is on the domestic implementation of international human rights norms, this includes the issue of HT.

Most countries have committed to international human rights treaties and other multilateral treaties. More than five hundred and sixty multilateral treaties are deposited with the UN Secretary General.¹²⁵⁰ The sheer number is an indication of the multiple areas of interest these treaties cover in particular human rights treaties enabling the protection of individuals which have penetrated domestic spheres and may influence some States compliance.

In 2005, the then UN Secretary-General, Kofi Annan addressing the Commission of Human Rights, declared that the cause and framework of human rights had entered a new era and that it was moving to an 'era of implementation'.¹²⁵¹ However, despite the solid foundations of an international legal system of human rights and its interactions with domestic legal orders, human rights and more widely international legal norms continue to experience poor implementation on the ground.¹²⁵²

Part III of the thesis examines the implementation of the legal framework addressing HT and its limitations including the overarching human rights framework. Part III is divided in three chapters.

¹²⁵⁰ Multilateral Treaties Deposited with the Secretary-General (As of 7 June 2018) <https://treaties.un.org/Pages/Content.aspx?path=DB/titles/page1_en.xml> accessed 5 April 2019.

¹²⁵¹ UN Secretary-General, Address to the UN Commission on Human Rights (2005) <<https://www.un.org/sg/en/content/sg/statement/2005-04-07/secretary-generals-address-commission-human-rights>> accessed 6 May 2019.

¹²⁵² Julie Fraser, 'Challenging State-centricity and legalism: promoting the role of social institutions in the domestic implementation of international human rights law' (2019) 23(6) *The International Journal of Human Rights* 974.

Chapter 7 examines generic challenges faced by States and in FCAS that hinder the implementation of the protective legal framework against human rights violations and more specifically HT. The chapter primarily provides an overview of implementation of international law in domestic legal systems. The thesis refers in particular, to the existence of legal pluralism that characterise some domestic legal systems such as Palestine. Legal pluralism is therefore presented and examined in the case study in chapter 8 and 9.

Implementation of States' international human rights obligations is complemented by the contribution of a variety of international and domestic actors. The research chooses to focus on the examination at an international level of existing UN human rights mechanisms and at a domestic level on human rights mechanisms through the role of the national human rights institutions including the role of civil society organisations (CSOs). The research highlights that domestic actors at a local level are crucial supporting actors to the implementation of human rights protection and against HT. They act closer to home and are more likely to achieve practical and more immediate outcomes. Chapter 8 provides a condensed historical and political narrative for the analysis of the Palestinian legal system. Chapter 8 examines the status of international law in the Palestinian legal framework and the challenges faced by Palestine regarding the implementation of its international commitments.

Chapter 9 is the empirical qualitative analysis of interviews with key stakeholders that uncovers particular challenges inherent to fragile and conflicted affected environments such as Palestine, to implement its international legal commitments, focusing on the HT legal framework.

The previous chapters 5 and 6 have shown that State parties to international human rights instruments have obligations under international law towards other States, towards the international community but also *vis-à-vis* their own nationals in order to protect their human rights.¹²⁵³ The latter has therefore brought the possibility for individuals to invoke international human rights law in domestic courts. This presupposes that norms of international law to be applied in States territories are being implemented and subsequently enforced by domestic courts.¹²⁵⁴

Building on this, section 7.2 of the present chapter begins by presenting the traditional role of the State in implementing international law with specific reference to the international human rights and HT legal framework in domestic legal systems.

Section 7.3 examines the role and contribution of the UN human rights system as it represents mechanisms that support State compliance with human rights and encourages the domestic implementation of member States' international treaty commitments.

Section 7.3 highlights the challenges inherent in the proliferation of entities which leads inevitably to complexity of duplication and/or overlapping mandates. The section refers to the formation of a 'human rights industry' in conjunction with the growth of human rights CSOs worldwide.¹²⁵⁵

Section 7.4 examines the increasing and pivotal role of domestic entities. These primarily concern the national human rights institutions (NHRIs) generally

¹²⁵³ M. Shah Alam, 'Enforcement of International Human Rights Law by Domestic Courts: A Theoretical and Practical Study' (2006) 53 *Netherland International Law Review* 399, 401, 403.

¹²⁵⁴ *ibid* 404.

¹²⁵⁵ Par Engstrom, 'Human Rights: Effectiveness of International and Regional Mechanisms' (2017) *Oxford Research Encyclopaedia, International Studies* 1,11.

supported by the UN in promoting and monitoring the implementation of international human rights law domestically. In relation to the latter, the section demonstrates the crucial involvement of CSOs and other actors such as human rights defenders, academics, social institutions, community-based groups, advocacy groups, and other networks.¹²⁵⁶

7.2 Principles of implementation of international law in domestic legal systems

Under the 1969 Vienna Convention on the law of treaties, the State concludes a treaty governed by international law and therefore consents to be bound by this treaty as well as perform it in good faith. This rests upon the *pacta sunt servanda* rule¹²⁵⁷ confirmed for instance by the ICJ *Nuclear Test case* emphasising the binding character of an international obligation which requires to be respected¹²⁵⁸ and for the States to comply to this obligation. In particular, the States parties are obliged to achieve the full realisation of the rights recognised in the treaties they committed to.¹²⁵⁹

The definition of 'implementation' takes its origin from the Latin verb 'implēre' and means 'to fill' or 'to fulfil'.¹²⁶⁰ In the legal context, one definition of implementation is 'the act of putting into effect a norm of international law within

¹²⁵⁶ Amnesty International or Human Rights Watch. Hans Peter Schmitz, 'Non-State Actors in Human Rights Promotion' in Anja Mihr and Mark Gibney (eds), *The SAGE Handbook of Human Rights* (SAGE, 2014) 355.

¹²⁵⁷ Article 26 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS, p. 331.

¹²⁵⁸ Para.46 of the *Nuclear Tests Case (Australia v France)* (Merits) [1974] ICJ Rep 253.

¹²⁵⁹ UN Committee on Economic, Social and Cultural Rights, 'General comment No. 21' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights' (2009) UN Doc E/C.12/GC/21, para 67.

¹²⁶⁰ E.B Beenakker, *The implementation of international law in the national legal order: a legislative Perspective* (2018) University of Leiden 1, 15.

the legal order of the State'.¹²⁶¹ Implementation is a complex process, involving many types of actors¹²⁶² along with the traditional role of the State and its multiple organs.

However, there is no clear guidance and uniform standards for States on how to implement human rights norms.¹²⁶³ This is not necessarily problematic as the absence of uniformity may enable cultural diversity to enrich and benefit international human rights law. However, there are some views that divergent interpretations of international law and its process weaken its implementation and enforcement:

*'the status of international law in the domestic legal system and the role of the national courts applying international law varies greatly from country to country. These divergent perceptions of international law tend to weaken the regime of enforcement of international law in state territories, because the states believe they have the liberty to apply the norms of international law in state territories the way they like, not always the way they ought to'.*¹²⁶⁴

There are no well-defined priorities or forms of international regulation or at least uniformity in the domestic implementation of human rights treaties.¹²⁶⁵ From inception, there is a relatively discretionary process left to the States¹²⁶⁶ which have primacy to choose the means to achieve this obligation.¹²⁶⁷ The

¹²⁶¹ Beenakker (n 1260) 15.

¹²⁶² Beenakker (n 1260) 15.

¹²⁶³ Alberto Quintavalla and Klaus Heine, 'Priorities and human rights' (2019) *The International Journal of Human Rights* 679.

¹²⁶⁴ Alam (n 1253) 401.

¹²⁶⁵ Antonio Cassese, *International Law* (Oxford University Press, 2nd ed, 2005) 217.

¹²⁶⁶ Quintavalla and Heine (n 1263) 6. See also Human Rights Committee, 'General Comment No. 3' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty (1981) UN Doc HRI/GEN/1/Rev.1, para 1 at 4 (July 19, 1981).

¹²⁶⁷ Tom Zwart, *Using Local Culture to Further the Implementation of International Human*

implementation process has therefore been portrayed as an obligation of results rather than means.¹²⁶⁸ This has led to debates among scholars and human rights practitioners concerning the various existing procedural requirements and optimum means of implementation and how domestic institutions such as executives, legislatures and courts, engage respectively with international law.

Approaches to the implementation process traditionally place reliance upon formal State institutions, through mainly legal means and usually involves the principal State organs: the executive, legislature and/or judiciary.¹²⁶⁹

Firstly, the State through the executive initiates international legal commitments such as the signatory of treaties. The State party is the main duty-bearer responsible taking all the steps necessary to give effect to human rights by enacting legislation for the domestic implementation of international human rights treaties¹²⁷⁰ and has therefore prerogative to determine the manner of implementation.¹²⁷¹

However,

'members of civil society - individuals, groups, communities, minorities, indigenous - peoples, religious bodies, private organizations, business and civil society in general' have also a responsibility in contributing to effective implementation'.¹²⁷²

Rights: The Receptor Approach' (2012) 34(2) Human Rights Quarterly 546,549.

¹²⁶⁸ *ibid* 549,550.

¹²⁶⁹ Alam (n 1253) 408.

¹²⁷⁰ Christian Tomuschat, *Human Rights: Between Idealism and Realism* (OUP, 2nd edn, 2008) 165.

¹²⁷¹ Fraser, 'Challenging State-centricity and legalism: promoting the role of social institutions in the domestic implementation of international human rights law' (n 1252) 976.

¹²⁷² UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 21 (n 1259) para 73.

In the case of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), States are required to adopt and implement legislation with explicit obligations to criminalise acts of torture,¹²⁷³ to provide for the right to complain about acts of torture and have such allegations investigated effectively and to obtain an enforceable right to redress.¹²⁷⁴ In practice, the implementation of the prohibition of torture presents challenges in circumstances where there is arbitrary law enforcement, failing administration of justice, lack of judicial protection, or absence of the rule of law and/or a repressive regime.¹²⁷⁵

In order to understand the domestic implementation of international rules and its evolution, it is important to recall that the relationship between international and domestic legal order was characterised almost a century ago by the representation of monist and dualist theoretical models which were classically the conduits to the domestication of international law.¹²⁷⁶ This distinction continues to be referred to, to some extent as examined in the case of Palestine regarding the process and methods of domesticating international human rights treaties and particularly regarding the clarification of their position in the domestic hierarchy of norms.

¹²⁷³ Article 4 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, UNGA/RES/39/46.

¹²⁷⁴ *ibid* Articles 13,14.

¹²⁷⁵ Lutz Oette, 'Implementing the prohibition of torture: the contribution and limits of national legislation and jurisprudence' (2012) 16(5) *The International Journal of Human Rights* 717,719, 729.

¹²⁷⁶ David Sloss, 'Domestic Application of Treaties' (2011) Santa Clara Law Digital Commons 1,2. See also D. A. Jeremy Telman, 'A Monist Supremacy Clause and a Dualistic Supreme Court: The Status of Treaty Law as U.S. Law. Basic Concepts of Public International Law: Monism and Dualism' (2013) Valparaiso University Legal Studies Research Paper No. 13-6, p.2

In parallel, there is a growing engagement of domestic courts in the judicial application of international law. Hence, the judiciary contributes to the implementation of international norms although there are considerable variances in approaches by domestic courts to the issue of treaty interpretation.¹²⁷⁷ In some legal systems such as the US, domestic Courts interpret treaties so as to determine whether they are directly applicable, or 'self-executing' without implementing legislation.¹²⁷⁸ In this regard, the judiciary is partly responsible for the domestic legal enforcement of ratified norms that can be interpreted¹²⁷⁹ and applied judicially by national Courts through judges, prosecutors and practising lawyers.

7.3 Impediments and challenges to implementation of the legal framework addressing human rights and HT

Non-compliance impacts on States' reputation¹²⁸⁰ and is inherently related to the questions of States willingness,¹²⁸¹ effectiveness and/or capacity.¹²⁸² Non-compliance of human rights treaties may generate some legal sanctions at the domestic level.¹²⁸³ States' compliance and accountability to human rights

¹²⁷⁷ Helmut Philipp Aust, Alejandro Rodiles and Peter Staubach, 'Unity or Uniformity? Domestic Courts and Treaty Interpretation' (2014) 27 (1) *Leiden Journal of International Law* 75,77, 80.

¹²⁷⁸ Eyed Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts' (1993) 4 *European Journal of International Law* 160,166.

¹²⁷⁹ Oona A. Hathaway, 'Why Do Countries Commit to Human Rights Treaties?' (2007) 51(4) *Journal of Conflict Resolution* 588,593.

¹²⁸⁰ Daniel Bodansky, 'Legally binding versus non-legally binding instruments ' in Scott Barrett, Carlo Carraro and Jaime de Melo (eds) *Towards a Workable and Effective Climate Regime* (CEPR Press and Ferdi, 2015) 161.

¹²⁸¹ Engstrom (n 1255) 5.

¹²⁸² Engstrom (n 1255) 4.

¹²⁸³ Hathaway, 'Why Do Countries Commit to Human Rights Treaties?' (n 1279) 593.

treaties are therefore linked to the existence of effective domestic legal enforcement.¹²⁸⁴

7.3.1 Lack of political will

Effective implementation is partly related to the rationale and enthusiasm of States to ratify human rights treaties even if the issue of treaties represents only a part of the whole human rights field.¹²⁸⁵ Treaty ratification demonstrates at least some commitment. In this regard, 'the commitment itself sets processes in train that constrain and shape governments' future behaviour, often for the better'.¹²⁸⁶ This, however, does not mean that State has the political will to live up to its commitment.

Reviewing examples of ratification indicate that States' treaty commitments may be triggered by some form of international pressure. States are under scrutiny for their human rights records. This occurs with repressive governments that experience public criticism called 'naming' and 'shaming'. Such act may serve as a deterrent mechanism. 'Shaming' may be an attempt to address States' wrong behaviour with regard to their human rights practices.¹²⁸⁷ As a result, this may become a concern for States regarding their reputation¹²⁸⁸ and influence them to ratify human rights treaties in order to avoid criticism¹²⁸⁹ or to implement and respect international human rights standards. A recent example of international pressure, in November 2020, Gambia

¹²⁸⁴ Hathaway, 'Why Do Countries Commit to Human Rights Treaties?' (n 1279) 593.

¹²⁸⁵ Ann Marie Clark, 'Laws, talk, and human rights: The impact of treaty ratification, UN criticism, and democratic change on torture' (2018) 17(4) *Journal of Human Rights* 418.

¹²⁸⁶ Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009) 8.

¹²⁸⁷ Katrin Kinzelbach and Julian Lehmann, 'Can Shaming Promote Human Rights? Publicity in Human Rights Foreign Policy. A Review and Discussion Paper' (2014) *European Liberal Forum* 8.

¹²⁸⁸ Hathaway, 'Why Do Countries Commit to Human Rights Treaties?' (n 1279) 597.

¹²⁸⁹ Simmons (n 1286) 78.

instituted proceedings against Myanmar before the International Court of Justice alleging violations of the Genocide Convention against members of the Rohingya ethnic community.¹²⁹⁰ Subsequently, the Court ordered Myanmar to grant access to and cooperate with all United Nations fact-finding bodies for the investigation of alleged genocidal acts against the Rohingya.¹²⁹¹

In addition, pressure can be exerted internally by social media and civil society organisations vis a vis States' practices and accountability for their international human rights commitments.¹²⁹² This pressure can also be brought to international spheres such as in UN fora¹²⁹³ specifically before the UN human rights mechanisms of the Universal Periodic Review (UPR) and the State reporting procedure of the treaty bodies whose main objectives are to trigger States compliance and implementation of human rights recommendations.¹²⁹⁴

In the case of HT, the significant number of member States to the Palermo Protocol suggests on a *prima facie* basis a political will and commitment to combat HT.¹²⁹⁵ Nevertheless, practical obstacles to ratification are observed. Some barriers for instance may relate to a lack of understanding of the Protocol's content and requirements such as the scope and the nature of the crime.¹²⁹⁶ This may possibly reveal a lack of political will¹²⁹⁷ which imply that some States do not go beyond ratification and do little to address trafficking on

¹²⁹⁰ International Court of Justice Press Release, No. 2019/47 of 11 November 2019, p.1

¹²⁹¹ *ibid*, 'The Republic of The Gambia institutes proceedings against the Republic of the Union of Myanmar and asks the Court to indicate provisional measures', p.4.

¹²⁹² Valentina Carraro, 'Promoting Compliance with Human Rights: The Performance of the United Nations' Universal Periodic Review and Treaty Bodies' (2019) 63(4) *International Studies Quarterly* 1079,1090.

¹²⁹³ Clark (n 1285) 421.

¹²⁹⁴ Valentina Carraro (n 1292) 1090.

¹²⁹⁵ UNODC, 'International Framework for Action to Implement the Trafficking in Persons Protocol' (n 411) 5.

¹²⁹⁶ *ibid* 5.

¹²⁹⁷ Andreas Schloenhardt and Ellen Bevan, 'To Ratify or not to Ratify? Exploring the Barriers to Wider Ratification of the Trafficking in Persons Protocol' (2011) *New Zealand Yearbook of International Law* 161,162.

the ground but nevertheless try to avoid international criticisms and scrutiny.¹²⁹⁸ Alternatively, there may be serious capacity and financial limitations. Another example relates to the case of Nigeria who committed to various international legal instruments framing HT and human rights.¹²⁹⁹ The country adopted both anti-trafficking legislation and national referral mechanisms.¹³⁰⁰ Nevertheless, Nigeria fails to combat HT and implement its international and domestic legal obligations.¹³⁰¹ Analysis of the reasons present primarily the fact that Nigeria adopted a HT definition with the reservation that anti-trafficking laws ‘would not offend some well-entrenched cultural, religious and social practices’.¹³⁰² Moreover, the narrow interpretation of the HT definition does not mention the exploitation purpose, neither organs trafficking.¹³⁰³ However, the example of Nigeria evidences a lack of political will, corruption and complicity at all levels of government;¹³⁰⁴ a dysfunctional rule of law and consequently a lack of effective law enforcement mechanisms;¹³⁰⁵ a lack of effective control of the territory manifested by the ruling of armed groups such as Boko Haram,¹³⁰⁶ the

¹²⁹⁸ *ibid* 181.

¹²⁹⁹ Austrian Red Cross, ‘Nigeria: COI Compilation on Human Trafficking’ (2017) 55. See also S.K Kigbu and Y.B. Hassan, ‘Legal Framework for Combating Human Trafficking in Nigeria: The Journey So Far’ (2015) 38 *Journal of Law, Policy and Globalization* 205,216, 217,218.

¹³⁰⁰ Nigeria: Trafficking in Persons (Prohibition), Enforcement and Administration Act, 2015 (Act No. 4 of 2015).

¹³⁰¹ The US Department of State, Trafficking in Persons Report (2019): Nigeria < <https://www.state.gov/reports/2019-trafficking-in-persons-report-2/nigeria/>> accessed 3 August 2019.

¹³⁰² Kigbu and Hassan (n 1299) 220.

¹³⁰³ Kigbu and Hassan (n 1299) 219,220.

¹³⁰⁴ Austrian Red Cross (n 1299) 60.

¹³⁰⁵ Chris Mensah-Ankrah and Rex Osei Sarpong, ‘The Modern Trend of Human Trafficking in Africa and the Role of the African Union (AU)’ (2018) *Eban Centre for Human Trafficking Studies* 1,5,13.

¹³⁰⁶ The Northern part of Nigeria in the 2018 US Trafficking in Persons Report - < <https://www.refworld.org/docid/5b3e0ab6a.html>> accessed 2 August 2019. John Campbell and Asch Harwood, ‘Boko Haram’s Deadly Impact’ (2018) *Council on Foreign Relations* < <https://www.cfr.org/article/boko-harams-deadly-impact>> accessed 2 August 2019.

occurrence of HT criminal networks such as the 'Black Axe' or the 'Supreme Eiyee' Confraternity involved with international sex trafficking.¹³⁰⁷

7.3.2 Lack of State's capacity

When States' capacity is fragilised, implementation of human rights may be lacking as the process requires some degree of institutional and legal functionality. One chosen definition of capacity refers to the State's ability to maintain borders and security, to provide for its citizens and to perform in terms of social as well as economic development.¹³⁰⁸ The lack of States' capacity in fragile and conflict affected environments is magnified and constitutes specific challenges to implementing their existing human rights commitments.¹³⁰⁹ Lack of capacity may result in the inability of States to address for instance, subsequent risks of forced migration and HT practices that generally accompany weak rule of law and institutional structures.¹³¹⁰

This lack of capacity is exemplified by the situation in Yemen where crimes of sexual violence cannot currently be prosecuted due to the collapse of the rule of law.¹³¹¹ This highlights the incapacity of the State and possibly coupled with an absence of political will to address such crimes in a collapsed criminal justice

¹³⁰⁷ Black Axe is a Nigerian criminal network which has roots in Benin city and cells in Sicily and Italy, Austrian Red Cross (n 144) 5. See also the Eiyee confraternity, who is affiliated with Black Axe for trafficking: IRB - Immigration and Refugee Board of Canada: The Eiyee confraternity, including origin, purpose, structure, membership, recruitment methods, activities and areas of operation; state response (2014-March 2016) <<https://www.ecoi.net/en/document/1200790.html>> accessed 5 August 2019.

¹³⁰⁸ Nafisa Akbar and Susan L. Ostermann, 'Understanding, Defining, and Measuring State Capacity in India Traditional, Modern, and Everything in Between - An Asian Survey Special Issue on India' (2015) 55(5) Asian Survey, University of California Press 850, 851.

¹³⁰⁹ Mie Roesdahl, 'Universal Periodic Review and its Limited Change Potential: Tracking the Complexity of Multiple Actors and Approaches to Human Rights Change through the Lens of the UPR Process of Nepal' (2017) 9 Journal of Human Rights Practice 403.

¹³¹⁰ Schloenhardt and Bevan (n 1297) 169.

¹³¹¹ Office of the Special Representative of the secretary-general on sexual violence in conflict (16 April 2018) UN Doc S/2018/250 p.6.

system.¹³¹² In these contexts, implementation of human rights is often not the priority, neither are States able to generate the necessary political will.

Another implementation challenge relates to States financial capacity.¹³¹³

Contributing factors to enabling States' political will are multifarious but are often related to practical difficulties of allocating resources. Scarcity of financial resources often leads states to have to prioritise multiple needs in their budget.¹³¹⁴ In particular, scarcity of resources influences the prioritisation of implementing certain human rights such as the right to health, education and security.¹³¹⁵ For instance, Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) sets out an implementation obligation on the State party to undertake steps 'with a view to achieving progressively the full realization of the rights recognized in the present Covenant'.¹³¹⁶ This obligation requires States parties to place priority in the allocation of resources for the implementation of human rights.¹³¹⁷

This hierarchy of implementation priorities is of concern for HT as the issue may not be envisaged to be a priority specifically in fragile contexts and in extremely poor countries. This is verified in the case of Palestine. There may be other pressing humanitarian and development needs. To this end, the persistent challenge in the practical implementation of anti-human trafficking activities is

¹³¹² Human Rights Council Working Group on the Universal Periodic Review Thirty-second session, National report of Yemen submitted to the Human Rights Council (8 November 2018) p. 24. See also Human Rights Council, 'Situation of human rights in Yemen, including violations and abuses since September 2014' (17 August 2018) UN Doc A/HRC/39/43, para.86 p.12.

¹³¹³ Quintavalla and Heine (n 1263) 681.

¹³¹⁴ Quintavalla and Heine (n 1263) 679.

¹³¹⁵ Quintavalla and Heine (n 1263) 679.

¹³¹⁶ Article 2 (1) of the International Covenant on Economic, Social and Cultural Rights (n 186).

¹³¹⁷ Anne Peters, 'Corruption as a Violation of International Human Rights' (2019) 29(4) The European Journal of International Law 1251,1263.

the allocation of sufficient financial resources. This can be exacerbated by the poor institutional and technical capacity of member States to the Protocol to develop appropriate anti-trafficking policies and strategies.¹³¹⁸

7.3.3 Presence of corruption

Corruption often linked with organised crime can disrupt implementation. Corruption is defined as ‘the abuse of power of public office for private gain’¹³¹⁹ and brings further burdens on the State faced with capacity and financial problems. In this instance, corruption circumvents the rule of law.¹³²⁰ States with a high level of corruption evidenced by the undermining of the rule of law, inevitably experience significant human rights violations. As Peters describes the relationship, ‘there not only exists a nexus, but even almost a tautology’.¹³²¹ However, even benign environments experience similar challenges in the implementation of their human rights commitments. The recent implementation of the Modern Slavery Act in the UK reflects many of the common problems evolving around resources and poor cross government cooperation. DCAF notes in 2015 that while the enactment of the Modern Slavery Act was an indication of the government political will, there remains a lack of staff to implement the provisions of the Act. In recent years police numbers in the UK have diminished and budgets are under pressure.¹³²² Similarly, the UK Government made other commitments such as the creation of an independent

¹³¹⁸ UNODC, ‘International Framework for Action to Implement the Trafficking in Persons Protocol’ (n 411) 6.

¹³¹⁹ World Bank Group, ‘Helping Countries Combat Corruption: The Role of the World Bank’ (1997) Poverty Reduction and Economic Management 8.

¹³²⁰ Anne Peters, ‘Corruption and Human Rights’ (2015) Working Paper Series 20, Basel Institute on Governance 9.

¹³²¹ *ibid* 9.

¹³²² Bernie Gravett, ‘Countering Human Trafficking: The UK’s Efforts’ (2015) DCAF – Geneva Centre for Security Sector Governance 33.

child advocate scheme for child victims of trafficking which is not yet in place.¹³²³ The Winston Churchill Memorial Trust compared the UK's support to that offered by the US, Belgium and Netherlands and confirmed a lack of financial, legal, and pastoral support for trafficking survivors in the UK. Moreover, the UK National Audit Office notes that:

'the campaign to drive out modern slavery is in the early stages. So far it is helping to establish the scale and international nature of this issue. To combat modern slavery successfully, however, government will need to build much stronger information and understanding of perpetrators and victims than it has now'.¹³²⁴

7.3.4 Dysfunctional institutional rule of law

One definition establishes that the principles of the rule of law arise

'from domestic legal systems where institutions and procedures had been established permitting, amongst other tenets, the existence of a stable government, transparency and access to justice'.¹³²⁵

The government is bound by the rule of law which contains safeguards for the separation of powers which includes the independence of the judiciary enabling the implementation of the rule of law and human rights.¹³²⁶ Legal institutions and their balance are no doubt fundamental, but they may not be the only or most important element affecting the rule of law. Political will, key political and

¹³²³ ECPAT UK, 'Child trafficking in the UK 2018: A snapshot' (2018) 4.

¹³²⁴ UK National Audit Office, Amyas Morse, 'Reducing Modern Slavery. HC 630 Session 2017–2019 (15 December 2017) < <https://www.nao.org.uk/report/reducing-modern-slavery/>> accessed 26 January 2020.

¹³²⁵ Sanderijn Duquet, Joost Pauwelyn, Ramses A. Wessel and Jan Wouters, 'Upholding the Rule of Law in Informal International Lawmaking Processes' (2014) 6 (1) Hague Journal on the Rule of Law 75,78.

¹³²⁶ Geert Corstens, 'Human Rights and the Rule of Law' (2014) Centre for Judicial Cooperation, Distinguished Lecture, abstract.

economic incentives are parameters that lead to the enforcement or non-enforcement of laws and policies.¹³²⁷ Moreover, the rule in the sense of equity of treatment for citizens can be achieved when ‘the institutional trilogy-formal rules, informal norms, and enforcement mechanisms-come together harmoniously.’¹³²⁸

Conversely, examples such as the crisis of Mali and the Sahel illustrate that countries experiencing collapsed state-structures evidence the limitation and lack of ability to implement principles of democracy, good governance, human rights, and functioning rule of law.¹³²⁹ In this context accountability and incentives are missing or undermined by politics. Other examples of weak rule of law often evidence a random or misapplication of the law which often disadvantages poor, ethnic, and racial minorities, generally the more vulnerable.¹³³⁰ The latter is the case of Myanmar regarding mass atrocity crimes committed in Rakhine against ethnic communities of Rohingyas. Recent analysis of the UN Security Council highlights that one aspect of the failure of the rule of law is the lack of individual criminal accountability.¹³³¹ Examples are provided by some of the most devastating recent conflicts such as Syria, Iraq, Yemen. For instance, international investigation teams collected evidence of ISIL’s crimes in Iraq that may be used later in domestic criminal proceedings before Iraqi national-level courts.¹³³²

¹³²⁷ Edouard Al-Dahdah, Cristina Corduneanu-Huci, Gael Raballand, Ernest Sergenti, and Myriam Ababsa, ‘Rules on Paper, Rules in Practice *Enforcing Laws and Policies in the Middle East and North* (2016) World Bank Group 5.

¹³²⁸ Al-Dahdah, Corduneanu-Huci, Raballand, Sergenti and Ababsa (n 1327) 12.

¹³²⁹ Mireille Affa’a Mindzie, ‘Strengthening the Rule of Law and Human Rights in the Sahel’ (2013) 2(2) *Stability: International Journal of Security & Development* 1.

¹³³⁰ Al-Dahdah, Corduneanu-Huci, Raballand, Sergenti and Ababsa (n 1327) 19.

¹³³¹ UN Security Council, ‘The Rule of Law: Retreat from Accountability’ (2019) Research report 1.

¹³³² *ibid* 3.

7.3.5 Lack of social will

Implementation theories, for example the ‘Normalization Process Theory’¹³³³ which characterises implementation as a social process of collective action through the study of individual and group behaviour, can be applied to understanding implementation problems.¹³³⁴ This theory seems relevant when considering the process of implementing human rights. Thus, the implementation of a complex intervention within a social system depends on the various agents’ capacity to cooperate and coordinate their actions. All parties both individually and collectively have to share a commitment to operationalising human rights and protection against HT in practice. Without alignment and joint commitment, implementation will always remain a challenge.

This consideration may be linked usefully to the concept of ‘social will’ which is as important as the political will to implement human rights.¹³³⁵ In this regard, communities may not express the social and common will to address and denounce fundamental human rights abuses based on their prevalent traditional and cultural practices such as early and forced marriage or female genital mutilation (FGM).¹³³⁶ Conversely an example of ‘social will’ or ‘social

¹³³³ Carl R May, Frances Mair, Tracy Finch, Anne MacFarlane, Christopher Dowrick, Shaun Treweek, Tim Rapley, Luciana Ballini, Bie Nio Ong, Anne Rogers, Elizabeth Murray, Glyn Elwyn, France Légaré, Jane Gunn and Victor M. Montori, ‘Development of a theory of implementation and integration: Normalization Process Theory’ (2009) 4(29) *Implement Science* 1,2.

¹³³⁴ May, Mair, Finch, MacFarlane, Dowrick, Treweek, Rapley, Ballini, Ong, Rogers, Murray, Elwyn, Légaré, Gunn and Montori (n 1333) 2.

¹³³⁵ Azadeh Chalabi, ‘Social will as important as political will for implementing human rights’ (2019) <<https://ohrh.law.ox.ac.uk/social-will-as-important-as-political-will-for-implementing-human-rights/>> accessed 17 January 2020.

¹³³⁶ *ibid* 69.

mobilisation' of women's rights activists in Jordan led to the amendment of the Jordanian Personal Status Law in order to protect the rights of women regarding their exclusion from property ownership against norms, attitudes and the application of the Sharia law discriminating women inheritance issues.¹³³⁷

However, the theoretical link between cultural considerations and the apparent lack of 'social will' in civil society to implement human rights is relatively unexplored.

7.3.6 Cultural considerations

Related to the notion of 'social will', the issue of cultural and societal diversity challenges the implementation of universal human rights. This does not necessarily imply that specific cultural norms question the legitimacy of international human rights.¹³³⁸ Nevertheless, advocating for a culturally sensitive approach to human rights may lead to a more participative approach which goes beyond States institutions and involve different actors such as non-state actors.¹³³⁹ This inclusive participation may engage a wider spectrum of responsibilities regarding the protection of human rights which encompass HT. Furthermore, the general perception that human rights constitute a foreign discourse, can be mitigated if domestic as well as regional bodies and actors help bridge the gap. They may do so by forming a compatible and coherent mix of human rights norms considering local cultural particularities and environmental contexts acquainted with the needs of people on the ground.

¹³³⁷ Al-Dahdah, Corduneanu-Huci, Raballand, Sergenti and Ababsa (n 1327) 7.

¹³³⁸ Yvonne Donders and Vincent Vleugel, 'The Receptor Approach: a New Human Rights Kid on the Block or Old Wine in New Bags? A Commentary on Professor Zwart's Article in HRQ' (2013) INTERFACES Research Paper 04 Amsterdam Centre for International Law 1227.

¹³³⁹ Fraser, 'Challenging State-centricity and legalism: promoting the role of social institutions in the domestic implementation of international human rights law' (n 1252) 984.

These combined norms may offer more possibilities and improve chances of implementation as well as enforcement.

The thesis supports the view that cultural diversity and human rights are mutually enriched and can find common ground.¹³⁴⁰ Vigilance is needed to ensure that promoting respect for local culture and traditions is not used by States as a pretext to avoid implementation of their human rights commitments.¹³⁴¹ Cultural particularities should not be advocated in order to justify discriminatory practices, oppressive traditions, and human rights violations.¹³⁴²

Some sensitive areas include, for example, concern with women's rights and the implementation of core aspects of the CEDAW. This is the situation for many countries that entered reservations to Articles 2 and 16 which are fundamental provisions of the CEDAW relating to issues of discrimination and marriage.¹³⁴³ Examples are provided by Algeria which subjects the CEDAW's implementation to the condition that Article 2 does not conflict with the provisions of the Algerian Family Code.¹³⁴⁴ Similarly, the Kingdom of Bahrain conditions the CEDAW implementation to the respect of Islamic Sharia.¹³⁴⁵ The Convention on the Rights of the Child is also subject to reservations which limits the scope and effectiveness of protection provided by this international human

¹³⁴⁰ *ibid* 232.

¹³⁴¹ UN GA/SHC/4241 (23 October 2018) Relativist Claims on Culture Do Not Absolve States from Human Rights Obligations, Third Committee Expert Says as Delegates Denounce Country-Specific Mandates <<https://www.un.org/press/en/2018/gashc4241.doc.htm>> accessed 18 December 2019.

¹³⁴² Flávia Saldanha Kroetz, 'Between global consensus and local deviation: a critical approach on the universality of human rights, regional human rights systems and cultural diversity' (2016) 3(1) *Revista de Investigações Constitucionais* 43,46.

¹³⁴³ Johanna E. Bond, 'CEDAW in Sub-Saharan Africa: Lessons in Implementation' (2014) *Michigan State Law Review* 241,244.

¹³⁴⁴ <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=en#EndDec> accessed 16 December 2019.

¹³⁴⁵ <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=en#EndDec> accessed 16 December 2019.

rights instruments.¹³⁴⁶ This is illustrated by Iran which ‘reserves the right not to apply any provisions or articles of the Convention that are incompatible with Islamic legislation’.¹³⁴⁷ Another example relates to Syria which made a reservation for the implementation of the article 7 (1) of the Palermo Protocol. This article encourages the State party to adopt ‘legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases’.¹³⁴⁸ Other reservations to the Palermo Protocol are made by thirty-one States parties under Article 15(2) to exclude the compulsory jurisdiction of the International Court of Justice (ICJ).¹³⁴⁹

7.4 Challenges in the implementation of human rights and HT legal frameworks in a plural legal system

The concept of legal pluralism is complex, and the thesis will not delve into this debate. Legal pluralism exists whenever social actors identify more than one source of ‘law’ within a social arena’.¹³⁵⁰ Legal pluralism is also described as the multiplicity and diversity of legal systems which are not exclusively the monopoly of the State and the features of the state building process.¹³⁵¹

¹³⁴⁶ William A. Schabas, ‘Reservations to the Convention on the Rights of the Child’ (1996) 18(2) Human Rights Quarterly 472, 473.

¹³⁴⁷ *ibid* 478. See also

< https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-11&chapter=4&lang=en#EndDec > accessed 18 January 2020.

¹³⁴⁸ Article 7(1) of the Palermo Protocol. See also

<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XVIII-12-a&chapter=18&lang=en> accessed 14 January 2020.

¹³⁴⁹ <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XVIII-12-a&chapter=18&lang=en#EndDec> accessed 18 January 2020.

¹³⁵⁰ Brian Z Tamanaha, Understanding Legal Pluralism: Past to Present, Local to Global’ (2008) 30 Sydney Law Review 396.

¹³⁵¹ *ibid* 375, 380, 381.

Legal pluralism is frequently found in the context of colonisation where 'state court processes and norms instituted by the colonising power applied mainly to economic activities and government affairs, while officially recognised customary or religious institutions enforced local norms'.¹³⁵² This became therefore the legacy of many developing countries and fragile countries such as Somalia, Afghanistan, and in Palestine.

In the case of Palestine, this thesis applies the term 'legal pluralism' as it relates to the multi-layered legislation with various sources of law (foreign law, common law, civil law, customary law, sharia law, tribal law) that govern different areas of laws: criminal law, personal law, land law distinctly applied in the West Bank, Gaza, and East Jerusalem.

Legal pluralism *per se* may not be problematic. It depends on whether the systems act to complement one another and cooperate or whether they are in competition, and/or in opposition.¹³⁵³ To what extent this is the case in Palestine would require a deeper study but *de facto*, the current legal system poses very significant challenges rooted partly in the colonial period.

'Legal pluralism in Palestine is often understood as a means of increasing access to justice and dispute resolution in developing countries and transitional states where access to the state justice system is limited. Legal pluralism can be beneficial in enabling other paths to accessing justice and dispute resolution. In this regard legal pluralism

¹³⁵² Tamanaha (n 1350) 383.

¹³⁵³ Geoffrey Swenson, 'Legal Pluralism in Theory and Practice' (2018) 20 (3) International Studies Review 438.

assists in the critical job of maintaining law and order because the state is often incapable of providing these basic services'.¹³⁵⁴

As an example, with the case of Palestine the frequent recourse to the informal justice system of the tribal law is an alternative to dealing with Israeli courts and also because of the lack of trust in the Palestinian judicial system.¹³⁵⁵

With regard to the issue of human rights, aside from the State legal system, human rights are addressed in other coexisting normative systems that can be customary, religious, economic or community based.¹³⁵⁶ The observation is that 'no single model offers better human rights protection *per se*. It is important to assess how these frameworks impact on human rights in practice'.¹³⁵⁷ In principle, the legal pluralism construct need not contravene international standards of rule of law and human rights, and ultimately does not affect the enjoyment of human rights. The related concern is therefore the political will of Palestine to ensure that norms from the various sources of law incorporate human rights dimension including HT and in particular respect for women's rights. A legally plural situation on the ground may contribute or not to the realisation of human rights, depending on the specific circumstances and the interpretation and application of both human rights standards and other norms'.¹³⁵⁸ This is illustrated by the situation in Palestine as examined in chapter 8 and 9.

¹³⁵⁴ Laurence Grenfell 'The conceptual relationship between legal pluralism and the rule of law in post-conflict states' in *Promoting the Rule of Law in Post-Conflict States* (Cambridge University Press, 2013) 64.

¹³⁵⁵ < <https://www.aljazeera.com/news/2021/1/25/palestinian-tribal-law-puts-stability-over-justice-rights-groups>> accessed 2 August 2021.

¹³⁵⁶ Tamanaha (n 1350) 403, 404.

¹³⁵⁷ Giselle Corradi, 'Can Legal Pluralism Advance Human Rights? How International Development Actors Can Contribute' (2013) *European Journal of Development Research* 1,3.

¹³⁵⁸ Ellen Desmet, 'Legal Pluralism and International Human Rights Law: A Multifaceted Relationship' in Giselle Corradi, Eva Brems and Mark Goodale (eds), *Human Rights Encounter Legal Pluralism Normative and Empirical Approaches* (Hart Publishing, 2017) 43.

However, one drawback of this expanding pluralism is the risk of 'global disorder' of normative orders'.¹³⁵⁹ This may bring legal conflict, overlapping and duplication which may ultimately compromise effective protection of human rights on the ground. In that sense it is important to understand how potential conflicts between normative orders are being managed under this pluralist framework. This requires greater understanding of the proliferation of normative orders and how it may impact on the implementation of international human rights commitments and the way they are operationalised in practice.¹³⁶⁰ This examination is out of the purview of the research. In a plural environment, however, one of the challenges for individuals is to navigate between various justice process influenced by 'customary', religious, and/or formal legal norms and to ensure in particular for women no obstruction to their access to justice.¹³⁶¹

On this basis, in FCAS, implementing and accessing human rights is even more challenging. This is evidenced by the situation in Afghanistan where in the midst of conflict, plural normative systems coexist: Sharia law, customary rules, State law. This context often reduces individuals to recourse to other means of judicial resolutions provided by customary practices initiated at family or inter-family level. In places like Afghanistan and Somalia, legal 'services' are offered by the Taliban and Al-Shabbab respectively. These tradition-based systems and non-state forms of law occur in other similar fragile settings and may be also

¹³⁵⁹ Neil Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders' (2008) 6 (3-4) *International Journal of Constitutional Law* 373.

¹³⁶⁰ Fraser, 'Challenging State-centricity and legalism: promoting the role of social institutions in the domestic implementation of international human rights law' (n 1253) 984.

¹³⁶¹ Tanja Chopra and Deborah Isser, 'Women's Access to Justice, Legal Pluralism and Fragile States Women's Access to Justice, Legal Pluralism and Fragile States' (2012) 4(2) *The Hague Journal on the Rule of Law* 337,353.

indicative that in such contexts the State's legal and judicial regime may generate mistrust or simply does not exist. However, not all elements of these alternative legal systems are compatible with international human rights law.

7.5 The role of UN human rights mechanisms in enhancing the domestic implementation of the international legal framework addressing HT

This section examines the contribution and the challenges of the UN human rights system which represents mechanisms that support State compliance with human rights mechanisms and encourages the domestic implementation of its member States' international treaty commitments. The UN offers expertise and support to the different human rights monitoring mechanisms in the United Nations system.

The wide range of UN human rights special procedures, investigative, monitoring mechanisms and cooperation between various entities constitute key support to States in the implementation process. In this regard, 'the examination of State reports for instance constitutes the key mechanism established at the universal level to monitor the implementation of treaty obligations by contracting states'.¹³⁶² Some scholars describe the contribution of UN agencies as 'operational' or as executing organs with their respective wide-ranging expertise also perceived as powerful conduits to assist and guide States to strengthen practical implementation.¹³⁶³ The section examines the limitations of the proliferation of UN procedures.

¹³⁶² Walter Kälin, 'Examination of state reports' in H. Keller and G. Ulfstein (eds), *UN human rights treaty bodies. Law and legitimacy* (Cambridge University Press 2012) 16.

¹³⁶³ Paul Hunt, 'Configuring the UN Human Rights System in the "Era of Implementation": Mainland and Archipelago' (2017) 39 (3) *Human Rights Quarterly* 489,498,500.

As examined in chapter 5 and 6, despite progress made by States in ratifying core human rights treaties, implementation of international human rights obligations remains weak.¹³⁶⁴ Many reasons impede States implementation and were identified in the previous section. In order to bridge this gap, the UN has created three types of universal human rights mechanism: Treaty Bodies, Special Procedures, and the UPR.¹³⁶⁵ These mechanisms were established to review and assess levels of State compliance with international human rights obligations and commitments. A former UN High Commissioner for Human Rights has emphasised that the establishment of treaty bodies is a great achievement and lie at the heart of the international human rights protection system.¹³⁶⁶

Treaty bodies include the Committee on the Rights of the Child, which has responsibility for monitoring the implementation of the Convention on the Right of the Child. General Comment N.5 adopted by the Committee on the Rights of the Child in 2003 highlights States parties' obligations with regard to general measures of implementation.¹³⁶⁷ Importantly and in line with the issue of legal pluralism examined previously, the Committee advises that both legal as well as non-legal measures are essential to achieve full implementation.¹³⁶⁸ This includes the participation of multiple actors domestically¹³⁶⁹ as well as a cross-

¹³⁶⁴ Marc Limon and Mariana Montoya, 'Clustering and the integrated implementation of recommendations: The key to unlocking the complementary power of the UN's compliance mechanisms - The Universal Periodic Review, Treaty Bodies and Special Procedures: A connectivity study' (2019) 8.

¹³⁶⁵ *ibid* 8.

¹³⁶⁶ Navanethem Pillay, 'Strengthening the United Nations human rights treaty body system' (2012) Report of the United Nations High Commissioner for Human Rights 8.

¹³⁶⁷ Committee on the Rights of the Child, 'General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6) UN Doc CRC/GC/2003/5 (27 November 2003).

¹³⁶⁸ *ibid* paras. 26, 27. p. 7,8.

¹³⁶⁹ Andressa M. Gadda, Juliet Harris, E. Kay M. Tisdall, Elizabeth Millership and Ursula Kilkelly, 'Human rights' monitoring and implementation: how to make rights 'real' in children's lives' (2019) 23(3) *The International Journal of Human Rights* 317,319.

sectoral coordination.¹³⁷⁰ Implementation of States human rights obligations is therefore complemented by judicial and quasi-judicial decisions,¹³⁷¹ programmes, policies with more empowerment at the domestic level of civil society actors closer to individuals in need of human rights protection.

Additionally, the Committee notes that States parties need to

*‘clarify the extent of applicability of the Convention in States where the principle of ‘self-execution’ applies and others where it is claimed that the Convention ‘has constitutional status’ or has been incorporated into domestic law’.*¹³⁷²

Another similar perspective is provided by the CEDAW Committee which has been acting as a catalyst for domestic efforts on implementation¹³⁷³ and was established for that purpose.¹³⁷⁴ Through the process of State reporting, the Committee monitors States’ compliance with the CEDAW Convention and helps them fulfil their obligations based on the Committee’s observations.¹³⁷⁵ The reporting process has also served as an empowerment tool for civil society in particular women as well as NGOs to be involved in the implementation and enforcement of the Convention.¹³⁷⁶ In addition, the adoption of the Optional Protocol to the Convention was part of procedural improvements to the implementation machinery.¹³⁷⁷ The ‘communications’ or ‘petitions’ procedure

¹³⁷⁰ Committee on the Rights of the Child, General Comment N.5 (n 1370) para.27, p.8.

¹³⁷¹ International Commission of Jurists (ICJ), ‘Study on the Reform of the United Nations Human Rights Treaty Body System’ (2008) 33.

¹³⁷² Committee on the Rights of the Child, General Comment N.5 (n 1370) para 19, p. 6.

¹³⁷³ Anne F. Bayefsky, Denesha Reid and Kathryn Balmforth, ‘The CEDAW Convention: Its Contribution Today’ (2000) 94 American Society of International Law 197,198.

¹³⁷⁴ Article 17(1) of the CEDAW (n 10).

¹³⁷⁵ Ruth Abril Stoffels, ‘The role of the CEDAW Committee in the implementation of public policies on gender issues: analysis through a study of the protection of girls’ rights in Spain’ (2019) 23(8) The International Journal of Human Rights 1317.

¹³⁷⁶ Afra Afsharipour, ‘Empowering Ourselves: The Role of Women's NGOs in the Enforcement of The Women's Convention’ (1999) 99(1) Columbia Law Review 129,131,132.

¹³⁷⁷ Bayefsky, Reid and Balmforth (n 1373) 199. See also the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 54/4,

through individual complaints of violations as well as inquiry procedure on grave or systematic violation of the Convention, were envisaged to strengthen the Committee's capacity to assist States parties to implement their obligations. Another example of guidance and cooperative mechanisms to support States implementation relates to the reporting process before the UN Human Rights Council (HRC). Since 2006, the HRC established the UPR procedure.¹³⁷⁸ This UN procedure represents a key feature of the international human rights mechanisms. It is described as a 'peer review' system.¹³⁷⁹ The mechanism enables monitoring on a regular basis States human rights performance, assisting to improve the human rights situation of every member State and provide them through a cooperative process with technical assistance.¹³⁸⁰ During this interactive process, domestic human rights practices are discussed with other institutions in the presence of State under report: NGO, intergovernmental organisations, international non-governmental organisations, diplomatic missions. This process often exposes the States to open criticism. Domestic actors such as CSOs and NHRIs may also speak out to 'name and shame' perpetrators of human rights¹³⁸¹ and sometimes their own government.¹³⁸²

Among a wide range of human rights concerns, the issue of HT can also be raised during the UPR process which enables States to frame their actions and

annex, 54 U.N. GAOR Supp. (No 49) at 5, UN A/54/49 (Vol.I) (adopted 6 October 1999, entered into force 22 December 2000).

¹³⁷⁸ UNGA Res 60/251 (3 April 2006) UN Doc A/RES/60/251.

¹³⁷⁹ McMahon and Ascherio, 'A Step Ahead in Promoting Human Rights: The Universal Periodic Review of the UN Human Rights Council' (2012) 18(2) *Global Governance* 234.

¹³⁸⁰ Res 5/1 (18 June 2007) UN Doc A/HRC/RES/5/1: *Institution-building*'.

¹³⁸¹ Emilie M. Hafner-Burton, 'Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem' (2008) 62(4) *International Organization* 689.

¹³⁸² Jalloh (n 41) 48.

initiatives undertaken to address national-level changes.¹³⁸³ An example is provided by the State of Nigeria under the UPR in November 2018. HT legal commitments were discussed based on the recent establishment of the Nigerian National Agency for the Prohibition of Trafficking in Person.¹³⁸⁴ Similarly, in 2018, Yemen was under review and its report highlighted the absence of domestic response in particular a national plan to prevent and punish HT as well as to criminalise sexual exploitation and trafficking of children.¹³⁸⁵ As mentioned earlier in the chapter, section 7.3, a weak rule of law hinders government will and capacity to prosecute and convict trafficking offenses. Corruption in the case of Yemen was identified as an additional cause for inaction.

In parallel to the UPR process, additional and more narrowly focused procedures can take place in order to examine HT or other human rights issues more thoroughly. This is characterised by the intervention of the Special Rapporteur on Trafficking in Persons, Especially Women and Children as well as the collaborative work of the Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict.

However, the proliferation of UN bodies, institutions and processes may negatively impact the implementation of human rights. States may be confused by so many bodies and mandates. There is a myriad of Special Rapporteurs, and UN special procedures with differing mandates, and independent experts

¹³⁸³ The Human Rights Council adopts Universal Periodic Review outcomes of Botswana, Bahamas, and Burundi (28 June 2018). <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23289&LangID=E> > accessed 10 April 2019.

¹³⁸⁴ HRC, (40th Session) Report of the Working Group on the Universal Periodic Review of Nigeria (26 December 2018) p.4.

¹³⁸⁵ HRC, (32nd Session) Compilation on Yemen, Report of the Office of the United Nations High Commissioner for Human Rights (5 November 2018) UN Doc A/HRC/WG.6/32/YEM/2, paras 28,29,30.

who report on human rights in a specific country or specialised in thematic rights. These specific procedures for instance are forecast to reach the number of one hundred by 2030.¹³⁸⁶ An example could be the mandate of the Special Rapporteur on contemporary forms of slavery including its causes and consequences overlapping with the mandate of the Special Rapporteur on trafficking in persons, especially women and children, thus, causing confusion. When ratification occurs, there follows a special and wide array of interactions between States and the UN human rights mechanisms with their various procedures as evoked previously and with other relevant international institutions.¹³⁸⁷

In this regard, the proliferation of processes to monitor the implementation of human rights treaties¹³⁸⁸ takes place through country visits, thematic reports, and communications on individual cases; the establishment of independent commissions of inquiry, fact-finding missions and other *ad hoc* human rights investigations initiated by the Human Rights Council, the Security Council, the High Commissioner for Human Rights, or the UN Secretary-General.

States can be overwhelmed by the UN complexity and possibly conflicting objectives. Weak implementation may be partly linked to the difficulty for States to address appropriately their multiple human rights reporting requirements. To this end, UN former High Commissioner for Human Rights, Navanethem Pillay noted that States who ratified several treaties and comply with their reporting requirements are requested to implement approximately 100 to 350

¹³⁸⁶ Rosa Freedman and Jacob Mchangama, 'Expanding or Diluting Human Rights? : The Proliferation of Special Procedures Mandates' (2016) 38 (1) Human Rights Quarterly 164,165.

¹³⁸⁷ Ryan Goodman and Derek Jinks, 'Measuring the Effects of Human Rights Treaties' (2003) 14(1) European Journal of International Law 171,176.

¹³⁸⁸ In 2018, the independent human rights experts undertook 83 visits to 58 countries and territories.

recommendations from the various treaty bodies they report to in a span of four to five years. This process often results in overlapping, duplications and contradictions that may arise from recommendations of different human rights mechanisms.¹³⁸⁹

Proliferation may therefore 'weaken the system by diluting core rights, reducing resources available to mandate holders providing a smokescreen for States seeking to avoid scrutiny of their record on fundamental human rights'.¹³⁹⁰

Process can be confusing as can the sheer number of bodies involved. Many entities form a network within the UN human rights systems.¹³⁹¹ This includes a myriad of UN specialised agencies¹³⁹² such as UNDP, UNICEF, UNHCR, the International Organization for Migration (IOM) and other international institutions such as OSCE. For example, UNODC, being the guardian of the HT Protocol, illustrates its involvement in the implementation of the Palermo Protocol through its operational role in providing technical assistance, recommendations, support in decision or policymaking to States who adjust their methods and chose measures of implementation according to their social, cultural, political environment.¹³⁹³

Another example of UN involvement in the implementation of the HT framework relates to the Working Group on Trafficking in Persons established by the Conference of the Parties to the UN Convention against Transnational Organised Crime. This entity is tasked *inter alia* to identify difficulties that States

¹³⁸⁹ Kälin (n 1362) 18,19.

¹³⁹⁰ Freedman and Mchangama (n 1386) 165.

¹³⁹¹ Hunt (n 1363) 495.

¹³⁹² Dinah L. Shelton, *The United Nations System for Protecting Human Rights, Volume IV* (Routledge, 2014) xi.

¹³⁹³ Fraser, 'Challenging State-centricity and legalism: promoting the role of social institutions in the domestic implementation of international human rights law' (n 1252) 976.

parties may face with implementation and can provide some guidance along with other entities.¹³⁹⁴ The UN system proposes for instance other support of joint entities to strengthen their coordination and cooperation through the work of the Inter-Agency Coordination Group against Trafficking in Persons (ICAT) established in 2006.¹³⁹⁵ In addition, cooperation on HT between the UN with law enforcement entities include the contribution of Interpol, Europol and other security sections of regional bodies.¹³⁹⁶

As further examples of this proliferation and potential confusion, in 2007 a group of organisations launched the UN Global Initiative to Fight Trafficking initially focusing on global conferences. This initiative intended to foster awareness, global commitment, and action to counter human trafficking.¹³⁹⁷ The coalition involves the contribution of the International Labour Organization (ILO), the Office of the United Nations High Commissioner for Human Rights, the United Nations Children's Fund, the United Nations Office on Drugs and Crime, the International Organization for Migration, and the Organization for Security and Cooperation in Europe. In 2009 the same organisations introduced 'The Framework for Action' to support the effective implementation of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. The Framework is a technical assistance tool

¹³⁹⁴ Schloenhardt and Bevan (n 1297) 163, 165.

¹³⁹⁵ For example, see Inter-Agency Coordination Group Against Trafficking in Persons (ICAT), 'The next decade: Promoting common priorities and greater coherence in the fight against human trafficking' (2012). ICAT is composed of the following entities: DPKO, ICAO, ICPO-Interpol, IOM, ILO, OHCHR, UNAIDS, UNDP, UN Women, UNFPA, UNHCR, UNICEF, UNIFEM, UNICRI, UNESCO, UN-INSTRAW and UNODC. See also UN Economic and Social Council (ECOSOC), UN Economic and Social Council Resolution 2006/27, 'Strengthening International Cooperation in Preventing and Combating Trafficking in Persons and Protecting Victims of Such Trafficking' (27 July 2006) UN Doc E/RES/2006/27.

¹³⁹⁶ UNODC, 'Countering Trafficking in Persons in Conflict Situations – Thematic Paper' (2018) 63.

¹³⁹⁷ UNODC, 'United Nations Global Initiative to Fight Human Trafficking (UN.GIFT)'(2011) 7.

rooted in action for prevention, protection, and prosecution (the 3Ps) as well as national, international cooperation and coordination.¹³⁹⁸

In conclusion, various actors and multiple processes nevertheless do contribute to shape the implementation framework for human rights within which HT is addressed. This ranges from the 'monitoring by human rights treaty bodies and adjudication by international courts and tribunals, to capacity building in civil society organizations and human rights education at the grass-roots level.'¹³⁹⁹

The protection against HT 'has come to be governed by a dense assortment of public and private initiatives promulgating binding and nonbinding rules that address States and non-state actors'.¹⁴⁰⁰ However, this overall context of overlapping and duplication between UN agencies and other donors are likely to lead to misunderstandings, to a lack of coordination and potentially to inaction. The latter is exemplified in the case of Palestine as observed in chapter 9.

The next section examines the role and the associated challenges of domestic legal systems in their accountability to implement the legal framework addressing HT and human rights in general as well as to provide through their proximity, primary protection to individuals. The previous section argued that implementation is not the sole responsibility of States institutions and can be enriched by an engaged civil society at national, regional, and international

¹³⁹⁸ UNODC, 'International Framework for Action to Implement the Trafficking in Persons Protocol' (n 411).

¹³⁹⁹ Gordon Brown, *The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World* (Cambridge: Open Book Publishers, 2016).

¹⁴⁰⁰ Laura Gómez-Mera, 'The Global Governance of Trafficking in Persons: Toward a Transnational Regime Complex' (2017) 3(4) *Journal of Human Trafficking* 303,306.

levels.¹⁴⁰¹ Empowered grassroots community-based actors can slowly gain UN if not international and regional recognition.¹⁴⁰²

7.6 The role of domestic bodies in enhancing the domestic implementation of the international legal framework addressing HT: The contributions of national human rights mechanisms and CSOs

A crucial component of the tasks of NHRIs and CSOs relates to their involvement in the implementation processes of States' international legal obligations. They are relying partly on the will and capacity of the State as well as the legitimacy it accords them. NHRI are described as forming a 'bridge between the international and domestic systems of human rights protection'.¹⁴⁰³ CSOs are perceived as 'key collective actors in civil society'¹⁴⁰⁴ and as:

*'the "public sphere" that cares about the common good...with shared interests, willingness to accommodate others with opposite views and work together to pursue common goals.'*¹⁴⁰⁵

In the international arena, international human rights mechanisms have placed great emphasis on NHRIs and CSOs roles for both their contribution at the grassroots and international level. Among their plural tasks, they became

¹⁴⁰¹ Brown (n 1399) 58.

¹⁴⁰² Genevieve Lessard, 'Civil Society Interactions within the Inter-American Institutional Framework: Two case-studies in promoting the strengthening of the Regional Human Rights System (2011) (Special Edition) Quebec Journal of International Law 165,177,178.

¹⁴⁰³ Richard Carver, 'A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law' (2010) 10 (1) Human Rights Law Review 1.

¹⁴⁰⁴ Antoine Buyse, 'Squeezing civic space: restrictions on civil society organizations and the linkages with human rights' (2018) 22(8) The International Journal of Human Rights 966,968.

¹⁴⁰⁵ Jane Wamaitha Munene and D. Reckson Thakhathi, 'An analysis of capacities of civil society organizations (CSOs) involved in promotion of community participation in governance in Kenya (2017) Journal of Public Affairs 1.

increasingly involved in independent reporting to treaty monitoring bodies¹⁴⁰⁶ as well as working towards justice and protection closer to home.

7.6.1 The contribution of national human rights mechanisms

National Human Rights Institutions have the function of 'promoting and monitoring the effective implementation of international human rights standards at the national level'.¹⁴⁰⁷ Based on their broad constitutional and/or legal mandate, NHRIs initiate awareness-raising and training activities that are crucial in the implementation of international human rights standards.¹⁴⁰⁸

The origin of NHRIs date from 1946, following the suggestion from the UN Commission of Human Rights to establish 'information groups or local human rights Committees to periodically report to the UN on their observance of human rights in their countries'.¹⁴⁰⁹ Since the 1990s, the international human rights system witnessed the birth of multiple NHRIs with current figures of over one hundred in the world.¹⁴¹⁰ The Danish Centre for Human Rights in 2003 was the first officially accredited as a national human rights institution worldwide.¹⁴¹¹ NHRs have a variety of denominations with common features and

¹⁴⁰⁶ Geneva Academy of International Humanitarian Law and Human Rights, 'Optimizing the UN Treaty Body System – Academic Platform Report on the 2020 Review (2018) 32.

¹⁴⁰⁷ OHCHR AND NHRIS (Office of the High Commissioner for Human Rights 2015).

¹⁴⁰⁸ Francesca Jessup and Koffi Kouste, 'Evaluation of OHCHR Support to National Human Rights Institutions' (2015) 5. See also Anna-Elina Pohjolainen, 'The Evolution of National Human Rights Institutions - The Role of the United Nations' (2006) The Danish Institute for Human Rights 1.

¹⁴⁰⁹ UN Economic and Social Council, 'Report of the Commission on Human Rights to the Second Session of the Economic and Social Council' (21 May 1946) UN Doc E/38/rev.1 para.2, p.6.

¹⁴¹⁰ Ryan M. Welch, 'National Human Rights Institutions: Domestic implementation of international human rights law' (2017) 16(1) Journal of Human Rights 96,99.

¹⁴¹¹ Pohjolainen (n 1408) 19.

mandates:¹⁴¹² Public Defender,¹⁴¹³ Institute for Human Rights,¹⁴¹⁴ Human Rights Commissions, Human Rights Ombudsmen.¹⁴¹⁵

NHRIS are state-based structure but nominally independent bodies.¹⁴¹⁶ As State bodies they are primarily funded by the State and can be subject to the vagaries of the budget process as well as political influence. An example of this political dimension reflects the situation of the Myanmar National Human Rights Commission (MNHRC). The latter has been criticised by the international community for not exercising its mandate to address serious human rights violations perpetrated by military officers including allegations of sexual violence in some conflict areas.¹⁴¹⁷ This situation highlights not only the MNHRC's lack of effectiveness but mainly its lack of independence from the State regarding the occurrence of mass atrocities.¹⁴¹⁸ In these instances, family of victims and witnesses either did not know how to file complaints or were afraid to do so, fearing reprisals from the authorities.¹⁴¹⁹ This is illustrated by a father's victim who requested the investigation of the killing by the military of his

¹⁴¹² Pohjolainen (n 1408) 20.

¹⁴¹³ Public Defender of Georgia <<http://ennhri.org/The-Public-Defender-Ombudsman-of-Georgia-131>> accessed 15 June 2019.

¹⁴¹⁴ The Danish Institute for Human Rights <<https://www.humanrights.dk/>> accessed 15 June 2019.

¹⁴¹⁵ Ombudsman for Human Rights of Bosnia and Herzegovina <<https://ombudsmen.gov.ba/Default.aspx?id=0&lang=EN>> accessed 15 June 2019.

¹⁴¹⁶ Catherine Shanahan Renshaw, 'National Human Rights Institutions and Civil Society Organizations: New Dynamics of Engagement at Domestic, Regional, and International Levels' (2012) 18(3) *Global Governance* 299.

¹⁴¹⁷ Jonathan Liljeblad, 'The Efficacy of National Human Rights Institutions Seen in Context: Lessons from the Myanmar National Human Rights Commission' (2017) 19(1) *Yale Human Rights and Development Law Journal* 95,107,108.

¹⁴¹⁸ Myanmar Times, 'Rights Body Under Fire' (29 September 2014) <<https://www.mmtimes.com/national-news/11803-rights-body-shake-up-under-fire.html>> accessed 16 June 2019.

¹⁴¹⁹ HRC, 36th Session, 'Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar' (17 April 2018) UN Doc A/HRC/39/CRP.2, p.95,96.

daughter in Kachin State. In this case, the MNHRC failed to meet its obligations under the Paris Principles and the father was subsequently prosecuted.¹⁴²⁰

NHRIs are considered to be one of the pillars of human rights protection, increasingly involved in participating to the advancement of international law, as well as being considered as ‘useful complementary mechanisms to international mechanisms’.¹⁴²¹ The challenge related to the lack of governmental engagement vis a vis human rights implementation is for NHRIs to successfully harness synergies and engagement with the various components of the human rights system.¹⁴²² This entails for instance coordinating with the UN treaty bodies, the UN Human Rights Council, other NHRIs and CSOs. NHRIs form parts of various international and regional networks, namely: the Asia Pacific Forum (APF); the European Network of National Human Rights Institutions (ENNHRI); the Network of African National Human Rights Institutions (NANHRI) and la Red de Instituciones Nacionales para la Promoción y Protección de los Derechos Humanos del Continente Americano.

NHRIs advocate or advise on States’ responsibilities of their human rights commitments.¹⁴²³ For instance with regard to the implementation of the HT Protocol, the Indian NHRC has been acting as a catalyst to engage communities and raise awareness at the early stage of its existence.¹⁴²⁴

¹⁴²⁰ Amnesty International, Fortify Rights Harvard Law School International Human Rights Clinic, Human Rights Watch, International Commission of Jurists, Physicians for Human Rights, joint action ‘ Prosecution of Shayam Brang Shawng’ (8 December 2014).

¹⁴²¹ Morten Kjærsum, ‘National Human Rights Institutions Implementing Human Rights’ (2003) Danish Institute for Human Rights 19.

¹⁴²² Liljeblad (n 1417) 100.

¹⁴²³ UNDP-OHCHR Toolkit for collaboration with National Human Rights Institutions (2010) i.

¹⁴²⁴ Fostering Human Rights among European Policies (FRAME), ‘International Human Rights Protection: The Role of National Human Rights Institutions - a Case Study’ (2017) 29.

In addition, through their human rights mandate, NHRIs generally seek to ensure that ‘no one is left behind’¹⁴²⁵ by in part investigating individuals complaints submitted to them and defend for instance cases of marginalised individuals, minorities, victims of HT.

NHRIs are therefore conferred a quasi-judicial competence.¹⁴²⁶ However, such responsibility can expose them to conflicting situations with the government, especially in contexts where there is a poor rule of law and weak State’s commitments *vis à vis* international human rights obligations. An illustration concerns the Maldives National Human Rights Commission whose members were convicted in September 2014 for the crime of treason by the Supreme Court, following criticism of the human rights situation in the country submitted to the UN Human Rights Council.¹⁴²⁷ This is despite the UN injunction that ‘national human rights institutions and their respective members and staff should not face any form of reprisal or intimidation, including political pressure, physical intimidation, harassment’.¹⁴²⁸

Furthermore, NHRIS are meant to build bridges between civil society and the State.¹⁴²⁹ The case of the Palestinian Independent Commission for Human Rights (PICHR) reflects for instance the proximity and nurturing of this institution with many actors of its civil society: The former PICR director is now heading a prominent Women’s Rights CSO in Palestine.¹⁴³⁰ Another example

¹⁴²⁵ European Networks of National Human Rights Institutions, ‘National Human Rights Institutions and Human Rights Defenders - *Enabling human rights and democratic space in Europe*’ (2018) 5.

¹⁴²⁶ UNGA Res 48/134 (n 827).

¹⁴²⁷ Human Rights Watch, ‘An All-Out Assault on Democracy -Crushing Dissent in the Maldives’ (August 2018) <<https://www.hrw.org/report/2018/08/16/all-out-assault-democracy/crushing-dissent-maldives>> accessed 16 June 2019.

¹⁴²⁸ UNGA Res 70/63 (17 December 2015) UN Doc A/Res/70/63, para. 11 p.3.

¹⁴²⁹ Pohjolainen (n 1408) 17.

¹⁴³⁰ < <https://www.thisweekinpalestine.com/feminist-advocacy-womens-rights-palestine/>> accessed 23 August 2020.

relates to the Nepal National Human Rights Commission which has a special department dealing with trafficking in Women and Children and actively engaged with local NGOs.¹⁴³¹ However, despite evident synergy between the NHRC and CSOs as well as the support from the Nepal government through policy and plans of actions, effective implementation of its anti-trafficking legislation remains inadequate. Implementation challenges in the Nepalese context are due to the lack of resources allocated. This is combined with a poor coordination within the government as well as frequent natural disasters which exacerbate vulnerabilities to HT.¹⁴³²

7.6.2 The influential and evolving role of CSOs regarding the implementation of HT and related human rights framework

There is a widespread acceptance that civil society organisations (CSOs) are meant to serve altruistic goals in particular when dealing with human rights and can be considered to represent the ‘conscience of the world’.¹⁴³³ Their increasing participation in international governance and policy,¹⁴³⁴ their longstanding influence and contribution to the different areas of work of the UN, in the building, development of human rights standards and particularly the area of women’s rights are significant since the early time of the League of Nations.¹⁴³⁵

¹⁴³¹ Palita Thapa, ‘Human trafficking in Nepal: Changing dimensions’ (2015) 21(4) Asian Journal of Women’s Studies 450,455.

¹⁴³² *ibid* 458. See also < <https://reliefweb.int/report/nepal/echo-factsheet-nepal-january-2019>> accessed 15 June 2019.

¹⁴³³ Peter Willets, *The Conscience of the World – The Influence of Non-Governmental Organisations in the UN System* (Washington, D.C.: Brookings Institution Press 1996) 11.

¹⁴³⁴ Charnovitz (n 39) 183,184,185.

¹⁴³⁵ Jutta Joachim, ‘Women’s Rights as Human Rights’ (2018) Oxford Research Encyclopedia of International Studies 1,10.

CSOs can be a vector for change at the domestic level through their grassroots activities and their support to States implementation and enforcement of human rights, including the protection against HT. However, CSOs and NGOs, in particular in FCAS are mainly funded by international organisations and the issue of 'agency' arises in that they have often been labelled as simply implementing the donor's agenda. This is examined further in chapter 9 for the situation of Palestine.

The issue of HT has been advocated by a wide mobilisation of anti-slavery and women's movements.¹⁴³⁶ The early involvement of human rights and women's rights CSOs in combatting exploitative practices was reinforced by the birth of the Palermo Protocol. Besides triggering international and regional cooperation, this international instrument provided a framework for the development of an HT legislation at a domestic and regional level. This required the collaboration of various domestic actors, specifically CSOs to assist States with the implementation of the HT legal framework.

CSOs are engaged at both international and national level regarding States compliance to their treaty obligations. In this respect, States' change of behaviour is partly encouraged by the contribution of CSOs including human rights advocacy entities.¹⁴³⁷ They monitor, cooperate, and inform various UN human rights mechanisms on States' compliance and implementation of their human rights commitments.¹⁴³⁸

¹⁴³⁶ Jane Connors, 'NGOs and the Human Rights of Women at the United Nations' in Peter Willets (ed), *The Conscience of the World – The Influence of Non-Governmental Organisations in the UN System* 149.

¹⁴³⁷ Hathaway (n 1279) 596.

¹⁴³⁸ Felice D. Gaer, 'Implementing international human rights norms: UN human rights treaty bodies and NGOs' (2003) 2(3) *Journal of Human Rights* 339, 345,

Hence, their practical involvement in international fora, specifically with the UN, other specialised agencies, and international institutions, is formalised for many of them and increasingly¹⁴³⁹ through the procedure of accreditation of the ECOSOC status.¹⁴⁴⁰ This does give them considerable voice and influence. This recognition has enabled them to influence international rulemaking and to contribute to the implementation of international legal norms

NGOs that are not accredited can still participate in various UN human rights mechanisms by joining 'umbrella organisations'.¹⁴⁴¹ With regard to HT, some of NGOs are part of a structured network such as the Coalition Against Trafficking in Women (CATW) or La Strada International. The latter is a European NGO Platform against HT part of the bigger network of the Global Alliance against trafficking in Women (GAATW). For instance, this platform gathering 99 other women's CSOs and coalitions¹⁴⁴² submitted in 2019 a global report to the 72nd Session of the CEDAW Committee working on the elaboration of a General Recommendation on Trafficking in Women and Girls in the Context of Global Migration.¹⁴⁴³

Another example of coordinated network pertains to the International Coalition of Organizations for Human Rights in the Americas made up of organisations

¹⁴³⁹ UN ECOSOC, 'List of non-governmental organizations in consultative status with the Economic and Social Council as of 1 September 2018' (31 October 2018) E/2018/INF/5. As of 1 September 2018, 5,161 NGOs enjoy active consultative status with ECOSOC: 138 organisations in general consultative status, 4,052 in special consultative status and 971 on the Roster.

¹⁴⁴⁰ Jens Steffek, Claudia Kissling, 'Civil society participation in international governance: the UN and the WTO compared' (2006) 46 *TransState working papers*, University of Bremen 8,9.

¹⁴⁴¹ Emanuele Rebasti and Luisa Vierucci, 'A Legal Status for NGOs in Contemporary International Law?' Workshop on 'A Legal Status for NGOs in Contemporary International Law? A Contribution to the Debate on "Non-State Actors" and Public International Law at the Beginning of the Twenty-First Century' (2002) European University Institute of Florence, 4.

¹⁴⁴² < <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/GRTrafficking.aspx> > accessed 16 June 2019.

¹⁴⁴³ CEDAW Committee on Trafficking in Women and Girls in the Context of Global Migration, 72nd Session (22 February 2019).

from various countries in the Americas. These organisations are mostly domestic human rights organisations which represent victims before their domestic judicial system as well as before the Inter-American Human Rights Commission and Court.¹⁴⁴⁴

At the grassroots and community level, CSOs have direct access to victims of abuses and in relation to HT can adopt a protectionist approach focused on the human rights, dignity, and protection of the victim. This entails practical undertakings towards human rights advocacy and lobbying the State to request the implementation of HT legislation. Some CSOs may comprehend the implementation of the HT framework by providing practical assistance to survivors of HT through programmes of reintegration in their communities.

In this respect, the development of grassroots initiatives is being encouraged by the UN. For example, the UN Special Rapporteur (SR) on HT focused recently on the need to implement social inclusion programmes for trafficked persons.¹⁴⁴⁵ Furthermore, the SR pledged allocation of funding to CSOs engaged in grassroots interventions and includes specifically the cooperation of other types of non-States actors: 'trade unions, traditional and religious leaders, faith-based organizations and the private sector'.¹⁴⁴⁶ In parallel, the 2018 US Trafficking in Persons Report examines efforts undertaken towards the '3Ps' - prosecution, protection and prevention, adds a fourth P for partnerships.¹⁴⁴⁷ The report therefore draws attention to the engagement of communities through close coordination with national, regional and local

¹⁴⁴⁴ Lessard (n 1402) 171.

¹⁴⁴⁵ Report of the Special Rapporteur on trafficking in persons, especially women and children (23 April 2019) UN Doc A/HRC/41/46.

¹⁴⁴⁶ *ibid*, p. 18, 19.

¹⁴⁴⁷ US Trafficking in Persons Report (2015) p.4.

governments, including CSOs, victims of HT and envisage the contribution of other key actors within and across communities.¹⁴⁴⁸ This evolution echoes the testimony of a survivor from sex trafficking before the Human Rights Council in 2010 who expressed concerns that went beyond the reiteration by the UN that victims of HT should not to be treated as criminals.¹⁴⁴⁹

*'From the ground to the top we need to create network[s]. From governments, legal, medical, social institutions, businesses to schools, local communities, individuals. We have to involve all. Traffickers are extremely well connected. We need to be, too.'*¹⁴⁵⁰

The understanding of human rights goes beyond their legalistic definitions suggesting therefore a key role played by social movements and civil society activism in the way human rights principles and values are perceived.¹⁴⁵¹ In this regard,

*'the social practice of human rights takes place not in front of a judge, but in the streets and alleys, backrooms and out of the way places where significant change occurs'.*¹⁴⁵²

7.7 Conclusion

Human rights, HT and more widely international legal norms continue to experience the challenges of poor implementation on the ground. Implementation is a complex process which involves a variety of international

¹⁴⁴⁸ *ibid* p.4.

¹⁴⁴⁹ <<https://www.ohchr.org/EN/NewsEvents/Pages/SurvivortraffickingBreakingthesilence.aspx>> accessed 12 June 2019.

¹⁴⁵⁰ Trafficking in Persons Report 2015 (n 1450) p.12.

< <https://www.ohchr.org/EN/NewsEvents/Pages/SurvivortraffickingBreakingthesilence.aspx> > accessed 12 June 2019.

¹⁴⁵¹ Ron Dudai, 'The Study of Human Rights Practice: State of the Art' (2019) 11(2) *Journal of Human Rights Practice* 273,275.

¹⁴⁵² Joel R. Pruce, 'The Practice Turn in Human Rights Research' in Joel Pruce (ed), *The Social Practice of Human Rights* (2015, Palgrave Macmillan) 1.

and domestic actors along with the traditional role of the State and other executive organs: the legislative and the judiciary.

There are many implementation challenges which exist at a domestic level in benign environments with specific challenges inherent to FCAS. These specific impediments are identified to be primarily a lack of political will; a lack of State's capacity, including financial resources; dysfunctional rule of law; a lack of social will related to cultural considerations.

The chapter has preliminarily examined the traditional means and approaches concepts to implementing international law, international human rights obligations encompassing the issue of HT.

Implementation involves the contribution of a variety of international and domestic non-state actors that participate in a more practical human rights protection on the ground. This nevertheless entails dealing with a proliferation of systems and human rights mechanisms such as the UN. Implementing international law is a complex intervention, different agencies work on differing tasks at differing pace and often poorly coordinated. Moreover, the key issue as to who has 'agency' in a particular situation is not often discussed in a human rights context. In many instances it is the donor who funds the UN and other bodies such as CSOs that acts as the principal agent. This is explored further in chapter 9.

Bridging international support to implementation with grassroots protection against human rights violations is undertaken by domestic entities that both have a voice internationally, regionally, and domestically: The National Human Rights Institutions and Civil Society Organisations. These entities because of their advocacy and their monitoring functions which can be expressed by

potential critics towards States' human rights performance, experience themselves challenges and hindrance at times in their respective contribution to human rights implementation. However, growing support is emerging through the international recognition of a variety of non-state actors within and across communities who themselves contribute to the chain of human rights implementation.

Chapter 9 verifies these challenges through the case study on Palestine. The next chapter prepares the ground for the case study on Palestine commencing with an analysis of the Palestinian legal framework, the extent of its current disunity and legal fragmentation.

Chapter 8 The Palestinian Legal Framework and its Limitations

8.1 Introduction

This chapter begins the detailed analysis of the case study of Palestine and reconfirms its FCAS status as emphasised in section 1.11. However, the chapter demonstrates that Palestine is more than simply fragile and impacted by conflict. Instability impacts and permeates every aspect of Palestinian social, economic, and political life.

Chapter 8 seeks to explain a particular context in which human rights and HT legal commitments have to be tackled. The chapter provides a preliminary examination of the historical background and building of the Palestinian legal framework. This chapter highlights the implementation challenges experienced by Palestine as a result of its inherent fragility. This is verified further by the interviews and FGD data set out in chapter 9. The key link between chapters 8 and 9 is the focus on the challenges for domestic implementation of Palestine human rights and HT legal commitments. Implementation cannot be considered without understanding the complex entanglement and legacy of multiple applicable laws in Palestine inherited from the Ottoman Empire, the British Mandate, the Jordanian and Egyptian period and from the current Israeli occupation (through military orders) as well as the Palestinian Authority eras.¹⁴⁵³

Understanding this historical and political context together with a 'light touch' political economy analysis is necessary to navigate the trajectory of the Palestinian legal framework. Therefore, through a condensed historical and

¹⁴⁵³ Qandeel (n 184) 2.

political narrative the chapter explains the complexity of successive occupations of Palestinian territory which has created *de facto* a plurality of legal orders. These various phases have impacted on the Palestinian legislative framework and highlighted its legal gaps.¹⁴⁵⁴

This complex legal setting has also been reinforced by the divisions of Palestinian people partly as a result of the Oslo legal-institutional mechanisms¹⁴⁵⁵ and subsequent political fragmentation.

The historical legacies of fragmentation have also been exacerbated by the establishment of the Palestinian Authority (PA) regime itself¹⁴⁵⁶ with the subsequent impact of the political breakdown between the two main political parties, Fatah and Hamas, post 2007. However, the political division between Hamas and Fatah has roots that extend back in time beyond the elections of 2006. The split is a result of wider ideological issues and in particular the rejection of secularism, the recognition of Israel and UN resolutions by Hamas.¹⁴⁵⁷

This split resulted in the *de facto* administrative separation between the West Bank and the Gaza Strip, heightened by the related division of the legislative and the judiciary into two parts functioning separately and differently in the West Bank and the Gaza Strip.¹⁴⁵⁸

¹⁴⁵⁴ Anis F. Kassim, 'Legal Systems and Developments in Palestine' (1984) 1 The Palestine Yearbook of International Law 19.

¹⁴⁵⁵ Emilio Dabed, 'Constitutional Making and Identity Construction in Occupied Palestine' (2013) 86 *Confluences Méditerranée* 115, 124.

¹⁴⁵⁶ *ibid* 124.

¹⁴⁵⁷ Alijla, Abdalhadi and Al Masri, Aziz, 'New Bottles, Old Wine: The Contemporary Palestinian Political Division' (2019) 6(1) *Journal of Islamic and Middle Eastern Multidisciplinary Studies* 10.

¹⁴⁵⁸ Qandeel (n 184) 6.

The chapter highlights how the history of occupied Palestine and the ongoing conflict with Israel continues to impact the social, economic and political fabric of Palestine and to prevent Palestine fulfilling the classical conditions of what legally constitutes a State.¹⁴⁵⁹ This historical and political context has ultimately fostered a dysfunctional rule of law and judicial system despite ongoing international and domestic efforts to unify and harmonise national laws in accordance with human rights standards, the Palestine legal framework.

The chapter presents the Palestinian legal framework, the extent of its disunity and the problems this causes for the process of implementing human rights and HT international legal commitments. In the current context, even enforcement of human rights as well as domestic judicial decisions are hindered. This is exacerbated by the fact that the Palestinian Authority has no jurisdiction over certain parts of its territory fully controlled by the Israeli State and military apparatus.¹⁴⁶⁰

The chapter examines the status of international law in the Palestinian legal framework.¹⁴⁶¹ In addition, the chapter reviews the rationale of domestic and international actors who pursue legal harmonisation which they perceive to be a key component for the domestic implementation of international legal commitments, hence, to prepare the ground for how human rights and HT

¹⁴⁵⁹ Shadi Sakran, 'The Creation of the Non-Member Observer State of Palestine: A Legal Analysis of UN General Assembly Resolution 67/19' (2017) 9 (2) Amsterdam Law Forum 131,133. See also Valentina Azarov, 'An international legal demarche for human rights? Perils and prospects of the Palestinian UN bid' (2014) 18(4-5) The International Journal of Human Rights 527,534.

¹⁴⁶⁰ < <https://freedomhouse.org/report/freedom-world/2019/west-bank>> accessed 8 January 2020.

¹⁴⁶¹ See Elias Al-Hihi and Asem Khalil, 'International Law within the Palestinian Legal System: A Call for Granting Human Rights Treaties a Special Constitutional Status' (2019) 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3453191> accessed 6 January 2020.

obligations may be implemented and strengthened in the Palestinian Territories.

8.2 The historical and political context in the building of the Palestinian legal framework

Since the sixteenth century, Palestine has been subject to multiple sources of law starting with the extended impact of the Ottoman domination which commenced in 1516 ending with the Great War.¹⁴⁶²

Throughout the nineteenth century, Palestine due to its geographical location became an 'arena of intense international scrutiny and involvement.'¹⁴⁶³ The Balfour Declaration in 1917 simultaneously supported the establishment in Palestine of 'a national home for the Jewish people' whilst also stating '...that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine'. The same promise was reiterated by the League of Nations in 1922.¹⁴⁶⁴

In 1920, Palestine found itself ruled by the British under a League of Nations mandate up until June 1947.¹⁴⁶⁵ However, Palestine's quest for independence was ultimately compromised by Britain's earlier political and strategic commitment to Zionism.¹⁴⁶⁶

¹⁴⁶² John Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* (Cambridge University Press, 2012) 10. See also Edward W. Said, *The Question of Palestine* (New York: Vintage Books, 1992) 11.

¹⁴⁶³ Michael Provence, *The Last Ottoman Generation and the Making of the Modern Middle East* (Cambridge University Press, 2017) 125, also: 'Palestine was unique in that it was the focus of a colonization program of settlement and intense scrutiny unlike any of the other mandates' p. 202.

¹⁴⁶⁴ The League of Nations Mandate for Palestine (12 August 1922) < https://ecf.org.il/media_items/291 > accessed 22 August 2020.

¹⁴⁶⁵ UNGA Resolution A/364 Add. 1 (3 September 1947). In addition, UNGA Resolution A/516 (25 November 1947) takes note of the complete evacuation planned by the Mandatory Power, of Palestine by 1 August 1948.

¹⁴⁶⁶ Quigley (n 1462) 18. See < <http://www.balfourproject.org/wp-content/uploads/2018/08/Bush-House-report.pdf> > accessed 3 October 2018. See also

At the end of the second World War, the horrific event of the Jewish Holocaust was to have a lasting impact on the situation in Palestine as more and more Jews sought to escape Europe and settle in Palestine.

The period of 1936 to 1939 was marked by the revolt of the Palestine Arabs, the Zionist nationalism and increasing tensions between Arab and Jewish protagonists which Britain struggled to address. Faced with a deteriorating security situation, in November 1947 the United Nations recommended the partition of Palestine and the establishment of independent Arab and Jewish States.¹⁴⁶⁷

On 15 May 1948, Britain ended its mandate and the State of Israel was unilaterally declared resulting in an immediate conflict between this new entity and the Arab nations surrounding it.¹⁴⁶⁸ In May 1948, the West Bank of the Jordan Valley was militarily annexed by the Hashemite Kingdom of Jordan¹⁴⁶⁹ and put under Jordanian civilian administration in 1949 through the Law Amending the Law of Public Administration.¹⁴⁷⁰ The 1948 war led to forced uprooting and systematic displacement as well as dispossession and eviction from the homes of approximately 750,000 Palestinians.¹⁴⁷¹ The Gaza Strip was then placed under Egyptian administrative control in order to maintain security and order.

Salman Abu Sitta and Terry Rempel, 'The ICRC and the Detention of Palestinian Civilians in Israel's 1948 POW/Labor Camps' (2014) 43(4) *Journal of Palestine Studies* 11,12.

¹⁴⁶⁷ UNGA Resolution 181(II) (29 November 1947) UN Doc A/519. (Cited as Partition Resolution).

¹⁴⁶⁸ Bob Labes 'The Law of Belligerent Occupation and the Legal Status of the Gaza Strip' (1988) 9(1) *Michigan Journal of International Law* 383,389.

¹⁴⁶⁹ Kassim (n 1454) 27.

¹⁴⁷⁰ Raja Shehadeh, 'The Land Law of Palestine: An Analysis of the Definition of State Lands' (1982) 11 (2) *Journal of Palestine Studies* 82,89.

¹⁴⁷¹ Bansidhar Pradhan, 'Palestinian Politics in the Post-Arafat Period' (2008) 45(4) *International Studies* 296.

When conflict broke out over the Suez Canal in 1956¹⁴⁷² Israel supporting Britain and France, invaded the Gaza strip and the Sinai Peninsula¹⁴⁷³ marking the second period of the Egyptian administration of the Gaza Strip, this time with the presence of UN troops. This period witnessed the emergence and building of a legal basis for a Palestinian collective entity¹⁴⁷⁴ and identity. In 1964, the Palestine National Council (PNC) was formed as a Legislative Council representing Palestine Arabs living in the territory of Palestine or outside. Subsequently, the Council established the Palestine Liberation Organisation (PLO) designed as the precursor of a government for Palestine working towards national independence.¹⁴⁷⁵

However, in 1967 the Middle East conflict heightened as Israel took back the Gaza Strip from Egypt and began establishing Jewish settlements there. The occupation of Gaza and the West Bank followed with the annexation of East Jerusalem.¹⁴⁷⁶ This brought further legal changes by way of more than a thousand military orders issued by the Israeli military government.¹⁴⁷⁷ By 1985, the Gaza Strip was described as the 'forgotten corner of Palestine'¹⁴⁷⁸ despite its important geographical, political, and strategical position.¹⁴⁷⁹

¹⁴⁷² Esther Moeller, 'The Suez Crisis of 1956 as a moment of transnational humanitarian engagement' (2016) 23 (1,2) *European Review of History* 136,137.

¹⁴⁷³ Labes (n 1468) 393.

¹⁴⁷⁴ Avi Shlaim, 'Edward Said and the Palestine Question' in Iskandar, Adel, and Hakem Rustom (eds), *Edward Said: A Legacy of Emancipation and Representation* (University of California Press, 2010) 283.

¹⁴⁷⁵ Quigley (n 1462) 133.

¹⁴⁷⁶ Kassim (n 1454) 30.

¹⁴⁷⁷ Glenn E. Robinson, 'The Politics of Legal Reform in Palestine' (1997) 27 (1) *Journal of Palestine Studies* 51,53.

¹⁴⁷⁸ Ann M. Lesch, 'Gaza: Forgotten Corner of Palestine' (1985) 15 (1) *Journal of Palestinian Studies* 43.

¹⁴⁷⁹ Said (n 1462) 9.

In December 1987, following increasing tensions the first *Intifada*¹⁴⁸⁰ erupted in Gaza and spread to the West Bank with civilian uprisings against Israeli rule and occupation. Soon after in 1988, the Declaration of Independence¹⁴⁸¹ was adopted by the Palestinian National Council (PNC) representing the legislative body of the PLO.¹⁴⁸²

Following support from the US government to help broker a settlement between the Palestinians and Israelis, on 13 September 1993, the Declaration of Principles on Interim Self-Government Arrangements¹⁴⁸³ known as the Oslo Accords (Oslo I) was signed. The Palestinian Authority (PA) was formed in 1994 with a five-year mandate, as the interim government of the OPT, pursuant to the Oslo Accords between the PLO and the Government of the State of Israel. In April 1994, the Government of Israel and the PLO representing the Palestinian people signed the 'Paris Protocol' and interim agreement on economic relations between the two entities.¹⁴⁸⁴ However, the Oslo Accords of 1993, the Paris Protocol and the Israeli–Palestinian Interim Agreement on the West Bank and the Gaza Strip, Oslo II (1995)¹⁴⁸⁵ have offered only partial solutions to the

¹⁴⁸⁰ See Adrien K. Wing, 'Legal Decision-Making During the Palestinian Intifada: Embryonic Self-Rule' (1993) 18 *Yale Journal of International Law* 95,96, 101: *intifada* taken from the Arabic verb "to shake" as symbolising the revolt against the Israeli occupation with the aim to develop autonomous governmental and legal structures.

¹⁴⁸¹ UNGA, UNSC, 'The question of Palestine and Declaration of Independence' (18 November 2018) UN Doc A/43/827 S/20278.

See also Nathan J. Brown, 'Constituting Palestine: The Effort to Write a Basic Law for the Palestinian Authority' (2000) 54 (1) *Middle East Journal* 25,27.

¹⁴⁸² European Council on Foreign Relations, 'Mapping Palestinian Politics' (2018) 9.

¹⁴⁸³ Article I Aim of the Negotiations, Declaration of Principles on Interim Self-Government Arrangements: 'The aim of the Israeli-Palestinian negotiations ... is ... to establish a Palestinian Interim Self-Government Authority, ... for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period not exceeding five years, leading to a permanent settlement based on Security Council resolutions 242 (1967) and 338 (1973)'.

¹⁴⁸⁴ The Israeli Palestinian Interim Agreement on the West Bank and the Gaza Strip: Protocol on Economic Relations between the Government of the State of Israel and the PLO, representing the Palestinian people Paris (9 April 1994).

¹⁴⁸⁵ Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (28 September 1995) Washington D.C.

problems created by the 1967 war. In 2019, the PNC decided to seek disengagement from the Paris Protocols due to repeated Israeli violations of the Protocol.¹⁴⁸⁶

From 1993, the PA was attempted to create a State based upon a strong democratic and constitutional basis with a viable legal system.¹⁴⁸⁷ This was cemented by the drafting process¹⁴⁸⁸ of a transitional Constitution: the Basic Law subsequently amended in 2003 and 2005.¹⁴⁸⁹

Conflict has arisen with regard to who in the current circumstances has the responsibility to elaborate and endorse the Basic Law such as the elected Palestinian Legislative Council (PLC).¹⁴⁹⁰ Notwithstanding this, whilst going through the 'state building' process, the PA did not have, and still does not have, full jurisdiction and control over the whole of the West Bank and the Gaza Strip.¹⁴⁹¹

In September 2000, the outbreak of a second *Intifada* marked the next step in the collapse of the ongoing peace negotiations and further deterioration in the application of the Oslo Accords' belated attempt to bring about genuine political settlement and reconciliation between the two communities.¹⁴⁹² In the

¹⁴⁸⁶ For a detailed background explanation see Palestine Economic Policy Research Institute (MAS) 'Economic Disengagement from Israel: Challenges and Feasibility' (2019).

¹⁴⁸⁷ Nathan J. Brown, *Palestinian Politics After the Oslo Accords: resuming Arab Palestine* (University of California Press, 2003) 16. See also Nathan J. Brown, 'Constituting Palestine: The Effort to Write a Basic Law for the Palestinian Authority' (n 1481) 31.

¹⁴⁸⁸ The process started in 1988 and the Basic Law was finally approved by Yasser Arafat in 2002.

¹⁴⁸⁹ Sylvie Delacroix, 'From Constitutional Words to Statehood? The Palestinian Case' (2014) 3(4) *Cambridge Journal of International and Comparative Law* 1,3. See Asem Khalil, 'Constitution-Making and State building Redefining the Palestinian Nation' in Rainer Grote and Tilmann Röder (eds), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (OUP 2012) 584.

¹⁴⁹⁰ Asem Khalil, 'Constitution-Making and State building Redefining the Palestinian Nation' (n 1489) 590.

¹⁴⁹¹ Article XI Land of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip.

¹⁴⁹² Jean-Pierre Filiu, 'The Twelve Wars on Gaza' (2014) 44(1) *Journal of Palestine Studies*, Special Issue: Operation Protective Edge 52,55. See also Mandy Turner, 'Building Democracy

immediate aftermath of the Oslo Accords, the Gaza Strip had already experienced prolonged closures by Israel. The isolation imposed on Gaza since 1993, had escalated internal dissolution, exacerbated an economy already in decay which has been in a permanent state of collapse with increasing unemployment and poverty.¹⁴⁹³

Simultaneously, there was a growing lack of confidence among civil society in the PA's patriarchal leadership and its institutions, coupled with a lack of effective governance¹⁴⁹⁴ and perceived corruption practices.¹⁴⁹⁵ Internal factional hostilities manifested through societal breakdown especially in Gaza and disillusion with leadership, exacerbated the deepening of institutional fragmentation.¹⁴⁹⁶ In 2005 the Israeli government authorised the dismantling and evacuation of Gaza by Israeli Settlers after 36 years of military rule following the 1967 war. There are many explanations of the motives behind the Israeli withdrawal including the spiralling security costs, the death of Yasser Arafat in 2004, and escalating international pressure. Subsequent legal arguments have been made by some authors that a lack of presence of Israeli and civilian personnel in the Gaza Strip is legally sufficient to indicate that there is 'no effective control' by Israel.¹⁴⁹⁷ This is not a view held by the United Nations nor by other authors referenced throughout this thesis. Furthermore, sixteen years after emptying the settlements Israel still maintains control of Gaza's land

in Palestine: Liberal Peace Theory and the Election of Hamas' (2006) 13 (5) Democratization 739,743.

¹⁴⁹³ The World Bank, 'Economic Monitoring Report to the Ad Hoc Liaison Committee' (2018), paras 15, 16 p.9. See also Sarah Roy, 'The Seeds of Chaos, and of Night: The Gaza Strip after the Agreement' (1994) 23 (3) Journal of Palestine Studies 23,86.

¹⁴⁹⁴ Roy (1493) 86, 87, 97. See also Pradhan (n 1471) 304.

¹⁴⁹⁵ Turner (n 1492) 740.

¹⁴⁹⁶ Roy (n 1493) 90.

¹⁴⁹⁷ Elizabeth Samson, 'Is Gaza Occupied? : Redefining the Status of Gaza under International Law' (2010) 25 American University International Law Review 915, 966.

borders, access to the sea and airspace. Furthermore, it could be contended that the Israeli disengagement exacerbated the deteriorating political situation which culminated with an internal political crisis in January 2006 between the Palestinian political factions of Fatah and Hamas. This crisis ultimately led to the control and administration of the Gaza Strip by Hamas following its victory in the Palestinian legislative elections.¹⁴⁹⁸ Pressured by the international community demanding the recognition of the State of Israel which Hamas refused, economic and aid sanctions were then imposed on the Palestinian Authority and the Gaza Strip.¹⁴⁹⁹ Gaza came under increased air, sea and land blockade¹⁵⁰⁰ partly reflecting the Israeli security discourse *vis à vis* Palestine, through 'hegemony in the land, the sea, the air and the cyber space'.¹⁵⁰¹ This has left almost two million Palestinians trapped in Gaza isolated from the West Bank, East Jerusalem and the rest of the world.¹⁵⁰² Despite this, the PA continued to pursue with the support of the donor community, its state building agenda .¹⁵⁰³

¹⁴⁹⁸ Filiu (n 1496) 56.

¹⁴⁹⁹ Beverley Milton-Edwards, 'Hamas: Victory with Ballots and Bullets' (2007) 19 (3) *Global Change, Peace & Security* 301,302.

¹⁵⁰⁰ Human Rights Report, State of Palestine (2017/2018)

<<https://www.amnesty.org/en/countries/middle-east-and-north-africa/palestine-state-of/report-palestine-state-of/>> accessed 2 October 2018. See also the Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, to the Human Rights Council (15 March 2018) A/HRC/37/75, p.10. See also the Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 Human Rights Council, UN Doc A/HRC/40/73, para 13 p.5

¹⁵⁰¹ Ilan Baruch, 'Why the state of Palestine is an existential must for the security and viability of the state of Israel' (23 July 2018) <<http://www.balfourproject.org/why-the-state-of-palestine-is-an-existential-must-for-the-security-and-viability-of-the-state-of-israel/>> accessed 3 October 2018.

¹⁵⁰² Human Rights Council, thirty-fourth session, Report on the Human rights situation in the Occupied Palestinian Territory, including East Jerusalem (16 March 2017) UN Doc A/HRC/34/38.

¹⁵⁰³ Alaa Tartir, 'Securitized development and Palestinian authoritarianism under Fayyadism' (2015) 15(5) *Conflict, Security & Development* 479,480.

Since 2014, diplomatic and political negotiations persist with the intention of forming a Government of National Unity bringing the Fatah and Hamas factions together; a union described as a quasi-tribal arrangement between factions.¹⁵⁰⁴ However, despite efforts made towards a political settlement and despite international undertakings of Palestine before the international UN human rights mechanisms,¹⁵⁰⁵ gaps have opened up between diverging national aspirations and the needs of grassroots organisations and civil society, called the 'Oslo generation'.¹⁵⁰⁶ The latter have expressed growing disillusionment with Palestinian politics and the 'old guard'.¹⁵⁰⁷ Despite reconciliation attempts between 2017 and 2019 which focused on re-establishing PA administrative control in Gaza,¹⁵⁰⁸ the ongoing factional divide has contributed further to the loss of hope and trust in political entities that was already observed as early as 1993.¹⁵⁰⁹ The situation has been reinforced by the acute humanitarian crisis, ongoing direct conflict with Israel in Gaza and the subsequent collapse of infrastructure and services in Gaza.¹⁵¹⁰

From this condensed analysis of the Palestinian historical and political foundations, the most striking feature of the Palestinian legal and institutional

¹⁵⁰⁴ Khalil, 'Constitution-Making and Statebuilding Redefining the Palestinian Nation' (n 1520) 584.

¹⁵⁰⁵ Human Rights Council Holds General Debate on the Human Rights Situation in Palestine and Other Occupied Arab Territories (July 2018)

< <https://www.un.org/unispal/document/human-rights-council-holds-general-debate-on-the-human-rights-situation-in-palestine-and-other-occupied-arab-territories-press-release-2/>>

accessed 5 October 2018.

¹⁵⁰⁶ Dag Tuastad, 'The Violent Rise of Palestine's Lost Generation' (2017) 26(2) Middle East Critique 159.

¹⁵⁰⁷ Jacob Høigilt, 'Fatah from Below: The Clash of Generations in Palestine' (2016) 43(4) British Journal of Middle Eastern Studies 456,466.

¹⁵⁰⁸ Hugh Lovatt, European Council on Foreign Relations, 'Gaza's Fragile Calm: The Search for Lasting Stability' (2018) 12,14,15. See UNSCO, Report to the Ad Hoc Liaison Committee (2018) 3,4.

¹⁵⁰⁹ Roy (n 1497) 91. See Lovatt (n 1512) 12. See also Wing, 'The Palestinian Basic Law: Embryonic Constitutionalism' (n 307) 394.

¹⁵¹⁰ UNSCO, Report to the Ad Hoc Liaison Committee (n 1510) 11.

framework is the inheritance of successive layers of eclectic legal norms and concomitant legal regimes with variable applicability.¹⁵¹¹ This has led to inevitable fragmentation reinforced by Israel remaining a *de facto* and *de jure* occupying administrative and military power which now shows worrying signs of permanent arrangement.¹⁵¹² There are divergent narratives concerning the purpose and intent of occupation for which many Israelis perceive necessary to maintain their security.¹⁵¹³ The thesis addresses the impact of occupation not the perceived justification by certain parties. The Occupation has fermented a febrile atmosphere of distrust. The Occupation relies upon security cooperation between the Palestinians and Israelis. More specifically it relies upon cooperation between Israeli and Palestine law enforcement agencies. In May 2020, security cooperation with Israel was withdrawn by President Abbas in protest against plans by former Israeli Prime Minister Netanyahu to unilaterally annex large portions of the occupied West Bank. Security cooperation was restored in November 2020 following the US presidential election. Naturally, all aspects of law enforcement were impacted. The fragility of security relations is related to ongoing political deadlock and goes back to the signing of the Oslo Accords. In the Autumn of 2000, during the second intifada, the Israeli Air Force repeatedly bombed the offices of the Palestinian police and destroyed the office of the Enforcement Division of the PNA police in Ramallah. Three wars in Gaza; 2008-9, 2012 and 2014 and the most recent crisis in May 2021 have all resulted

¹⁵¹¹ Sylvie Delacroix, 'From Constitutional Words to Statehood? The Palestinian Case' (n 1493) 4,5.

¹⁵¹² Nathan J. Brown, 'Time to Rethink, But Not Abandon, International Aid to Palestinians' (2018) Carnegie Endowment for International Peace 13.

¹⁵¹³ German Institute for International and Security Affairs, 'Actors in the Israeli-Palestinian Conflict Interests Narratives and the Reciprocal Effects of the Occupation' (2018) SWP Research Paper 3, p.7.

in Gazan Ministries and law enforcement agencies being targeted and, in the main destroyed.

The West Bank and the Gaza Strip have developed two different legal frameworks.¹⁵¹⁴ Following the Oslo Accords, regardless of the attempt to unify the legal systems from both the West Bank and Gaza,¹⁵¹⁵ one of the most damaging effects of this fragmentation exacerbated by the Fatah-Hamas split in 2007 is the impact of a progressive division of the Palestinian people and the longer-term risk to no longer be a 'united and single people'.¹⁵¹⁶

8.3 The Palestinian legal system

In 1997, the constitutional text titled the 'Basic Law' was approved by the PLC, new Parliament of the PA elected in 1996. The Basic Law subsequently amended in 2003 and 2005, specifies the PA's constitutional structure¹⁵¹⁷ as well as structuring the interaction between the executive, legislative and judicial authorities, regulating for instance the PA security forces.

However, the PLC did not meet since 2007, the legislation since occurring via presidential decrees. Hence, contradictions emerged with the principle of 'checks and balances' concerning the interference of the executive in the judiciary, for instance in the formation of the Judicial Authority with the appointment of the Chief Justice and the Director of Public Prosecutions.¹⁵¹⁸

¹⁵¹⁴ Nathan J. Brown, 'Constituting Palestine: The Effort to Write a Basic Law for the Palestinian Authority' (n 1495) 18.

¹⁵¹⁵ Alexander Abdel Gawad, 'E pluribus Unum? Palestinian authority and statehood in an environment of legal pluralism' (2013) working paper 4, The Institute for Peace Research and Security Studies at the University of Hamburg.

¹⁵¹⁶ Asem Khalil, 'Palestinian Nationality and Citizenship Current Challenges and Future Perspectives' (2007) Robert Schuman Centre for Advanced Studies 1,15.

¹⁵¹⁷ Nathan J. Brown, 'Evaluating Palestinian Reform', 59 Carnegie Papers (Washington, DC: Carnegie Endowment for International Peace, 2005) 11.

¹⁵¹⁸ Ahmad Mubarak al-Khalidi, 'Academic Study: The Performance of the Palestinian Judiciary and the Achievement of Justice 1994-2013' (2014) Al-Zaytouna Centre for Studies & Consultations 1,29.

Another example relates to the legislation on the judicial independence creating the High Judicial Council by Presidential Decree N.29 of 2000.¹⁵¹⁹

Nevertheless, the building of the legal framework for the justice sector institutions encompasses prominent laws: the Law of the Judicial Authority N.1 of 2002,¹⁵²⁰ the Law on the Formation of Regular Courts N.5 of 2001 and its amendment by Law N. 2 of 2005.¹⁵²¹

The Basic Law and the Judicial Authority Law are benchmarks towards guaranteeing the rule of law in Palestine and reflected some political will to ensure a separation of powers¹⁵²² as well as to promote a transparent and accountable judicial legal framework.¹⁵²³

With regard to the Palestinian justice system, this includes the Attorney General's Office, the Bar Association with a court system supervised and regulated by the High Judicial Council (HJC) which nominates judges and approved by the president of the PA. The PA overall court system is composed of sharia courts, military Courts, the Court of First Instance, the Court of Conciliation, the Courts of Appeal, the High Court of Justice, and the Constitutional Court which was created to interpret the Basic Law and legislative texts, and the Electoral Court.

In 2015, there was a suggested pyramid of hierarchy of norms which consists of the Declaration of Independence,¹⁵²⁴ the Basic Law, the laws of the PA and

¹⁵¹⁹ Ministry of Justice, State of Palestine, 'Strategic Framework for the Justice and Rule of Law Sector 2014-16' (2014) 10.

¹⁵²⁰ < <https://www.courts.gov.ps/details.aspx?id=sEugV5a60912192asEugV5>> accessed 21 January 2020.

¹⁵²¹ Ministry of Justice, State of Palestine, 'Strategic Framework for the Justice and Rule of Law Sector 2014-16' (n 1523) 10.

¹⁵²² Philip Mattar, *Encyclopaedia of the Palestinians* (2005) 303.

¹⁵²³ Ministry of Justice, State of Palestine, 'Strategic Framework for the Justice and Rule of Law Sector 2014-16' (n 1523) 4, 14.

¹⁵²⁴ UNGA, UNSC, 'The question of Palestine and Declaration of Independence' (18 November 2018) UN Doc A/43/827 S/20278

the presidential decrees as well as the laws originating from foreign legislation.¹⁵²⁵ The position of international treaties gave rise to legal debate as the Basic Law does not address the hierarchy of international law.¹⁵²⁶ This brought complexity regarding the practical applicability of both accessed international instruments and more generally, international law, for their use for instance in domestic courts.¹⁵²⁷ The latter is of significance, especially when contradictions occur between different sources of legislation.¹⁵²⁸ This lack of clarification with regard to the position and applicability of international legal norms within the domestic legal order is evidenced by the decision N. 4 of 2017¹⁵²⁹ and the Constitutional Appeal N. 5 of 2017 issued by the Constitutional Court.¹⁵³⁰ The Constitutional Court attempted to interpret Article 10 of the Basic Law concerning Palestine international human rights commitments but did not clearly establish in the first decision the pre-eminence of international treaties over domestic laws. The Court concluded to the infra-constitutionality of international treaties although the Basic Law is silent on this aspect.¹⁵³¹

¹⁵²⁵ Annex C of the thesis (p.510) presents a suggestion in 2015 of a current informal and future envisaged hierarchy of Palestinian norms: Victor Persson, 'Palestine's Ratification of International Treaties - *A Back Door to Independence?* (Master Thesis, University of Lund, 2016) 47.

¹⁵²⁶ Al-Hihi and Khalil (n 1461) 2.

¹⁵²⁷ The Palestinian Independent Commission for Human Rights (PICHR) presents Shadow Report to the Committee on the Elimination of Discrimination against Women (July 2018) <<http://www.ichr.ps/en/1/17/2439/ICHR-presents-Shadow-Report-to-the-Committee-on-the-Elimination-of-Discrimination-against-Women.htm?v=1362363401000%3F>> accessed 30 November 2018. See also Asem Khalil, 'Courting Economic and Social Rights in Palestine: Justiciability, Enforceability and the Role of the Supreme Constitutional Court' (2019) 77 *Journal Sharia and Law* 8.

¹⁵²⁸ Victor Persson, 'Palestine's Ratification of International Treaties - *A Back Door to Independence?*' (Master Thesis, 2016, University of Lund) 6.

¹⁵²⁹ English translation of the Supreme Constitutional Court Decision 4/17 was provided to the author by UNDP (email 1 August 2018).

¹⁵³⁰ English translation and explanation of the Constitutional Appeal N. 5 of 2017 issued by the Constitutional Court provided to the author by UNDP (email 1 August 2018).

¹⁵³¹ Yasmin Khamis and Asem Khalil, '2018 Constitutional Review on the State of Palestine' (2018) *I-CONnect-Clough Center Global Review of Constitutional Law* 7.

The Court adopted 'the principle of dualism and ruled that:

'International treaties or conventions are not in themselves applicable in Palestine but must gain strength by going through the formal stages required to pass specific domestic legislation to enforce them'.¹⁵³²

Lastly, these decisions most contentiously suggested the domestic incorporation without prejudice to the religious and cultural identity of the Palestinian people. These decisions contribute to implementation impediments as the Constitutional Court formulated the supremacy of international instruments over domestic legislation although with expressed restrictions based on Palestinian national, cultural, and religious considerations which may compromise international human rights standards.¹⁵³³

However, recent statement by the delegation of Palestine in its report to the Committee on the Rights of the Child confirms 'that international law supersedes national law, with the exception of the Independence Act and the Constitutional Act'.¹⁵³⁴ This indicates *a de facto* clarification of the domestic legal order which would gain to be confirmed by the Constitutional Court.

¹⁵³² Al-Haq, Submission to the Committee on the Elimination of Racial Discrimination on the First Periodic Review of the State of Palestine, 99th Session (2019) 8.

¹⁵³³ *ibid* 8, 9. See CEDAW, Concluding observations on the initial report of the State of Palestine (25 July 2018) UN Doc CEDAW/C/PSE/CO/1, para. 12. See the Palestinian Independent Commission for Human Rights (ICHR) Shadow Report to the Committee on the Elimination of Discrimination against Women (July 2018) < <https://www.ichr.ps/en/1/17/2439/ICHR-presents-Shadow-Report-to-the-Committee-on-the-Elimination-of-Discrimination-against-Women.htm> > accessed 14 January 2020. See also Al-Haq Submission to the Committee on the Elimination of Discrimination against Women on the First Periodic Review the State of Palestine (n 1683) para. 8,9 at 6 and 7.

¹⁵³⁴ Committee on the Rights of the Child, 'Review of the report of the State of Palestine, highlights the protection of children from violence, CRC/20/26 of 29 January 2020 <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25508&LangID=E>> accessed 30 July 2021

8.4 The layers and plurality of Palestine Legislation

The different layers of legislation therefore reflect a plurality of legal sources in Palestine. The Basic Law affirms that 'the principles of Islamic *Shari'a* shall be a principal source of legislation'¹⁵³⁵ which recognises implicitly the co-existence of other legal sources.¹⁵³⁶

The *shari'a* court system is considered as a quasi-independent legal system and interchangeably referred to as personal status law mentioned above and mainly deals with issues related to family law.¹⁵³⁷ Personal Status Law is premised upon the Hanafi reading of the *Sharia*¹⁵³⁸ and is described as a 'shariah based law'¹⁵³⁹ applicable to the Muslim section of the population.¹⁵⁴⁰ Personal Status Laws provide the legal framework regulating family and social matters related to marriage contract, divorce, child custody arrangements, parental consent, property rights and an overall broader issues of citizenship. These norms are applied by separate *shari'a* judiciaries established in both Gaza and the West Bank including East Jerusalem.¹⁵⁴¹ The Personal Status Code N.16 of 1976 applies in the West Bank and follow the civil law system,¹⁵⁴² whereas the Law of Family Rights No. (303) of 1954 applicable in Gaza, is an

¹⁵³⁵ Article 4 of the Palestinian Basic Law.

¹⁵³⁶ Irene Schneider, *Debating the Law, Creating Gender: Sharia and Lawmaking in Palestine, 2012-2018* (Brill,2020) 43.

¹⁵³⁷ The Norwegian Refugee Council, 'The Shari'a Courts and Personal Status Laws in the Gaza Strip' (2011) 8.

¹⁵³⁸ Swart (n 162) 27. See also The Norwegian Refugee Council (n 1537) 17.

¹⁵³⁹ Lynn Welchman, 'In the Interim: Civil Society, the Shar'i Judiciary and Palestinian Personal Status Law in the Transitional Period' (n 1589) 36.

¹⁵⁴⁰ Lynn Welchman, 'The Bedouin Judge, the Mufti, and the Chief Islamic Justice: Competing Legal Regimes in the Occupied Palestinian Territories' (2009) 38(2) *Journal of Palestine Studies* 6,16.

¹⁵⁴¹ The Norwegian Refugee Council (n 1537) 10.

¹⁵⁴² Personal Status Law represent laws that regulate a person's marriage, divorce, and custody.

Egyptian law inheriting from the Ottoman Personal Status Law of 1919¹⁵⁴³ influenced by the common law system.

Another legal system applies to Christian communities who have their own personal status laws in their own tribunals.

Another normative order applicable to all Palestinians and represented by the informal justice system, a kind of conciliation process referred as 'tribal' which still coexists in Palestine and addresses family issues aiming at settling disputes outside the formal justice process.¹⁵⁴⁴

Criminal law in Palestine illustrates the plurality of the Palestinian legal system prevailing in the West Bank and the Gaza Strip. This pertains to the application of two Penal Codes in Palestine, for which the regular court system (*Nizami*) has exclusive jurisdiction. More specifically, the West Bank inherited the Jordanian Penal Code No. 16 of 10 April 1960 along with a number of its amendments which is still enforced.¹⁵⁴⁵ In Gaza, British-enacted criminal statutes are still the law of the land such as the Collective Punishments Ordinance of 1926, the Penal Labour Ordinance of 1927 and most significantly, the British Mandate Criminal Code Ordinance N. 74 of 1936.¹⁵⁴⁶

Lastly, another layer of legislation applicable to Palestinians living in East Jerusalem: the law, jurisdiction and administration of the State of Israel apply since its occupation in 1967.¹⁵⁴⁷ However, Palestinian East Jerusalemites are

¹⁵⁴³ WCLAC and Equality Now, 'Pre-Session Report on Palestine for Consideration During the 68th Session of United Nation Committee on the Elimination of Discrimination Against Women October 2017' 5.

¹⁵⁴⁴ Asem Khalil, 'Formal and Informal Justice in Palestine: Dealing with the Legacy of Tribal Law' (2009) 184 *Etudes Rurales* 169,171,172, 173.

¹⁵⁴⁵ The 1960 Jordanian Penal Code.

¹⁵⁴⁶ The 1936 Egyptian Mandate Penal Code.

¹⁵⁴⁷ < <https://www.hrw.org/news/2017/08/08/israel-jerusalem-palestinians-stripped-status>> accessed 16 January 2020. See also the Report of the Special Rapporteur on violence against women, its causes, and consequences, on her mission to the Occupied Palestinian Territory/State of Palestine, para.61 p.12.

not granted equal Israeli national citizenship rights and may see their main legal connection to Israel being cut when their Israeli 'permanent residency'¹⁵⁴⁸ is revoked based on the laws of entry they are subjected to.¹⁵⁴⁹ This raises the human right issue of statelessness and the related issue of international legal and human right protection for Palestinians from East Jerusalem under international law.¹⁵⁵⁰ This issue is not discussed further in the research.

With the governance of Hamas, the *de facto* authority reformed the legal and judiciary system in Gaza. Hamas has *inter alia* replaced parts of the Ottoman *Majallah* civil code, nominated new judges, a new Prosecutor General as well as setting up a new judicial Council.¹⁵⁵¹

8.5 A plural legal system in Palestine

Bearing in mind the above context, the question arises: is legal harmonisation *per se* likely to be pursued by domestic actors, international UN mechanisms¹⁵⁵² and international donors' who perceive the unification of Palestinian legal system as 'an essential precondition for national reconciliation'.¹⁵⁵³ Theoretically, it has been suggested that 'successful harmonisation occurs most frequently in competitive, and especially cooperative, legal pluralism

¹⁵⁴⁸ 'a form of quasi-citizenship' in Danielle C Jefferis, 'Institutionalizing Statelessness: The Revocation of Residency Rights of Palestinians in East Jerusalem' (2012) 24(2) International Journal of Refugee Law 204.

¹⁵⁴⁹ *ibid* 202, 203.

¹⁵⁵⁰ Michelle Foster, H el ene Lambert, 'Statelessness as a Human Rights Issue: A Concept Whose Time Has Come' (2016) 28 (4) International Journal of Refugee Law 564,565, 573, 574.

¹⁵⁵¹ Asem Khalil, A, 'Impulses from the Arab Spring on the Palestinian State-Building Process' in Rainer Grote and Tilmann R oder (eds) *Constitutionalism, Human Rights and Islam after the Arab Spring* (OUP 2016) 864.

¹⁵⁵² Committee on the Elimination of Discrimination against Women considers the report of the State of Palestine of 11 July 2018.

¹⁵⁵³ Swart, 'A Framework for Unity and Reconciliation in the State of Palestine Proposals for Legal Reforms (n 162) 12.

environments.’ In practice, this is illustrated to some extent by the building of the East Timor legal system where the State worked hard with international support to transform a legacy of competitive legal pluralism into a cooperative one, ‘involving the process of reconciling constitutional and local norms’.¹⁵⁵⁴

One view is that working towards legal pluralism in the case of Palestine, may be preferable to attempting to unify the legal system. A *de facto* legally pluralistic environment prevails in Palestine with the multi-layers of legislation, the cohabitation of a common law system,¹⁵⁵⁵ a civil law model,¹⁵⁵⁶ tribal law¹⁵⁵⁷ and the *Shari’a* law with its own court system¹⁵⁵⁸ applicable to parts of the Palestinian community. Furthermore,

*‘the Palestinian legal understanding stems from tribal, Islamic, and state law notions of justice, which are intimately intertwined, and share common sources’.*¹⁵⁵⁹

As mentioned in chapter 7, legal pluralism is ‘generally defined as a situation in which two or more legal systems coexist in the same social field’.¹⁵⁶⁰ A pluralistic approach may therefore enable recognition of the different cultural traditions, legal norms and aspirations that developed throughout decades in Palestine. A pluralistic approach may also encourage the State and other

¹⁵⁵⁴ Geoffrey Swenson, ‘Legal Pluralism in Theory and Practice’ (n 1353) 438,447,450,451. See also Laura Grenfell, ‘Legal Pluralism and the Rule of Law in Timor Leste’ (2006) 19 *Leiden Journal of International Law* 305,337.

¹⁵⁵⁵ Khalil, ‘Formal and Informal Justice in Palestine: Dealing with the Legacy of Tribal Law’ (n 1544) 172.

¹⁵⁵⁶ Khalil, ‘Formal and Informal Justice in Palestine: Dealing with the Legacy of Tribal Law’ (n 1544) 172.

¹⁵⁵⁷ Khalil, ‘Formal and Informal Justice in Palestine: Dealing with the Legacy of Tribal Law’ (n 1544) 173, 174.

¹⁵⁵⁸ The Norwegian Refugee Council (n 1537) 11.

¹⁵⁵⁹ Samer Fares, Feras Milhem and Dima Khalidi, ‘The Sulha System in Palestine: Between Justice and Social Order’ (2006) 28(1) *Practicing Anthropology* 21.

¹⁵⁶⁰ Sally Engle Merry, ‘Legal Pluralism’ (1988) 22 (5) *Law & Society Review* 869,870.

stakeholders to reach a balance between the enforcement of universal rights and the consideration of national traditions and cultural interpretations¹⁵⁶¹ as well as interpretations of constitutional principles.¹⁵⁶²

Furthermore, legal pluralism can provide an appropriate framework for fragile contexts characterised by weak and contested governing authorities.¹⁵⁶³ This is precisely the case manifested by Palestine. As mentioned, legal pluralism can exhibit different features: cooperation, competition, complementarity, in order to achieve an accepted rule of law and a normative legitimacy and overall judicial state-building.¹⁵⁶⁴ In the case of Palestine, legal pluralism entails interactions and constructive relationships between the current competing authorities governing in the West Bank and Gaza as well as between the existing distinct normative orders. This dynamic also requires and may encourage the consolidation of popular legitimacy.¹⁵⁶⁵ The issue of legal pluralism is raised in the interviews in chapter 9 with the support of a prominent Palestinian academic.

The initial task to harmonise national laws and practices was partly perceived as necessary to promote a coherent legal system in which to address Palestine's international treaty obligations and in respect with international human rights standards. A key current PA objective is to work towards the implementation of the numerous international instruments as well as on the recommendations from the UN human rights mechanisms Palestine reports to.

¹⁵⁶¹ Dabed (n 1455) 2.

¹⁵⁶² Dabed (n 1455) 2, 7.

¹⁵⁶³ Swenson (n 1353) 439.

¹⁵⁶⁴ Swenson (n 1353) 438.

¹⁵⁶⁵ Swenson (n 1353) 442.

This commitment is set out in the latest version of the Palestinian National Policy Agenda.¹⁵⁶⁶ Such undertaking requires *inter alia* the involvement of various Ministries and governmental institutions, the Palestinian Independent Commission for Human Rights, and most of all civil society organisations with the support of international donors.

Hence, legal pluralism is a realistic framework to understand Palestine's legal system considering that Palestine's unity has been further compromised by the territorial, social, and political division of the Palestinians. Furthermore, legal pluralism which embraces different legal cultures¹⁵⁶⁷ would be appropriate to Palestine, primarily owing to the history of legal, geographical, and political legacies and paths followed in the West Bank and Gaza since 1948.¹⁵⁶⁸

Whilst Palestine continues to experience the undermining of its social cohesion, the entity and identity of Palestine can co-exist with nevertheless distinct legal systems.¹⁵⁶⁹

8.6 Challenges to the harmonisation of the Palestinian legal framework and impact on law enforcement

In view of the multiple legal layers, reforms were initiated by the PA along with the international community and domestic actors to promote a harmonisation process of the Palestinian legal system and the attempt of unification of judicial

¹⁵⁶⁶ The State of Palestine's 2017- 22 National Policy Agenda: Putting Citizens (2016) 23. See Annex 1 of the 2017- 22 National Policy Agenda: National Policy Agenda Matrix p.1, 3.

¹⁵⁶⁷ Khalil, 'Formal and Informal Justice in Palestine: Dealing with the Legacy of Tribal Law' (n 1544) 172.

¹⁵⁶⁸ Robinson (n 1477) 52.

¹⁵⁶⁹ Interview on 6 December 2019 with leading Palestinian academic, Asem Khalil, Professor in Birzeit University.

institutions in the early 2000s.¹⁵⁷⁰ The context of the legal harmonisation takes its inspiration from the historical legacies of the West Bank and Gaza made of a non-unified body of laws, which affected the judiciary and the governance of the PA in both aeras. The Palestinian Legislative Council (PLC) established by the Oslo Agreements¹⁵⁷¹ was tasked *inter alia* to harmonise the laws of the Gaza Strip as well as the West Bank and the process of reforming the Palestinian legislation. Between 1996 and 2002, the PLC endorsed approximately eighty new laws addressing legal, commercial, civil and criminal matters.¹⁵⁷² To support the process, a Harmonisation Committee was set up in late 1990 and involved a number of actors such as civil society organisations, Birzeit University, and UNDP. The intent to build a coherent and harmonised legal framework has been compromised by a number of following factors: the political fracture between Fatah and Hamas in 2006; the lack of legislative elections for nearly thirteen years;¹⁵⁷³ the subsequent fight over political legitimacy and the continuing challenge of the legality of the judiciary and law-making process in the West Bank and the Gaza Strip.¹⁵⁷⁴ The weakening of the legislative institutions was already noticeable when in 2003, some presidential decrees began to by-pass the role of the legislative council.¹⁵⁷⁵ Following the factional fracture of 2007, in the West Bank the law-making process without

¹⁵⁷⁰ Reem Bahdi and Mudar Kassis, 'Decolonisation, dignity and development aid: a judicial education experience in Palestine (2013) 37(11) Third World Quarterly 2010,2014.

¹⁵⁷¹ Article XVII of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip.

¹⁵⁷² Mattar (n 1522) 303.

¹⁵⁷³ Report of the Special Rapporteur on violence against women, its causes, and consequences, on her mission to the Occupied Palestinian Territory/State of Palestine (8 June 2017) UN Doc A/HRC/35/30/Add.2, para.15.

¹⁵⁷⁴ Swart, 'A Framework for Unity and Reconciliation in the State of Palestine Proposals for Legal Reforms' (n 162) 7.

¹⁵⁷⁵ Independent Task Force on Strengthening Palestinian Public Institutions, 'Reforming the Palestinian Authority: An Update (2003) 8.

the involvement of the PLC has necessitated the intervention of the executive by way of multiple presidential decrees and secondary legislation (regulations, bylaws) based on article 43 of the Palestinian Basic Law.¹⁵⁷⁶ In Gaza, Hamas convened a parallel Legislative Council acting 'as proxy' with no constitutional basis and questionable legitimacy.¹⁵⁷⁷ Hence, the harmonisation process was interrupted post 2006 and led to a subsequent proposal to harmonise all laws issued by presidential decree in the West Bank, and laws made in Gaza post 2007,¹⁵⁷⁸ but the harmonisation process never materialised. In 2018, a new Legislative Harmonisation Committee was established headed by the Minister of Justice. Its objective was to harmonise domestic laws with human rights standards arising from Palestine's international legal obligations as required by various UN human rights mechanisms.¹⁵⁷⁹ In parallel, another *ad-hoc* Committee composed of the Ministry of Justice, the Ministry of Women Affairs, under the lead of the Ministry of Social Development was set up to draft the Law on Family Protection from Violence.¹⁵⁸⁰ This draft Law reflects legal commitments to address and incorporate specific human rights issues such as

¹⁵⁷⁶ Article 43 of the Palestinian Basic Law: "The President of the National Authority shall have the right, in cases of necessity that cannot be delayed, and when the Legislative Council is not in session, to issue decrees that have the power of law".

¹⁵⁷⁷ Swart 'A Framework for Unity and Reconciliation in the State of Palestine Proposals for Legal Reforms' (n 162) 23.

¹⁵⁷⁸ *ibid* 9.

¹⁵⁷⁹ State of Palestine, 'Sustainable Developments Goals - Palestinian National Voluntary Review on the Implementation of the 2030 Agenda (2018) 36. See also the Committee on the Elimination of Discrimination against Women, Concluding observations on the initial report of the State of Palestine (25 July 2018) CEDAW/C/PSE/CO/1 para.47 at 15. See also the Report of the Special Rapporteur on violence against women, its causes, and consequences, on her mission to the Occupied Palestinian Territory/State of Palestine, A/HRC/35/30/Add.2 (n 1573) para.59, p.12. CEDAW Consideration of reports submitted by the State of Palestine. CEDAW/C/PSE/FCO/1 (19 August 2020) para.1, p.2.

¹⁵⁸⁰ EUPOL COPPS (n 1604) 21.

the non-discrimination and non-violence against women, equality between men and women and the protection of women and children's human rights.¹⁵⁸¹

Another impediment to the achievement of a harmonised legal system is due to the imposed territorial division of Palestine into three administrative areas arising from the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip in 1995.¹⁵⁸²

The territorial fragmentation is manifested by the three administrative areas of the West Bank excluding East Jerusalem: A, B and C. Each holds a different governance status. Area A is under Israeli military administration who control entry and exit into this area, meanwhile the PA has jurisdiction in this area over civil, administrative and security related matters.¹⁵⁸³ In area B, the PA has civilian control over Palestinian rural areas¹⁵⁸⁴ whilst the Israeli authorities exercise jointly with the PA the control of security of this area. Area C constitutes approximately 62 % of the West Bank. This area comprises Israeli settlements, the Jordan Valley and bypass roads separately accessing Palestinian and Israeli communities.¹⁵⁸⁵ Area C is under exclusive control of the Israeli authorities for security, civil matters, planning and construction.¹⁵⁸⁶ This leaves Palestinians with effective self-government of civil, administrative and internal security matters of approximately 18% of the West Bank. In East

¹⁵⁸¹ Report of the Special Rapporteur on violence against women, its causes, and consequences, on her mission to the Occupied Palestinian Territory/State of Palestine, A/HRC/35/30/Add.2 (n 1573) paras.20,29, 68, 92 (e).

¹⁵⁸² Article XI Land of the 'Israeli-Palestinian Interim Agreement'(28 September 1995).

¹⁵⁸³ Article XIII security. 1 of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip.

¹⁵⁸⁴ European Council on Foreign Relations, 'Mapping Palestinian Politics' (2018) 11.

¹⁵⁸⁵ Human Rights Council (6 March 2018) UN Doc A/HRC/37/43, para 18, 5.

¹⁵⁸⁶ Turner (n 1492) 744. See also Article XI.2.c. of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip

Jerusalem, Israeli legislation has remained in force since 1967¹⁵⁸⁷ though its status remains an occupied territory under international law.¹⁵⁸⁸

The 1997 Protocol concerning the redeployment in Hebron of the Israeli military forces concerns the division of Hebron into Area H-1 (approximately 80 percent of the city) which is under Palestinian control and Area H-2. The latter remains under Israeli control for internal security, public order, civil power, responsibilities related to Israelis and their property.¹⁵⁸⁹ However, the military order No. 1789 of 31 August 2017 enhanced the status of settlements through the establishment of a 'civil services administration' in the H-2 area in violation of humanitarian principles.¹⁵⁹⁰

The continued territorial fragmentation has been exacerbated further by the construction of approximately 620 km of 'wall', physical barrier commenced in 2002 by Israel in the West Bank. This, in the opinion of the Israeli government, responded to security concerns¹⁵⁹¹ justifying a narrative on terrorism threats.¹⁵⁹² This edifice has resulted not only in disconnecting Palestinian people from one another¹⁵⁹³ but also in uprooting and incrementally severing and isolating access to Palestinian land.¹⁵⁹⁴ Furthermore, this has increased

¹⁵⁸⁷ Terry Rempel, 'The Significance of Israel's Partial Annexation of East Jerusalem' (1997) 51(4) *Middle East Journal* 521.

¹⁵⁸⁸ Human Rights Watch, Women's Centre for Legal Aid and Counselling (WCLAC), *Equality Now*, joint submission to the CEDAW Committee on the State of Palestine (June 2018) 5.

¹⁵⁸⁹ Protocol Concerning the Redeployment in Hebron of 15 January 1997.

¹⁵⁹⁰ HRC (6 March 2018) UN Doc A/HRC/37/43, para 12 at 4. See also Article 49 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (n 928).

¹⁵⁹¹ See the ICJ, 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory' (n 710).

¹⁵⁹² Reece Jones, Christine Leuenberger and Emily Regan Wills, 'The West Bank Wall' (2016) 31 (3) *Journal of Borderlands Studies* 271,272.

¹⁵⁹³ Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 (19 October 2016) UN Doc A/71/554, para.41.

¹⁵⁹⁴ Jones, Leuenberger and Regan Wills (n 1592) 271.

restrictions on Palestinians' movements and obstructed their enjoyment of basic human rights.¹⁵⁹⁵

In addition, the wall affects the cohesion of the Palestinian Authority trying to govern an already fractured territory.¹⁵⁹⁶ This inevitably hindered the coordination and work between Palestinian entities to achieve legal enforcement and prevents further the advancement of a coherent Palestinian entity as well as a unified legal system.¹⁵⁹⁷

Moreover, 'the organisation of the police force¹⁵⁹⁸ of the PNA under the Oslo agreements meant that the enforcement of the law was increasingly problematic: 'there was no clear legislation that governed the relationship between the PNA police and the courts' and also that the various branches of the police force often acted more as political factions than as police'.¹⁵⁹⁹ This often resulted in the non-enforcement of Court orders. Consequently, one of the practical impacts of both this legal and territorial incoherence relates to gaps created regarding law enforcement by both Israel and the Palestinian

¹⁵⁹⁵ Sir Arthur Watts, 'Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory) para. 28. Diakonia International Humanitarian Law Resource Centre, 'Rule of Law A Hardening of Illegality in Israel and the oPt 2014-2017' (2017) 12. See UNSCO Report to the Ad Hoc Liaison Committee (n 1510) 9. See the ICJ, Advisory Opinion Concerning 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory' (n 710).

¹⁵⁹⁶ Turner (n 1492) 740. See also Nathan J. Brown, 'Evaluating Palestinian Reform' (n 1517) 3,5. The Oslo I Interim Accord of 1995, the Oslo II Accords and the Sharm el-Sheikh Memorandum of 1999, between Israel and the PLO, whose part of the negotiation process resulted in the emanation of an interim Palestinian Authority (PA). See also Swart, 'A Framework for Unity and Reconciliation in the State of Palestine Proposals for Legal Reforms' (n 162).

¹⁵⁹⁷ Lynn Welchman, 'In the Interim: Civil Society, the Shar'i Judiciary and Palestinian Personal Status Law in the Transitional Period' (2003) 10 (1) *Islamic Law and Society* 34. See also Tobias Kelly, 'Access to Justice: The Palestinian Legal System and the Fragmentation of Coercive Power' (2004) Crisis Work Programme London School of Economics, working paper 43, 17.

¹⁵⁹⁸ Composed of the Civilian Police, Presidential Security (Force 17), Preventative Security (PS), General Intelligence, the Public Security Force and Civil Defence in Tobias Kelly, 'Access to Justice: The Palestinian Legal System and the Fragmentation of Coercive Power' (2004) Working Paper N.41, Development Research Centre LSE 7.

¹⁵⁹⁹ *ibid* 8.

authorities. As an example, the separation wall in the areas of East Jerusalem led to almost the complete withdrawal of the Israel law enforcement personnel and simultaneously the inability of Palestinian police institutions to operate in absence of exercising jurisdiction in these areas (designated area X).¹⁶⁰⁰ In addition, Palestinian law enforcement agencies do not have the jurisdiction to intervene in areas B and C of the West Bank including East Jerusalem without Israeli authorisation.¹⁶⁰¹ However, the PA courts have jurisdiction over Palestinians throughout the West Bank. Hence, the enforcement of Palestinian court orders in areas outside the immediate control of the Palestinian police forces therefore entails as mentioned, cooperation between the Palestinian and Israeli police, which following the second intifada broke down¹⁶⁰² and periodically continue to breakdown.

This lack of territorial integrity impacts on the lack of protection for victims of violence and possibly exploitation.¹⁶⁰³ It amplifies the inability of Palestinian law enforcement to address the crimes of HT. In this respect the PA is unable to exercise its due diligence obligation for effective protection of human rights and to prevent in particular violence against women based on the lack of full jurisdiction and effective control in these fragmented areas.¹⁶⁰⁴

¹⁶⁰⁰ Human Rights Council, A/HRC/37/43 (n 1582) 13. See also UNDP, 'Jerusalem Communities behind the Wall: "Area X"', Resilience Series (March 2017) 16,19 < https://issuu.com/thepalestinedevelopmentmonitor/docs/resilience_series_-_transformative> accessed 10 March 2020.

¹⁶⁰¹ UNDP, 'A Review of the Palestinian Legislation from a Women's Rights Perspective'(2013) 7.

¹⁶⁰² Kelly (n 1598) 7.

¹⁶⁰³ UNDP, 'A Review of the Palestinian Legislation from a Women's Rights Perspective' (n 1601) 20,21.

¹⁶⁰⁴ Report of the Special Rapporteur on violence against women, its causes, and consequences, on her mission to the Occupied Palestinian Territory/State of Palestine, (n 1585) para.47. See also EU Coordinating Office for Palestinian Support (EUPOL COPPS), Human Rights Strategy (2018) 2.

Furthermore, restrictions of movements resulting from this imposed territorial division¹⁶⁰⁵ prevent Palestinians from accessing courts and contributes to the inability of Palestinian judicial institutions to enforce court decisions in Areas B and C.¹⁶⁰⁶ Additionally, judges need authorisation from the Israeli authorities to travel abroad to and from Gaza and through the different checkpoints within the West Bank. Hence, the Palestinian justice system including law enforcement and prosecution is fatally compromised and continues to systematically rely on permission from Israeli authorities.¹⁶⁰⁷

As mentioned above, the PA is obligated to respect its duties under the international human rights norms and provisions within its territory and toward its citizens. However, it clearly has limited control over its territory. The Israeli State claims that the Oslo Accords handed over all civil responsibilities, including security to the PA with the reservations regarding areas A, B and C. Nevertheless, obligations to human rights 'must be determined in the light of the legal and practical context in which the Occupying Power is operating...this entails the existence of a law enforcement system capable of protecting the rights in the required manner'.¹⁶⁰⁸ In this context, the state of control/jurisdiction/authority is not a clear-cut situation between Israel and Palestine. The lack of clarity therefore impacts effective law enforcement responses to human rights violations and HT. This is despite the humanitarian rule that penal laws of the occupied territory shall remain in force (with the

¹⁶⁰⁵ Swart, 'A Framework for Unity and Reconciliation in the State of Palestine Proposals for Legal Reforms' (n 162) 18.

¹⁶⁰⁶ J. Salem, J, 'Legal Reform and the Process of De-Colonization and State-Building in Palestine' (2009) *The Palestine Yearbook of International Law* 10.

¹⁶⁰⁷ Bahdi and Kassis (n 1570) 2012.

¹⁶⁰⁸ Noam Lubell, 'Human rights obligations in military occupation' (2012) 95(885) *International Review of the Red Cross* 324, 326.

exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention).¹⁶⁰⁹

8.7 The Palestinian Legal framework: challenges in the implementation of international human rights commitments

This section addresses the main challenges Palestine faces as FCAS commonly experience, regarding the implementation of international human rights instruments and the subsequent enforcement of these norms. Chapter 7 examined specific impediments typically experienced by FCAS; often a lack of political will; a lack of State's capacity; a dysfunctional rule of law; a lack of social will related to cultural considerations that may conflict with international human rights standards. There are also financial, economic, and political bottlenecks to implementation. In addition, the availability of mechanisms provided by international human rights law enabling victims of human rights violations and HT to access justice and enjoy the right to effective remedy is paramount as examined in chapter 5 and 6. In the case of Palestine, the crucial question is addressed in further details in chapter 9 of how and whether these international and domestic mechanisms are available and effective to redress and prevent human rights violations against Palestinians.¹⁶¹⁰

In Palestine, other specific impediments to implementing international legal provisions are related to the gaps in Palestinian governance as well as in its

¹⁶⁰⁹ Article 64 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, entered into force 21 October 1950.

¹⁶¹⁰ Qandeel (n 184) 8.

legal and institutional system.¹⁶¹¹ The Basic Law did not provide rules envisaging the functioning of such cohabiting governments/entities.¹⁶¹² The situation was also aggravated by the longstanding intra-Fatah rivalries¹⁶¹³ and the growth since the mid-nineties, of the PA bureaucracy supported by donor countries.¹⁶¹⁴ Hence, whether legal harmonisation or legal pluralism is preferred, pursued or not, there are many impediments that compromise how these international commitments can be practically addressed and implemented.

Palestine international commitment to multilateral treaties and agreements

Palestine's access to procedural treaty mechanisms started through its UNESCO membership in 2011,¹⁶¹⁵ which enabled Palestine at an international plane to participate in international treaty regimes or in certain procedural mechanisms established by international treaties. Subsequently, Palestine became member of other international organisations including the Arab League.¹⁶¹⁶ As mentioned in section 1.11, the UN General Assembly in 2012 accorded Palestine to be a 'non-member observer State status in the United Nations'.¹⁶¹⁷ This UN recognition is significant as this legitimated Palestine's

¹⁶¹¹ Asem Khalil, 'Constitution-Making and Statebuilding Redefining the Palestinian Nation' (n 1489) 586.

¹⁶¹² Asem Khalil, 'Impulses from the Arab Spring on the Palestinian State-Building Process' (n 1551) 863.

¹⁶¹³ Ali Jabarwi, 'Palestinian Politics at a Crossroads' (1996) 25(4) *Journal of Palestine Studies* 31,35.

¹⁶¹⁴ *ibid* 35. Nathan J. Brown, 'Time to Rethink, But Not Abandon, International Aid to Palestinians' (2018) *Carnegie Endowment for International Peace* 8, 10.

¹⁶¹⁵ <https://news.un.org/en/story/2011/10/393562-unesco-votes-admit-palestine-full-member> accessed 25 July 2021.

¹⁶¹⁶ Charles F. Whitman, 'Palestine's Statehood and Ability to Litigate in the International Court of Justice' (2013) 44(1) *California Western International Law Journal* 10.

¹⁶¹⁷ UNGA Resolution 67/19 (4 December 2012) A/RES/67/19, para.2, p.3. See also Martin Wählisch, 'Beyond a Seat in the United Nations: Palestine's U.N. Membership and International Law' (2012) 53 *Harvard International Law Journal* 229.

statehood under international law and to gain subsequently in 2014, diplomatic recognition by many member States to the UN. Furthermore, Palestine was admitted in 2015 as a State Party to the Rome Statute of the ICC and in 2017, Palestine became a full member of Interpol. Palestine since 2014, was enabled to accede core multilateral treaties and agreements related to the areas of *inter alia* human rights, international humanitarian law, international criminal law, crime and corruption, environment and culture, fulfilling partly the requirement of the interim constitutional text¹⁶¹⁸ of the Basic Law, to uphold fundamental rights.¹⁶¹⁹ These multiple legal commitments were undertaken without reservations.¹⁶²⁰ In particular, Palestine made no reservations for the UN Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) an occurrence which is unique in the region of the Middle East and Northern Africa.¹⁶²¹ Furthermore, one of Palestine's latest commitments is the Palermo Protocol acceded to on 29th December 2018. This occurred in the course of the research and was perceived as a great legal undertaking. These multiple international treaty commitments may be understood as a strategy to activate Palestine's international legal personality through the

¹⁶¹⁸ Asem Khalil, 'The Legal Framework for Palestinian Security Sector Governance' in Friedrich Roland and Arnold Luethold (eds), *Entry-Points to Palestinian Security Sector Reform* (Geneva, DCAF, 2007) 33.

¹⁶¹⁹ Article 10 para 2 of the amended Basic Law of 2003: 'The Palestinian National Authority shall work without delay to become a party to regional and international declarations and covenants that protect human rights.' See Annex I, the list of multilateral treaties accessed by the State of Palestine, provided by the Multilateral Affairs Department of the Ministry of Foreign Affairs of the State of Palestine (18 July 2018). See also Asem Khalil, 'Courting Economic and Social Rights in Palestine: Justiciability, Enforceability and the Role of the Supreme Constitutional Court' (n 1527) 5.

¹⁶²⁰ Report of the Special Rapporteur on violence against women, its causes, and consequences, on her mission to the Occupied Palestinian Territory/State of Palestine (n 1573) para.19.

¹⁶²¹ Human Rights Watch, 'Palestine: 'Marry-Your-Rapist' Law Repealed Revoke Other Discriminatory Laws Against Women' (May 2018). See also Human Rights Watch, Women's Centre for Legal Aid and Counselling (WCLAC), Equality Now, joint submission to the CEDAW Committee on the State of Palestine June 2018.

capacity to enter into relation with other states and therefore to acquire a legal status among the international community.¹⁶²² Other interpretations suggest that the accession to multilateral treaties was a way for Palestine to circumvent the issue of statehood¹⁶²³ in relation to the Montevideo criteria or to other objective criteria for Statehood under general international law.¹⁶²⁴

These international legal undertakings inferred a right for Palestine to access international judicial and non-judicial accountability mechanisms and procedures for Palestinian victims of international law violations.¹⁶²⁵ More widely, in relation to violations of international humanitarian law as well as violations of international human rights law in the occupied Palestinian territory, there are three duty-bearers, namely Israel, the PA, and the *de facto* authorities in Gaza. In the areas under the jurisdiction of the Palestinian Authority, the PA has obligations under human rights treaties and by extension under the Palermo Protocol, and is the duty-bearer to combat HT. As for Israel, as an occupying State and as a State party to many of the core international human rights conventions, the latter continues to bear responsibility for implementing its human rights obligations in the OPT¹⁶²⁶ and humanitarian law obligations *vis-à-vis* the territory and the people under its effective control.¹⁶²⁷ As further example, the ICJ in the Wall case decision, judges emphasise that both

¹⁶²² Shadi Sakran and Mika Hayashi, 'Palestine's Accession to Multilateral Treaties: Effective Circumvention of the Statehood Question and its Consequences' (2017) 25 (1) Journal of International Cooperation Studies 81.

¹⁶²³ *ibid* 82.

¹⁶²⁴ Dapo Akande, 'Palestine as a UN Observer State: Does this Make Palestine a State?' (2012).

< <https://www.ejiltalk.org/palestine-as-a-un-observer-state-does-this-make-palestine-a-state/>> accessed 21 January 2020.

¹⁶²⁵ Azarov, 'An international legal demarche for human rights? Perils and prospects of the Palestinian UN bid' (n 1459) 529, 532.

¹⁶²⁶ UNGA, A/HRC/12/3 (19 August 2009) para 5 p.4.

¹⁶²⁷ Mais A.M Qandeel (n 184) 86.

Israel and Palestine are under the obligation to respect the rules of international humanitarian law. Furthermore, the ICJ recognises the applicability of human rights obligations.¹⁶²⁸ Specifically, the ICJ relates to the application of the International Covenant on Economic, Social and Cultural Rights (ICESCR) by Israel the occupying power, in a context that takes into account the existence and the role the PA play in the territory. However, Israel is 'under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities'.¹⁶²⁹

As signatories to the Palermo Protocol, this creates for both Israel and the PA legal obligations to cooperate on HT issues as per the article 2 c), articles 10 and 11 of the Protocol. In addition, the PA has the responsibility to report to the relevant UN treaty-bodies and related international human rights mechanisms. However, the international obligations contracted by the PA do not bind the area of Gaza under the control of Hamas who then is the direct duty-bearer for human rights and HT practices. Hamas exercises government-like functions and control over a territory is obliged to respect human rights norms when their conduct affects the human rights of the individuals under their control'.¹⁶³⁰ In particular, many laws enacted post 2007 in Gaza are not regarded as complying with international human rights standards. For instance, human rights violations relate to arbitrary detention and death sentences carried out¹⁶³¹ and crimes of 'honour' against girls and women.¹⁶³²

¹⁶²⁸ ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, ICJ Reports 2004, para. 106.

¹⁶²⁹ *ibid*, para 112.

¹⁶³⁰ UNGA, A/HRC/12/3 (19 August 2009) para 7, p.4. See also Report of the independent international commission of inquiry on the protests in the Occupied Palestinian Territory to the Human Right Council (6 March 2019) UN Doc A/HRC/40/74, para 11, p.3.

¹⁶³¹ <<https://www.amnesty.org/en/latest/news/2019/03/palestine-new-government-must-reverse-human-rights-decline/>> accessed 18 January 2020.

¹⁶³² <<http://www.alhaq.org/advocacy/6457.html>> accessed 22 January 2020.

Hamas as a duty-bearer for Palestinians in Gaza should amend the Penal Code of 1936 as there are no provisions criminalising acts of HT or related practices.

Challenges to the implementation of international human rights commitments

There was a hope that the accession to international human rights commitments and the reporting to various UN monitoring body would play a significant role in encouraging harmonisation of the Palestine legislative framework and encourages its conformity with international human rights norms. However, despite the setting up of supportive and implementing domestic mechanisms, the analysis of substantive legal norms reveals some inconsistencies and legal gaps between the applicable Palestine judicial and criminal system with human rights international standards. An example of these gaps concerns women's rights that are protected by the CEDAW.¹⁶³³ Based on Palestine's international legal commitment in this area, provisions on non-discrimination and equality should fully apply especially when it relates to practical matters such as access to justice without discrimination, divorce, inheritance, child custody, early marriage and forced marriage, honour killing, and domestic violence. In order to address the gaps between international human rights standards and Palestinian legislation, the issue of 'honour killing' was addressed and some amendments through presidential decree were made to article 340 of the Penal Code N. 16 of 1960 in the West Bank and its

¹⁶³³ The Geneva Centre for the Democratic Control of Armed Forces (DCAF) and Women's Centre for Legal Aid and Counselling (WCLAC), 'Palestinian Women and Personal Status Law' (2012) 1. See Swart, 'A Framework for Unity and Reconciliation in the State of Palestine Proposals for Legal Reforms' (n 162) 27. See also UNDP, 'A Review of Palestinian Legislation from a Women's Rights Perspective' (n 186) 26.

equivalent article of the Penal Code N. 74 of 1936 in Gaza.¹⁶³⁴ This decree removed the old provisions legitimising perpetrators of such crimes. In addition, the presidential decree abrogated Article 98 of the 1960 Penal Code which enabled perpetrators to plead 'honour' as a mitigating circumstances to this crime.¹⁶³⁵

Nevertheless, until now disputes resolution often resorts to informal justice mechanisms such as tribal and family networks relying on tribal conciliation¹⁶³⁶ rather than judiciary proceedings that many Palestinians mistrust.¹⁶³⁷ Furthermore, even formal judges perceive the *sulha*¹⁶³⁸ system as

*'complementary to the court system given the absence of effective police force and the weakness of the judiciary'.*¹⁶³⁹

Since the Covid 19 pandemic, incidence of gender-based violence and related human rights issues in this fragile context and in other FCAS are often dealt with in family spheres with the risk that: 'with the closure of judicial institutions and services, there is growing concern over the reversion to traditional mechanisms of resolving social problems. In the oPt, this is namely the concept of *sulha* which is a form of mediation that is preferred in some Palestinian

¹⁶³⁴ Report of the Special Rapporteur on violence against women, its causes, and consequences, on her mission to the Occupied Palestinian Territory/State of Palestine (of 8 June 2017) UN Doc A/HRC/35/30/Add.2 (n 1573) para.65, p.13. See also OHCHR Palestine, 'Women's Human Rights and Justice - Murder of Women in Palestine under the pretext of Honour - Legislation and Jurisprudence Analytical Study' (2014) 5.

¹⁶³⁵ Report of the Special Rapporteur on violence against women, its causes, and consequences, on her mission to the Occupied Palestinian Territory/State of Palestine (n 1569) para.65, p.13. See also OHCHR Palestine, 'Women's Human Rights and Justice - Murder of Women in Palestine under the pretext of Honour - Legislation and Jurisprudence Analytical Study' (n 1634) 21,22.

¹⁶³⁶ Khalil, 'Formal and informal justice in Palestine: Dealing with the Legacy of Tribal Law' (n 1544) 173.

¹⁶³⁷ Swart, 'Palestinian Reconciliation and the Potential of Transitional Justice' (n 1648) 20.

¹⁶³⁸ The Sulha system resolves disputes 'outside the framework of the official court system and its main objective is to reconcile the conflicting parties on the basis of the customs and traditions of the society'. See Fares, Milhem and Khalidi (n 1559) 21.

¹⁶³⁹ Fares, Milhem and Khalidi (n 1559) 24.

communities over judicial accountability. This tends to place women and girls at a disadvantage with risks of exploitation'.¹⁶⁴⁰ As mentioned, this is usually verified in other FCAS where some communities including minorities, have limited confidence in State justice institutions and rely upon informal systems.¹⁶⁴¹

Another discriminatory provision against women was removed by the Law N. 5 of 2018 which repealed article 308 of the 1960 Penal Code enforced in the West Bank.¹⁶⁴² Article 308 enabled the perpetrator of rape to avoid prosecution and imprisonment by marrying his victim.¹⁶⁴³ Another part of the law amended Article 99 of the same Penal Code by prohibiting judges to reduce sentences for serious crimes such as against women and children.¹⁶⁴⁴

At an international level, the monitoring of Palestine's practice and implementation of women's rights through the UN human rights mechanisms has taken place as per Palestine international legal commitment. In July 2018, Palestine submitted for the first time a report to the UN Human Rights Treaty body of the Committee on Elimination of Discrimination against Women.¹⁶⁴⁵ This process reviewed the initial report of Palestine and focused on the

¹⁶⁴⁰ UN Women, 'COVID-19: Gendered Impacts of the Pandemic in Palestine and Implications for Policy and Programming Findings of a Rapid Gender Analysis of COVID-19 in Palestine (2020) 20.

¹⁶⁴¹ UN Women, UNDP, UNODC, OHCHR, 'A Practitioner's Toolkit on Women's Access to Justice Programming' (2018) 23.

¹⁶⁴² Human Rights Watch, 'Palestine: 'Marry-Your-Rapist' Law Repealed Revoke Other Discriminatory Laws Against Women' (n 1621).

¹⁶⁴³ Human Rights Watch, 'Palestine: 'Marry-Your-Rapist' Law Repealed Revoke Other Discriminatory Laws Against Women' (n 1621).

¹⁶⁴⁴ Human Rights Watch, 'Palestine: 'Marry-Your-Rapist' Law Repealed Revoke Other Discriminatory Laws Against Women' (n 1621) 212.

¹⁶⁴⁵ CEDAW - Convention on the Elimination of All Forms of Discrimination against Women, 70th Session (02 Jul 2018 - 20 Jul 2018)

<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23377&LangID=E>>

implementation of the provisions of the Convention on the Elimination of All Forms of Discrimination against Women.¹⁶⁴⁶

However, with the absence of a functioning PLC, legislative changes related to women's issues and the overall implementation of international women's rights has occurred through the issuance of presidential decrees. As mentioned earlier, this is the case for the adoption of the gender-based violence protection law.¹⁶⁴⁷ The Personal Status Law and the Penal Code currently reviewed by drafting committees follow the same law-making process. To illustrate this legal paralysis and this executive interference, the draft of the penal code, which was originally submitted on 14 April 2003,¹⁶⁴⁸ the proposals for reforms of the personal status law which were initiated in 2008¹⁶⁴⁹ and the Law on family protection from violence have not yet been adopted, although the latter legal document is in its final review for endorsement by the President.¹⁶⁵⁰

Combatting HT, one of the latest international legal commitments of Palestine, was examined by the CEDAW Committee in July 2018 which expressed concerns over the legal gap within the domestic legislation pertaining to the question of human exploitation. The CEDAW Committee requested Palestine to enact specific domestic legislation relating to trafficking and the exploitation

¹⁶⁴⁶ Committee on the Elimination of Discrimination against Women considers the report of the State of Palestine (11 July 2018) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23377&LangID=E>> accessed 23 August 2020.

¹⁶⁴⁷ WCLAC, Equality Now, Pre-Session Report on Palestine for Consideration During the 68th Session of United Nation Committee on the Elimination of Discrimination Against Women' (October 2017) 3.

¹⁶⁴⁸ Palestinian Legislative Council, Draft Penal Code, Draft No. 93/2001/M.W (14 April 2003).

¹⁶⁴⁹ UNDP, 'A Review of Palestinian Legislation from a Women's Rights Perspective' (n 186) 23.

¹⁶⁵⁰ This week in Palestine, Hanan Kamar, 'The Family Protection Bill For a Family Life Free of Violence' (31 October 2018) < <http://thisweekinpalestine.com/wp-content/uploads/2018/10/art9.pdf> > accessed 30 November 2018.

of trafficked persons.¹⁶⁵¹ The legal response of Palestine *vis à vis* HT so far has not been implemented and is examined through the interviews in chapter 9.

An additional challenge for Palestine as a fragile entity relates to its human resources, organisational expertise, and financial capacity to undertake the whole process of implementation of the many international instruments accessed since 2014.

In relation to the implementation process of human rights instruments, it is recognised that economic, social and cultural rights consecrated in the ICESCR Covenant and some parts of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD) may require *progressive* implementation from the State party.¹⁶⁵² In contrast, the assumption is that the implementation of civil and political rights have more of an immediate effect.¹⁶⁵³

8.8 The active role of civil society organisations in support to the implementation of the international human rights framework

Practical steps have been initiated by Palestine with the mobilisation of civil society organisations and more precisely, women's organisations. These

¹⁶⁵¹ Concluding observations on the initial report of the State of Palestine, CEDAW/C/PSE/CO/1, 25 July 2018, p.9.

¹⁶⁵² Ralph Wilde, 'Expert opinion on the applicability of human rights law to the Palestinian Territories with a specific focus on the respective responsibilities of Israel, as the extraterritorial state, and Palestine, as the territorial state' (2018) Diakonia International Humanitarian Law Resource Centre 5.

¹⁶⁵³ Anja Siebert-Fohr, 'Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its Article 2 para.2' (2001) 5 Max Planck of the United Nations Yearbook Law 399,405. See Asem Khalil, 'Courting Economic and Social Rights in Palestine: Justiciability, Enforceability and the Role of the Supreme Constitutional Court' (n 1527) 4.

undertakings were subject to pressure by international donors' requirements to incorporate into domestic legislation core human rights standards and to support the legal harmonisation process.¹⁶⁵⁴

In the circumstances Palestine seems to fit the description below:

*'in their structurally weakened position, failed states are more beholden to international intergovernmental organizations such as the United Nations which then extend forms of global regulation through insisting upon the implementation of international human rights standards. In a positive sense, this linking up of intergovernmental organizations and national social movements can empower local human rights and civil society groups and make citizenship more participatory.'*¹⁶⁵⁵

The analysis of the field data in the next chapter examines the task of civil society organisations as well as 'independent governmental actors'¹⁶⁵⁶ such as the Palestinian Independent Commission on Human Rights trying to bridge the current gap of the Palestinian legal system. This is done by advocating at all levels for the enjoyment of human rights in people's daily life as well as to work towards the practicality of international human rights domestic implementation. The consistent and effective involvement of Palestinian grassroots organisations in human rights advocacy and recourse to UN cooperation as well as UN human rights mechanisms help contribute to bring human rights and their protection closer to people's daily life.¹⁶⁵⁷

¹⁶⁵⁴ Swart 'A Framework for Unity and Reconciliation in the State of Palestine Proposals for Legal Reforms' (n 176) 27. See also The Norwegian Refugee Council (n 1537) 39.

¹⁶⁵⁵ Richard Ashby Wilson and Jon P. Mitchell, 'The social life of rights' in Richard Ashby Wilson and Jon P. Mitchell (eds), *Human Rights in Global Perspective Anthropological studies of rights, claims and entitlements* (Routledge, 2003) 12.

¹⁶⁵⁶ Richard Carver, 'Refugees and National Human Rights Institutions: A Growing Engagement' (2017) 9 *Journal of Human Rights Practice* 218.

¹⁶⁵⁷ Human Rights Council holds interactive dialogue with the Commission of Inquiry on the Occupied Palestinian Territory (24 September 2018). See UN Doc A/HRC/38/NGO/119 (13

From both literature and field observations following the second Intifada in 2000, there has been a gradual change of priority among Palestinian civil society organisations. Their priorities shifted from state building efforts to the focus of granting relief to the Palestinian people whose economic, health and social situation had severely deteriorated. Their other focus has been to help the building of a strong judiciary.

As a specific example of their human rights advocacies, Palestinian civil society's contribution to the implementation of international human rights such as women's rights, is supported by a number of UN agencies¹⁶⁵⁸ with the cooperation of various Ministries.¹⁶⁵⁹ Joint programmes are devoted to practical protection initiatives for violence against women¹⁶⁶⁰ and aiming at building a more inclusive rule of law.¹⁶⁶¹ Another example as a result of the dynamic human rights advocacy of civil society organisations, Palestine is in the process of adopting legislation protecting against violence in the family. This 2004 draft law is currently under final review by the national CEDAW Committee to accord with international standards.¹⁶⁶²

June 2018). Joint written statement submitted by Al-Haq, Law in the Service of Man and BADIL Resource Center for Palestinian Residency and Refugee Rights, non-governmental organizations in special consultative status. See UN Doc A/HRC/38/NGO/115 (12 June 2018). Written statement submitted by the Al Mezan Centre for Human Rights, a non-governmental organization in special consultative status. See also: CEDAW Discusses with Civil Society Organizations the Situation of Women in State of Palestine. See also Swart, 'A Framework for Unity and Reconciliation in the State of Palestine – Proposals for Legal Reform' (n 162) 46.

¹⁶⁵⁸ Roberto Valent, Special Representative of UNDP's Programme of Assistance to the Palestinian People (UNDP/PAPP) 'Rule of Law and State-Building Forging the Social Contract' (interview This Week in Palestine 2017) 7.

¹⁶⁵⁹ This week in Palestine, Hanan Kamar (n 1650) 37.

¹⁶⁶⁰ The One Stop Center < http://www.undp.org/content/undp/en/home/ourwork/ourstories/in-palestine_s-first-one-stop-centre--women-survivors-of-violenc.html > accessed 30 November 2018.

¹⁶⁶¹ Press Release - Promoting the Rule of Law in Palestine UNDP, UN Women and UNICEF Launch Sawasya II Joint Programme (20 September 2018)

<https://reliefweb.int/sites/reliefweb.int/files/resources/EN_Sawasya%20launch%20II%20press%20release.pdf> accessed 30 November 2018.

¹⁶⁶² This week in Palestine, Kamar (n 1650) 37.

However, personal field observations uncover that despite CSOs popular and grassroots legitimacy, there is less of a common effort to coordinate mobilisation among them in particular within the Palestinian women's movement.¹⁶⁶³ CSOs in Palestine now represent to a large extent the aims and priorities that donors are eager to achieve. As a result, they often find themselves competing over funding.¹⁶⁶⁴ This is analysed further in chapter 9.

The next chapter examines the practical steps adopted by Palestine with regard to implementing the Palermo Protocol. The analysis includes the understanding of the definition at all levels of civil society and the role of different actors to combat such practice. This includes the translation of this international legal instrument into domestic legal safeguards and the implementation as well as enforcement challenges Palestine is facing that may compromise effective protection and remedies against HT.

8.9 Conclusion

Through a condensed historical and political analysis, this chapter explained first how successive occupations of Palestinian territory created an amalgam of legal orders which impacted on its current political and legislative framework, resulting in a dysfunctional rule of law and judicial system. Palestine can be considered a *prima facie* case as a FCAS.

The multi-layered and conflicting laws between the West bank and Gaza have contributed to the fragmentation of Palestine's legal system and this has partly

¹⁶⁶³ Swart, 'A Framework for Unity and Reconciliation in the State of Palestine – Proposals for Legal Reform' (n 162) 46,47.

¹⁶⁶⁴ Ayat Hamdan, 'Foreign Aid and the Moulding of the Palestinian Space' (2011) Bisan Center for Research and Development 99.

affected and delayed the implementation and enforcement of international human rights commitments.

At the time of the research and interviews, the status of international law in the Palestinian legal framework is not resolved.¹⁶⁶⁵ In particular the Palestinian Basic Law which continues to serve as an interim Constitution is silent on the hierarchy of norms and on the status and position of international treaties including human rights treaties.¹⁶⁶⁶ This causes uncertainty in the domestic implementation of all international legal obligations undertaken by Palestine ¹⁶⁶⁷ and creates confusion for the judiciary with regard to treaty provisions that are not yet incorporated, to be enforceable in domestic courts. However, an evolution of the hierarchy of norms issue is mentioned in section 8.3 through a statement in January 2020 by Palestine delegation before the Committee of the Rights of the Child that: 'international law supersedes national law, with the exception of the Independence Act and the Constitutional Act.'¹⁶⁶⁸

The chapter has described the attempt of legal unification and harmonisation, perceived as a key component to the state building agenda, to a functioning rule of law based on the 'separation of powers' principle, to the domestic implementation of Palestine international legal commitments, and lastly to harmonise the domestic legislation with international human rights standards. Legal harmonisation has not been achieved and this failure was, in part, due to the volatile Palestinian political context and crisis. Subsequently, the fracture

¹⁶⁶⁵ Al-Hihi and Khalil (n 1461) 2.

¹⁶⁶⁶ Al-Hihi and Khalil (n 1461) 3.

¹⁶⁶⁷ Persson (n 1528) 6.

¹⁶⁶⁸ Committee on the Rights of the Child, 'Review of the report of the State of Palestine, highlights the protection of children from violence, CRC/20/26 of 29 January 2020 <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25508&LangID=E>> accessed 30 July 2021

between political and legal entities has maintained Palestine in a state of fragility, at an institutional and legal and judicial level.

However, the complexity or rather richness of Palestine historical legacy and plurality of legal orders should not be considered as an obstacle to Palestine's unity. This view is shared by Palestinian academics who believe that legal pluralism in the case of Palestine may well provide a realistic normative framework to adopt, more in tune with Palestine's historical and political legacies and the diverging governance experienced by Palestinians.

The chapter finally examined the attempts of Palestine's compliance with some of its international human rights obligations despite specific challenges that affect the implementation and enforcement of international human rights commitments. Specific challenges are inherent to the unique situation of Palestine such as the lack of separation of powers with the predominance of the executive in the conduct of the rule of law which hinder good governance.

This is exemplified by the Constitutional Court perceived as an extension of the executive which does not enable an independent judicial authority to function.

The examined impediments contribute to delay further the legal status and practical applicability of both accessed international instruments and international law for their use and enforcement in domestic courts as well as achieving the harmonisation of Palestine legislation with international human rights standards.

The next chapter analyses through field observation, formal, informal interviews and focus group discussions, specific obstacles expressed and practical limitations that Palestine faces regarding the implementation and enforcement of a legal framework protective of HT.

Chapter 9 Analysis of Interviews and Focus Group Discussions

9.1 Introduction

This chapter is concerned with the analysis of this empirical research and outcomes of the qualitative data collected through the undertaking/execution of informal discussions, the recording of semi-structured interviews and a formal validation focus group discussion (FGD). All provided rich data. The semi-structured interviews and FGD were carefully designed and based upon initial and substantial feedback from the field. The analysis focuses on how HT and human rights more generally are implemented domestically in Palestine and the resulting implementation challenges.

The tool of 'thematic analysis' is used to interpret data collected; the methodology is set out in chapter 3 and not discussed in great detail other than to restate that thematic analysis aimed to create 'sensitive, insightful, rich and trustworthy research findings'.¹⁶⁶⁹ The research process provided a flexible but nevertheless a step-by-step approach of a complex account of data. This method was executed by thoroughly examining the perspectives of the various research participants, highlighting similarities and differences. This process included the researcher personal reflection on participants interests, opinions and all enabled to generate pattern which were structured into themes.

Section 9.2 presents the timeline and observations arising from the field visits. Section 9.3 is concerned with the analysis of the interviews using thematic analysis. Section 9.4 focuses on the analysis and outcomes of the validating FGD.

¹⁶⁶⁹ Nowell, Norris, White and Moules (n 470) 1,2.

Section 9.5 synthesises the findings.

As set out in chapter 3, in order to generate questions, identify issues around HT and collect data, initial scoping discussions were undertaken with some segments of Palestinian civil society. Subsequently, the ‘face to face’ interview was identified as the primary data source. Key participants were identified through personal contacts and by using the ‘snowball’ technique. The FGD was also regarded as a complementary method to exchange and corroborate opinions as well as a necessary tool to validate findings and themes emerging from individual interviews.

Before turning to the analysis, it is important to reiterate that the whole research period in Palestine has been undertaken in a volatile and fragile political, security and humanitarian context.

In particular, during the field visit of the summer 2017 tensions increased over the Israeli action to enhance security measures in the surroundings of the Temple Mount in Jerusalem following outbreaks of violence between Palestinians and Israeli Defence Forces near the holy site.¹⁶⁷⁰ As a result, the PA suspended all security coordination with Israel.¹⁶⁷¹ The immediate impact on the research led to restricted access from Ramallah to Jerusalem combined with reinforced security measures at check points.

During the field visit of August 2018, the deterioration of the Gaza’s economic and humanitarian situation contributed to the escalation of military

¹⁶⁷⁰ <<http://www.timesofisrael.com/rioters-clash-with-police-around-jerusalem-over-temple-mount-metal-detectors/>> accessed 22 July 2017.

¹⁶⁷¹ <<https://unsco.unmissions.org/security-council-briefing-situation-middle-east-including-palestinian-question>> accessed 19 September 2018. See also <<https://www.un.org/press/en/2017/sc12927.doc.htm>> accessed 19 September 2018.

confrontations with Israel specifically along the Gaza-Israel border fence.¹⁶⁷² The US State Department decided to cease all contributions to the UN Relief and Works Agency (UNRWA) which has been the primary aid organisation for Palestinian refugees since 1950. Then in early 2020, the US peace plan 'Peace to Prosperity: A Vision to Improve the Lives of the Palestinian and Israeli People'¹⁶⁷³ precipitated a further extended round of disruption and violence.

9.2 Timeline and Outcomes of the Field Visits

First field visit (July-August 2016)

The outcome of the first visit in July 2016 acknowledged, through informal discussions a lack of research, scarce information, and very little understanding of the HT legal definition as well as of the full scope of exploitative practices. As mentioned earlier, the understanding of HT was almost exclusively confined to the issue of sexual exploitation. This prompted the frequent response that 'HT is a taboo subject in Palestine'.

A number of consultees expressed the need for a definitional clarification. It was noted that the lack of awareness of the range of HT practices inhibits the debate on trafficking. This was confirmed by informal discussions with various members of the Palestinian Authority, CSOs and international organisations. Consultees suggested the need for human rights CSO that work on the ground to collect evidence of HT as the NGO SAWA did for the first time in 2007. However, most fieldworkers, social workers, human rights practitioners who

¹⁶⁷² Middle East Briefing of 19 September 2018 < <https://www.whatsinblue.org/>> accessed 20 September 2018.

¹⁶⁷³ < <https://www.whatsinblue.org/2020/02/security-council-to-meet-to-discuss-us-middle-east-peace-plan.php>> accessed 4 April 2020.

come across these practices do not know what to look for and are unable to identify HT victims. Government officials, CSOs and some international organisations were overall not conversant with the international debate around HT. This was despite the fact that HT was already addressed in some of the international legal instruments Palestine has ratified such as the CEDAW, the CRC and the UNCOC. The focus of these organisations remains on the Israeli occupation as well as the PA political dissensions with Hamas in Gaza and the failed hope to form a government of national unity. These issues restrict further research and analysis on the incidence of HT and related practices which leaves a legal gap in the prosecution and subsequent protection against this crime.

However, the initial reluctance expressed by participants to approach the HT issue evolved towards keen interest when the whole range of HT practices was presented and described to them. Consultees were eager to learn more about HT and the research. They highlighted that external expertise and guidance would enable Palestine to craft an HT legal framework suited to its context. In particular, some consultees expressed the need for technical assistance regarding international treaties requirements including support for their domestic implementation.

Consultees such as Al Haq, SAWA, the Palestinian Human Rights Organisations Council (PHROC), the Ministry of Labour, the Ministry of Foreign Affairs and the Public Prosecutor's Office genuinely support the implementation of Palestine existing legal obligations. Some of the consultees, such as the Chief Prosecutor from the Unit on Protecting Family from Violence, focused on the added value of the various UN reporting mechanisms despite the lack of

familiarity with these procedures and noted that reports to be submitted before UN Human Rights treaty bodies such as the CEDAW, the CRC, the CERD Committees were overdue.

Human rights organisations support the Ministry of Foreign Affairs (MoFA) commitment to further ratification of international instruments which they perceive as an engagement towards the international community and as a recognition of Palestine full State sovereignty. The same group of consultees confirmed allegations of potential HT practices such as the exploitation of children through forced-begging networks from Gaza to the West Bank. Other incidents of exploitation through Palestinian middlemen also involved children working in hazardous conditions in Israeli settlements which are in contradiction with international labour standards.¹⁶⁷⁴

Additional allegations gathered by the Prosecutor's Office include exploitation of women and girls through forced prostitution. This involves transfers of women to/from the Gaza Strip to Israel or the West Bank. No legal action has been taken yet on these possible crimes. Sexual exploitation is raised regarding Palestinian women working in Israeli settlers' houses. There were also reported incidences involving Palestinian women contacted by foreigners in the Middle East (Gulf) through social networks in order to get married in Jordan. There are persistent rumours regarding trafficking of people through various tunnels by the border of the Gaza Strip with Egypt.¹⁶⁷⁵

¹⁶⁷⁴ Human Rights Watch, 'Ripe for Abuse Palestinian Child Labor in Israeli Agricultural Settlements in the West Bank' (2015) 1, 73.

¹⁶⁷⁵ <<https://international-review.org/the-sinai-insurgency-part-5-the-underground-economy/>> accessed 27 July 2020.

These initial data informed the preparation of interview questions for the second field visit in July 2017. Specific questions were designed to better understand the Palestinian legal system and how it can address HT and discuss the implementation challenges of its international legal obligations Palestine may be facing.

Second field visit (13th July to 28th July 2017)

The second visit explored further the impediments for selected participants to engage with HT. In addition, this visit explored challenges inherent to the fragile context of Palestine with specific obstacles related to the implementation of its international legal obligations. In particular, the exploration of the challenges caused by the complex, plural, legal system as well as examining the impact of the protracted conflict with Israel and the worsening humanitarian crisis in Gaza.

Twelve interviews were supplemented by informal meetings with some international community members, by field observation as well as personal correspondence. Amongst Palestinian CSOs, women's organisations exhibited the most interest in HT and strongly advocated to address the issue. In contrast, some personnel of international organisations appeared defensive in acknowledging the likelihood of HT practices which to date they had not been considered as part of human rights violations present in Palestine. The legal framework addressing HT was unfamiliar to these interviewees who were apprehensive and careful when interviewed. It was noted that junior staff from OHCHR and UN Women were allocated to the interview whereas UNDP and UNRWA made senior staff available.

Despite the growing international concerns with HT exacerbated by migration issues prevalent in Europe, the research noted little progress made between July 2016 and July 2017 for the PA, CSOs, international agencies to consider HT as a priority. Meanwhile, some participants were involved in the preparation of reports to the CEDAW Committee and had to consider HT among different human rights issues during this UN reporting mechanism in July 2018.¹⁶⁷⁶

One noticeable rule of law development in 2017 concerned the opening of a shelter for women and girls victims of violence in Ramallah. The 'One Stop Centre' is now administered by the Family and Juvenile Protection Unit of the Palestinian Civil Police and is supported by a joint program of UN Women, UNICEF, and UNDP.¹⁶⁷⁷ However, during interviews SAWA, Women Center for Legal Aid and Counselling (WCLAC), Women's Studies Centre and Save the Children Fund assessed that government shelters for women and children victims of violence do not respond to the specific needs of victims of forced prostitution hence possibly trafficking. The latter are ignored as they are considered to be 'women of bad influence' who should not be mixed with victims of domestic violence. Overall, this highlights the issue of cultural considerations and context which is expressed by Palestine society in general *vis-à-vis* the taboo nature of sex.

With regard to other legal advancements during the period July 2016 - July 2017, some human rights CSOs remained hopeful that the draft of the Family Protection Law as well as the Penal Code would be adopted soon and

¹⁶⁷⁶ As part of the State of Palestine's obligations to report on violations of the CEDAW Convention.

¹⁶⁷⁷ < <https://www.unwomen.org/en/news/stories/2017/8/coverage-un-secretary-general-visits-one-stop-centre-in-palestine>> accessed 15 April 2020.

published in the Official Gazette. As mentioned in Chapter 3, in 2021 the 2011 draft penal code and the draft decree-law concerning protection of the family from violence have still not been enacted and published in the *Official Gazette*, process which was further delayed by the state of emergency due to the Coronavirus pandemic.¹⁶⁷⁸

At this time, concerns were expressed that the setbacks to the building of a unified and effective legal and human rights framework continue to be a result of the Oslo Accords legacy which had crafted ongoing political and economic deadlock with Israel. Some participants expressed hope that promised general elections would be held. Participants feel that elections could break the impasse of political disunity and enable in part, the advancement of the legal harmonisation process. However, these planned elections did not materialise. In parallel, pressing concerns were being raised by human rights organisations and the Palestinian Independent Commission on Human Rights regarding the impact of the death penalty being reinstated in Gaza; the issue of Palestinian civilians being tried before Palestinian Military Courts; the issue of prison sentences without trial and the practices of torture not legally incriminated.¹⁶⁷⁹ In March 2021, the High Commissioner for Human Rights corroborates 'extremely concerning cases of ill-treatment of detainees by Palestinian security forces in the West Bank and Gaza de facto authorities' security forces'.¹⁶⁸⁰

¹⁶⁷⁸ CEDAW/C/PSE/FCO/1 of 19 August 2020, paras 17,18, p.5

¹⁶⁷⁹ Director of the Palestinian Independent Commission for Human Rights statement, see also Amnesty International Report 2016/17, the State of Palestine (2016/2017) 287 <<https://www.amnesty.org/en/countries/middle-east-and-north-africa/palestine-state-of/report-palestine-state-of/>> accessed 6 September 2017. See also the 2017 Human Rights Watch Report on Israel and Palestine <<https://www.hrw.org/world-report/2017/country-chapters/israel/palestine>> accessed 6 September 2017.

¹⁶⁸⁰

<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26919&LangID=E>> accessed 24 July 2021.

This field visit noted again the growing impact of Israeli land, air, and sea blockade on the deterioration of economic conditions coupled with the prolonged isolation of Gaza. These actions by Israel increased the risks of exposure to trafficking practices by Gaza citizens for desperate survival means. UNRWA reported attempts to escape by sea and through tunnels from Rafah to Egypt as well as the vulnerability of individuals to smugglers or traffickers.¹⁶⁸¹

Third and fourth field visits (May 2018, 11th July - 11th August 2018)

The main FGD was conducted in May 2018 in order to validate the findings of the initial interviews. The FGD gathered Palestinian CSOs. Members of the Palestinian Independent Commission for Human Rights were invited but were unable to attend. The objective was to discuss trafficking practices as well as the role of these participants in advocacy against HT. This FGD was timely as Palestine was preparing for July 2018 reports before the CEDAW Committee with the preparation of their shadow report. The outcome and analysis of the FGD is provided in section 9.5.

The purpose of the final visit to Palestine in July 2018 was to follow up and build on two significant international and legal developments in Palestine with regard to the HT issue. First, Palestine became a member of Interpol in September 2017 which could be significant for the HT agenda as Interpol's varied mandate

¹⁶⁸¹ Letter dated 31 August 2015 from the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East addressed to the President of the General Assembly in < <https://www.un.org/unispal/document/auto-insert-179470/#>> accessed 15 April 2020. < <https://www.haaretz.com/.premium-thousands-of-gazans-fleeing-via-tunnels-1.5302003>> accessed 15 April 2020.

includes to address HT. Subsequently, Palestine acceded the Palermo Protocol on the 29th of December 2017.

The last field visit took place during a period of conflict qualified, according to the UN Special Coordinator for the Middle East Peace process to be the largest escalation since the 2014 conflict bringing Gaza further devastated.¹⁶⁸² From March 2018, thousands of Palestinians participated to demonstrations for the 'Great March of Return' along the fence separating Gaza from Israel calling for the right of Palestine refugees to return to their homes and land from which they were expelled in 1948.¹⁶⁸³ Between March and August 2018, 177 Palestinians, including 29 children were killed and 18,006 were injured in the demonstration hostilities in Gaza.¹⁶⁸⁴ Another trigger to the escalation of the conflict was caused by the relocation of the US Embassy from Tel Aviv to Jerusalem in May 2018. Furthermore, between August and September 2018, the US government cut its funding to the UN Relief and Works Agency for Palestine Refugees.¹⁶⁸⁵ Additionally, the US administration cut financial supports to six hospitals in East

¹⁶⁸² Briefing to the Security Council on the Situation in the Middle East, including the Palestinian question (24 July 2018)

<<https://unsco.unmissions.org/briefing-security-council-situation-middle-east-including-palestinian-question-0>> accessed 26 July 2018. See also the Report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People (4 September 2018) A/73/35, para.12, p.7.

¹⁶⁸³ Report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People, A/73/35 (n 1686) para.11 p.7.

¹⁶⁸⁴ ibid para.11 p.7. See also Defence for Children International, 'Statement to 28th Special Session of the Human Rights Council: The deteriorating situation of human rights in the occupied Palestinian territory (OPT), including East Jerusalem' (18 May 2018). The United Nations Human Rights Council 39th Regular Session of 24 September 2018, Statement delivered on behalf of Defence for Children International – Palestine.

¹⁶⁸⁵ The Guardian, 'US confirms end to funding for UN Palestinian refugees' (31 August 2018) <<https://www.theguardian.com/world/2018/aug/31/trump-to-cut-all-us-funding-for-uns-main-palestinian-refugee-programme>> accessed 6 April 2020.

Jerusalem providing health care such as cancer treatments and operations to Palestinians from the West Bank and Gaza.¹⁶⁸⁶

In this acute unstable political and humanitarian context, twelve more interviews and several informal meetings were conducted focusing on government institutions and international organisations. This field visit was also enriched by the participation to a seminar organised jointly by the Palestinian Ministry of Foreign Affairs and the UN High Commission for Human Rights discussing the legal status and implementation of international treaties in the Palestinian legal system.

One notable outcome of this field visit was the observation of a progressive change of attitude towards the HT issue among government personnel, albeit with mixed opinions on the need/relevance to build a legal framework protective against HT practices.¹⁶⁸⁷ This was in marked contrast to the first field visit in 2016. However, one cannot conclude that there has been a significant evolution of societal norms within civil society in such a small scale of time. However, the author was told that informal discussions held during the first field visit had sparked some reflection among CSOs. From the CSOs and civil society more widely, there were ongoing allegations that the practice of HT in Palestine is partly linked to corruption and the existence of criminal networks involving higher spheres. This tends to attenuate a clear political will and the commitment to advance human rights issues and more specifically women's issues. The

¹⁶⁸⁶ The Times of Israel, 'Palestinians: US cuts to Arab hospitals will have dire effect on healthcare' (13 August 2020) <<https://www.timesofisrael.com/palestinians-us-cuts-will-have-dire-effect-on-healthcare/>> accessed 6 April 2020.

¹⁶⁸⁷ The State of Palestine, 'Palestinian National Voluntary Review on the Implementation of the 2030 Agenda (2018) Sustainable Development Goals 77.

frustration expressed by consultees was partly due to the need for the PA to address the fragmented legislative framework as examined in chapter 8 in order to bring unity first through the work of the Harmonisation Committee and then to accord domestic legislation with international human rights standards. The legal harmonisation process was and still is obstructed by the political and administrative split between Fatah and Hamas within the omnipresent Israeli occupation. Furthermore, the clarification of the position of international conventions within the domestic legal order is perceived by CSOs to be paramount for the Palestinian legal system as well as for the judicial applicability and legal enforcement of Palestine international legal obligations.

In this regard, additional frustration was expressed with the ongoing uncertainty concerning the position of international human rights treaties in the Palestinian legal system. As described in chapter 8, this ambiguity has its origin in the Constitutional interpretation 4/2017:

*'International conventions take precedence and acquire superior force to domestic legislation, especially after it is ratified and published; and it has to go through the formal procedures of any domestic law applies to individuals and authorities, being attentive to the contours of national, religious and cultural identity of the Palestinian Arab people'*¹⁶⁸⁸

¹⁶⁸⁸ Asem Khalil and Sanaa Alsarghali, 'Palestine' (2020) The 2019 I-CONnect-Clough Center Global Review of Constitutional Law <<https://ssrn.com/abstract=3593594>> accessed 27 July 2020. See also the English translation of the case number (12) for the year 2, 04/17 Supreme Constitutional Court and provided by UNDP on 1/08/2018.

This ruling suggests that

'Courts will not be obliged to apply provisions that contradict Sharia, and which are therefore contrary to Palestinian religious identity, even after publication'.¹⁶⁸⁹

As an illustration in July 2018, the issue of HT in Palestine was raised as a concern by the CEDAW Committee during Palestine reporting. Members of the Committee acknowledged the absence of data. As presented in chapter 1, the lack of systematic and reliable data on the scale of the HT phenomenon coupled with limited understanding of the characteristics of victims were emphasised by the Palestinian NGO SAWA which initiated in 2008 a research on HT in Palestine.¹⁶⁹⁰ Furthermore, the CEDAW Committee emphasised the legal vacuum regarding the exploitation of children as well as the absence of anti-trafficking domestic laws despite the ratification of the Palermo Protocol in December 2017. The Committee enquired about steps undertaken to address this issue domestically as well as steps undertaken with regard to cooperation at a regional level.

9.3 Thematic analysis and detailed findings from the interviews

The interviews offered multiple perspectives on the HT issue. Five categories of participants were identified. The three main categories represented were PA public institutions, Palestinian CSOs and international organisations. It was intended to include academics and law enforcement represented by Interpol at an international and domestic level. However, only one academic interview was

¹⁶⁸⁹ *ibid* 6

¹⁶⁹⁰ SAWA and UNIFEM (n 192) 5, 10, 13,14.

carried out and two members of Interpol were interviewed. Hence, these participants were dealt with as two separate categories.

In sum, thirty-seven respondents were interviewed. They provided multiple insights into HT in Palestine. The overall concern was to address specific aspect of the research questions presented in Chapter 1. The analysis was undertaken with this in mind, capturing therefore, interesting, and relevant data about the research question.

The thirty-seven interviews generated extremely lengthy transcripts, although these transcripts were not reproduced *verbatim*. Analysis of the interviews generated a number of patterns which after review and consolidation emerged into recognisable 'themes'. Detailed analysis was written for each individual theme, identifying the story that each theme told while considering how each theme fit into the overall story about the entire data set in relation to the research questions.¹⁶⁹¹

The first major part of the analysis is contained in Annex D. These responses were then refined into a number of headline themes which are set out below.

¹⁶⁹¹ Nowell, Norris, White and Moules (n 470) 10.

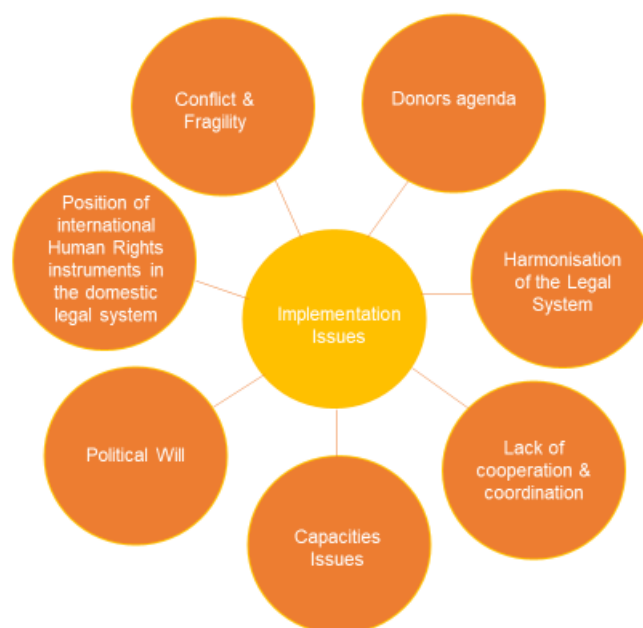


Figure 9.1 Implementation issues

Figure 9.1 represents the most significant issues challenging the implementation of the legal framework addressing HT, eliciting the highest numbers of responses from the interviewees. The analysis which follows highlights and confirms that particular challenges to implementation discussed in chapter 7 corresponds to some challenges experienced by Palestine. The sum of the comments points to a unique context.

Table 9.1 sets out these themes in a little more detail and demonstrates that there are high-level and common concerns regardless of organisational affiliation.

Table 9.1 Summary of common themes/issues identified in interviews

Theme/Issue	NGOs	Palestinian Public Institutions	International Organisations
Lack of understanding definition and the problem of identification of HT	HT is a taboo, and sensitive issue focusing on the sexual aspect of the definition.	Do not understand the HT definition. Not familiar with the issue.	Misunderstanding of the HT definition. Research is paramount to overcome the

practices, incidents & cases	Problem to identify and define HT practices not normally considered. as such by Palestinian society.		misunderstanding of the HT crime and violations of human rights it entails. Experience and picture of HT in Palestine is generated only through rumours.
HT is not a priority for any organisation due to other pressing concerns	HT is not perceived as a priority in the Palestinian context.	There are other priorities identified before addressing HT.	Donors have other priorities and do not regard HT as a core human rights issue.
Implementation issues (by sub-theme)			
Political will	Conflicting position regarding the PA political will to address and implement its human rights commitments and HT. There is a lack of trust in the Palestinian Authorities.	There is manifestation of PA political will through the ratification of relevant international human rights instruments. Political will demonstrated by their commitment to UN various reporting mechanisms. Problem is one of resources.	UN agencies do not all agree on whether political will exists in the PA. Suggestion that ratification was partly a political strategy. Other suggestion that political will is committed by ratification and that implementation is a lengthy process requiring legal harmonisation first.
Capacity*	Capacity concerns, lack of cooperation and transparency regarding steps undertaken by the PA to address HT. Illustration by the Committee on HT and the state of draft legislation.	There is awareness of the PA lack of expertise and familiarity to address the HT issue as well as the knowledge of related UN various mechanisms.	Recognise need to provide technical assistance. However, it is difficult to organise various domestic stakeholders involved with HT. Support provided to PA entities to strengthen capacities to provide gender-responsive services to violence against women cases and in line with international human rights standards.
Harmonisation of the Legal System	Lack of advancement of the legal harmonisation process and weak rule of law.	Ongoing effort on the harmonisation of the Palestinian legal system, resources are an issue.	Weak and dysfunctional legal system due to the lack of harmonisation and legislative process aggravated by the geographical and institutional fragmentation of Palestine.
Context: The Occupation	Occupation is a direct factor for	The occupation context	The occupation results in the lack of control by

	human rights violations and HT in Palestine.	experienced by Palestine contributes to HT.	the PA of its entire territory.
Fragility and conflict	Conflict is a direct factor for human rights violations and HT practices occurring in Palestinian territory.	The context of the protracted conflict and occupation experienced by Palestine contributes to HT.	Conflict means a focus on emergency issues such as the humanitarian assistance in Gaza. Fragility delays implementation of Palestine's overall human rights commitments.
Issues around cooperation and coordination	NGOs have a key role to play with the HT issue but are not empowered to contribute.	Lack of clarity regarding the responsibility within government.	Have little knowledge of Palestinian counterparts' activities.
Donors/UN agenda	Donors pursue their own agendas.	Policy is driven by donors' agendas.	Interested to address the HT issue but donors need to allocate the funds.

*Capacity refers to adequate human resources, processes, structures, finances, and organisation.

In the sections below, the themes identified in Table 9.1 above are explored in greater detail.

9.3.1 Problems with the HT definition: Taboo issue, lack of familiarity and misunderstandings

All interviewees referred to the definition of HT as problematic. Firstly, the focus of the participants was exclusively on the understanding of the three requirements which constitute HT as well as the types of existing trafficking practices. At no stage during the interviews, the FGD or informal discussions, the debate on the interaction of the key legal concepts of the definition detailed in chapter 4 could be raised. HT practices are not familiar and Palestinian people, the public, do not think there is HT in Palestine. However, what emerged at the very beginning of various individual interviews was the taboo nature of the HT topic. However, some feedback from NGOs, PA members or

international organisations on the definition issue indicated a degree of nuance.

According to a legal researcher from the NGO Al Haq:

'Taboo exists with regard to sexual issues, but HT is not considered a taboo when it concerns children, forced labour and organ trafficking'.

Additionally, another legal researcher from Al Haq commented that:

'HT is also a hidden practice so forced marriage ending up in forced prostitution may be possible especially in Gaza, but it is also shameful to speak about it'.

This echoes the Director of Women Studies Centre who expressed that:

'HT is an underground practice so there must be cases in Palestine, but they are not reported and not talked about.'

Similarly, the Director from SAWA which was the first Palestinian NGO to undertake a pilot research on HT in 2008 confirms that it is

'extremely difficult for officials and senior persons to admit such phenomenon. The HT issue is considered as taboo within the Palestinian society'.

As regards to participants from the PA and more specifically from the Ministry of Social Development:

'Women's exploitation is still perceived as taboo, and we have to confess that we have forced-prostitution practices that can reach HT. Palestinians are not special. We have all of that, as the rest of the world'.

The Director of the Palestinian Independent Commission for Human Rights assessed that:

'HT is not a taboo. Homosexuality and LGBT are taboos'.

Among participants from international organisations, the UNDP Rule of Law Adviser corroborates with the above NGOS that:

'HT is a taboo. Palestine would hide behind the response: We do not have this problem in Palestine, but in fact people cannot name or recognise these practices'.

Similarly, a Legal Officer from the Office of the High Commissioner for Human Rights (OHCHR) comments that:

'Maybe social norms do not encourage to talk about HT and to encourage the Government to insert HT in the agenda as one of their priorities'.

Concerning the common difficulty to grasp the HT definition, a number of participants across the three categories from Table 9.1 as well as from the academic and Interpol category genuinely expressed their own lack of understanding and confusion as well as on behalf of the Palestinian society as a whole. In this regard the Director of SAWA reflected that:

'The Palestinian community is not aware of the definition'.

More personally, the Director of Palestinian Human Rights Organizations Council (PHROC, coalition of Human Rights Organisations) recognised:

'I never heard of HT and cases in Palestine, and we should conduct a workshop to familiarise people with HT practices that must be present as well in Palestine.'

Additional evidence on the lack of familiarity is expressed by the Head of Woman and Gender Unit from the Ministry of Social Development:

'Actually, HT definition seems different according to contexts, so could you please provide the definition?'

The interview with a Professor of Public Law from Birzeit University also highlights that there is a lack of knowledge and some confusion in the meaning of HT. During the interview, the professor sought clarification as to whether HT includes abusive practices within families such as violence against women and girls as well as forced and early marriages. However, the academic commented that *'the absence of data is not enough in itself to deny the phenomenon.'* He corroborated with other participants that *'in Gaza there may be reluctance to admit the existence of HT practices.'* As expressed by the Family Protection Chief Prosecutor for the Palestinian Public Prosecution:

'We are aware of exploitation through forced-begging, forced-prostitution using tunnels in Rafah (Gaza).'

In complement, the Director of the National Society for Democracy and Law in Gaza suggests that:

'HT practices probably differ in Gaza compared to France. There are a lot of incidents of forced marriages, forced begging, forced prostitution organised by networks. Sometimes networks involve parents and wider members of families.'

Judge and Chief Prosecutor from the Sharia Courts observations mirror the above opinions expressed by academics, NGOs' and the Head of the MoSD: *'Palestine still does not have a clear and accurate picture about the HT topic because there are many faces of HT.'* In addition, the Shariah Judge specifies:

'A lot of professionals in the judiciary system think that the question of HT is not clear to them. The definition is an issue as we do not understand what elements constitute HT.'

Law enforcement such as Interpol in Palestine corroborates:

'In fact, we don't understand exactly what the practices of HT mean'....'
After your explanation, yes, we have issues regarding forced marriages'. ...' *The main issue is what prevent us to act and react is because we have a lack of awareness regarding HT within different layers of Palestinian society'.*

More widely the complexity and evolving trends in the HT definition are illustrated by one recent international gathering on HT. One of the main purposes of the 4th Interpol Global Trafficking in Human Beings Conference in November 2016 gathering law enforcement personnel including investigators, prosecutors, representatives of international organisations and NGOs was in support to understand new trends in trafficking in human beings.

9.3.2 HT is not a priority as the overriding issue is the impact of the context of occupation

HT is not a priority as the overriding issue is the occupation and the consequent impact on fragility and conflict. Palestine is responsible to take all the necessary

steps to address its legal commitment towards HT. However, implementation issues arise in particular with the overriding context of the occupation. The occupation provides an over-arching and omnipresent context that impacts on almost every aspect of life in Palestine. Participants across all categories including the academic as well as Interpol commonly identified the first issue that preoccupies domestic actors in Palestine to be the occupation. Participants such as UN Women, SAWA, the National Society for Democracy and Law based in Gaza, the Head of the Gender Unit from the Ministry of Social Affairs, the Prosecutor for the Sharia courts, the Prosecutor for the State of Palestine as well as the Director of the Heinrich Böll Foundation confirmed for instance the increasing occurrence of human exploitation through forced prostitution¹⁶⁹² and forced marriage¹⁶⁹³ in the Gaza Strip, East Jerusalem, in the West bank as well as from the West bank to the Negev desert in Southern Israel. However, interviewees unanimously relate these practices to the deterioration of the political and economic situation in Palestine which are inextricably linked to the context of occupation.

A specific quote from the Chief Prosecutor for the Sharia Courts is evocative:

'On the basis of conflict, many family issues will lead to HT for survival means. HT is a result of the prolonged occupation, of the protracted conflict, of the internal political situation and economic difficulties. HT is a consequence in our situation, it is not a reason.'

¹⁶⁹² CEDAW Committee, Concluding observations on the initial report of the State of Palestine (25 July 2018) CEDAW/C/PSE/CO/1. Para 28 (a).

¹⁶⁹³ UNDP, UN Women, UNFPA, 'State of Palestine Gender Justice & The Law' (2018) 22.

It is clear from the findings of the interviews analysed that the political context of the occupation is the focus of attention and the common ground for all international and domestic stakeholders involved. To this end, the legal and administration expert for the European Union Police Mission for the Palestinian Territories (EUPOL COPPS) confides that:

‘everything is political in Palestine including technical support’.

Thus, the link between the occupation and the impact on law enforcement and security issues are explicitly established. Politics and security are the prime focus of donors. This is practically related to the contentious issue of borders and area controls. As an example, the narrative of the Director of the WCLAC

‘HT appears more in conflict contexts and HT could also happen in occupation contexts. In addition, Palestine does not control the movements of its people and goods, so the issue of HT is relevant in Palestine’.

The UNDP Rule of Law Adviser highlights:

‘the reality of HT is under the umbrella of the current political situation and ongoing occupation by Israel’.

A freelance journalist emphasised the point concerning security and control:

‘the priority is that Palestine controls its own territory in order to bring security’.

In complement to the narrative of categorised participants of Table 9.1 regarding the common theme of occupation, the academic supported some aspects of this identified theme. He noted that *‘context is everything’* and was

very vocal during the interview, particularly with regard to the responsibility of foreign powers in the current fate of Palestine:

'Give us a break. At the time of drafting human rights treaties, France was involved with Algeria. Let us take our time to digest what is happening to us... We would be the most enthusiastic human rights defenders...for Palestinians, human rights are part of international law, and part of a system that has been partly responsible for what took place in Palestine, so we as Palestinians cannot just separate our understanding of human rights and the reality of what happened with foreign occupation'.

Narrowing the impact of the occupation on HT, the professor links the incidence of HT with the issue of borders and their control by Israel. He corroborates other participants statements that security and law enforcement are ensured mostly by Israel in certain areas outside the PA control. Hence, according to him most issues related to HT would depend on the type of regulations and policies Israel put in place. In that sense Palestinians do not control people's movements and some of the exploitative practices occurring.

9.3.3 Harmonisation of the Palestinian legal system.

As contributors to the making of a rule of law, most participants across categories of CSO, International Organisations and the PA public institutions converge to being committed to pursue the harmonisation of Palestine legal framework which is described in chapter 8. Only the NGO SAWA raised the issue as a concern which suggest that harmonisation seems to be amalgamed with so many other pressing issues such as the occupation or the humanitarian

emergency situation of Gaza. To illustrate this, the Director of the Palestinian Independent Commission for Human Rights emphasises:

'the agenda of Palestine is filled with basic issues: the humanitarian situation in Gaza, the death penalty in Gaza, civilians tried by military courts, prison sentences without trial, court decisions that are not enforced, criminal law which does not incriminate torture.'

However, with regard to international organisations, the legal Officer from OHCHR reports that the Government had set up a Harmonisation Committee under the lead of the Ministry of Justice since 2016 and is based in the West Bank. However, this Committee seems still born as it has hardly met since its inception. This is despite the support of joint programmes involving a number of international organisations such as UNICEF, UN Women, UNDP. According to the OHCHR legal Officer, the unification of Palestine legal framework is perceived to be primarily 'a political process':

'it is difficult to implement initiatives from the Committee in Gaza under the de facto Hamas authorities who are passing laws only applicable to the Gaza Strip.'

This contentious political process is corroborated by the Director of the Palestinian Independent Commission for Human Rights:

'the Harmonisation Committee recently set up did nothing so far. There were debates regarding the reform and harmonisation of the criminal codes from Ramallah and Gaza, but the government passes laws without informing the Committee.'

The UNDP Chief Technical Specialist explained that specific projects focused:

'on the harmonisation of the Palestinian legislation which is linked to the reconciliation process. Nothing moved much so we worked on the harmonisation with international human rights standards in the Palestinian legislation'

From the PA side, a legal Officer to the Ministry of Foreign Affairs neutrally confirms:

'there will be no harmonisation of past foreign legislation, but the Harmonisation Committee will harmonise only current domestic legislation in relation to international treaties'. 'The priority is to work on the draft Penal Code, then the draft law to protect the family from violence'.

Critical of the Committee, UNDP Chief Technical Specialist explicitly points out:

'the terms of reference of this Committee is confusing: it is not clear on its tasks and to identify existing legislation that need to be modified. Whether it is part of the drafting legislative process, whether it has to ensure the harmonisation with international conventions. In addition, there are problems with its composition as there are too many different ministries. It is UNDP views that this Committee should be dissolved so the legislative units from each Ministry should be trained on harmonisation and do it'.

The position of the academic on the harmonisation issue was in contrast with most of the participants. The academic primarily commented that political division in 2007 with Hamas has not been conducive to the achievement of legal

harmonisation of Palestine as one entity which resulted in forming separate administration with a distinct legal system in Gaza. Furthermore, the professor confirmed as examined in chapter 8 that international treaty commitments undertaken by the Palestinian authorities do not apply to Gaza. However, his line of thoughts believes in pluralism based on the cohabitation of distinct legal systems which was theoretically presented in chapter 7 and mentioned as well in chapter 8 devoted to Palestine. In that sense, the academic feels that the attempt of legal harmonisation should not be pursued:

‘legal harmonisation as presented by Oslo, is over, but it does not mean that unity is over for Palestine. Unity can live and co-exist with different/separate legal systems.’

9.3.4 The legal status of international human rights instruments in the domestic legal system

As mentioned in chapter 7, there is no clear guidance and uniform standards for States on how to implement human rights norms¹⁶⁹⁴ and by extension to implement the Palermo Protocol ratified by Palestine in December 2017. Moreover, this led the legal Officer from the Ministry of Foreign Affairs to acknowledge that:

‘international treaties are not implemented. There are legitimate questions as to which State organ is in charge of implementation?’

The above observation is echoed by the director of the Palestinian Independent Commission for Human Rights:

¹⁶⁹⁴ Quintavalla and Heine (n 1263).

'there is a decision for the PA not to join further international legal instruments as there is a need to address them domestically which the PA did not do yet. Implementation is not going forward.'

This statement is reinforced by the Judge, chief Prosecutor for the Sharia Courts:

We need a strong vision of how to implement the law against HT'.

As noted by a majority of interviewees, there is some uncertainty with regard to the position of international legal commitments which includes human rights treaties and specifically the Palermo Protocol. As a consequence, there is a legal gap in addressing HT as a criminal issue. This leads the academic from Birzeit University to note:

'the issue of implementation means that the Prosecutor's Office would deal with issues and label crimes as HT practices which may prove difficult given the current state of the legal system combined with the absence of implementation of Palestine human rights obligations'.

The uncertainty on the process and how to position international human rights treaties in the Palestinian legal system was debated during a seminar held on the 2nd of August 2018 by the Office of the High Commissioner for Human Rights with Palestinian public institutions and NGOs on the *'legal status and implementation of the International Treaties in the Palestinian Legal System'*. This event demonstrated clear dissensions. Some participants such as the Ministry of Foreign Affairs supported that:

'International treaties take precedence over domestic law and will be incorporated into the national legislation. Palestine follows therefore the dualist system'.

The UNDP Chief Technical Specialist perspective confirms a remaining lack of clarity:

'the Constitutional Court decision seems to have chosen for a dualist legal system. There is confusion as no one understands the way forward'.

Other interventions such as the Professor from Birzeit University expressed dissensions when presenting the topic on *'Comparative experiences in transposing the international treaties into Domestic Legal Order'*. According to him, recent decisions taken by the Constitutional Court which are described in chapter 8 in attempts to position the hierarchy of Palestine legal norms:

'have confused many domestic stakeholders and therefore have delayed the clarification on Palestine legal system and the subsequent hierarchy of its legal norms'.

Hence, during an interview in December 2019, the Professor concluded:

'with regard to the choice of the legal system, nothing changed since August 2018. The way the Constitutional Court was established was to help the executive to get away from the many decree-laws taken in the absence of the Palestinian Legislative Council.'

9.3.5 Political will

The parameter of political will is perceived by many participants as an additional challenge to the implementation of Palestine's international legal commitments. For instance, the Director of the Women's Studies Centre highlights that Palestinian women's organisations request the implementation of human rights treaties in the domestic legislation. As a response to this legal agenda:

'One of the justifications from the PA is that the Palestinian Legislative Council is not functioning which hinder the process of implementation. There is no political will.'

The absence of political will of the PA links the response of the Law Professor from Birzeit University to the lack of trust in the PA. According to this academic, the executive affects the necessary equilibrium of separation of powers which impact on the coherence of the rule of law. The absence of a functioning legislative body has paralysed a democratic law-making process. As a consequence, there is no change in domestic legislation in accordance with international standards and in conformity with international law as well as to ensure respect for people's human rights and fundamental freedoms.

Hence, the academic emphasises:

'we are pushing towards enhancing an authoritarian regime where there is no transparent and participatory process of law-making. The executive controls the population and all aspects of their lives, through decree-law'.

The academic complements by warning:

'there is a risk of civil disobedience, as people do not consider decrees-laws as a source of laws'.

Others such as the UN Women Programme Officer in Access for Justice perceive Palestine's will and commitment to international treaties as a focused political strategy:

'there is some manifestation of political willingness from the PA and to fulfil its international responsibilities, not necessarily a sensitivity to human rights issues but acknowledging the fact that the international community has an influence in relation to the image of Palestine, to the establishment of the State of Palestine, to the relation with the donors community'.

To corroborate on the political will and the issue of trust, a legal researcher from Al Haq vocally affirms:

'the State of Palestine has so far not respected all its treaty obligations. Since the ratification of CAT there are even more cases of torture which demonstrates that the aim of ratification was not to combat and protect against human rights violations but to send a political message internationally. Implementation is non-existent'.

The inextricable link between political will and trust in the institutions and in the government is clearly expressed by a freelance journalist:

'People in Palestine lost faith in their leader'

The Director from Al Haq describes the state of Palestinian civil society which is represented in the West Bank and Gaza by 50% of individuals who are under 17 years of age:

‘Young people have lost hope and faith in the PA who cannot protect them’.

The PA political will to address and implement its human rights commitments is overshadowed by both its internal political division and the daily ramification of the occupation for civil society collectively. As a related illustration of this driven political will, the lack of trust extends to aid:

*‘the relationship between the PNGOs and the IOs and donors has gone through a transition from solidarity forms of support to politically driven aid to bolster the peace process with Israel’.*¹⁶⁹⁵

9.3.6 Capacity

Capacity refers to adequate human resources, processes, structures, finances, and organisation. Palestine does not have the resources available to devote to fighting HT. The Director of Al Haq nevertheless recalls that:

‘Protection is the core role of the State’.

In order for Palestine to undertake its obligations as a State, the Technical Adviser from Save the Children Fund identifies:

‘there is a lack of resources. Funding is an issue and is an obstacle to the implementation of Palestine human rights commitments’.

¹⁶⁹⁵ Esra Çuhadar and Sari Hanafi, ‘Israel and Palestine: Civil Societies in Despair’ in Thania Paffenholz (eds), *Civil Society and Peacebuilding: A Critical Assessment* (Lynne Rienner Publishers 2010) 207, 213.

In the last five years, the PA has lurched from one financial crisis to another. In the last two years things have worsened. In 2019 the World Bank noted:

'The Palestinian Authority (PA) faces a financing gap that could exceed US\$1.8 billion for 2019 driven by declining aid flows and the unresolved transfer of taxes and import duties collected by Israel on behalf of the PA (clearance revenues) ...the financing gap... has forced the PA to accumulate debt from domestic banks, and build up arrears to employees, suppliers and the public pension fund, creating large liquidity challenges for the economy'.¹⁶⁹⁶

In 2020 the COVID-19 pandemic brought a new economic crisis to Palestine which may lead to an even greater fiscal crisis. The unstable and uncertain funding and revenue situation means the PA functions under an emergency budget. As a consequence, public servants are not paid regularly and there are no 'spare' resources for new initiatives. The 'State of Emergency Palestine's COVID-19 Response Plan' anticipates at least a 40% drop in revenues further exacerbating a dire financial situation.¹⁶⁹⁷

With regard to other aspects of capacity, some respondents across categories aside the Palestinian Independent Commission for Human Rights as well as NGOS in consultative status with the UN Economic and Social Council, expressed the need for technical assistance regarding access to many human rights mechanisms now available within the UN system.

¹⁶⁹⁶ World Bank, 'Economic Monitoring Report to the Ad Hoc Liaison Committee' <<https://www.worldbank.org/en/country/westbankandgaza/publication/economic-monitoring-report-ahlc>> accessed 30 June 2020.

¹⁶⁹⁷ State of Emergency - Palestine's COVID-19 Response Plan.

For instance, the Chief Prosecutor of the Family Protection Unit in the Public Prosecution explained that public prosecution services developed specialised services addressing violence against women:

‘Another objective is to become familiar with referring to international human rights conventions such as the CEDAW, for litigation purposes’.

In this regard, one of UNDP’s programmes called *Sawasya* provides technical support to the Gender Unit at the Attorney General Office as well as to the Specialised Prosecution Unit on Protecting Family from violence:

‘The aim is to strengthen these units’ capacities to provide gender-responsive services to violence against women cases and in line with international human rights standards. Another overarching objective is access to justice and therefore to seek effective legal remedy against HT’.

Addressing this need, the Legal Officer from OHCHR explains that this UN entity is involved in the implementation process of Palestine numerous human rights international commitments partly with regard the UN reporting process:

‘OHCHR supports for instance the PA in the reporting process before the UN Human Rights mechanisms. For instance, pre-sessional meetings were organised to discuss list of issues for the reporting to the CEDAW Committee’.

9.3.7 Issues around cooperation and coordination

A number of common ideas from participants interviews emerged that the National Committee on HT should seek external experts on HT to guide towards

achieving a thorough understanding of HT. The need for raising awareness and training were reiterated at all levels of civil society in order to identify and qualify HT practices. Hence, the building of a legal framework and strategy on HT should be inclusive and simplified to one coordinating body engaging the international community and key Palestinian stakeholders. However, according to the Head of Woman and Gender Unit from the Ministry of Social Development (MoSD):

‘We need help from academic people and other international institutions such as UN women, UNICEF, but not to review our work. We need our voice.’

Related to the HT topic and the question of cooperation with external bodies, the Head of the Gender Unit from the Ministry of Interior acknowledges:

‘UNODC is not part of the Committee but gives advice to the Head of the National Committee against HT’.

The Head of the Gender Unit from the Ministry of Interior describes a political will on behalf of the government to:

‘fortify the cooperation between NGOs and the government. The role of NGOs is vital in ensuring the link between the West Bank, Gaza and East Jerusalem in their reporting of human rights violations.’

For instance, the Technical Adviser for Save the Children Fund suggests further cooperation with other entities such as the UN in order to work on the HT issue:

‘Cooperation between SCF and UNRWA to work on protection issues: such as child labour, sexual violence and HT would be important topic to raise and contextualise in the situation of Palestine’.

With regard to the relationship of judiciary entities, the issue of cooperation and coordination were particularly elaborated by the Judge, Chief Prosecutor for the Sharia Courts and were not restricted to the HT topic:

We need to cooperate with different bodies despite our different rules and functions. The main challenge is the cooperation between sharia courts and regular courts. It would reflect a complete justice system for women for instance and would help building a strong rule of law’.

According to this participant, cooperation involves coordinating with authorities from Gaza and Israel:

‘The issue of cooperation for us in Palestine is important because we have many judicial systems. Also, this includes cooperation with Sharia courts in Gaza and East Jerusalem. We also need cooperation with Israeli judges, with the Chief justice and Governor of Hebron We need to check that judgements are correct and are implemented in Gaza in a proper way.’

At a law enforcement level, the Chief of the newly established Interpol Office in Palestine believes in the necessity to cooperate with different domestic and external actors:

‘We need cooperation with various parts of society who also have a role in combatting HT crime whether they are human rights organisations or other institutions. At the moment we do not cooperate yet with other Arab

countries. We can join other efforts and initiatives to combat HT which also can be the opportunity to explain our new role in Palestine.'

In the meantime, the Interpol Team Leader from the Danish National Police and National Centre of Investigation broadly expands on HT and the cooperation issue to ultimately link it to States political will:

'We put nations together and have a global perspective, but Interpol is not a miracle, and we cannot force countries to cooperate if there are no political will'.

9.3.8 Donors agenda

Donors fund most, if not the majority, of local research and development into policy issues in Palestine. Human rights are no exception. As a consequence, if donors do not support an issue, little progress is likely to be made as NGOs, CSOs, the UN and the PA seek donor support for 'projects. According to a participant, freelance Palestinian journalist:

'NGOS seek sexy topics to please donors but actually do not make much change on the ground'.

Thus, the Director of SAWA concludes:

'Donors are not building long term projects and do not operate with continuity'.

Building on the above observation, the Director of Women Studies Centre resentfully noted:

'some divisions within women's organisations in their agendas as most of them face pressure regarding their funding, so they are inclined to follow donors agenda rather than the needs of civil society'

The Interpol interviewees drew attention to donor's Political conditionality and Priorities suggesting that any:

'political economy analysis' of Palestine will reveal the multi-faceted and often confused agendas of various donors'

The most recent and obvious case in point relates to the actions of the US government under the Trump administration. These led to the withdrawal of support to UNRWA and access to essential medical care such as cancer treatment. In this political context, it is legitimate to question what chances specific human rights issue such as the HT agenda would have in terms of funding or obtaining the necessary support to address HT. As a recollection, the politics of aid conditionality is omnipresent in the Palestinian-Israeli conflict and function as a stick or a carrot to withdraw or withhold aid 'in an effort to punish, and ultimately change, behaviour'.¹⁶⁹⁸ This was most evidenced in 2007 when the donor community maintains its sanctions against the Hamas-controlled Palestinian administration in Gaza.¹⁶⁹⁹ The academic confirmed donors independence:

¹⁶⁹⁸ Rex Brynen, 'Aid as carrot, aid as stick, the politics of aid conditionality in the Palestinian Territories' in Aaron Griffiths and Catherine Barnes (eds), *Powers of persuasion, Incentives, sanctions and conditionality in peacemaking* (19 Accords, 2008) 75.

¹⁶⁹⁹ *ibid* 78.

'...Donors often respond to their own agenda. We do not want to act as tools for the donor community who spend the money allocated, pay us to undergo a drafting process which then will be over for them'.

Furthermore, examination of the main current donors' strategies, that is the EU, Norway, UK, the World Bank, Sweden, and the United States, do not mention HT. Their focus is to support the establishment of a democratic and accountable Palestinian State within the context of the two State solution.

For instance, the European Joint Strategy in Support of Palestine lists the EU's guiding principles and areas of interventions in 2017-2020 which includes the pillar of 'Rule of Law, Justice, Citizen Safety and Human Rights'. There is no mention of HT, and the focus is to support the Palestinian aspirations for Statehood with the consolidation of the state-building as well as accountable institutions. In addition, the agenda focuses on service delivery to Palestinians, particularly to the most vulnerable as well as assisting for the sustainable economic development of Palestine.¹⁷⁰⁰

9.3.9 UN and other international organisations' agendas

In Palestine, the landscape of international support is a crowded field of multiple UN agencies with multiple joint programmes.

According to the UNDP Chief Technical Adviser:

'Cynical persons would say these actors have overlapping mandates and projects, and national counterparts could take advantage of that in the sense they can shop around for support. However, CSOs know what

¹⁷⁰⁰ European Joint Strategy in Support of Palestine (2017-2020), Towards a democratic and accountable Palestinian State, 10,11,12.

they are doing and where they can get support. National counterparts could play a stronger role in obliging donors to coordinate’.

With regard to priorities in UN agendas, HT has recently spurred the attention of many agencies who previously expressed support to ‘ending domestic violence against women’ programmes. In 2018, a meeting through the format of FGD was held between UNODC, IOM, UNFPA and OHCHR to discuss the likelihood of addressing HT in Palestine. The outcome of the meeting confirmed the findings analysed in section 9.3 with an overall lack of understanding of the definition and a confusion in qualifying the practice. As a specific example, HT was seen to be associated with the issue of collaboration with Israel. Written exchanges with the UNODC programme Officer and the Programme coordinator for the UNODC Regional Office for the Middle East and North Africa confirmed the lack of a coherent approach to address HT. UNODC Palestine is part of the Anti-Human Trafficking sub-cluster established within the Global Protection Cluster architecture. This followed upon the UN Security Council Resolution 2331 addressing trafficking in situation of conflict. However, this anti-trafficking sub-cluster is not yet operational in Palestine.

Additional example relates to UNRWA Palestine who expresses priorities and concern other than HT:

‘UNRWA can provide some protection, but the overall protection of Palestinian people should be undertaken by the Palestinian authorities. As for HT we are not the best agency to address the issue of HT. It is not to say we would not want to look at HT as such, but I think we would probably focus on the consequences of it. We need to prioritise, but we

certainly want to make sure that we do not contribute to any kind of human rights violations’.

9.4 Outcomes and analysis of the FGD

The main FGD was held at the end of the first stage of the interview process in order to validate the findings of the interviews and documentation review. The discussion lasted approximately three hours. The FGD convened a group of eight participants selected from five Palestinian CSOs and women’s rights organisations. The PA was invited but declined to attend. A list of questions was submitted to two sub-groups of four persons in order to generate initial discussions and a variety of opinions. During the session, participants exchanged and shared their views and experience on the topic of HT. In particular, discussions took place regarding the understanding of the HT legal definition, the incidence of HT in Palestine and the contributing factors of the occupation, the awareness of HT practices from human rights CSOs perspective and from government institutions perspective. The other objective of this FGD was to understand how HT is legally addressed in the Palestinian society and to examine issues that could affect the implementation of Palestine international legal obligation to HT. The outcome from the FGD was transcribed but not *verbatim*.

The responses from the FGD were categorised around the following themes and sub themes:

- **Theme 1 - The awareness and understanding of the legal definition of HT**

- **Theme 2 - The priorities of action for Palestine following its accession to the Palermo Protocol in December 2017**
 - Sub-theme - Cooperation to address the HT issue between various domestic stakeholders: government institutions, CSOs, civil society communities and international organisations
- **Theme 3 - Identification of challenges to the implementation of Palestine international legal obligation to HT**
 - Sub-theme - Extent of political will in Palestine regarding the implementation and commitment to human rights and to combatting HT in particular.
- **Theme 4 - Legal remedy for human rights violations and HT practices Palestinians provided by the building/ implementation of a legal framework addressing HT at a domestic level. Legal remedy internationally through the recourse of UN human rights mechanisms**

9.4.1 Theme 1 - The understanding of the legal definition of HT

The first observation from the FGD was that participants confirmed they were not all conversant with the latest international legal undertakings of Palestine regarding the accession to the Palermo Protocol. The primary issue was the misunderstanding of the scope of the HT definition. The initial focus of the group on sexual exploitation was perceived by them to entirely cover the definition. Participants confirmed the difficulty to identify and recognise the practice in Palestine acknowledging first that HT is a 'hidden crime' as well as a taboo

subject. Some participants from the human rights CSOs admitted that HT is not a familiar concept to many people in Palestine who do not yet dare to face the issue. To date, human rights organisations often rely on rumours and allegations of HT. This finding echoes the ongoing debate examined in chapter 4 regarding the interpretation of the HT legal definition and the suggestion of a non-exhaustive definition. This has brought confusion despite the intention of drafters that one ‘best practice’ legal approach would be unhelpful. The response of Palestinian participants confirms this. The analysis suggests that participants from human rights organisations are inclined to stretch the HT legal definition. This was manifested by most participants’ opinions to incorporate for instance forced labour practices occurring in Israeli settlements and to relate exploitative practices of Palestinians as a result of the Israeli occupation.

Participants unanimously correlated the presence and extent of HT with the consequences of the Israeli occupation. In particular, the deteriorated economic situation and humanitarian crisis in Gaza being conducive for HT to develop and particularly affect women and girls with allegations of sexual exploitation through forced prostitution and forced marriages.

There are patterns emerging that captures the correlation between HT and the occupation. Examples of exploitation were provided regarding children in Hebron often engaged in the worst forms of forced labour in the agriculture and construction sectors or involved with forced begging in Israel. These findings were subsequently verified by external sources.¹⁷⁰¹ Another example confirmed

¹⁷⁰¹ US Department of Labour, ‘2018 Findings on the Worst Forms of Child Labour’(2018) 1211. See also the Committee on the Rights of the Child, ‘Initial report submitted by the State of Palestine under article 44 of the Convention, due in 2016’ (25 March 2019) UN Doc CRC/C/PSE/1.

the multi-layered nature of the HT phenomenon as well as the pressure brought by the occupation. This relates to a Palestinian from Jericho forcing his three wives to work in Israeli settlements where they were sexually exploited.

In all examples given, the concern expressed by participants was whether these different exploitative practices amounted to HT. Hence, this highlighted the difficulty raised at the beginning of the FGD to understand the HT definition and the legal identification of exploitative practices on the ground. In the case of children's exploitation, participants discussed the need for the intervention of law enforcement in order to identify and investigate the organisers and recruiters. The question of enforcement is analysed further in theme 3 below. As a correlation to theme 1, the sub-theme 1 reflects the participants' voice of the difficulty to know the extent of HT. This is reinforced by the scarce data which was not developed further following the first report on HT in 2008 researched by SAWA and UN Women¹⁷⁰² of which most participants were unaware. In this regard, contributors to this report confirmed that there were no incentives to explore the issue of HT in Palestine and field workers were threatened by traffickers in order to stop the data collection for the research.¹⁷⁰³

9.4.2 Theme 2 - The priorities of action for Palestine following the accession to the Palermo Protocol in December 2017

The analysis of theme 2 turns to how HT is legally addressed and what practical actions are undertaken domestically. Discussions converged upon the fact that although Palestinian legislation does not address the crime of trafficking *per se* prior to the accession of the Palermo Protocol, there were some aspects of HT

¹⁷⁰² SAWA and UNIFEM (n 192) 5.
¹⁷⁰³ SAWA and UNIFEM (n 192) 8.

related to gender issues inserted in the draft Family Protection Law. These concern for instance the exploitation of women and girls through forced-marriage and forced prostitution that are also mentioned in the 1960 Jordanian Penal Code applicable in the West Bank. Other provisions of the 1960 Penal Code contains explicit articles that criminalise and penalise some forms of HT such as slavery.¹⁷⁰⁴ In contrast, there are no such legal provisions in the Criminal Code of 1936 applicable in Gaza.

However, the concern of participants relates to whether such crimes would nevertheless be better left to the realm of the Family Protection Law¹⁷⁰⁵ in order to ensure effective protection and remedy to HT victims. The analysis of the participants reactions suggests the priority and the preference to draft a separate legal instrument criminalising HT. Meanwhile, participants expressed their frustrations at the paralysed law-making process in the absence of a functioning PLC. This had accounted for in part, the draft law on the Family Protection Law under discussion since at least 2015.¹⁷⁰⁶ To date there was no time frame announced for its adoption.¹⁷⁰⁷ Based upon this experience, participants expressed doubts that an HT law would be promptly drafted and adopted.

¹⁷⁰⁴ 1960 Penal Code, Chapter II, Incitement to Debauchery and Breach of Public Ethics and Morality. Articles 311, 317 < http://www.ahtnc.org.jo/sites/default/files/penal_code.pdf.> accessed 16 April 2020.

¹⁷⁰⁵ Also called Protection from family violence Law.

¹⁷⁰⁶ UNDP, 'State of Palestine Gender Justice Assessment of laws affecting gender equality and protection against gender-based violence' (2018) 15.

¹⁷⁰⁷ Al Haq, Submission to the Committee on the Rights of the child on the First Periodic Review of the State of Palestine (2020) 9.

Sub-theme 2 - Cooperation to address the HT issue between various domestic stakeholders: government institutions, CSOs, civil society communities and international organisations

Some participants shared the understanding that the Ministry of Interior in 2018 formed a technical Committee in charge of drafting a self-standing piece of legislation on HT as well as a National Action Plan. In addition, the Committee aim was tasked to monitor Palestine's compliance with its international legal obligations in relation to HT. Participants were unclear as to the precise composition of the Committee formed of various legal advisers from Ministries and NGOs.¹⁷⁰⁸ However, a few participants emphasised that the HT drafting process reveals the absence of representatives from some Women's rights organisations. The FGD participants vowed to write to the MOI for the contribution of Women's rights organisations in the Committee' drafting process and sessions.

In addition, to the groups' knowledge there are no external experts or observers such as UN or academics that could guide the Committee on the legal definition of HT and its implementation requirements.

Participants stressed at this stage that there is a lack of strategy to address HT and highlighted the risk of overlapping programmes eventually emerging. To this end, since the membership of Palestine with Interpol in October 2017 followed by the ratification of the Palermo Protocol in December 2017, some

¹⁷⁰⁸ The current National Committee to combat HT is composed of the Mol, MoFA, MoWA, MoJ, MoSD and likely participation from the Council of Ministers, Security Forces, Civil Police, Prosecutor's Office, The Palestinian Independent Commission for Human Rights, and NGOs: Al Haq, Al Muntada (Palestinian NGO is a platform for civil society actors advocating against GBV and to empower women and advance their rights).

international agencies with the participation of two Palestinian women's rights organisations have already initiated cluster groups and joint meetings to coordinate on this 'new' human rights issue. Nevertheless, the findings confirmed a lack of understanding of the legal definition and its judicial implication as well as an unclear coordination with respective devoted roles in addressing HT.

9.4.3 Theme 3 - Identification of challenges to the implementation of Palestine international legal obligation to HT

Israeli occupation as a challenge

The Israeli occupation and the subsequent lack of effective control of the PA on the Palestinian territory are perceived by most participants to be the primary obstacles to Palestine's implementation of its legal obligations to protect its citizens against HT. Participants agreed that the State of Palestine is unable to prevent violence against women and girls or by extension against any HT practices in areas where it does not have full jurisdiction. Participants opined that the absence of effective law enforcement is reinforced by the Oslo Accords which fragmented the territories with the majority under the dominant control of Israel. One participant mentioned for instance that despite its disengagement in 2005, Israel still exercises effective control of Gaza through border crossings of people and goods, territorial waters, and airspace except for the Rafah border with Egypt which is frequently closed through Israeli pressure. Participants feel that the lack of sanctions against Israel for its continuing violations of humanitarian law and human rights law is also coupled with the non-engagement of Hamas with international human rights law which affect the

implementation of the State of Palestine regarding its international legal obligation to HT.

Challenge of the hierarchy of Palestinian legal norms

An additional challenge raised was the uncertainty regarding the position of international instruments, hence of the Palermo Protocol in the amalgam of the Palestinian legal system. The undefined hierarchy of legal norms impacts the judiciary which hardly ever refer directly to international instruments.

In correlation to the undetermined legal system, the internal political context emerged as a main impediment to the implementation of Palestine international legal commitments. To this end, participants believed that the paralysis of the legislative process and the fragmented legal framework will remain unless the rival governments in the West Bank and Gaza reconcile their political divide and hold elections.¹⁷⁰⁹ Hence, participants confirmed that the implementation of international law is not a priority neither can be the HT agenda in this fragile political context inextricably linked to the Israeli occupation.

Sub-theme 3 - Extent of political will in Palestine regarding the implementation and commitment to human rights, and to combatting HT in particular.

Participants were divided concerning the genuine political will of the PA to comply to its international legal obligations. Some emphasise that the President sends conflicting messages domestically. On one hand, Palestine advocated in 2012 for its international recognition through its status as Non-Member-

¹⁷⁰⁹ Yezid Sayigh, 'Policing the People, Building the State: Authoritarian Transformation in the West Bank and Gaza' (2011) Carnegie Endowment for International Peace 4.

Observer-State in the United Nations which led to the ratification of many international conventions as well as core human rights treaties. On the other hand, participants confirmed a growing mistrust within civil society towards the government conduct in particular with issues of corruption and lack of transparency. This is illustrated for instance by the ongoing non-democratic process of legislating through decree-laws. Doubts regarding Palestine's political will to commit to human rights standards are also illustrated by the violations committed by Palestinian entities, personnel, and security forces *vis à vis* the right to freedom of expression or the right not to be subjected to torture. The weak political will for accountability to human rights commitments applies in both Gaza and the West Bank.

With regard to Palestine political will of HT legal commitments, participants do not know what to expect from the drafting committee on the HT legislation and what will be the steps further. This interrogation is verified by the lack of participants accurate knowledge regarding the composition of the legislative Committee on HT and the lack of transparency regarding its functioning and progress. This reflects generally the confusion generated by the proliferation of Committees set up to address the legal harmonisation project and in particular the practical role of the Committee on HT. However, in order to address this confusion of what the participants infer to be a lack of political will, CSOs participants manifested their commitments to engage in this issue and bring pressure on the authorities in order to implement their legal obligations to HT and to other human rights.

9.4.4 Theme 4 - Legal remedy for human rights violations and HT practices Palestinians provided by the building/ and implementation of a legal framework addressing HT at a domestic level and internationally through the recourse of UN human rights mechanisms

To the group's knowledge there is no data of HT cases prosecuted yet either in PA or in sharia courts. This was subsequently confirmed by the State of Palestine reporting to the Committee on the Rights of the Child.¹⁷¹⁰ Participants unanimously believed that the building and harmonisation of a legal framework in accordance with human rights standards may provide a wider base for legal protection regarding current human rights violations experienced in Palestine. More specifically these extend to women's rights violations as well as HT victims. Moreover, new legislation on HT may be able to provide guidance to examine exploitative practices for judges as well as for law enforcement. Awareness was raised among the group to address the crime of HT as a serious human rights violation and not just as a criminal issue. Hence, participants affirmed the importance of developing a human rights-based approach to deal with trafficking. The latter prompted at a domestic level, the difficulties for some victims in particular women and girls to access justice and to seek effective legal remedy against HT. At an international level, some participants expressed their unfamiliarity with the existing UN human rights mechanisms. However, three human rights organisations shared their experience regarding the preparation of submissions to the Committees on the Rights of the Child due in 2016 and of CEDAW in July 2018.

¹⁷¹⁰ The Committee on the Rights of the Child, UN Doc CRC/C/PSE/1 (n 1701) para 437, p.58.

9.4.5 Conclusion of FGD

The overall outcome of the FGD and previous informal discussions highlighted primarily a misunderstanding of the scope of the HT definition with an initial focus on sexual exploitation with the confirmation that the topic is taboo and shameful. Exploitative practices that can relate to HT such as forced begging, forced marriage, forced prostitution, organ trafficking, sexual exploitation and forced labour in Israeli settlements are all described as a result of the Israeli occupation. This is despite a scarce data as well as the difficulty to know the extent of HT in Palestine. The current legislation does not address the crime of trafficking *per se*. However, there are some aspects of HT related to gender issues that are inserted in the draft of the Family Protection Law. These concern the exploitation of women and girls through forced-marriage and forced prostitution which are also mentioned in the 1960 Jordanian Penal Code applicable in the West Bank. There are no such legal provisions in the Criminal Code of 1936 applicable in Gaza.

There is a preference for drafting a self-standing law on HT. There are nevertheless doubts regarding prospects for adoption as the law-making process is paralysed and affects all legal undertakings that seek conformity with international human rights law. There is confusion as to who is part of this drafting Committee which has no representation from many women's rights organisations. As to cooperation and involvement of various entities, there are risks of duplication and overlapping mainly due to an absence of coordinated strategy and vision to address HT. A cluster of some international organisations

reveals a lack of understanding and coherent contribution with regard to this 'new' human right issue. With regard to Palestine's implementation of its legal obligations to protect its citizens against HT, the Israeli occupation, and the subsequent lack of effective control of Palestine territory are perceived to be the primary obstacles. This is a validation of the findings in section 9.3. The non-respect of humanitarian and human rights principles in Gaza by both Israel and the Hamas authorities hinder Palestine in its commitment to uphold human rights at large. Another challenge to implementation of Palestine legal obligation to HT is the uncertainty of the status of international instruments in the amalgam of the Palestinian legal system. This impacts on the judiciary which does not directly apply international human rights instruments. Furthermore, another challenge to implementation of the Palermo Protocol lies in the paralysis of the legislative process and the fragmented nature of the Palestinian legal framework. Therefore, this confirms that the issue of HT may not be considered a priority in the legislative reform agenda. Consequently, there are doubts expressed regarding Palestine political will to comply to its international human rights and HT obligations. There is a growing mistrust within civil society regarding the government conduct such as issues of corruption and the non-democratic process of decree-laws. Other examples relate to the violations committed by Palestinian entities *vis-à-vis* the right to freedom of expression or the right not to be subjected to torture in both Gaza and the West Bank. The CSOs commitments to HT may put pressure on the government to implement its legal obligations to HT. In addition, Palestine needs to develop a human rights-based approach to trafficking. The latter prompts the observation that at a domestic level, some victims in particular women and girls remain unable to

access justice and therefore to seek effective legal remedy against HT. This is despite the creation of specialised prosecutorial process for such victims.

International legal recourse against HT violations could be facilitated by CSOs based on their reporting experience before UN human rights mechanisms. However, there is still unfamiliarity with the availability of such human rights procedures which may change with further reporting process Palestine is currently undergoing before various UN treaty bodies.

9.5 Summary of findings

The four field visits enabled the researcher to delve deeper into the research questions and be more acquainted with current social and political developments in Palestine. Over this period, participants manifested increased interest in the HT topic.

The field visits revealed the weakness of both governance capacity and the rule of law which affect both Gaza and the West Bank; the ongoing conflict with Israel; the resulting dire socio and economic conditions; the reliance upon humanitarian assistance combined with the ongoing closure of the Gaza strip in particular, restrict freedom of movements of Palestinians and subsequently their right to earn a livelihood. These factors increase vulnerabilities to any means of survival which expose Palestinians to risks of exploitation and various forms of trafficking. Such practices are being identified in Palestine and include forced prostitution, forced begging, forced marriage, labour exploitation. In addition, vulnerability is exacerbated by the fact that individuals on the ground are not aware of naming these types of exploitation and to identify themselves as to the authorities as research on the ground suggests that such practices in

link with sexual aspects are perceived as ‘taboos’. Furthermore, vulnerabilities are overlooked due to the dire and immediate humanitarian emergencies specifically in Gaza. In this regard, ‘for international actors attempting to address cases of trafficking in persons, conflict places an additional burden on a system already overwhelmed by other humanitarian, development and reconstruction challenges’.¹⁷¹¹

Simultaneously, the research found significant progress and mobilisation around HT at a legal and political level occurring in Palestine within a short space of time. Such advancement was first manifested by the ratification of the Palermo Protocol in December 2017. This was certainly triggered in part by a wide array of international instances and mechanisms that have addressed this crime including UN Security Council statements and resolutions. HT was also brought in the agenda during various UN reporting mechanisms and in particular before the CEDAW Committee in July 2018. The recent presence of Interpol also may play a significant role in the near future in its monitoring role of the State of Palestine’s responsibilities vis a vis anti-trafficking measures. Lastly to some extent, sensitisation to HT was promoted through multiple meetings and interviews during the research.

What appears to be another sign of advancement was the establishment of the National Committee on HT headed by the Ministry of Interior soon after the ratification of the Palermo Protocol. According to some participants, this Committee has begun the process of drafting the legislation on HT irrespective

¹⁷¹¹ ‘Human Trafficking in Conflict’ (2020) 6(1) Armed Conflict Survey 31, 33.

of the progress on legal harmonisation and of the State of Palestine legal system.

However, Palestine's international legal commitment to HT and human rights remain paralysed as far as the process of implementation is concerned.

Analysis of the findings identifies:

1. The lack of clarity regarding the position of international rules in the domestic legal order, despite controversial attempts of clarification by the Supreme Constitutional Court which is considered by many respondents as an instrument of the executive.
2. The fragmentation of the domestic legal framework and the proliferation of Committees and processes which ultimately hinder the support to the legal harmonisation undertaking.

Narrowing down to HT, other issues were consistently and coherently identified by many participants from both the interviews and the FGD. Most importantly, there were:

1. Lack of understanding definition and the problem of identification of HT practices, incidence, and cases
2. HT is not a priority for any entity due to other pressing concerns more specifically the Occupation and the associated fragility and conflict. With little meaningful control over borders, territory the Palestinian security forces cannot be a credible deterrent which also affect law enforcement actions.

3. Issues around the political will are magnified by a lack of trust in the PA commitments and vision. Capacity issues unfold the lack of resources to address Palestine human rights obligations and to that matter HT.
4. Issues around cooperation and coordination indicated the need for different domestic stakeholders to gain more acquaintance regarding international human rights instruments and related mechanisms that may be available to Palestine.
5. Lastly, various donors and UN agendas showed a lack of understanding in HT and coherent contribution with regard to this 'new' human right issue. However, without their funding and support CSOs and NGOs have no financial basis for proceeding to address HT.

To summarise, the above observations of the Programme Officer in Access for Justice from the UN Women corroborate that:

'the implementation of human rights commitments which include HT also depends on the persistence of CSOs, public institutions and donors which are not easy given the socio and political context, the fragmented legal framework, the many outdated laws and the lack of functioning PLC.'

Chapter 10 Conclusions

10.1 Introduction

The thesis sought to answer the following research question and its two sub-questions:

The purpose of this thesis was to examine the challenges to implement the international legal framework addressing HT in FCAS and to address/answer the following two sub questions:

1. What is the legal framework under international law through which vulnerable individuals can be protected against HT practices?
2. How can this normative framework be implemented in fragile, and conflict affected situations to provide protection and remedies to victims of HT?

The aim of the thesis was four-fold:

First, to provide a thorough understanding of the multifaceted nature of the crime of HT and its occurrence in Fragile and Conflict-Affected Situations (FCAS).

Secondly, to clarify definitional issues of HT arising from the Palermo Protocol with the choice for States parties to the Protocol of incorporating it or not *verbatim* in domestic legislation. Furthermore, the research examined the legal status of HT in international law by discussing how the elements of the definition relate to each other. This endeavour enables an effective use of the definition

for implementation and for prosecutorial purposes especially with HT being a prominent feature in conflict and armed conflict settings.

Thirdly, the research examined relevant international instruments and legal branches of international law that form a legal framework addressing HT and provide remedies to HT victims.

Fourth, generic challenges arising in the context of FCAS to implement the HT legal framework are analysed and confirmed based on the field research for the case study of Palestine. The present chapter reviews the overall findings for these questions.

10.2 HT in FCAS

HT is prevalent in most countries of the world within a matrix of human rights, security, and economic issues/impacts. HT presents a web of core human rights violations: sexual exploitation, slavery, servitude, the right to liberty and security, the right to freedom of movement, the right to work freely chosen and accepted, and the right to be free from cruel, inhumane, and degrading treatment. Furthermore, HT has become a prominent feature in conflict settings and armed conflict.

The growing concern over HT during armed conflict was confirmed by the United Nations Security Council with the adoption of the UN resolution 2331 recognising for the first time the occurrence of HT in areas of armed conflict, post conflict and humanitarian crisis.¹⁷¹² This followed the statement of 20 December 2016 from the UN Secretary-General explicitly condemning the

¹⁷¹² UNSC Res 2331 (n 127).

occurrence of HT in areas affected by armed conflict. The latter was complemented by UN resolution 2388 confirming practices of HT in conflict and post-conflict associated with sexual violence in such contexts. These resolutions were the basis to explore in chapter 2 the nexus between HT and the incidence of instability, fragility, and conflict contexts. The review confirmed that the implementation of international law addressing HT including normative mechanisms of protection against HT practices are challenged as the traditional role of the State in fragile and conflict settings is compromised in its duty to protect in relation to HT. In this regard, recent case law like *Hacienda Brasil Verde Workers v. Brazil* from the Inter-American Court of Human Rights confirms for the first time States' positive obligation to prevent and prohibit HT practices. Most international development bodies, and academics, agree that fragility, conflict and violence are inextricably linked.

The research has demonstrated that the resulting political instability exacerbates further the vulnerabilities of communities to the risk of HT exploitation. In fragile settings, States have even weaker institutions and capacity to respond which often results in the absence or poor domestic law enforcement of legal norms including anti-trafficking laws. Furthermore, the lack of State capacity means that the financial resources to combat HT are not a priority. Weak state capacity may also be linked to corrupt practices and collusion with organised HT. These occurrences are even more difficult to address especially when officials and law enforcement are involved with illicit practices. The research confirms, based on the findings of the case study, that in fragile settings or emergency humanitarian settings, counter-trafficking measures may not be envisaged by both by both governmental and non-

governmental actors as 'lifesaving' and therefore not considered as a priority in the various protection measures provided to vulnerable individuals in humanitarian responses.¹⁷¹³ In Chapter 1, it was noted that the UNSC resolution 2331 condemned human trafficking in conflict as well as being described as 'the greatest human rights issue of our time'. Yet in Palestine the overall UN community, UNRWA, UNODC, OHCHR, UN Women, UNDP, UNICEF, ILO, until now has not paid attention to HT at all. The research confirms that Palestine is an overlooked location with regard to HT¹⁷¹⁴ consistent with reports that HT is often neglected in crisis situations.¹⁷¹⁵ The research investigated and provided a better understanding of the specific challenges faced by Palestine to implement its international human rights and anti-HT legal commitments. The research journey and findings were specifically welcomed by prominent Palestinian human rights organisations and are very likely to be of practical value to Palestine which is in the process of drafting anti-trafficking domestic legislation as well as setting up related national referral mechanisms with an action plan.

The research also contributes to a better understanding of the process Palestine is going through regarding the implementation of its international legal commitments, in the midst of an ongoing political split and a deep rooted fragmented legal and judicial system.

¹⁷¹³ IOM Report, 'Addressing Human Trafficking and Exploitation in Times of Crisis-Evidence and Recommendations for Further Action to Protect Vulnerable and Mobile Populations' (2015) 3.

¹⁷¹⁴ Ashley Russell (n 150) 114, 129. See also Shelley (n 2) 25.

¹⁷¹⁵ IOM Report, 'Addressing Human Trafficking and Exploitation in Times of Crisis-Evidence and Recommendations for Further Action to Protect Vulnerable and Mobile Populations' (n 1713) 3. See the Report of the Special Rapporteur on trafficking in persons, especially women and children (31 March 2015) UN Doc A/HRC/29/38, p.6,7.

The single case study analysis of Palestine enabled an in-depth understanding of HT within a social group and its natural setting. This empirically rich case study provided the opportunity 'to concentrate on the contextual particularities' of the setting and to potentially 'contribute to larger theoretical and empirical problems' with findings that can/may be generalizable to other contexts.

Specific considerations were necessary pertaining to the research being partly based in a FCAS. The research methods unfolded the risks and challenges to undertake field research in hostile and conflict environments which impact both on the research design and on the planned conduct of the research.

10.3 The need for clarification of the HT definition

Part I grounded the discussion confirming the need for legal clarity of the HT definition as well as clarity regarding the connection between the different constitutive elements of the definition, discussed in Part II.

Part II examined and justified the interconnection of HT with other legal concepts such as enslavement, sexual slavery, two of which being embedded in the Protocol's definition: slavery and forced labour, whereas enslavement and sexual slavery are codified in international criminal law. The examination of the legal status of HT and its inclusion in the definition of enslavement in some instance leads to its possible international criminal justice consideration, which may provide an effective route towards criminal prosecution of HT as a serious crime. The interrelation of these legal concepts was also analysed in chapter 4 through selected judicial decisions from international, regional courts as well as domestic courts. This doctrinal examination tends to evidence 'the

disintegration of the legal boundaries between slavery and trafficking'¹⁷¹⁶ supporting their mutual interrelation and also with enslavement and forced labour. However, there remains some academic resistance in conflating trafficking, and forced labour with slavery which may raise the threshold of what constitute trafficking as well as undermining the effective application of the distinct legal regimes of slavery, forced labour and trafficking.

In summary, the research highlights that the complexity and conflicting understanding of what constitutes HT was and likely still is, partly the result of the initial emphasis on a criminal justice response towards HT and its perceived nexus with security threats, as well as international criminal networks pursuing sexual and labour exploitation. This categorised HT as a transnational crime, in parallel with drug trafficking and terrorism. In addition, the lack of clarity of the HT definition has been too widely exacerbated by academic debates and perhaps too remotely connected and therefore potentially irrelevant to situations on the ground. As a direct consequence, this affects not only a consistent interpretation, but most crucially the applicability of the definition by States parties to the Protocol. This in turn impacts on the implementation and enforcement of the normative framework addressing HT.

Making the understanding of the definition more accessible would not only assist States to have a better grasp of the HT phenomenon but would also assist legal practitioners to apply the law and effectively protect HT victims on the ground. These issues are even more exacerbated in FCAS and confirmed by the case study analysis. In Palestine, the discussion of the HT definition has

¹⁷¹⁶ Nicole Siller, 'The Prosecution of Human Traffickers? A Comparative Analysis of Enslavement Judgments Among International Courts and Tribunals' (n 562) 239.

not reached the legal complexity envisaged by academics and experts particularly with regard to the interaction of the legal concepts or as a potential international criminal justice issue. The findings established that the struggle for various stakeholders was to match exploitative practices to the definition's legal requirements and whether these identified practices could amount to trafficking.

The research concludes that the ongoing theoretical and academic debates on the definition of HT is largely detached from reality on the ground and the capacity of some States. As demonstrated in Palestine, different priorities mean the HT agenda does not move forward but also that the HT issue may be neglected especially if the legal concept of HT is difficult to comprehend. Additionally, the implementation of States' legal commitments regarding HT may also be deferred as this requires a functioning rule of law and capacity, including specialist expertise in place. Lastly, the research confirms that a uniform and static definition would be unable to grasp the complexity of all political, legal, cultural, and social fabrics. Evidenced by the findings of the case study in Palestine, the suggestion of Mattar is fully relevant:

'there is no model legislation that may be applied by all countries regardless of the particularities of their individual legal systems'.

10.4 Added value of the legal branches of international law that form an interactive legal framework addressing HT and provide possible remedies to HT victims.

Chapters 5 and 6 undertook a theoretical analysis and examined various branches of international law, namely international human rights law, refugee law, humanitarian law, criminal law, and labour law, to determine how they

address HT. These legal norms form a legal framework protective against these practices, enabling judicial and quasi-judicial remedies for HT victims. These normative frameworks can come in support to the Palermo Protocol for a more complete understanding of the various aspects of HT and the contexts in which HT takes place which includes FCAS. The choice of these legal regimes enables to form a wider protective legal framework for HT victims which compensate the weakness of the Palermo. As mentioned, the latter has a predominantly criminal justice approach and is weak on HT victims' human rights protection.

Moreover, the chosen legal regimes have for most of them, addressed and elaborated upon the HT definition either through international instruments such as the ILO 1999 Convention on the Worst Forms of Child Labour Convention, the 2014 Protocol to the 1930 ILO Convention, a number of human rights treaties: the CEDAW, the CRC, or through the form of soft laws: UNHCR 2002 Recommended Principles and Guidelines on Human Rights and Human Trafficking, or in the elements of crimes to the Rome Statute.

The relationship between ICL and IHRL is given effect under Article 21(3) of the Rome Statute which enables the ICC to consider 'internationally recognised human rights'. Another example evidencing the regimes' interaction between IHRL, IHL and ICL relates to the work of human rights bodies and specific UN mechanisms such as special rapporteurs: UN Special Rapporteurs: the Special Rapporteur on contemporary forms of slavery, including its causes and consequences and the Special Rapporteur on trafficking in persons, especially women and children, fact-finding missions, inquiry commissions, that collect information on the ground, and evidence of human rights violations.

However, this analysis identified limitations regarding the applicability and accessibility of these international legal norms, specifically in fragile contexts.

However, the profusion of possible recourses may confuse HT victims. The issue of accessibility to complaints mechanisms in situations of conflict is significant. Furthermore, HT victims may live in remote locations or be trapped and away from social support. In addition, victims often mistrust authorities or are ashamed as well as fearful to report HT abuses.

To some extent the issue of accessibility is confirmed by the context of Palestine where 'internationally, there are no clear available remedies for the Palestinian victims of human rights violations.'¹⁷¹⁷ Additionally, Palestinians cannot currently approach the regional human rights system in the Middle East which would be closer to home, as this regional judicial recourse and litigation is not yet available to individual complaints. With regard to UN quasi-judicial recourses and in particular HT complaints brought before the CEDAW Committee, such remedies are scarce in positive outcomes and do not have enforcement mechanisms. However, there may be positive development to monitor in the future based on the Spanish Supreme Court's recent jurisprudence ruling that UN Human Rights Treaty bodies decisions are binding on States parties.

With regard to the scope of application of international refugee law *vis à vis* HT victims, in many instances, HT victims may be unable to satisfy the refugee criteria of their 'membership to a particular social group' and therefore fall

¹⁷¹⁷ Qandeel (n 184) 385.

outside the scope of the 1951 Refugee Convention. However, the international human rights regime often complements international refugee law through a subsidiary form of protection. Nevertheless, as demonstrated in the case study, grassroots support from CSOs contributes greatly to the implementation of the HT victims protection who are at risk on the ground whether they obtained refugee status or were rejected from the asylum process.

The law of armed conflict may operate simultaneously with other branches of law as complementary sources of legal protection, in particular with international human rights law. However, HT *per se* has not been expressly prohibited nor regulated under IHL. Hence, IHRL comes in support to IHL norms where the latter do not explicitly address all aspects of the HT definition. However, acts of HT are often associated with violations of international humanitarian law linked to situations of conflict. UNSC Resolution 2331 confirms, implicitly, the applicability and interaction with IHRL, IRL, ILL, ICL, recalling that HT in areas affected by armed conflict and post-conflict situations ‘can be for the purpose of various forms of exploitation, including exploitation of the prostitution of others or other forms of sexual exploitation, forced labour, slavery or practices similar to slavery, servitude or the removal of organs’... ‘can affect children, displaced persons including refugees.’¹⁷¹⁸

Doctrinal examination highlights that some IHL instruments prohibit enslavement, slavery, and rape practices which relate to HT. IHL addresses the concept of ‘sexual violence’ referred to in the Geneva Conventions of 1949 and their Additional Protocols of 1977, emphasising the strong links to other

¹⁷¹⁸ UNSC, S/RES/2331 (n 127) 1,2.

patterns of violence in conflict. In sum, trafficking for the purpose of sexual exploitation and sexual slavery are encompassed under serious forms of sexual violence, part of a pattern of violence linked to other violations of IHL. The international criminal court and *ad hoc* tribunals as well as UN bodies through fact-finding mechanisms, contribute to the implementation and enforcement of IHL rules. However, at a domestic level, the implementation of IHL may be affected by the often bias relationships that manifest between judicial institutions and State actions. In this regard, the State itself may be a party to the conflict, which for victims may result in a lack of trust in States institutions. In addition, there may be an inability or unwillingness of the State to prosecute crimes of sexual violence. The role of national legal systems remains nevertheless crucial to support accountability for crimes of sexual violence at times of conflict as justice ideally needs to be exercised closer to home. As examined in chapter 8 and 9, the case of Palestine exhibits specific to unique challenges that affect the implementation of international humanitarian law regulating occupied territories.

The lens of international criminal law aims towards individual accountability and to combat impunity of core international crimes. In addition, ICL can complement defective domestic criminal justice systems when States are unable and/or unwilling to carry out their prosecutorial duties. HT is described as a crime that offends humanity and can be characterised in some instances as an international crime. Chapter 6 therefore examined the legal requirements for HT to be qualified as an international crime. Human rights breaches can lead to the involvement of ICL through the opening of investigations by the ICC. As an example, with regard to HT, the Office of the Prosecutor to the ICC has

begun focusing on HT, with a particular interest in investigating trafficking crimes in Libya.¹⁷¹⁹

Nevertheless, to date, no HT prosecution *per se* has been brought before the ICC despite evidence of this crime in some of the States under investigation. Other mechanisms can be envisaged regarding HT crimes as part as referrals to the ICC under Chapter VII of the UN Charter. Once again, such referrals have been activated only twice in the case of Sudan and Libya despite the many affected regions where HT and related sexual violence occur. This confirms the complementarity role of the ICC having a symbolic and deterring function, which can be meaningful especially when criminals have leadership roles. The primary responsibility to investigate and prosecute HT remains therefore with States at a grassroot level and closer to home and victims. The potential qualification of HT as a serious crime also depends on the scale and systematic patterns of its occurrence. Based on the analysis of the case study, Palestine does not exhibit such pattern but requires monitoring as well as prevention mechanisms to be in place in link with the evolution of its fragile and conflict context. In this regard, the last correspondence with SAWA highlighted that the situation deteriorates in Palestine with increasing violence against women and more accounts of forced prostitution. All victims being pressured by families and organised networks. Through their helpline, SAWA reports that in 2020 three children were identified in forced begging and six adults in sexual exploitation: four men and two women. CSOs are therefore requesting more shelters for protection.¹⁷²⁰

¹⁷¹⁹ <<https://www.icc-cpi.int/Pages/item.aspx?name=180509-otp-stat-UNSC-lib>> accessed 3 August 2021.

¹⁷²⁰ SAWA written conversation through WhatsApp on 7 September 2020.

Lastly, the examination of international labour law highlights that there is a fine line in the identification between ‘trafficking for forced labour’ from the offence of ‘forced labour’. This is confirmed by the findings in the case study. In addition, in the context of a globalised economy, the occurrence of HT for forced labour can be hard to detect, even more so in FCAS where poor economic conditions generally prevail, and access is poor. This is verified in the case study with the exploitation of Palestinian working illegally in Israel or in Israeli settlements in the West Bank in the construction, agriculture, and caregiving sectors.¹⁷²¹ Additionally, the risks of HT are magnified especially when business entities have multiple subcontracting or outsourcing arrangements often in fragile environments where such supply chains are established. In this context, it is difficult to establish the liability of legal persons due to the complex structure of international businesses.

It can be concluded that the issue of the respective legal regimes and their interactions is, as Young¹⁷²² points out a ‘risky undertaking’, is complex and requires an understanding of the boundaries and relationships between regimes and how they overlap on issues of global concern, such as HT. This is potentially another very significant area of research beyond the scope of this thesis.

¹⁷²¹ The US Department of State, 2019 Trafficking in Persons Report (n 537) 256.

¹⁷²² Margaret A. Young, ‘Introduction: The Productive Friction between Regimes in M. Young (Ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2021) 1.

10.5 Analysis of generic challenges faced by FCAS to implement the HT legal framework and the specifics of Palestine

The research examined in chapter 7, principles of implementation of international law in domestic legal systems which confirm that there are no clear guidance and uniform standards for States on how to implement human rights norms. The absence of uniformity may enable cultural diversity to enrich and benefit international human rights law. However, the State remains the main duty-bearer responsible taking all the steps necessary to give effect to human rights by enacting legislation for the domestic implementation of international human rights treaties. In addition, as mentioned in section 5.2.4, the State has a 'responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers as well as to assist and protect trafficked persons'

Chapter 7 confirms that besides States, a plurality of other actors has emerged often referred to as 'non-state actors' who contribute to the process of implementation.¹⁷²³ This plurality of actors encompasses civil society at large such as communities, minorities, indigenous peoples, religious bodies, private organizations, and business. The case study therefore validates that this contribution to implementation is exercised in part, in Palestine by the most prominent human rights organisations as well as by the Independent Commission on Human Rights.

¹⁷²³ Julie Fraser, 'Domestic Implementation of International Human Rights Treaties: Legislative and Other Effective Measures' in *Social Institutions and International Human Rights Law Implementation: Every Organ of Society* (Cambridge University Press, 2020) 113.

Chapter 7 also identified generic impediments to implementation of the legal framework addressing HT and human rights in FCAS which include the lack of political will. In the case of HT, the lack of political will implies that some States do not go beyond ratification of the Protocol and do little to address trafficking on the ground but nevertheless try to avoid international criticisms and scrutiny. Part of this may be related to the lack of understanding of the Protocol's content and requirements such as the scope and the nature of the crime. The analysis of the case study demonstrates both instances.

Additional impediments to implementation are related to the lack of State's capacity which is magnified in FCAS often associated with dysfunctional institutions and rule of law. Financial capacity is also a factor related to the practical difficulties in allocating sufficient resources. In these contexts, there is a 'hierarchy' in the implementation of human rights and HT may not be the priority of human rights issues to address. This is verified in the case of Palestine. The presence of corruption can also disrupt implementation by undermining a fragile rule of law and burdens further the State faced with capacity and financial problems.

Moreover, there may be a lack of social will whereby civil society are unable or do not express their will to denounce certain human rights abuses fearing repressive regimes or acquiescent to prevalent cultural practices. In this regard the implementation of human rights and more specifically women's rights may be hindered through the recourse for instance of reservations to the CEDAW Convention. Cultural considerations can be an obstacle to implement human rights standards, justifying discriminatory practices which can amount to human rights violations such as the case of female genital mutilation.

The research focused on significant actors that encourage and contribute to domestic implementation process such as the UN. However, observation confirms the proliferation of human rights mechanisms which often means overlap and duplication and ultimately confusion as to who is doing what. Such mechanisms are lengthy and imply first the exhaustion of domestic remedies and secondly may not be easily available as exemplified in the case of Palestine. The findings in chapter 9 confirmed that domestic entities represented by National Human Rights Institutions and human rights CSOs remain in essence pivotal in the participation and monitoring of the human rights implementation process and their enforcement. Grassroots structures and CSOs represent a strong mobilisation towards the entitlement of specific human rights and can be valuable to help more practically victims of human rights violations and of HT.

The choice of the case study of Palestine exemplifies the challenges *vis à vis* fragile contexts whose specific context magnify the generic challenges identified in Chapter 7. The ongoing conflict and the persistent and illegal policies of the Israeli occupation over most of Palestinian territory contribute to this. To this must be added Palestine's weak infrastructure and institutions; its plural legal system, the lack of successful harmonisation of its legal framework, all which affect the domestic implementation of Palestine's international human rights and HT commitments; the insufficient judicial and institutional capacities and expertise regarding the access to international human rights mechanisms, Palestine's chronic financial and economic situation; the extreme poverty and difficult socio-economic situation, all coupled with the ongoing humanitarian crisis in Gaza.

These specific challenges mean that there is little priority given to HT. Part III in its chapter 8, provided a chronological and historical background of Palestine that shaped the legal and judicial systems as well as the current obligations of Palestine vis a vis human rights as well as to report to various human rights treaty bodies. The empirical and research challenge with regard to the hidden nature of the HT applies to Palestine and the fact that it is also considered a 'taboo' social issue.

The scarcity of research on HT in Palestine justified this research. In addition, the conditions experienced by Palestinian society and the context of the fragile situation in the Middle East region are conducive for the need to legally prevent and protect against the prevalent HT phenomenon. Furthermore, the chapter 9 findings throughout the field-based phase provide tangible information on the expressed need by civil society organisations to support the research, collect data in order to assess the occurrence of HT in Palestine and to equip Palestine with a protective legal framework against HT.

'Context is everything'

The political fragility of Palestine and associated incidence of conflict cannot be under-estimated. In the current circumstances, it is highly unlikely that Palestine could or would finalise drafting appropriate legislation on HT and implement it successfully. Since the signing of the Oslo Accords, Palestine has undergone an illusory process of State formation including attempts to establish a functional legal system, the ability to make laws and implement them as well as to deliver basic services to its citizens. However, the actions of the Israeli State have repeatedly curtailed any progress on the two-State-solution. In July 2020,

the report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 refers to the 2334 resolution condemning ‘the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem which has no legal validity and constitutes a flagrant violation under international law and a major obstacle to the achievement of the two-State solution’.¹⁷²⁴ The situation has been exacerbated by significant internal political disagreements amongst the various Palestinians factions.

Hence, the importance of understanding politics and political economy is key to both shaping support for addressing HT and understanding whether and how reforms happen. In addition to understanding context, the importance of personal relationships and networks in the development community; the different incentives of the various stakeholders are also important parameters. Palestine exhibits the additional burden of historical legacies, social trends, and forces, exacerbated by the regional and geopolitical context that shape international donor engagement and actions.

10.6 The way forward: building the capability of Palestine’s mechanisms and institutions to address HT

The research confirms that domestic remedies constitute the cornerstone and the immediate haven for the protection of human rights. The research supports therefore the importance of developing the capacity of States to ensure the effectiveness of domestic remedies and implement ‘justice closer to home’.

¹⁷²⁴ Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 (15 July 2020) UN Doc A/HRC/44/60, p.20. See also UNSC Resolution 2334 (23 December 2016) S/RES/2334 p.2.

Chapter 5, 6 and 7 noted that most international human rights conventions commit State parties to incorporate human rights within their domestic legislation. This process therefore obligates the States to make available legal mechanisms for victims to seek remedies and obtain reparation against HT and human rights violations.

However, in the case study analysis of Palestine the findings revealed that domestic remedies, particularly with regard to gender-based violence and trafficking¹⁷²⁵ do not provide adequate protection to women and girls. This is despite the current drafting of a new penal code,¹⁷²⁶ the applicable criminal laws, and the nascent drafting of legislation on HT. There is still a long way to go for Palestine to establish HT as a priority and build capacity in the implementation of its international human rights commitments. Hence, in this current context where do victims of human rights violations or HT turn for protection and to seek justice, in absence of trustworthy and effective legal process? This poses the question of the availability of the right to effective remedy which is the pillar of the enforcement of human rights as well as the basis for providing mechanisms to address and redress violations. In addition, it enables to hold accountable individuals who violate domestic laws, or various branches of international law examined in chapter 5 and 6. Meanwhile, local but short-term solutions for victims of HT and human rights violations are mostly envisaged via the support of communities or shelters available for emergency

¹⁷²⁵ Human Rights Watch, 'World Report, Israel and Palestine - Events of 2018' < <https://www.hrw.org/world-report/2019/country-chapters/israel/palestine> > accessed 22 July 2019.

¹⁷²⁶ European Commission Report: 'Implementation of the European Neighbourhood Policy in Palestine Progress in 2014 and recommendations for actions' (2015) 10. See also Euro-Mediterranean Human Rights Network, 'Palestine-Report on violence against women in the context of conflict' < <http://euromedrights.org/wp-content/uploads/2015/12/EMHRN-Factsheet-VAW-Palestine-EN.pdf> > accessed 11 March 2016.

and provided by both the MoSD and the MoI. Practical and legal are also provided by some human rights organisations. This practical support provided for victims of HT and human rights violations by human rights organisations on the ground is confirmed and exemplified by the last exchange with the Director of SAWA mentioned earlier.

In this regard the research verified that HT and human rights victims trust prominent and longstanding human rights NGOs who are also familiar with relevant international human rights procedures. These NGOs may therefore propose long term support through international individual complaints mechanisms. The latter are generally a lengthy process and therefore do not provide immediate protection. However, Palestinian victims of HT and other human rights violations to date are not able to access certain individual complaints mechanisms. Palestine has not yet ratified the Optional Protocol to the International Covenant on Civil and Political Rights nor the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. Neither has it adopted the Optional Protocol to the Convention on the Rights of the Child. However, recently Palestine did adopt the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women which offers additional access to remedy for HT victims.¹⁷²⁷ Efforts should be pursued towards expanding the existing availability offered by the Committee against Torture (CAT)¹⁷²⁸ and more recently the Committee on the Elimination of Racial Discrimination (CERD).

¹⁷²⁷ <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=217&Lang=en> accessed 10 July 2020.

¹⁷²⁸ Human Rights and Democracy: The 2019 Foreign & Commonwealth Office Report: 'The PA drafted legislation to establish a National Preventive Mechanism against Torture', p.49.

Additionally, there are reports and decisions of these UN human rights mechanisms including the system of Special Procedures such as commission of inquiry, fact-finding missions, coupled with reports from international human rights organisations¹⁷²⁹ including several Palestinian human rights organisations that defend, protect, and promote human rights in the occupied territories. All remain important tools in documenting international humanitarian law, human rights and HT violations committed either by the PA, the *de facto* authorities in Gaza, or by the State of Israel as an occupying power. These give rise to State responsibility and may also provide information on alleged crimes to international justice mechanisms, including the International Criminal Court, complementary to national criminal jurisdiction. This the case since March 2021 with the opening of an investigation by the Office of the Prosecutor to the ICC regarding the situation in Palestine.¹⁷³⁰

HT victims could also approach the Palestinian Independent Commission on Human Rights which is vested with competence to promote, protect human rights and encouraging Palestine to meet its reporting obligations. However, in practice and so far, this institution confirmed that HT was not a priority in the agenda of other pressing human rights issues. The latter was further confirmed in September 2020 by the Director of the Palestinian Independent Commission on Human Rights that the HT agenda did not advance at all.¹⁷³¹ This is despite the recent innovative action of a proposed cooperation between the Committee on the Elimination of Discrimination against Women and National Human

¹⁷²⁹ Amnesty International, Human Rights Watch, The International Federation for Human Rights (FIDH).

¹⁷³⁰ <<https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine>> accessed 4 August 2021.

¹⁷³¹ Email correspondence exchanged with the Director of the Palestinian Independent Commission on Human Rights (6 September 2020).

Rights Institutions which aims at the overall protection of women's rights, prevention of violations including in times of conflict.¹⁷³² This initiative helps 'to contribute in all stages of the reporting procedure under the Convention'¹⁷³³ as well as playing 'an important role in providing assistance and advice to a victim of human rights violations on how to submit individual communication or relevant information to the Committee on any violation of the rights protected by the Convention'.¹⁷³⁴ This may lead to a more pressing agenda regarding HT for NHRIS and consequently in Palestine.

At the time of completion of the thesis in July 2021, there has been no further policy development nor any implementation on the ground of the Palermo Protocol. This was confirmed by the CEDAW Committee following-up from the concluding observations on its initial report which makes no reference to the state of advancement of the anti-trafficking draft legislation.

Furthermore, Ammar Dweik, Director of the Palestinian Independent Commission for Human Rights mentions that:

'Nothing significant that I can talk about has happened since we last met. Nothing has moved on. The law on organs transplant was passed but since then no work has been done on the bylaws'. 'I am not aware of any new development concerning HT in Palestine. 'With the Covid, this has

¹⁷³² CEDAW Committee, 'Paper on the cooperation between the Committee on the Elimination of Discrimination against Women and National Human Rights Institutions' (adopted by the Committee at its seventy-fourth session (21 October-8 November 2019) E/CN.6/2008/CRP.1) para.3

< <https://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>> accessed 10 July 2020.

¹⁷³³ CEDAW Committee, 'Paper on the cooperation between the Committee on the Elimination of Discrimination against Women and National Human Rights Institutions' (n 1732) para.21.

¹⁷³⁴ CEDAW Committee, 'Paper on the cooperation between the Committee on the Elimination of Discrimination against Women and National Human Rights Institutions' (n 1732) para.31.

relegated HT to an even further degree on the priority scale in Palestine. I believe the major reason that HT is not a significant HR priority is that we are to a large extent closed to the outside world in terms of freedom of movement. Bringing anyone from abroad is very difficult due the Israeli full control of the crossings'.¹⁷³⁵

Additionally, Ohaila Shomar, Director of SAWA confirms:

'there are no news concerning HT in Palestine from the PA side or other human rights resources. During the Covid, all reports talk about GBV only. In Gaza there are prostitution cases but no official information'.¹⁷³⁶

UNICEF corroborates that the COVID-19 pandemic context in this conflict-affected and fragile situation seriously impact on children protection who are victims of exploitation at an alarming rate'.¹⁷³⁷

The thematic analysis of the findings identified specific other contextual parameters impeding the effectiveness of domestic remedies. In particular, the analysis highlighted that the legal and judiciary systems are not independent from the executive and suffer therefore from the ongoing political interference of the different Palestinian political entities. This is a failure of the principle of 'separation of powers' which was confirmed by participants. The political split coupled with an executive authority with questionable democratic legitimacy, has affected the performance of both the legal and judiciary systems, in particular the Constitutional Court, the High Court of Justice of the West Bank and the High Court of Justice of Gaza. This has also clear repercussions on the

¹⁷³⁵ Exchange of emails on 16/09/2020 and 10/07/2021.

¹⁷³⁶ Exchange of correspondence on 21/01/2021.

¹⁷³⁷ UNICEF, 'COVID-19 Protection Needs Identification and Analysis in the State of Palestine' (2020) 10.

implementation and enforcement of Courts decisions, hence on effective domestic remedies. Furthermore, the judiciary lacks experience in applying provisions of international human rights and humanitarian law in order to enforce the protection of human rights and anti-trafficking legislation. This is despite their constitutional guarantee by the 2003 Basic Law.

One way forward would be to restore the equilibrium of ‘checks and balances’ as promoted by Article 2 of the Palestinian Basic Law, through the conduct of elections which will by consequence address the prolonged absence of a functioning legislative power.

It is important that Palestine as a State fully grasps its legal obligations and endorse its ‘responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers as well as to assist and protect trafficked persons’.¹⁷³⁸ To be supported in its human rights obligations, the combination of independent judicial institutions, effective national human rights institutions (NHRIs) and an engaged civil society can be conducive for the State to comply to its human rights obligations and reinforce domestic enforcement efforts regarding HT as mentioned in section 5.2.4.¹⁷³⁹

Additionally, legal pluralism should be considered as a way forward rather than focusing on legal harmonisation or unity between the West Bank and Gaza. Palestine should however remain focused on its various international legal and

¹⁷³⁸ GRETA (Group of Experts on Action against Trafficking in Human Beings), 8th General Report on GRETA’s Activities (2018) para 205, p.67. See also UNICEF Innocenti Research Centre, ‘South Asia in Action: Preventing and Responding to Child Trafficking – Analysis of Anti-Trafficking Initiatives in the Region’ (2009) 35.

¹⁷³⁹ The primacy of human rights, para 2 of the 2002 United Nations High Commissioner for Human Rights, ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking’ (n 665).

human rights commitments including HT, independently on donors agendas which often move on.

As an academic participant emphasised:

'There are 250 decree-laws that apply in the West Bank and not in Gaza, there are international treaties that apply in the West Bank but not in Gaza, there are separate Courts of law, Prosecutors are completely separated. It is too late for legal unity: 'unity/unification is over in the way we wanted it and the way it was presented under Oslo, but it does not mean that unity is over for Palestine. Unity can live and co-exist with different/separate legal systems'.

10.7 Concluding Remarks

The research concludes that addressing the issue of HT has complex policy implications and therefore requires a competent policy making and legal implementation expertise. The latter capability may grow with the familiarity of Palestine concerning its obligations with the UN human rights mechanisms and regular reporting processes as well as familiarity with the examined international legal framework addressing HT. The issue of HT and its ramifications also highlight the urgent need for domestic legal reforms in Palestine in accordance with human rights standards

The way forward for implementation of FCAS in such situations therefore requires progress on multiple fronts to help create an enabling environment to tackle HT:

1. Domestic legislation focused on HT needs to be in place in accordance with human rights standards. A starting point could be the UNODC

Model Law against Trafficking in Persons which was developed to promote and assist Member States to implement UNTOC and the Protocols. Further inspiration can be drawn from individual country HT legislation.

2. Anti-trafficking legislation should incorporate some provisions of the international humanitarian rules in relation to HT characterised under the form of 'conflict-related sexual violence'.
3. The thesis has demonstrated the importance of raising awareness with stakeholders including civil society. Evaluations of HT programmes have noted that the impact of raising awareness campaigns is limited when these are not targeted to specific communities with a clear message and support for victims is effective when it is victim-centered.¹⁷⁴⁰
4. A recommendation for the Harmonisation Committee with human rights organisations including the PICHR is to work further towards the integration of human rights standards into the various sources of law that form Palestine, in particular the sharia and tribal laws.
5. Recommendation for Palestine to ratify the Optional Protocol to the International Covenant on Civil and Political Rights, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, the Optional Protocol to the Convention on the Rights of the Child. These will enable HT victims access to remedy through further UN human rights individual complaint mechanisms.
6. With regard to an enhanced implementation of the ILL framework for further protection and legal recourse, the recommendation is for

¹⁷⁴⁰ Katharine Bryant and Todd Landman, 'Combatting Human Trafficking since Palermo: What Do We Know about What Works?' (2020) 6(2) *Journal of Human Trafficking* 119, 140.

Palestine to ratify the 2014 Protocol to the 1930 ILO Convention which *inter alia* addresses HT practices in the context of forced labour.

7. Based on Palestine's existing human rights commitments, the recommendation is that the PICHR develops working links with the CEDAW Committee which can facilitate the implementation of the HT agenda, as described in section 10.6. The UN community present in Palestine UNRWA, UNODC, OHCHR, UN Women, UNDP, UNICEF, ILO, other international organisations, and Palestinian human rights NGOs should integrate the issue of HT as part of their agendas which would contribute to the dissemination of awareness at all levels of Palestinian civil society including at an institutional level.
8. The above should also involve law enforcement and in particular Interpol in Palestine whose mandate addresses HT. Interpol should utilise all their assets and resources, including a significant legal capacity, to engage with various actors of civil society to disseminate awareness on the crime of HT and train various police forces for identification of such practices. In other countries Interpol is a member of Task Forces on HT such as in the UK.
9. HT is still under researched in FCAS so further studies are both needed and welcome.
10. Lastly, the thesis makes recommendations on how to tackle HT in a pluralist legal system: cooperation and collaboration is key engaging state, and non-state actors in a constructive fashion, being culturally appropriate and easily comprehended, whilst not contradicting international human rights standards. The respective parties can

collaborate on a variety of initiatives including the setting-up of national referral mechanisms that encompass HT, surveys in cooperation with the Palestinian Central Bureau of Statistics, and the Ministry of Women's Affairs. There are well documented cases in Afghanistan and East Timor of tackling legal reforms in a pluralist legal system which resonate with Palestine.

These recommendations should be accompanied with further research on the impact of Palestine's legal culture and cultural understanding of HT and related human rights violations. It is hoped that the research helps policymakers, human rights, and legal practitioners in addressing HT in Palestine even though the context of Palestine remains one of continuous crises. The research may also support understanding HT in the wider context of complex crises in FCAS as well as providing a modest contribution to the body of scholarly research on HT.

Annex A Participant Information Sheet General – To Law Enforcement Personnel

International Law and Human Trafficking in Fragile and Conflict Affected Situations:

The case of Palestine

Thank you for contributing to this research project through your active participation and commitment. Your answers to my questions will be very valuable and will assist me to analyse and explore, in the context of Palestine, the question of effectiveness of the current legislative regime to combat human trafficking practices and wider issues regarding the implementation of law enforcement activities.

The overall aim of my research seeks to address whether and how the provisions of the Palestinian legal framework can provide efficient and effective protection of vulnerable persons against human trafficking. Is there evidence that this aim can partly/also be achieved through the reconsideration of the current legal framework, with the recourse and contribution of other existing protection mechanisms such as the UN human rights mechanisms, regional mechanisms such as the EU, that can improve the normative frame in the context of a complex legal situation, in an ongoing conflict context coupled with civil society disruption?

Why am I interviewing law enforcement officers?

The research will therefore also seek to address to what extent:

- HT is a real and possibly growing concern in conflict affected countries, and specifically Palestine

- How the current Palestinian legal framework operates in such a complex situation and what could be done to improve it.
- How best can the problem be addressed with the assistance of the existing legal framework, looking further at international, regional systems of institutions, cooperation mechanisms, and enforcement mechanisms.
- In particular, the research will examine the crucial role of law enforcement agencies and authorities in combating HT and giving support to member states against organised crimes as well as building international and regional police and judicial cooperation.

Please do read the following information. If there is anything unclear or if you wish to contact me for further queries, my details are below. I can update you at any time on the progress of the research. Thank you for taking the time to read this.

Who will conduct the research?

Mrs. Laurence Wilson, Female researcher. Exeter University - Law School – College of Social Sciences and International Studies – Amory Building, Rennes Drive, Exeter, UK EX4 4RJ

What is the aim of the research?

The aim of this research is to uncover evidence of the need for and means to enhance legal protection of vulnerable groups against human trafficking in fragile and conflict affected areas and victims of humanitarian crisis and sub. The aim is also to contribute through legal review and assessment of worldwide knowledge of such phenomenon, to the work being done in this field along with other human rights practitioners. The research also looks at the case study of Palestine

Why have you been identified for an interview?

Participants in this research are all individuals who have a key engagement in some way in the field of human trafficking. Some participants have a connection to victims, some are lawyers, some are part of the law enforcement responses, some are human rights defenders, others have an excellent grasp of the complexities of the politics and the problems associated

with state fragility and the vulnerability this creates for certain individuals. Many participants have long working experience and familiarity with the primary objectives of the research. Preliminary group or/and individual discussions as well as ad hoc meetings have helped identify many of the important questions to be raised for discussion and have also suggested the names of appropriate participants.

What does participation entail?

You will take part in an interview or a focus group discussion that will last a minimum of about 50 minutes but could be as long as two hours depending on the discussions. The following issues may be discussed:

- Background political, economy, social contexts
- Context and legacies – law, legal traditions, legal framework
- The role of the international community, donors, and donor coordination
- The role of law enforcement agencies
- The context/typology of fragility, humanitarian crises
- Your exposure and experiences
- Your views on the phenomenon of human trafficking.

All of the interview is recorded for accuracy and subsequent analytical purposes. If you do not want the interview to be recorded, just tell me before we start. The material will not be used for any commercial purposes, only for my doctoral thesis, academic research, and publications. The results of my overall research may also be used in other publications that may emerge out of my research.

What happens to the interview recording? Data protection notice

The recording is turned into a detailed and accurate transcript which you will read some time after the interview is over in order to confirm that you agree with the content. Once the transcript is finalised, I will submit it to you for your approval. You may opt to remove certain statements you may have made, change, or add further information. Once you are satisfied with the data, it will be immediately transferred from the hard copy to be digitally stored in the secure drive of the University of Exeter server. Only I will have access to it. Subsequently, no research data will be stored on my computer, USB key or any other device. The transcripts and recording will be only used by myself and my supervisors for the sole purpose of my research project. Requests for anonymity will be respected,

How is confidentiality maintained?

Before the interview commences, I will emphasise to you the importance of anonymity, confidentiality, and privacy to which I am committed. Thus, I will assume that you prefer to remain anonymous unless you state otherwise. A coding system will be used in order to protect anonymity. The transcript will describe you as Respondent A, B etc., along with a description of which general grouping of participants you belong to. Participants contact details will be kept separately from transcripts. All data gathered through surveys, interviews, questionnaires will be processed fairly and lawfully, kept in anonymity and confidentiality according to the UK Data Protection Act of 1998. Privacy will also be held with regard to the location of the interview. Because of the highly sensitive nature of the research, public places will not be chosen as a place for interviews whether those interviews are face to face or on the telephone. Private areas will be sought as well as agencies and NGOs buildings when possible.

What happens if I decide I not want to take part or if I change my mind?

Participation is voluntary. You should decide willingly whether or not to take part. Similarly, if you decide at any time not to continue in the course of the interview, then you only need to inform me, and all information will be destroyed. You do not need to give me a reason. You can also decline to answer certain questions that you may find inappropriate or uncomfortable.

Will I be paid for participating in the research?

Participation is on a voluntary basis and there is no remuneration. The research being self-funded, there will be no conflict of interest with any of the interviewees during the research process.

How long will the research last?

The interview research takes place over a two to three-month period. At the same time as interviewing, there is a parallel process of gathering other data such as project reports, evaluations, strategy documents, notes of donor-government dialogues and meetings, human rights and other UN and NGOs reports, legal documentation etc. It is anticipated that the final writing up of the research will be complete before the end of 2020.

Where will the research be conducted?

At this stage, the interviews will initially take place from and within the UK, France, and other parts of Europe through the means of emails, telephone interviews and where possible at the physical location of participating NGOs and other institutions.

Will the outcomes of the research be published?

The results will be published in the form of doctoral thesis. The most likely other publication would be articles in academic journals.

Contact for further information

Mrs. Laurence Wilson.

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Email: lw426@exeter.ac.uk

Participant Consent Form

Title:

International Law and Human Trafficking in Fragile and Conflict Affected

Situations: The case of Palestine

Conditions of Participation

1. I have read the Participant Information Sheet provided to me. The nature of the project as well as the purpose of the research project have been explained to me. I understand and agree to be involved with this research project.
2. I understand that my participation is voluntary and that I am free to withdraw from the interview at any stage, without giving reason and by doing so, this will not hinder my situation and status.
3. Interview data will be held and used on an anonymous basis unless you chose to be identified by name. There will be no mention of your name and these details will only be known to the researcher, who will use an anonymous coding system for identification.

Please tick one box to indicate how you wish your data to be used:

- I agree to my interview data being used on an anonymous basis
- I agree to be identified by name.

4. I understand and agree the interview may be recorded through audio recording to facilitate the accuracy of what was expressed. However, strict confidentiality procedures apply, as described below.

- 5. I understand that all sensitive information gathered for this study will remain strictly confidential. That means that all information provided during the interview will be transcribed into a written transcript. This transcript, and the scanned consent form will be then transferred in electronic form and safely and solely stored in a University of Exeter secure hard drive. The written transcript and the consent form will then be destroyed immediately to protect the safety and confidentiality of the individuals, institutions, and the interviewee
- 6. I agree/ I do not agree to the fact that this data may then be used for future publication and/or research purposes.
- 7. I understand and agree that I may wish to contact the researcher or supervisor for any query related to this process or for any complaint related to my involvement with this study.

Signature of participant..... Date.....

.....

Printed name of participant (Email address of participant if there is a request to view a copy of the interview transcript.)

Signature of researcher..... Date.....

Printed name of researcher: Mrs Laurence Wilson

Contact details

Researcher's contact name and address

Mrs Laurence Wilson
 Exeter University Law School, College of Social Sciences and International Studies, Amory Building, Rennes Drive, Exeter,
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Supervisor's names

Dr Christine Bicknell and Dr Aurel Sari

Contact address

Exeter University - Law School – College of Social Sciences and International Studies – Amory Building, Rennes Drive,
Exeter, UK EX4 4RJ

Annex B List of 37 interviewees

Designation	Organisation
Palestinian Authority Senior Officials	
Head of the Gender Unit	Palestinian Ministry of Interior
Head of the Policy Unit	Office of the Prime Minister
Director of PICHHR	Palestinian Independent Commission for Human Rights
Head of Multilateral Relations, United Nations, and its Specialized Agencies	Ministry of Foreign Affairs and Expatriates - State of Palestine
Legal Consultant - Multilateral Affairs- Ministry of Foreign Affairs and Expatriates - State of Palestine	Ministry of Foreign Affairs and Expatriates - State of Palestine
Head of Woman and Gender Unit Ministry of Social Development	Ministry of Social Development
Chief Prosecutor of the Specialized Prosecution on Protecting Family from Violence	Public Prosecution Office State of Palestine
Gender and Prosecutor Expert for the Attorney General Office	Contracted by UN Women
Legal advisor to the Minister of labor	Ministry of Labor
Director General of Employment	Ministry of Labour
Palestinian Security Organisations	
Director of the National Central Bureau	Interpol
Palestinian NGOs	
Professor of Law Birzeit University	Birzeit University
PHROC coordinator	Palestinian Human Rights Coordinator Organisations Committee

Director of Women's studies center	Women Studies Center
Head of WCLAC	Women's Centre for Legal Aid and Counselling (WCLAC)
Director – Vice-President of French NGO FIDH	Al-Haq
Legal Researcher and Advocacy Officer	Al-Haq
Head of Programme Office	Al-Haq
Head of Center for Applied International Law	Al-Haq
Director	SAWA
Attorney and legal consultant	SAWA
Director of National Society for Law and Democracy Gaza	National Society for Law and Democracy Gaza
Journalist	Free Lance/ Newspaper: Alaraby Al Jadeed
International Organisations	
Technical Advisor	Save the Children Fund
Associate Human Rights Officer	OHCHR Office of the United Nations High Commissioner for Human Rights - occupied Palestinian territory
Joint Programme Manager (UNDP Justice Programme)	UNDP
Gender Adviser, SAWAYSA	UNDP
Project Officer - Evaluation and Project development	UNODC Palestine
Head of Office	ILO
Director of the Legal Department	UNRWA (Palestine)
Legal Adviser	UNRWA
Programme Officer -Access for Justice	UN Women
UNDP Chief Technical Specialist	UNDP

Heinrich Foundation	Heinrich Foundation
MOI Legal and Administration Expert	EUPOL CoPPs
Senior Police Adviser	EUPOL CoPPs
Interpol Team Leader - Danish National Police -National Centre of Investigation (NCI)	International Communication INTERPOL – SIRENE – Europol Interpol

Annex C Interview Guide/Framework

Introduction (explanation and information provided to the interviewee)

Presentation of the researcher and the reasons for conducting the research on HT in a conflict setting. Such an approach is facilitated by the fact that the researcher is familiar with the context and wishes to build trust with the Palestinian community to help unfold the complex HT phenomenon.

Your answers to the following questions will help me to analyse and identify the legal and practical means to enhance protection against HT. This research looks at the complex legal situation of Palestine where ongoing political, and humanitarian crises are disrupting institutions and civil society. Lastly, this research aims to assist the implementation of legal protection and mechanisms against HT in fragile and conflict affected situations. The aim is to contribute through legal review and assessment, to worldwide knowledge of such phenomenon, to the work being done in this field and complex situation along with other human rights practitioners.

The research will seek to examine:

- Existing legal and theoretical international frameworks on human trafficking highlighting outcomes of various approaches, methods, and enforcement and cooperation mechanisms.
- How legal frameworks and related institutions work together in building international legal protection against HT and how that can be implemented and applied to vulnerable individuals in Fragile and Conflict affected situations (FCAS).
- Identify the gaps in the academic literature, particularly with regard to approaches to addressing HT in FCAS.

The research will therefore also seek to understand to what extent:

- HT is a real and possibly growing concern in Palestine.

- the issue of HT is perceived and addressed in the context and complexity of the existing Palestinian legal framework, in particular by the government authorities, law enforcement and prosecuting authorities, Palestinian NGOs, civil society as a whole and lastly the international community operating in Palestine.

Type of Interviews/Questionnaire

Semi-Structured interviews are envisaged because of the flexibility such process entails. Emphasis is on how the interviewee frames and interprets events. This focus allows the interviewee to relay and interpret important issues, events, and behaviours. The interviewee is allowed leeway to digress, discuss 'critical incidents' and 'critical events' (Bryman and Bell 2007).

Guidance for the conduct of interviews/questionnaires

Confirm with the interviewee the issue of consent. Reminding that consent will be an ongoing conversation throughout the interview. Explain to interviewees that ethical conscience including establishing trust, is present during the whole research and interview process. Introduce the purpose of the questionnaire orally and explain the content of the information sheet, estimated duration of the interview, flexibility within the general interview guide, use of the audio recorder, confidentiality issues, respect of privacy and anonymity, authorization to use the data collected, follow up if required and thanking the contribution of the participant.

This research has sampled a wide range of participants representing Palestine society as well as the international community involved in Palestine. The research hence relies on the unique and very valuable contribution of politicians, senior civil servants, law enforcement personnel, prosecuting authorities, academics, civil society organisations, human rights practitioners, UN, and international agencies staff members. It is important to emphasise that during this process, the participant is in control of the conversation and therefore their opinion matter and will be respected all the way through the research.

Strategy in the conduct of interviews

Start with open questions.

End with positive questions:

1/ if you were the President of Palestine right now, what would you do to change the situation for women, girls and children that are identified to be trafficked?

2/ What are your hopes and dreams for the future?

Questions	Explanation	Analysis and synthesis
<p><u>A. Questions addressed to senior government officials</u></p> <p><u>1. Legal Background and Issues</u></p> <p>1/What has been and is the driving force behind efforts to harmonise the Palestinian legal framework and in particular the human rights legal framework including women's issues?</p> <p>2/What (varying) combinations of driving forces can be observed (domestic leadership interests, driven (imposed?) by the international community, etc.) to address such issues?</p> <p><u>2. Legacies and Context</u></p> <p>1. Have legal reforms and the building of a core Palestinian legal framework since the 1993 Oslo Accords built on the amalgam of past legal systems shaped by past foreign colonial powers and ongoing foreign occupation?</p>	<p>Palestine has been subject to on-going violence and high levels of political instability</p> <p>In Palestine progress may not be uniform and back sliding may be due to a number of factors including changes to security conditions, poor strategy/implementation.</p>	<p>Is there strong commitment and leadership from (i) the top political level? (ii) from specific and relevant Ministries such as the Ministry of Women's Affairs or others (to specify) to address HT? What are the incentives for leaders to take an interest in and promote HR issues and anti-HT strategies?</p>

<p>2 Were legislative reforms in Palestine inspired by a western model? Why does the current legal system remain incoherent, lacking in harmonisation?</p> <p>3. How can legislative reforms address the current fragmented situation of the legal sector? And how should they take place?</p> <p>4/To what extent has the political turmoil and division in Palestine especially since 2007, coupled with the ongoing Israeli occupation continued to obstruct and impact upon the Palestinian legal system?</p> <p>5/ Are leadership and political (buy-in) engagement and international legal commitment necessary conditions for the implementation and success of an overall legislative and HR framework that would encompass an anti-HT legal framework?</p> <p><u>2 State building, national reconciliation integrating human rights issues</u></p> <p>1. Does Palestine have a clear state-building vision? If yes, does this mean that Palestine is therefore more likely to be committed to (re-)building/reforming <i>inter alia</i> the legal system?</p> <p>2. Is progress on legislative and institutional reforms fundamental to ensure harmonization between Gaza and the West Bank and to reach a sustainable transition? Can</p>		<p>Gather information on proposed legislative reforms and measure, if possible, the outcomes (to be measured by available indicators and by qualitative information).</p> <p>What evidence is there in Palestine of obstruction and disruption to legal reforms? What has caused disruption? Is international commitment helpful in building a legal harmonization? Which reforms are most at risk and why?</p> <p>Specifically address how Palestine has dealt with fragility factors and whether some of these factors have undermined or not the implementation of legislative and institutional reforms (and why)?</p>
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<p>political stability and national reconciliation partly be achieved through such legislative and institutional reforms?</p> <p>3. What are the areas of priorities and sequence of reforms? Are HR and HT areas of priority for the Palestinian Authority with the contribution of relevant actors from the civil society as well as the donor community?</p> <p>4. How does the current security situation affect the development and implementation of international legal obligations and legislative reforms? Are there specific characteristics of the current conflict in Palestine that negatively affect/undermine implementation? In particular, other priorities such as the occupation, peace negotiations. Corruption, on-going or re-emerging violence and turmoil.</p> <p>B. Common questions to law enforcement/prosecuting authorities/ senior officials/Palestinian HR NGOs, Women's organisations</p> <p>1/ Are you aware of the HT phenomenon in Palestine, in the region?</p> <p>2/ What evidence exists to suggest that human trafficking is a problem in Palestine? Both in the West Bank and Gaza? (reports, testimonies, incidents).</p> <p>3/ Does HT involve neighbouring countries such as Israel, Jordan, Egypt, Lebanon, Syria? If it affects these other countries, why not Palestine?</p>		
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<p>4/ Are there trafficking routes or patterns you are aware of?</p> <p>5/ Is Palestine considered as a source, transit or destination country for HT?</p> <p>5/Is HT internal to Palestine, and/or between the West bank and Gaza?</p> <p>6/ What is your understanding of the definition of HT?</p> <p>7/Is the understanding of HT in Palestine in line with the Palermo Protocol?</p> <p>8/ What practices of HT are Palestine familiar with? Sexual exploitation? forced labour? Forced and early marriage? Trafficking in organs?</p> <p>9/Is HT considered as a taboo in Palestinian society? If so, why</p> <p>10/ Do you think that incidents of HT are reported? If not, why not? If they are reported, who to?</p> <p>11/ Is HT considered as a priority issue by the Palestinian Authorities? If not, why not?</p> <p>12/ Are there practical initiatives and incentives undertaken by the PA to tackle HT? If not, why not?</p>		
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<p>13/ In view of the current political preoccupation with peace negotiations and the building of a Palestinian state, to what extent HT can be considered as a priority alongside existing proposals for broader legal harmonisation?</p> <p>14/Which government department would have a responsibility for addressing human trafficking? Is the Ministry of Women’s Affairs the most suitable and the only one?</p> <p>15/ Are law enforcement officials in Palestine familiar with HT?</p> <p>16/ Are prosecuting authorities familiar with HT?</p> <p>17/Are there specific laws and procedures for combatting HT in Palestine?</p> <p>18/ Under which law HT can be currently prosecuted?</p> <p>19/Is there jurisprudence available on HT in Palestine?</p> <p>20/Are forced marriage and early marriage prohibited in domestic law?</p> <p>21/Is forced prostitution prohibited in domestic law?</p> <p>22/What are the laws on sexual violence/violence against women?</p> <p>23/What are the laws prohibiting forced labour?</p>		
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<p>24/ Are there practical steps undertaken by Palestinian civil society to advocate against HT? For example: (i)workshops/conferences/projects following SAWA conference on HT in 2008? (ii) Creation of an NGO network (including the support of UN Women in Palestine and the International Community) aimed at an HT agenda in Palestine.</p> <p>25/Are there any research initiatives looking at HT in Palestine being done so far that can establish a base for programmes and actions? If research is not underway, why not?</p> <p>26/Which UN and International organisations deal with human trafficking in Palestine and the region?</p> <p>27/ Does the PA or any other body have procedures in place to protect victims of trafficking?</p>		
<p><u>3.Human Rights Commitments</u></p> <p>1/Is it possible to insulate some legal reforms from the adverse impacts of possibly low leadership interest/commitment on engaging a strong human rights agenda which includes looking at HT? (engaging</p>		<p>Is there as well a strong commitment from donors on HT and related issues?</p>

<p>Palestinian HR practitioners and/or external international HR professionals).</p> <p>2/Are existing legislative reform efforts and achievements (since 2012, Palestine was accorded “non-member observer State status in the UN), among which Palestine’s recognition encourages Palestinian government to enter into further international and regional human rights commitments? What are the incentives for Palestine to do so?</p> <p>3/ What is Palestine’s international commitment vis a vis international instruments in particular human rights instruments and their domestic implementation?</p> <p>4/ Palestine has ratified a number of international HR instruments such as CEDAW, would it be timely and important to include the ratification of the Palermo Protocol to the building of a HR legal framework in Palestine?</p> <p>5/Do you feel that Palestine would see human trafficking as part of its HR commitments and will be ready to take on the building of specific anti HT legal framework?</p> <p>6/Do you feel Palestine should be encouraged to sign the specific Conventions dealing with human trafficking, in particular the Palermo Protocol?</p> <p>7/ What would be your expectations vis a vis the international community if Palestine commit to the Palermo</p>		
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Protocol, regarding the implementation of the HT international legal framework?

8/ Is training for Palestine civil society and institutions necessary for the dissemination of awareness of HT's definition and identification?

9/ Do you feel that if Palestine joins Interpol, it can be instrumental in the fight against the overall security and for the protection of vulnerable persons against exploitative practices including HT?

4. Donor coordination and impact on an anti-trafficking agenda

1. Have donors in Palestine allocated enough resources to support legal reforms including HR reforms, including looking at HT? Has this support been consistent?

2. Is strong donor support and engagement positively in tune to the pace and scope of legal reforms?

3. Is donor aid crucial to achieving sustained progress on legal reforms and on human rights and HT issues?

C. Questions to NGOS

1/Which Palestinian NGOs have an agenda on human trafficking in both the West Bank and the Gaza Strip?

2/Which NGO would intend to mainstream HT into their agenda?

3/What made your organisation look at HT?

4/In terms of developing an anti-HT agenda, what would be your first objectives?

5/ As an NGO, do you have a role in assisting victims or providing services?

6/If so, do you actively share information with police and prosecutors regarding:

a- traffickers

b- victims

c- routes

7/Do police and prosecutors seek out and/or use your information?

8/What is the level of cooperation, communication, and trust between your organisation and law enforcement authorities?

<p>9/ Are you aware of corruption or complicity of government officials (including law enforcement officials) with regard to HT?</p> <p>10/ Is there currently a cooperation between Israeli NGOs and Palestinian organisations with regard to acts of trafficking?</p> <p>11/ Can you imagine that such cooperation would contribute greatly to the building of the anti-trafficking agenda?</p>		
<p><u>D. Final questions to all:</u></p> <p>1/ if you were the President of Palestine right now, what would you do to change the situation for women, girls and children that are identified to be trafficked?</p> <p>2/ What are your hopes for the future with regard to occurrence of human exploitation against Palestinians?</p> <p>3/ What are your dreams regarding the situation of women in Palestinian civil society?</p>		

Core questions

- 1/ Familiarity of HT: is there HT and practices perceived as such, in Palestine?
- 2/ Understanding of HT: Is HT understood as covering not only sexual exploitation but expands to exploitation of labour, domestic servitude, trafficking of organs?
- 3/ Do you see HT as a serious violation of HR and should be dealt with domestically but also at an international criminal judicial level?
- 4/ Are various international and human rights instruments ratified by Palestine that address HT (CRC, CEDAW art.6, UNTOC) practically implemented into the Palestinian domestic legal system?
- 5/ Can Palestinian NGOs and Human Rights Organisations assist and be supportive of the implementation as they are generally familiar with international legal instruments and existing UN human rights mechanisms?
- 6/ What is the role of the Independent Commission for Human Rights in promoting the implementation of human rights instruments and regarding HT which constitute serious violations of human rights?
- 7/ When do you feel it is timely for the State of Palestine to ratify the Palermo Protocol which is the main legal instrument addressing HT and attached to the UNTOC (UN Convention against Transnational Crimes) already ratified in January 2015?
- 8/ What are the national legal recourses available against the various HT practices?
- 9/ On the basis of its various treaty commitments, is Palestine familiar with existing UN mechanisms and special procedures (reporting on the State's human rights practices, recourse and complaints)?
- 10/ Could the HT topic as it is raised by the UNSC as a phenomenon to address, be a common agenda for Palestinian civil society (NGOs, Government department, HR institutions) and at least, lead to cooperation from different bodies of Palestinian civil society and international organisations?
- 11/ What do you think are the top 3 reasons/challenges why HT in all its forms is not being addressed in Palestine (Gaza, East Jerusalem and the West Bank)?

12/ Can you foresee that Palestine would enact anti-trafficking laws as a part of the Penal Code or Criminal Code or as separate comprehensive legislation?

Questions to law enforcement personnel

A. Introduction

The world community, more than ever, faces the internationalisation of criminal activities moving at high speed in part through adopting new and complex technologies. Human Trafficking (HT) is linked to the international displacement of individuals affected by increasing occurrence of fragile and conflict situations, vulnerability to human rights violations and the ancillary risks associated with HT practices. In this context, the role of law enforcement is crucial to address organised crime activities driving HT and related human exploitation, terrorism activities and extremist groups using sexual violence to profit, bargain and threat to international peace and security. However, the research highlights that law enforcement and criminal justice response complements other approaches of the HT legal framework.

At a global level, the UN Security Council in a recent resolution of 20 December 2016, has reasserted that HT is “exacerbated by conflict and foster insecurity and instability”. Many countries are addressing threats from HT through updating anti-trafficking legislation and law enforcement activities. Common legislative frameworks and security policies are being developed and implemented at an international and regional level. With regard to fragile countries and affected situations, the volatile contexts such as Palestine, with often complete breakdown of political and governmental structures such as in Afghanistan, constitute challenges to practically address HT. Hence, based on these observations, the interview focuses on the role your agency/ institution/organisation has undertaken to combat HT adequately and effectively including in complex contexts described above.

B. Questions to introduce the participant:

1/What made you work on the topic of HT?

2/What are your title/position/ task in organisation/agency/government department/ other?

C. General introduction questions and mandate

4/ What are the current priorities for your organisation/agency/government department/ other/ regarding HT?

5/ Do you think the external perception of your organisation/agency/government department/ other/ is that you have a key role in combatting HT?

6/ Has an HT Unit been specifically created?

Legal questions

1/ Does your organisation/agency/government department/other focus on a specific aspect of the HT legal definition?

2/ Do you feel that the legal definition is comprehensive? Do you feel that there are gaps in the definition of exploitative practices that ought to be addressed?

3/ What are your views regarding including “forced marriage” and “early marriage” as additional HT practices?

4/ There is currently a focus on ‘forced labour exploitation’ as this element of HT had previously a low profile. Bearing this in mind, has this exploitative practice become a focus for your organisation/government?

4/ Do you believe that the global HT agenda and specifically the criminal justice response and process, fully support a human-rights based approach towards victims?

5/ Do you feel that in relation to HT, your organisation/agency/ government department/other/ adopts a human-rights based approach in its law enforcement strategy and responses?

6/ Do you feel that law enforcement officials in general receive adequate training in victim’s identification?

8/ Do you personally interview victims of HT during your police operations?

Interpol Questions

10/ On the Interpol website, it is written: "We work to prevent and investigate a wide range of crimes" (There are 19 crimes areas listed among which is HT). In relation to HT,

- a. how does Interpol materialise the prevention of HT, specifically?
- b. How does Interpol prioritise activities?

11/ Do you feel that the support, training, and awareness, given to member states and other law enforcement agencies give you a sense of increasing effectiveness?

12/ Is there a branch within the HT Unit of Interpol devoted to strategy/ research/analysis of law enforcement operations and responses?

- a. Is there a focus person for that?
- b. What are the resources allocated for that?
- c. And what are your views on this?

D. Strategic questions

1/ Is your organisation registering (as quantitative evidence) increases of specific HT practices?

2/ Does your organisation/agency/government department/ other make a difference in combatting HT? Can you give me specific examples of this?

4/ Where do the role and responsibility of your organisation end after its operations?

5/ Does your organisation liaise with other agencies regarding victims, following police interventions?

E. Policy questions

- 1/ Do you feel that the current situations of forced migration, the influx of asylum-seekers make the tasks of law enforcement more complex? In what way?
- 2/ What impact has the increased number of conflict situations in the world in recent years had on your organisation's work regarding HT? Practically speaking, what have you been asked to do?
- 3/ How does your organisation/agency/government department/ other intervene in fragile and conflict affected situations? What are the main features of the interventions in such settings?
- 4/ What prevent you from achieving your objectives in these settings?

F. Political economy approach questions – Institutions, incentives, power relations, agency.

- 1/ Which institutions/agencies/organisations/government departments/ are you working with regarding your advocacy and training activities?
- 2/ How effective is your cooperation with other agencies/institutions and governments?
 - a. How is this cooperation manifested?
 - b. How do you measure the success of your cooperation?
- 3/ However, do you feel that the effectiveness of your work can be affected by overlapping mandates with other agencies and other institutions?
 - a. How is your work affected and possibly duplicated?
 - b. With which specific agencies/organisations/others are you most likely overlapping?
 - c. What area would you improve regarding this cooperation?
- 4/ Does your high level of confidentiality create an obstacle to close collaboration with other Governments, international institutions or NGOs?

5/ Because of the nature of your tasks: do you think that both the high degree of confidentiality and the criminal justice response can intimidate and overwhelm NGOs and other agencies, from seeking cooperation?

6/ Do you feel that victims wishing to approach NGOs would retract knowing that these NGOs work in close contact with your organisation/ government department/other/ and therefore would fear to speak and seek help?

7/ Would your organisation/agency/government department/ benefit from the academic perspective to strengthen the expertise of law enforcement personnel?

G. Regional/country specific questions

1/ What is your understanding of HT in the Middle East?

2/ Can you reflect on the fact there are 4 regional offices of Interpol in Africa but none in the Middle East and North Africa (MENA)? Why is this?

3/ Would it be important to you that there be an Interpol presence through a regional office in the Middle East?

4/ Do you feel such regional presence would be a great support to the population at risk at this moment in time because of conflict affected situations and volatile regimes?

5/ Specifically are you aware of occurrence of HT in Palestine? Considering reported facts of HT in areas surrounding Palestine?

6/ Do you feel Palestine would benefit from being a member of Interpol , regarding the building of an HT legal framework and the possibility to develop international cooperation to combat HT?

7/ How would your organisation/agency/government department/ other be able to support Palestine's initiatives in the building of its anti-trafficking agenda? Besides law enforcement training?

8/ Does your organisation/agency/government department/ other/ have already specific programmes on the topic of HT and related exploitative practices in Palestine?

9/ What would prevent your organisation/agency/government department/ other/ to do so?

H. Improving organisation/agency/government department/ other/ support to combatting HT and conclusion

- 1/ Please give me one example of success in HT in recent years?
- 2/ If you were heading your organisation/agency/government department/ other/ what would you change or consolidate regarding your HT agenda? What would be your priority?
- 4/ Can you imagine for instance a slogan, a picture or anything you feel would represent adequately your organisation/agency/government department/ other/ action?
- 5/ Is there anything you would like to add and suggest at the end of this interview?

Questions for the FGD May 2017

Question 1

The understanding of the definition of HT

- How is HT perceived in Palestine and how is it described?
- Is it understood, if not why?
- Do we know the extent of HT in the Occupied Palestine Territories?

Question 2

Palestine has acceded the Palermo Protocol on 29 December 2017. What are the necessary steps to undertake, regarding the implementation of the Trafficking Protocol?

- What would be the legislative priorities?
- What, and how do you think your contribution could be to the implementation process.

- What impact can this legal instrument have on your current human rights agenda?

Question 3

What would be the obstacles and challenges to addressing HT?

What are the incentives and disincentives to tackling HT in Palestine in terms of legal and institutional reforms?

What are the main implementation challenges for the State of Palestine?

This might include:

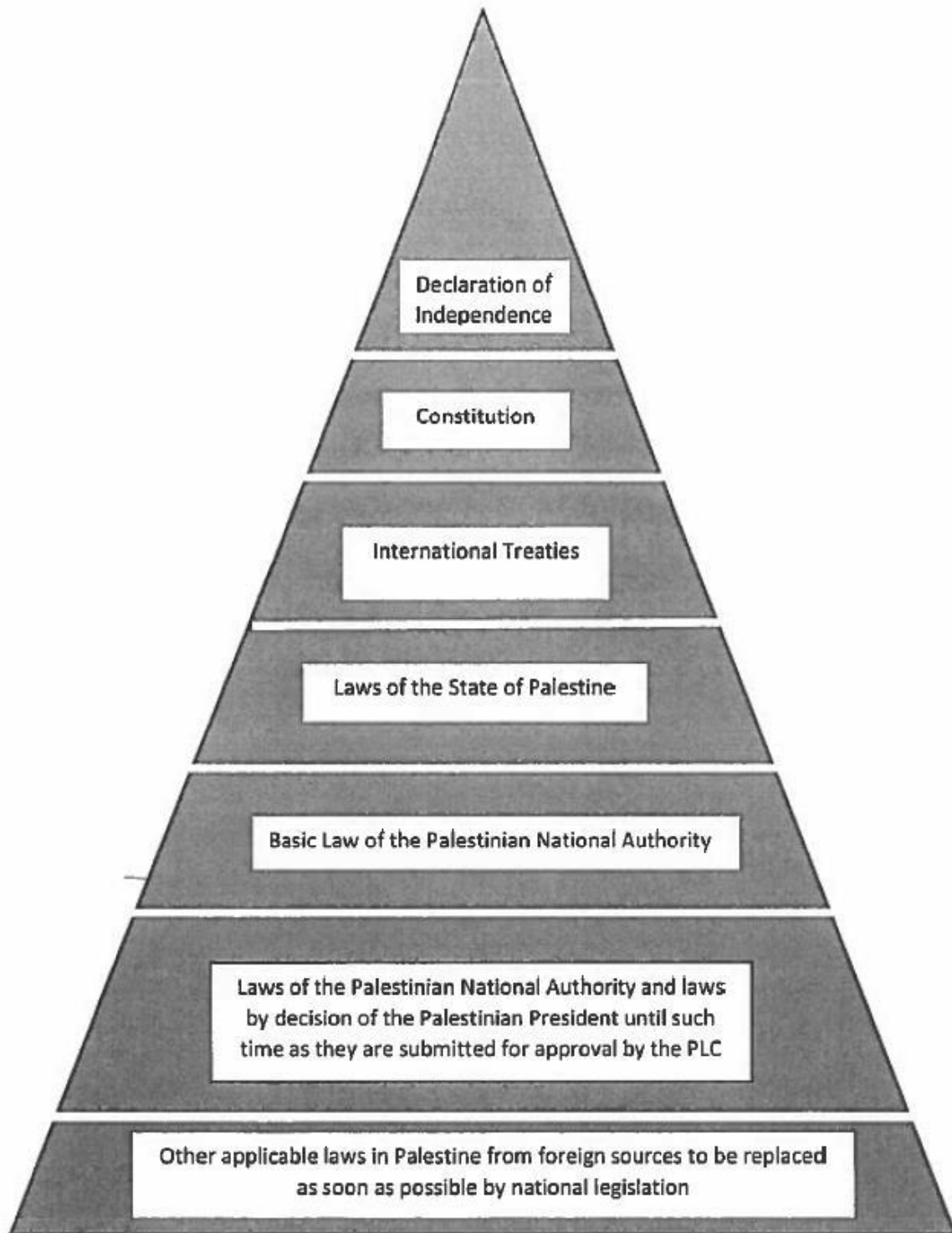
- The fragile context of Palestine
- The impact of the Israeli occupation
- The subsequent fragmentation of the Palestinian legal framework aggravated by the physical, political, and administrative separation of Gaza and the West Bank since 2007.
- Harmonisation of Palestine legal framework with international standards given the current undefined legal system.

Question 4

Are there opportunities for improved communications and cooperation working between stakeholders?

Would this require improved coordination between justice/security/civil society institutions as well as with CSOs, and international agencies?

Pyramid of norms in the State of Palestine



Hierarchy of norms in Palestine, current and envisioned. Distributed at a meeting on 17 December 2015 in Stockholm (Victor Persson, 'Palestine's Ratification of International Treaties - A Back Door to Independence?' (Master Thesis, 2016, University of Lund) 6.

Annex D Thematic Analysis: Participant Group – Palestinian NGOS/Civil society

Interviewees – SAWA (2 persons); National Society for Democracy Gaza; Al Haq (3 persons); Women’s Center for Legal Aid and Counselling (WCLA); Women Studies Centre; Palestinian Human Rights Organizations Council (PHROC).

Themes identified through interviews	General Comments on Theme	Specific Relevant Quotes
<p>Theme 1: HT is a taboo, sensitive and conflicting issue.</p>	<p>Need to be raised and inserted into awareness agendas. Need for deeper research.</p> <p>Certain issues in Palestinian society are difficult to research. Domestic and gender based violence are other examples.</p> <p>Attempt to set up a National Committee Combating HT in 2010 gathering MOI, MOFA, MOJ, MOH, MO Soc Affairs, intending to join Legislative Council, Palestinian Bar Association, journalists.</p> <p>To date the National Committee is dormant and not officialised.</p>	<p>‘Extremely difficult for officials and Senior persons to admit such phenomenon. The HT issue is considered as taboo within the Palestinian society’ (SAWA).</p> <p>‘Women would feel more confident to speak to CSOs rather than reporting to the authorities’ (National Society for Democracy – NGO in Gaza).</p> <p>‘ Taboo exists with regard sexual issues, but HT is not considered a taboo when it concerns children, forced labour and organ trafficking’ (Al Haq Legal researcher).</p> <p>‘HT is also a hidden practice so forced marriage ending up in forced prostitution may be possible especially in Gaza, but it is also shameful to speak about it’. (Al Haq Legal researcher).</p> <p>‘In Ramallah, there has been some involvement of officials (from the Fatah political party and from Security) in prostitution networks, which can be described as exploitative practices, but this issue was covered’</p>

		<p>(WCLAC Director).</p> <p>‘HT is an underground practice so there must be cases in Palestine, but they are not reported and not talked about’</p> <p>(Women Studies Centre Director).</p>
<p>Theme 2: Pb to identify and delimitates HT practices not considered as such by Palestinian society.</p>	<p>Difficulties for Palestinian people to admit there is HT in Palestine, which they perceive as shameful.</p> <p>A sample of NGOs based in Gaza are clearly not aware of the Palermo Protocol and the HT definition.</p> <p>Prominent NGOs in the West Bank (Al Haq) acknowledges the occurrence of forced labour in Israeli settlements against Palestinian workers.</p>	<p>‘The Palestinian community is not aware of the definition.’ People look at HT mainly as a sexual issue. (SAWA). (Freelance journalist).</p> <p>‘Palestine is concerned about its image internationally and if HT is reported, it will look bad on the State.’ (SAWA).</p> <p>‘One of the issue is identification of HT but also the fear and shame to report to the authorities’. (Director of National Society for Democracy and Law).</p> <p>‘I never heard of HT and cases in Palestine, and we should conduct a workshop to familiarise people with HT practices that must be present as well in Palestine’ (PHROC Coordinator).</p> <p>‘There is a need to involve the participation of civil society on the issue of HT’ (SAWA).</p>
<p>Theme 3: Recurrent practices of HT: forced and early marriage, forced prostitution, forced begging. Incidents</p>	<p>Especially in Gaza with an increase of domestic violence: physical and psychological as a consequence of the prolonged closure which strangle the economy.</p>	<p>‘HT practices probably differ in Gaza compared to France. There are a lot of incidents of forced-marriages, forced begging, forced prostitution organised by networks. Sometimes networks involve parents and wider members of families. (Director of National Society for Democracy and Law).</p>

<p>of organs trafficking.</p>		<p>‘Incidents of organs trafficked by Israel from Palestinian prisoners and martyrs, but there is no evidence’ (SAWA). ‘We cannot alert the international community against organs trafficking on Palestinian bodies held in Israel because there is a lack of evidence’. (Al Haq Legal researcher). ‘Allegations of forced marriage in Balata refugee camp in Nablus’ (Palestinian Freelance journalist).</p>
<p>Theme 4: HT is not a priority in the Palestinian context.</p>	<p>Other priorities:</p> <ul style="list-style-type: none"> - Isolation of Gaza from the West Bank -Collective punishment and restrictions of movements which constitute violations of IHL (ongoing legal debate on the applicability of the IV Geneva Convention) and basic human rights norms. -Reconstruction of Gaza. Humanitarian assistance and emergency for Gaza . - Issue regarding the expansion of Israeli settlement in the occupied Palestinian territory. 	<p>‘HT should be integrated with other human rights issues’ (SAWA). ‘Social media should be used to disseminate education regarding HT, but there are risks that this initiative may be countered and hacked’ (SAWA).</p> <p>‘Priority is that Palestine controls its own territory in order to bring security’ (Palestinian Freelance journalist)</p> <p>‘HT is not an issue addressed by our NGO as Al Haq focuses on house demolitions/killings of Palestinians/ expansion of Israeli settlements’.</p> <p>Legal argument on the occupation: ‘ Israel bypass art.49 (6) of the IV GC which addresses the question of transfer of its population into the occupied territory and uses art. 49 (1) to justify that the IV GC in not applicable under the notion of ‘security threat’. (Legal researcher AL Haq).</p> <p>‘Under international forum, HT comes as a top priority for women and children but in Palestine HT is not addressed’(WCLAC Director).</p>

	<ul style="list-style-type: none"> - Issue of house demolitions. - Political settlement on the question of the two State solution. 	<p>‘HT is not yet considered as a major issue in Palestine’.</p>
<p>Theme 5: PA conflicted with its legal system, impact on the domestic implementation of its international legal obligations regarding human rights and HT.</p> <p>Conflicting position regarding the PA political will to address and implement its human rights commitments and HT.</p>	<p>Exemplified by the issuance of decree-laws that undermine the influence and advocacies of Palestinian NGOs, Human Rights organisations who have a history of being a vibrant and active civil society, media, journalists. Further regulations restrain Palestinian NGOs from receiving direct funding from donors. This manifests an overall control on civil society and means to restrict freedom of expression.</p> <p>Conflicting position of the PA as they demonstrate through specific undertakings, some political will to address its human rights commitments.</p> <p>The relationship between Hamas and the PA continues to be tense and CSOs in Gaza</p>	<p>‘The family protection law is still on the president desk, whereas the Law on electronic crimes of July 2017 was immediately implemented’ (Director SAWA).</p> <p>‘Attempt from the PA to set up a National Committee on HT’.</p> <p>‘The PA know about their international legal obligations but are mostly concerned with the ongoing political situation’ (Al Haq Legal researcher).</p> <p>‘NGOs who monitor the implementation of human rights obligations are paralysed in their tasks as political issues are a priority and supersedes everything’ (Al Haq Legal researcher).</p> <p>‘Palestinian women’s organisations request the implementation of human rights conventions in the domestic legislation. One of the justification from the PA is that the PLC is not functioning which hinder the process of implementation. There is no political will.’ (Women’s Studies Centre Director).</p>

	request that both authorities comply with international law commitments and human rights standards.	
Theme 6: Occupation and conflict is a direct factor for human rights violations and HT practices occurring in Palestinian territory .	HT is occurring because of the closure and isolation especially in Gaza, although there is no evidence of such practices. Allegations of trafficking of organs by Israel on Palestinian prisoners.	‘Allegation of smuggling routes and criminal networks from Gaza to Egypt, Mauritania, Morocco and Spain. The cost is 6000 USD per person’ (Director National Society Democracy). ‘HT appears more in conflict contexts and HT could also happen in occupation contexts. In addition, Palestine does not control the movements of its people and goods, so the issue of HT is relevant in Palestine’ (WCLAC Director).
Theme 6 Lack of trust in the Palestinian Authorities	Lack of trust from NGOs generally as well as from the overall civil society.	‘People in Palestine lost faith in their leader’ (Palestinian Freelance journalist). ‘Young people have lost hope and faith in the PA who cannot protect them. 50% of Palestinians living in the West bank and Gaza are under 17 years of age’ (Director Al Haq). ‘Protection is the core role of the State’ (Director of Hal Haq). ‘The State of Palestine has so far not respected all its treaty obligations. Since the ratification of CAT there are even more cases of torture which demonstrates that the aim of ratification was not to combat and protect against human rights violations but to send a political message

		internationally. Implementation is non-existent' (Al Haq Legal researcher).
<p>Theme 7 Donors pursue their own agenda.</p> <p>Or Does donors agenda match the needs of civil society?</p> <p>Or Contribution of donors to address HT.</p>		<p>'NGOs seeks sexy topics to please donors but actually do not make many changes on the ground' (Palestinian Freelance journalist).</p> <p>'Donors are not building long term projects and do not operate with continuity' (SAWA Director)..</p> <p>'Donors supporting NGOs in Palestine do not focus on HT. When SAWA after the pilot-report on HT in 2008 tried to seek funding but overall resources allocated to Palestine have reduced and HT is not considered as a priority topic, even if UN women was supporting such study'.</p> <p>'Donors can help but there is a need to have the direct support from the PA who do not seem to express the political will to promote women's agenda as a priority' (Women Studies Centre Director).</p> <p>'A gender audit was commanded by the Ministry of Women and supported by donors, but none of the recommendations were followed' (Women Studies Centre Director).</p> <p>'There are some divisions within women's organisations in their agendas as most of them face pressure regarding their funding, so they are inclined to follow donors agenda rather than the needs of civil society' (Women Studies Centre Director).</p>

<p>Theme 8 Contribution of NGOs to address HT.</p>	<p>Request by some NGOs to gather and discuss how to integrate the issue of HT. In particular in the agenda of Women's Organisations.</p> <p>Advocacy of NGOs against HT to the Government.</p>	<p>'Combating HT is not just about raising awareness but also pushing together for a protective legislation' (Women Studies Centre Director).</p> <p>'Ideas that civil society is represented by through NGOs who can find ways and tools to address HT to the government. For instance, if there are human and financial resources, we can propose awareness training to all parts of the Palestinian society on HT and the various practices present in Palestine such as forced marriage' (SAWA Director).</p>
<p>Theme 8 Contribution of the Palestinian Independent Commission for Human Rights.</p>		<p>'Along with NGOs, the support of the Palestinian Independent Commission for Human Rights is necessary to work on the HT issue'(Women Studies Centre Director).</p> <p>'The existence and the role of the PICHHR is ambiguous and not clear in its supportive position of NGOs and civil society as it is too closely related to the government' (SAWA Director).</p>

Table 9.2 Thematic Analysis participant group Palestinian Institutions

Interviewees: Ministry of Foreign Affairs (MoFA); Ministry of Social Development (MoSD); Palestinian Independent Commission for Human Rights (PICHR); Public Prosecution Office; Prosecutor for the Islamic Sharia Courts; Head of Gender Unit, Ministry of Interior; Ministry of Labour (MoL) (2 persons).

Themes identified through interviews	General Comments on Theme	Specific Relevant Quotes
<p>Theme 1 Harmonisation of the Palestinian legal system.</p>	<p>Composition of the Harmonisation Committee: MoFA, MoWA, MoSD, MoJ, MoE, MoI, MoF, MoL, MoC, Council of Ministers, Palestinian Independent Commission for Human Rights (PICHR), Palestinian Bar Association (PBA), Bureau for Legislation. Also work in cooperation with CSOs, and invitation of experts from the international community.</p>	<p>‘Steps are undertaken to harmonise the legislation thanks to the Harmonisation Committee created in 2017.’ (Legal Officer MoFA). ‘there will be no harmonisation of past foreign legislation, but the Harmonisation Committee will harmonise only domestic legislation in relation to international treaties’ (Legal Officer MoFA). ‘The priority is to work on the draft Penal Code, then the draft law to protect the family from violence’ (Legal Officer MoFA).</p> <p>‘The Harmonisation Committee recently set up did nothing so far. There were debates regarding the reform and harmonisation of the criminal codes from Ramallah and Gaza, but the government passes laws without informing the Committee’ (Director of the</p>

		Palestinian Independent Commission for Human Rights).
Theme 2 Debate regarding HT legislation.	Varying positions of Palestinian institutions on how to legislate regarding HT.	<p>'The MoFA is for a self-standing legislation on HT – There is a Committee on HT. Incidents of this nature are not registered under HT. As it stands, judges cannot refer to HT practices as it is not legally qualified' (Legal Officer MoFA).</p> <p>'We need laws in order to raise awareness against HT issues. There is, however, a closed mentality still which need to change' (Head of Woman and Gender Unit, Ministry of Social Development MoSD).</p> <p>'There is a section on HT in the draft penal code' (Family Protection Chief Prosecutor for the Palestinian Public Prosecution) 'We need a law against HT'.</p>
Theme 3 The issue of the implementation on Palestine human rights obligations.	Issues concerning the responsibility of implementation international legal obligation.	<p>'International treaties are not implemented' (Legal Officer MoFA). 'There are legitimate questions as to which State organ is in charge of implementation?' (Legal Officer MoFA).</p> <p>'We need a strong vision of how to implement the law against HT' (Judge, chief Prosecutor for the Sharia Courts).</p>

		<p>‘There is a decision for the PA not to join further international legal instruments as there is a need to address them domestically which the PA did not do yet. It is not just about ratifying international instruments but implementing them. Implementation is not going forward. The government is passing laws and attempt to pass laws that are against international human rights treaties. This shoes that the level of commitments with regard to implementation is questionable. The most recent example relates to the cybercrime law which had a disastrous effect on the freedom of expression and obviously contradicts basic human rights standards.’ (Director of the Palestinian Independent Commission for Human Rights).</p>
<p>Theme 4 Palestinian legal system and the position of international law.</p>	<p>Debate within Palestinian institutions and civil society based on the interpretative decision of the Constitutional Court (CC) N.5/2017.</p>	<p>‘To faster the process and the work on harmonisation and how to implement international treaties, the CC issued decisions on that matter.’ In principle, the President cannot ratify some treaties (related to peace, border, trade, HR, and liberties) without the approval of the legislative power. However, because the legislative power is not working, the President can issue decree that have power of law, can ratify treaties but need to</p>

		<p>present them to the legislative power' (Legal Officer MoFA).</p> <p>'International treaties take precedence over domestic law and will be incorporated into the national legislation' (Legal Officer MoFA).</p> <p>'Palestine follows the dualist system' (Legal Officer MoFA).</p>
<p>Theme 5 Understanding the HT definition.</p>	<p>No familiarity of the HT definition within various Ministries and other Palestinian institutions.</p> <p>Perception of HT as a taboo.</p>	<p>'Actually, HT definition seems different according to contexts, so could you please provide the definition?' (Head of Woman and Gender Unit, Ministry of Social Development MoSD).</p> <p>'Our mandate in the MoSD is to protect women and children. Our interventions relate to social and labour abuses. The ones that face most pb are marginalised groups. HT targets these individuals. Also, men can be victims of HT' (Head of Woman and Gender Unit, Ministry of Social Development MoSD).</p> <p>'In Palestine situation and context, how do we define HT? So far, there was no law identifying HT. In the Ministry and with other Ministries we were discussing that a law should identify and regulate the issue of HT. Especially the issue of forced prostitution'</p>

		<p>(Head of Woman and Gender Unit, Ministry of Social Development MoSD).</p> <p>'Women's exploitation is still perceived as taboo' (Head of Woman and Gender Unit, Ministry of Social Development MoSD).</p> <p>'We have to confess that we have forced-prostitution practices that can reach HT. Palestinians are not special. We have all of that, as the rest of the world'.</p> <p>'We are aware of exploitation through forced-begging, forced-prostitution using tunnels in Rafah (Gaza)' (Family Protection Chief Prosecutor for the Palestinian Public Prosecution) .</p> <p>'One of the problem is that there are no statistics on HT' (Family Protection Chief Prosecutor for the Palestinian Public Prosecution).</p> <p>'Palestine still does not have a clear picture about the HT topic, because there are many faces of HT. There are examples of forced and underaged marriage of girls from Hebron who are sent to marry Bedouin men in Israel. These girls are sent back and re-married often with the complicity of sheikhs. It is not yet clear to confirm a pattern of this practice</p>
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		<p>as Sharia courts do not have an accurate picture' (Judge, Chief Prosecutor for the Sharia Courts).</p> <p>'A lot of professionals in the judiciary system think that the question of HT is not clear to them. The definition is an issue as we do not understand what elements constitute HT' (Judge, Chief Prosecutor for the Sharia Courts).</p> <p>'The priority should be to bring awareness. Set up a course on the Palermo Protocol to discuss the definition among judges in order to refer to the Convention. We need these steps in parallel of drafting new laws' (Judge, Chief Prosecutor for the Sharia Courts).</p> <p>'Back in 2008, I was fighting for the HT practice to be recognised. I contributed to a presentation on HT with SAWA. At the time the focus was on trafficking of martyr's organs. With the outcome of the legislation on HT, such practices affecting Palestine will be legally qualified' (Head of Gender Unit, Ministry of Interior).</p> <p>'Palestinians suffer a lot from so many issues that trafficking is seen as a new</p>
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		<p>concept' (Director General of Employment, Ministry of Labour).</p> <p>'There is no usage of HT in the vocabulary. There are some practices that could be characterised as HT but are not framed as such: Issues of forced-prostitution. Social workers working in shelters can confirm. There are also issues of forced-begging on children. In South Hebron, young women are forced to marry (marriages non-officially registered) Bedouins and people from Israel from the Negev area. Because of the occupation and restrictions of movements, there are no issues of exploitation of foreign women housemaid.' (Director of the Palestinian Independent Commission for Human Rights). 'HT is not a taboo. Homosexuality and LGBT are taboos' (Director of the Palestinian Independent Commission for Human Rights).</p> <p>'HT is not a phenomenon that requires to be a priority. May be this can change because of the ongoing restrictions imposed' (Director of the Palestinian Independent Commission for Human Rights).</p>
Theme 6 The context of the protracted	'Human rights violations in the form of violence are pervasive throughout the	'High poverty rate, significant unemployment, background of conflict. All this is conducive

<p>conflict and occupation experienced by Palestine contributes to HT.</p>	<p>OPT as a result of the protracted conflict and occupation’.</p> <p>‘Women experience violence as a direct and indirect effect of security measures, as well as violence within the family’.</p>	<p>for the presence of HT. The MoSD interventions are affected because of the division between the West Bank and Gaza, as well as the different areas within the West Bank which enable human exploitation to grow’ (Head of Woman and Gender Unit, Ministry of Social Development MoSD)</p> <p>‘Exploitation is mixed with forced-prostitution, the occupation context and the political situation. In areas close to Israel, there are exploitative practices through marriages. Examples relate to families selling girls in the South of Hebron to people in Israel. Fathers can force divorces and marry their daughters again. As Palestinians, we cannot go and criminalise perpetrators in Israel and often these marriages are not legally registered (under 15 yo, it is forbidden to register marriages). The marriage contract is usually arranged with the complicity of Sheikhs. The girls have no rights in Israel and their exploitation continue’ (Head of Woman and Gender Unit, Ministry of Social Development MoSD).</p> <p>‘The many forms of human exploitation and illegal movements are linked to the main issue: How can the protection of the PA be</p>
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		<p>effective if they do not control borders and the whole Palestinian territory? This is an issue of law enforcement of courts decisions. For example, a husband flees to area C, the PA does not have jurisdiction to enforce its courts decisions' (Family Protection Chief Prosecutor for the Palestinian Public Prosecution).</p> <p>'On the basis of conflict, many family issues will lead to HT for survival means. HT is a result of the prolonged occupation, of the protracted conflict, of the internal political situation and economic difficulties. HT is a consequence in our situation, it is not a reason' (Judge, Chief Prosecutor for the Sharia Courts).</p> <p>'Human exploitation must be different for other countries as most of them are affected by the lack of freedom of movement, and also the fact that Palestine has no power and control over its borders' (Director General of Employment, Ministry of Labour).</p> <p>'There are some allegations of forced-prostitution organised through Israel' (Director General of Employment, Ministry of Labour)</p>
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		<p>'HT is important, but the agenda of Palestine is filled with basic issues: death penalty in Gaza, civilians tried by military courts, prison without trial, court decisions that are not enforced, criminal law which does not incriminate torture' (Director of the Palestinian Independent Commission for Human Rights).</p>
<p>Theme 7 Actions undertaken against violence against women and against HT.</p>	<ul style="list-style-type: none"> - Decision of the Council of Ministers in 2008 to form a national committee to combat violence against women. -Presidential Decree No. 19 of 2009 on the ratification of the Convention on the Elimination of All Forms of Discrimination against Women. - 25 January 2011 Adoption of the National Strategy to Combat Violence against Women for the years 2011-2019. -There are five sheltering services in the West Bank and the Gaza strip: Mehwar Centre, Nablus Safe Home, the Jericho shelter in the West Bank, the Hayat Centre and Aman Centre (Safe Home) in Gaza. In East Jerusalem there are no sheltering services. These centres 	<p>'The MoSD is responsible for monitoring shelters and ensuring that they meet the minimum requirements' (Head of Woman and Gender Unit, Ministry of Social Development MoSD) 'In Gaza the Ministry of Social Affairs supervises the Safe Home but not the Hayat Centre' (Head of Woman and Gender Unit, Ministry of Social Development MoSD).</p> <p>'There is an emergency shelter set up in 2017 and supervised by the Palestinian Civil Police. The centre rescues women and juveniles victims of violence not more than 7 days' (Head of Woman and Gender Unit, Ministry of Social Development MoSD).</p> <p>'Since 2008, Family protection units (FPU) in the Palestinian Civilian Police have been set up. These FPUs collaborate with the Public Prosecution services with gender experts. Since 2014, 15 specialised Public Prosecutors were assigned by the Attorney</p>

	<p>provide safety and social as well as legal protection of women victims of violence. These shelters are part of the National Strategy to Combat Violence Against Women.</p>	<p>General to investigate cases of violence against women in different district offices. In 2016, the new specialised public prosecution on protecting family from violence. These specialised prosecution services can handle sexual crimes. Another objective of the specialised prosecution services is to become familiar with referring to international human rights conventions such as the CEDAW’.</p> <p>‘It is also important to understand the Palermo Protocol that Palestine ratified’ (Family Protection Chief Prosecutor for the Palestinian Public Prosecution).</p> <p>‘I was asked to participate to the Committee drafting a law on HT’ (Head of Woman and Gender Unit, Ministry of Social Development MoSD).</p> <p>‘It seems that women involved into forced-prostitution cannot be accepted in shelters for protection, as they risk ‘contaminating other women sheltered’ (Family Protection Chief Prosecutor for the Palestinian Public Prosecution).</p> <p>‘What is important in our work is to facilitate for victims of violence access to justice’</p>
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		<p>(Family Protection Chief Prosecutor for the Palestinian Public Prosecution).</p> <p>‘The judiciary should be involved with the existing committee in the drafting of the HT legislation. Also, that is way to be familiar with human rights conventions and what is going on with the rest of the world in this field.’ (Judge, Chief Prosecutor for the Sharia Courts).</p> <p>‘We will have a special/separate law for HT. There are some articles related to HT in the draft penal code and in the anti-corruption law – issues with money laundering are linked to HT’ (Judge, Chief Prosecutor for the Sharia Courts).</p> <p>‘The Jordanian Penal Code and the Egyptian Penal Code are too old and new legislations are necessary to address new forms of exploitation’. At the moment, there are no official statistics on HT, because the law does not exist and people do not know what to look for’ (Head of Gender Unit, Ministry of Interior).</p> <p>‘The national referral system for women victims of violence provides protection for victims of gender based violence and can</p>
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		<p>provide protection for HT victims’ (Head of Gender Unit, Ministry of Interior).</p> <p>‘Following the promulgation of the law combating HT, gathering of statistics will be performed by the Palestinian Central Bureau for Statistics (PCBS)’ (Head of Gender Unit, Ministry of Interior).</p> <p>‘Practically, the first step is to be part fully of the international community through Palestine’s international legal commitments’ (Director General of Employment, Ministry of Labour).</p> <p>‘PICHHR would not push for a law against HT at this moment in time (interview in August 2017), but if the government issues a draft law, PICHHR would support it’ (Director of the Palestinian Independent Commission for Human Rights).</p>
<p>Theme 8 Interventions of donors.</p>		<p>‘No one can deny the role of the international community and the role of UN agencies to bring human rights principles to Palestine and to want to develop programs in a short space of time. Even if the ratification of so many international conventions make the wheel goes faster – As recipients we feel there are</p>

		<p>overlapping projects – The Palestinian government began to develop strategies and policies in our work, and we have reached a phase where we can say yes or no. At least the MoSD. We know exactly what we need.’ (Head of Woman and Gender Unit, Ministry of Social Development MoSD).</p> <p>‘We need help from academic people and other international institutions such as UN women, UNICEF, but not to review of work. We need our voice.’ (Head of Woman and Gender Unit, Ministry of Social Development MoSD).</p> <p>‘UNODC is not part of the Committee but gives advice to the Head of the National Committee against HT’ (Head of Gender Unit, Ministry of Interior).</p>
<p>Cooperation between governmental institutions, cooperation with civil society organisations.</p>		<p>‘We need to cooperate with different bodies despite our different rules and functions. The main challenge is the cooperation between sharia courts and regular courts. It would reflect a complete justice system for women for instance and would help building a strong rule of law’ (Judge, Chief Prosecutor for the Sharia Courts).</p>

		<p>'We also need cooperation with Israeli judges, with the Chief justice and Governor of Hebron.' (Judge, Chief Prosecutor for the Sharia Courts).</p> <p>'There is a need for cooperation with the MoSD, the police and set up a special judiciary committee.' (Judge, Chief Prosecutor for the Sharia Courts).</p> <p>'The issue of cooperation for us in Palestine is important because we have many judicial systems. Also, this includes cooperation with sharia courts in Gaza and East Jerusalem. We need to check that judgements are correct and are implemented in Gaza in a proper way.' (Judge, Chief Prosecutor for the Sharia Courts).</p> <p>'The national committee against HT was set up in February 2018. There is another special committee more specialised in the drafting of the law. It is composed of legal advisors from different Ministries. NGOs such as Al Haq, Al Muntada (Women platform), MoJ, MoFA, MoL, MoI, MoWA, MoSD, The Palestinian Independent Commission for Human Rights, the Cabinet of the President, Committee of Prefects(?), PCBS. The next step is to adopt</p>
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		<p>a national plan against HT' (Head of Gender Unit, Ministry of Interior).</p> <p>'There seems to be a political will to fortify the cooperation between NGOs and the government. The role of NGOs is vital in ensuring the link between the West Bank, Gaza and East Jerusalem in their reporting of human rights violations.' (Head of Gender Unit, Ministry of Interior).</p>
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Thematic Analysis: Participant – Academic

Interviewee: Professor of Law, University of Birzeit

Themes identified through interviews	General Comments on Theme	Specific Relevant Quotes
Theme 1 No trust in the PA: The executive affects the necessary equilibrium of separation of powers, which impact on the coherence of the rule of law.	Absence of a functioning legislative body: paralysis of a democratic law-making process. Consequence no change in domestic legislation in accordance with international standards and in conformity with international law and to ensure respect for people’s human rights and fundamental freedoms.	‘We are pushing towards enhancing an authoritarian regime where there is no transparent and participatory process of law-making. The executive controls the population and all aspects of their lives, through decree-laws ‘. ‘There is a risk of civil disobedience, as people do not consider decree-laws as a source of laws’
Theme 2 Constitutional Court at the mercy of the Executive.	The current functioning of the CC as an extension of the executive (confuse by its decisions taken) can only delay the decision of Palestine legal system and the hierarchy of its legal norms.	‘With regard to the choice of the legal system, nothing changed since August 2018. The way the CC was established was to help the executive to get away from the many decree-laws taken in the absence of the Palestinian Legislative Council’.

<p>Theme 3 Lack of legal harmonisation, unification of the Palestinian legal system.</p>	<p>Political division in 2007 with Hamas, is not conducive to the achievement of legal harmonisation of Palestine as one entity. Separate administration and legal system in Gaza. International treaties commitment undertaken by the PA do not apply to Gaza.</p>	<p>'Legal harmonisation as presented by Oslo, is over, but it does not mean that unity is over for Palestine. Unity can live and co-exist with different/separate legal systems'.</p>
<p>Context is everything: Occupation.</p>	<p>Responsibility of foreign powers in the current fate of Palestine.</p>	<p>'For Palestinians, human rights are part of international law, and part of a system that has been partly responsible for what took place in Palestine, so we as Palestinians cannot just separate our understanding of human rights and the reality of what happened with foreign occupation'.</p> <p>'Give us a break. At the time of drafting human rights treaties, France was involved with Algeria. Let us take our time to digest what is happening to us... We would be the most enthusiastic human rights defenders.</p>
<p>HT is related to the issue of borders and control by Israel.</p>	<p>Security and law enforcement are ensured mostly by Israel in certain</p>	<p>Israel controls the population and borders. Most issues related to HT would depend on the type of</p>

	areas where the PA does not have any control.	regulations and policies Israel put in place. In that sense we do not control people's movements.
Legal gap in addressing HT so far as a criminal issue.		'The issue of implementation means that the Prosecutor's Office would deal with issues and label crimes as HT practices which may prove difficult given the current legal system'.
Existence of HT in Palestine, awareness that it is a taboo concept.		'The absence of data is not enough in itself to deny the phenomenon.' In Gaza there may be reluctance to admit the existence of HT practices'
Donors community often responds to their own agenda.		'We do not want to act as tools and for the donor community who spend the money allocated, pay us to undergo a drafting process which then will be over for them'.

Thematic Analysis: Participant Group – International Organisations

Interviewees: Save the Children Fund (SCF); Heinrich Foundation International; UNODC; UNODC Programme Coordinator Regional Office for the Middle East and North Africa (UNODC) (2 persons); The legal office of the United Nations Relief and Works Agency for Palestine Refugees (UNRWA) (2 persons); International Labour Organisation (ILO); UN Women Gender Expert; Rule of Law Adviser for the United Nations Development Programme (UNDP); Chief Technical Specialist for the United Nations Development Programme (UNDP); Legal Officer for the Office of the High Commissioner for Human Rights (OHCHR).

Themes identified through interviews	General Comments on Theme/ Reflections and field notes that contain the whole interview context	Specific Relevant Quotes
<p>Theme 1 Meaning of HT – Sub themes:</p> <ul style="list-style-type: none"> a. Misunderstand the definition of HT. b. Understand the definition of HT. c. Research is paramount to overcome misunderstanding of the HT crime and violations of human rights it entails. 	<p>Overall lack of knowledge of the HT definition. No one knows what to look for when we speak about HT practices or mainly equate HT with sex.</p>	<p>‘HT is not a familiar concept in the Palestine perception’ (Save the Children Fund, Technical Adviser). ‘Problem of understanding the HT definition. There is also a problem of identification and to delimitate situation for foreigners or Palestinians who come to Jordan for work and end up being trafficked. Many come legally but how and by who have they been recruited?’ (Director Heinrich Foundation International). ‘Forced prostitution is a big problem in Gaza. Some parents sell their daughters out of poverty, and they can</p>

		<p>be sold several times' (Heinrich Foundation International Director). 'The lack of research, and data on HT makes the phenomenon difficult to be identified on the ground and to undertake adequate protective measures against it' (SAWA Director). UN Women reported forced labour practices in the West bank, occurrence forced marriage forced prostitution – Does all this amount to HT?' (UNODC, Evaluation Project manager).</p> <p>'We do not have the expertise and tools to identify HT practices. We do not have a systematic data on HT yet, but we are progressing towards including HT'. (UNRWA Legal Adviser). 'We would need more practical guidance to understand the Palermo Protocol, we are happy to engage with you further- We are interested in this development' (UNRWA Director and Principal Legal Officer). 'HT is a new topic. Palestine is a patriarchal and male dominating society, so women's issues are slow to advance. However, Palestinian women's organisations (WCLAC) have pushed for the draft of the family law.' (UN Women Gender Expert for the</p>
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		<p>Ministry of Interior/Civil Police/ Family Protection Unit at the Prosecutor's Office).</p> <p>'Rumours of traffic through the tunnels in Rafah in the Gaza Strip.' (UN Women Gender Expert for the Ministry of Interior/Civil Police/ Family Protection Unit at the Prosecutor's Office).</p> <p>'The lack of figures does not justify no action. It may be also that social norms do not encourage to talk about HT and also encourage the government to insert HT in the agenda as of their priority' (OHCHR Legal Officer).</p> <p>'HT is a taboo. Palestine would hide behind the response: we do not have this problem in Palestine, but in fact people cannot name or recognise these practices' (UNDP Rule of Law Adviser). 'Allegations of foreign women (from Philippines) brought to Palestine to work but they have no document and are invisible and receive no protection'. (UNDP Rule of Law Adviser).</p> <p>Allegations of organs trafficking through the Israeli Forensic Institute Abu Kbir retaining organs from</p>
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		<p>Palestinians martyrs. Bodies are usually returned to the Palestinian families with specific scars.’ (UNDP Rule of Law Adviser).</p> <p>‘Our work in ILO Palestine reports on the situation of workers in the occupied Arab territories. There is not yet information on trafficking per say, plus a clear coverage of situation of workers in the Israeli settlements and in Israel.’ (ILO Representative).</p>
<p>Theme 2 fragile context parameters that affect addressing HT – Sub themes:</p> <ul style="list-style-type: none"> a. Occupation by Israel and the resulting lack of control by the PA of its entire territory. b. Recourse to Islamic religious considerations to counter the full application of international human rights standards. c. Priority: Focus on humanitarian assistance in Gaza. d. Weak and dysfunctional legal system and 	<p>Lack of control on security and public order, and there is no effective cooperation between Israeli and Palestinian law enforcement. Crimes of different kinds (including HT) can be committed in some parts of the West bank with the author returning to area C or Jerusalem to avoid police investigation.</p>	<p>‘The PNA lacks effective control on the whole Palestinian territory, this makes it difficult to for the authorities to investigate and prosecute crimes such as HT committed in certain areas such as C, under Israeli control’ (Save the Children Fund, Technical Adviser). ‘We consider that what comes into question are the role, the responsibility and capacity of Palestine itself regarding issues of protection which includes exploitative practices.’ (UNRWA Legal Adviser).</p> <p>UNDP through specific projects such as Sawasya I worked on the harmonisation of the Palestinian legislation which is linked with the</p>

<p>legislative process aggravated by the geographical and institutional fragmentation of Palestine.</p>		<p>reconciliation process. We worked with the University of Birzeit. Nothing moved much so we worked on the harmonisation with international human rights standards in the Palestinian legislation' (UNDP Chief Technical Specialist).</p> <p>'The reality of HT is under the umbrella of the current political situation and ongoing occupation by Israel' (UNDP Rule of Law adviser).</p>
<p>Theme 3 Involvement of donors in the HT agenda to promote the implementation of the overall HR legal framework, which includes HT. Sub theme: - Effective engagement of Palestine into reporting and engaging with international human rights mechanisms. - Implementing human rights commitments and the Palermo Protocol enable the State of Palestine to assess the situation on the ground, based on data collection and analysis from CSOs, for legislative and policy review and changes.</p>	<p>Which international agencies/donors are involved in addressing HT?</p> <p>Obstacles: Involvement of donors raise the issue of effective cooperation with the Palestinian authorities. Who decide what? And how? overlapping of international support mandates and projects may affect effective implementation.</p> <p>For instance, the Heinrich Böll Stiftung established the Palestine & Jordan Office in Ramallah, working in close partnership with more than 20 local partner organisations in Gaza,</p>	<p>'UNODC currently does not address HT in Palestine through a specific programme despite the fact that the agency is the guardian of the UNTOC and the Palermo Protocol and also the main agency responsible to assist States in their efforts to implement the Protocol' (UNODC Evaluation Project manager). UNODC Palestine covers the Anti-HT Sub Cluster established as part of the Global Protection Cluster, initiative following up the UN Security Council resolution 2331 on trafficking situation in conflict' (UNODC Programme Coordinator Regional Office for the Middle East and North Africa). 'We can start anti-trafficking work in Palestine</p>

	<p>East Jerusalem, the West Bank and Jordan.</p> <p>UN agencies involvement in the reporting process to various UN human rights mechanisms, cooperation for instance with some NGOs. Prominent role of the Ministry of Foreign Affairs.</p>	<p>once we have dedicated project funding for this purpose, which is currently not the case, however fundraising is ongoing. Palestinian practitioners have been included in many trainings delivered under the concluded Arab initiative to strengthen national capacities to combat HT and implemented together with the League of Arab States with the participation of all the State members' (UNODC Programme Coordinator Regional Office for the Middle East and North Africa.</p> <p>'A meeting was initiated by IOM/UNFPA/UNODC/ OHCHR to discuss the likelihood to address HT in Palestine. The outcome was that the language of HT reveals a lack of understanding in the definition bringing some confusion. As an example, HT is associated with the issue of collaboration with Israel'. (UNODC, Evaluation Project manager).</p> <p>'UNRWA did not identify or came across HT practices. UNRWA has a protection division, but HT has not been tracked systematically. We look mainly at issues in relation to migration issues, refugee flows and for instance</p>
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		<p>the impact of the conflict in Syria. We heard of sorts of HT around male forced prostitution coming from Palestine. So, we pick up signals that HT could be an issue' (UNRWA Director and Principal Legal Officer).</p> <p>'UNRWA can provide some protection, but the overall protection of Palestinian people should be undertaken by the Palestinian authorities. As for HT we are not the best agency to address the issue of HT. It is not to say we would not want to look at HT as such, but I think we would probably focus on the consequences of it. We need to prioritise, but we certainly want to make sure that we do not contribute to any kind of human rights violations' (UNRWA Director and Principal Legal Officer).</p> <p>'Cooperation of SCF with UNRWA working on protection issues: such as child labour, sexual violence and HT would be an important topic to raise and contextualise in the situation of Palestine' (Save the Children Fund, Technical Adviser).</p>
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		<p>'Cooperation with other NGOs to aims to raise awareness on the difficult living and working conditions of migrant workers in Jordan, with a focus female domestic workers, cases of violations of the rights of migrant workers in Jordan and the issue of human trafficking in the region' (Heinrich Foundation International Director).</p> <p>'International support is a crowded field. UN agencies have joint programmes. Cynical persons would say these actors have overlapping mandates and projects, and national counterparts could take advantage of that in the sense they can shop around for support. However, CSOs know what they are doing and where they can get support. National counterparts could play a stronger role in obliging donors to coordinate.</p> <p>'UNDP is working with 33 CSOs carefully selected. On the ground it is difficult to support them all with the delivery of their projects. There are problems for donors based on political reasons to fund CSOs in Gaza' (UNDP Technical Adviser).</p>
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		<p>‘ HT is not under the scope of EuPol Copps activities. The focus is on technical aspects of international police cooperation and police institutions’. EUPOL Copps – Legal and Administration Expert).</p> <p>‘The OHCHR is involved in the implementation process of Palestine numerous human rights international commitments. OHCHR supports for instance the PA in the reporting process before the UN Human Rights mechanisms. For instance, pre-sessional meeting to discuss list of issues for the reporting to the CEDAW Committee’(OHCHR Legal Officer).</p>
<p>Theme 4 Obstacles to the implementation of HT in the domestic legal system.</p>	<p>Issues related to:</p> <ul style="list-style-type: none"> - a disfunction in the Palestinian legal system and the legal process: i.e., absence of the PLC, confusion of the role in internal legal harmonisation and with international standards - undefined legal status of international conventions in the Palestinian legal system. -political will -financial capacity - overlapping of international support. 	<p>‘Even if the PLC does not function, Palestine’s international commitments could protect children from HT exploitation for instance based on the CRC and the Protocol to the CRC.’ (Save the Children Fund, Technical Adviser).</p> <p>‘One of the issue of implementation is related to human and financial resources’ (Save the Children Fund, Technical Adviser).</p> <p>‘ There is some manifestation of political willingness from the PA and to</p>

	<p>- need to comply to increasingly competing requirements for States. For instance, they need to cooperate internally and internationally and periodically report to all of these international human rights mechanisms.</p>	<p>fulfil its international responsibilities, not necessarily a sensitivity to human rights issues but acknowledging the fact that the international community has an influence in relation to the image of Palestine, to the establishment of the State of Palestine, to the relation with the donors community' (UN Women, Programme Officer in Access for Justice). ' The implementation of human rights commitments which include HT also depends on the persistence of CSOs, public institutions and donors which are not easy given the socio and political context, the fragmented legal framework, the many outdated laws and the lack of functioning PLC' (UN Women, Programme Officer in Access for Justice). 'The issue of reporting on Palestine human rights commitments raises political concerns. Often Palestine uses the argument of 'the lack of effective control regarding Israel which has ramifications and may suggest not complying to some human rights obligations vis a vis Palestinians'. (UNRWA Director and Principal Legal Officer).</p>
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		<p>‘UNDP supports the legal harmonisation committee which was set up quickly after the ratification of do many international conventions. The terms of reference of this Committee is confusing: not clear on its tasks and to identify existing legislation that need to be modified. Whether it is part of the drafting legislative process, whether it has to ensure the harmonisation with international conventions. In addition, there are problems with its composition as there are many different ministries. It is UNDP views that this Committee should be dissolved so the legislative units from each Ministry should be trained on harmonisation and do it. Unless this Committee remains to look at the existing legislation and establish a priority list to the Council of Ministers’ (UNDP Chief Technical Specialist).</p> <p>‘An example relates to the draft Law on Family Protection from Violence produced by a Committee formed of the MoJ, Ministry of Women Affairs, under the lead of the Ministry of Social Development. This draft law was sent to the legal harmonisation Committee by the Council of Ministers to review it. With regard to the new legislation there</p>
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		<p>is a lack of clarity. Is it part of the Committee functions to review problematic legislation? Do we imagine that this Committee also reviews the Criminal Code and each article for their conformity with international standards?' (UNDP Chief Technical Specialist).</p> <p>'The Constitutional Court decision seems to have chosen for a dualist legal system'.(UNDP Chief Technical Specialist).</p> <p>'There is confusion as no one understands the way forward'(UNDP Chief Technical Specialist).</p> <p>'Everything in Palestine is political, even technical support provided' (EUPOL Copps – Legal and Administration Expert).</p>
<p>Theme 5 Obstacles to the enforcement of HT in the domestic legal system.</p>	<p>Overlap of theme 5 to some extent with theme 2 with regard to the issue of the occupation and the lack of control by the PA of its entire territory as this also constitute an impediment to law enforcement of HT and other human rights violations.</p>	<p>'The PNA lacks effective control on the whole Palestinian territory, this makes it difficult to for the authorities to investigate and prosecute crimes such as HT committed in certain areas such as C, under Israeli control' (Save the Children Fund, Technical Adviser).</p> <p>'Obstacles on the ground to legal enforcement, the Palestinian law will</p>

		not be able to protect Palestinians in areas where it has no legal control. In addition, there are different laws applying in Gaza and the West bank' (Save the Children Fund, Technical Adviser).
Theme 6 Experience and picture of HT in Palestine.	Complement of information shared with some participants. There are reports of trafficking practices involving some members of the Bedouin community in the Sinai. (See the report of Prof Dr Mirjam van Reisen, Meron Estefanos and Dr Conny Rijken: The Human Trafficking Cycle: Sinai and Beyond, 2013). Other information relates to the underground tunnels between Gaza and the Sinai-Egypt where traffic of goods and arms circulate with possible occurrence of HT.	'Cases where Palestinians living in Israel with ID card come to Gaza to visit poor families who sell their daughters and have about 30 years of difference.' 'Other cases of forced marriages involved the Bedouin community who are organised in networks with Israelis. The Palestinian girls are sent to the Negev in the North of Israel and forced to marry through the Sharia court in an informal way' (UN Women, Programme Officer in Access for Justice).
What protection measures are in place in Palestine against HT.		'Existence of shelters but they are only day shelters'.

Thematic Analysis: Participants Interpol

Interviewees: Law enforcement Interpol Headquarters and Palestine Office

Themes identified through interviews	General Comments on Theme	Specific Relevant Quotes
<p>Theme 1 Law enforcement combat HT through cooperation at a national, regional, and international level.</p>	<p>The high confidentiality of Interpol in its criminal justice response may mitigate close cooperation with stakeholders: NGOs agencies, other institutions.</p>	<p>'As an example, we have brought people together since through INTERPOL Global Conference on Human Trafficking which have strengthened ties between the various partners in fighting human trafficking'.</p> <p>'Experts, investigators and NGO delegates share their experience and knowledge on tackling this complex international crime.'</p> <p>(INTERPOL Team Leader, Danish National Police National Centre of Investigation).</p> <p>'For instance, in Denmark we have coordination mechanisms outside law enforcement, responsible to address HT. Police is only one of the players. This mechanism coordinates on HT, human rights issues with academics, NGOs, and the police. If there is a suspicion of a HT victim, the case can be reported to this mechanism as often we observe that there may be reluctance to approach the police. This national mechanism and close cooperation help us to identify the victim and act upon investigation'</p> <p>(INTERPOL Team Leader, Danish National Police National Centre of Investigation).</p> <p>'You have international police cooperation, Europol, Interpol. The idea is hook up with existing structures. For instance, as a country, I</p>

		<p>can cooperate with France through SPOC (single point of contact), but that means nothing if there are no infrastructures.’ (INTERPOL Team Leader, Danish National Police National Centre of Investigation).</p> <p>‘As Interpol in Palestine is newly established, we did not organise yet events like conferences on HT to gather different entities of Palestine society.’ (Interpol Palestine).</p> <p>‘We need cooperation with various parts of society who also have a role in combatting this crime whether they are human rights organisations or society institutions’ (Interpol Palestine). ‘At the moment we do not cooperate yet with other Arab countries’ (Interpol Palestine).</p> <p>‘We can join other efforts and initiatives to combat HT which also can be the opportunity to explain our new role in Palestine.’ (Interpol Palestine).</p> <p>‘Interpol Palestine does not yet have a programme with UNODC on HT but on forensic issues.’ (Interpol Palestine).</p>
<p>Theme 2 Understanding of the legal aspects of the HT definition.</p>		<p>‘Labour cases amounting to HT are often difficult to depict, but in Denmark for instance, labour unions react before the police.’ INTERPOL Team Leader, Danish National Police National Centre of Investigation).</p> <p>‘We do not have organised crimes related to HT in Palestine’ ...’ In fact, we don’t understand exactly what the practices of HT mean’....’</p>

<p>Sub theme: identification issues.</p>		<p>After your explanation, yes, we have issues regarding forced marriages'. ...' The main issue is what prevent us to act and react is because we have a lack of awareness regarding HT within different layers of Palestinian society'. (Interpol Palestine). 'Do all the practices of forced-marriages with daughters being sold several times as well as forced-begging come under HT? The Governor of Hebron was aware of such practices and alerted the authorities.' (Interpol Palestine). One of the reason why women would not talk their experience or report incidents is because they are ashamed' (Interpol Palestine).</p>
<p>Theme 3 fragile contexts facilitates the crime of HT.</p>	<p>Factors that contribute to HT: -instable state structure. - lack of political will. - corruption.</p>	<p>'There are common denominators for fragile contexts to facilitate organised crimes which includes HT: lack of transparent society, lack of democracy, corruption. Countries with poor infrastructures can find difficult to provide assistance and services to victims once Interpol rescues victims. They may risk being re-trafficked. Interpol operation ends and the country may implode again.' (INTERPOL Team Leader, Danish National Police National Centre of Investigation). 'We put nations together and have a global perspective, but Interpol is not a miracle, and we cannot force countries to cooperate if there are no political will'. (INTERPOL Team Leader, Danish National Police National Centre of Investigation).</p> <p>An example can be given about Ivory Coast where we have observed that capacity of different actors combating HT is lacking because in many instances this is due to the high level of corruption. We decided to bring in IOM to take care of HT victims and the money invested in projects' (INTERPOL Team Leader, Danish National Police National Centre of Investigation).</p>

<p>Theme 4: Capacity building regarding HT.</p>	<p>Capacity building means: -building security and infrastructure: to assist police to adopt proactive strategies to combat organised crimes, facilitate information exchange, - training law enforcement personnel: Pre-operational trainings; improve law enforcement investigative skills,</p>	<p>'Capacity building in my opinion is to train people of how to do it themselves and motivating them. If they are not motivated, it will not work. Do you know how much money we poured in West Africa with so little benefit mainly because of a lack of motivation and mindset despite free training and transmitted expertise'. (INTERPOL Team Leader, Danish National Police National Centre of Investigation).</p>
<p>Theme 5 Palestine joining Interpol.</p>	<p>-political motives, contributing to international recognition of Palestine as a State.</p>	<p>'HT is quite a blind angle topic for a big majority of human rights activists in Palestine.' (Interpol, Vulnerable Communities Sub-Directorate Trafficking in Human Beings). 'It is about politics and Interpol cannot engage with contexts related to politics, military or religion. What Palestine is trying to do as a member of international organisations is to put Israel under pressure. It is a political fight towards its independence.' (INTERPOL Team Leader, Danish National Police National Centre of Investigation (NCI)).</p>

		<p>'Membership is a positive signal, but it is mainly a cooperation matter'. (INTERPOL Team Leader, Danish National Police National Centre of Investigation).</p> <p>'Interpol Palestine does not have a main role in dealing with HT but rather to exchange information on cybercrimes, fugitives, stolen or illicit goods often driven by organised crime groups.' (Interpol Palestine).</p> <p>'Interpol Palestine is slowly setting relationship with other countries as well as Interpol regional Offices and HQ to share criminal data and intelligence.' (Interpol Palestine).</p> <p>'Joining Interpol is part of the objective of Palestine to become a State, even if Israel opposed our membership for years'. (Interpol Palestine).</p>
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Section on Interpol Conference and findings

- The 2nd INTERPOL Global Trafficking in Human Beings Conference in November 2013 at Interpol HQ in Lyon confirms evolving trends within HT with the need to develop a victim-centered approach including the non-law enforcement cooperation partners.
- The 3rd INTERPOL Global Trafficking in Human Beings Conference in November 2014 at Interpol HQ in Lyon with the financial support from the Abu Dhabi Judicial Department. The Conference confirms that forced labour and human trafficking in the fishing industry is endemic and is encouraged by the diversity of stakeholders concerned in the fisheries sector. The conference highly recommends the international quick exchange of information, ideas and best practises, including the use of INTERPOL tools to:

A. Promote awareness of the issue of forced labour in the fishing industry.

B. Stimulate multidisciplinary training and operational responses.

C. Achieve successful prosecutions and the protection of trafficked victims

Recognizing the complexity of human trafficking, the 3rd INTERPOL Global Trafficking in Human Beings Conference recommends an increase of cross sector cooperation especially in the areas of:

A. Development and sharing of best practice techniques in relation to identification and handling of victims of human trafficking and investigation and prosecution of human traffickers.

B. Creation of operational activities that lead to rescue of victims of human trafficking and prosecution of human traffickers.

C. Engagement of legitimate businesses that are part of the supply chain in sectors that are affected by human trafficking.

The 4th INTERPOL Global Trafficking in Human Beings Conference in November 2016 in Lugano Switzerland which brought together law enforcement personnel (investigators, prosecutors and communicators), representatives of international organizations and NGOs.

The purpose of the conference was to support the understanding of new trends in trafficking in human beings and in link with the issue of migration, supply chain. Presentations regarding the challenges of identification and referral of victims of trafficking in human beings. Other purpose was also to promote and enhance international cooperation and to develop strategies to combat human trafficking worldwide.

'International organisations contribute to victim's identification process on at least three main directions: drafting and compiling guidelines, concept papers and multinational strategies and policies; coordinating raising awareness and international advocacy and providing operational support to law enforcement authorities on concrete activities in the framework of investigations against trafficking in human beings. Acknowledging the impact of every moment of exploitation, reducing the trafficking period of time should be a priority for all the identification mechanisms in place, in a continuous process of improvement and adapting the actions of all the stakeholders' stated the Director for Operations of Southeast European Law Enforcement Center (SELEC).

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