

The Essence of Slavery: Exploitation in Human Rights Law

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ABSTRACT

The modern slavery discourse has brought attention to the idea of human exploitation, which underpins a range of practices comprised by this popular umbrella term. Despite its extensive use, the concept of exploitation has never been defined in international law. The article articulates the necessary and sufficient conditions for the notion of exploitation in the context of the human rights prohibition against slavery, servitude, forced or compulsory labour, and human trafficking. This is done by examining international legislation, jurisprudence, and the philosophical discussions of this concept. Articulating the parameters of exploitation sets firm boundaries of this right while leaving enough room for its further refinement in light of the new and emerging forms of modern slavery. Such analysis is a pioneering effort at elucidating the theoretical foundations of the prohibition of slavery, servitude, forced or compulsory labour and human trafficking.

KEYWORDS: exploitation, modern slavery, human trafficking, forced labour, Article 4 European Convention on Human Rights.

1. INTRODUCTION

Recent debates on practices commonly referred to as *modern slavery*¹ have brought attention to the notion of exploitation, which is considered central for their understanding. Exploitation is said to be ‘a large tent’² and ‘the overarching theme that subsumes all forms of human trafficking, slavery, forced labour, bonded labour, child labour, forced prostitution, economic exploitation, and so on.’³ However, it has never been defined in international law.

The article represents a pioneering effort in interpreting the legal parameters of the notion of exploitation in the context of the human rights prohibition of slavery, servitude, forced or compulsory labour and human trafficking.⁴ This analysis contributes to a better understanding

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¹ Scarpa, *Trafficking in Human Beings: Modern Slavery* (2008); O’Connell Davidson, *Modern Slavery: The Margins of Freedom* (2015); Paz-Fuchs, ‘Badges of Modern Slavery’ (2016) 79 *Modern Law Review* 757. There is no universally agreed definition of ‘modern slavery’ and the term is used to cover a range of exploitative practices. According to the UK Modern Slavery Act 2015, Sections 1 and 2, ‘modern slavery’ encompasses the offences of human trafficking, slavery, servitude and forced or compulsory labour. Practices that constitute ‘modern slavery’ under The Australian Modern Slavery Act 2018, No. 153, 2018 include: human trafficking, slavery, servitude, forced labour, debt bondage, forced marriage and the worst forms of child labour.

² Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (2013) at 369.

³ Koettl, *Human Trafficking, Modern Day Slavery, and Economic Exploitation*, The World Bank (Social Protection and Labor Policy and Technical Notes 49802, 2009) at 4. See also Plant, *Modern Slavery: the Concepts and Their Practical Implications*, International Labour Organization, 5 February 2015, at 3, available at: http://www.ilo.int/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_355052.pdf [last accessed 18 June 2020]; 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*, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, CTOC/COP/WG.4/2015/4, 25 August 2015, at para 20, available at: https://www.unodc.org/documents/treaties/organized_crime/2015_CTOC_COP_WG4/V1506009.pdf [last accessed 18 June 2020].

⁴ Mantouvalou, ‘Legal Construction of Structures of Exploitation’ in Collins, Lester and Mantouvalou (eds), *Philosophical Foundations of Labour Law* (2018) at 189-190. Mantouvalou’s discussion of exploitation is different in two major respects. First, it is primarily concerned with ‘structural accounts of exploitation’ rather

and interpretation of this under-theorized and under-adjudicated right.⁵ Exploitation is shown to be a distinct wrong, which binds together a range of practices that this right protects against.

The need for articulating the legal parameters of exploitation in human rights law has become pressing with an increased international engagement with human trafficking following the adoption of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol), which provided its universal definition.⁶ Exploitation is an essential part of this definition and represents the sole purpose of a trafficking act. But neither the Palermo Protocol nor any other international instrument explain the meaning of exploitation. Instead, the Palermo definition contains an open-ended list of exploitative practices without specifying criteria for deciding which other conducts may qualify. Human trafficking, as defined by the Palermo Protocol, was then brought within the scope of the right to be free from slavery, servitude and forced or compulsory labour through the teleological interpretation of this right by the European Court of Human Rights (ECtHR or the Strasbourg Court)⁷ and also by an explicit reference to it in the human rights instruments adopted after the Palermo Protocol.⁸ This has obfuscated the boundaries of the human rights prohibition of slavery, servitude and forced or compulsory labour because it is unclear which conducts reach the threshold of exploitation required by the trafficking definition to fall within the scope of this right.⁹

The present analysis of the concept of exploitation is grounded in international legal instruments and jurisprudence, and in the literature on moral philosophy. These sources are consulted in order to distil the necessary and sufficient conditions¹⁰ for a practice to qualify as

than interpersonal relations, which is the main focus of this article. Secondly, she focuses on exploitation in the context of labour relations and workers' rights, a conception which is both broader and narrower than exploitation that underpins practices of 'modern slavery'. Accordingly, her conception does not take into account, for example, exploitation in the context of trafficking for forced begging or for criminal activities while at the same time includes a broader spectrum of conducts that go well beyond the instances of 'modern slavery'. See also Allain, 'Conceptualizing the Exploitation of Human Trafficking' in Bryson Clark and Poucki (eds), *The SAGE Handbook on Human Trafficking and Modern Day Slavery* (2018) at 3.

⁵ Human rights instruments frame this right differently. Article 4 Universal Declaration of Human Rights 1948, GA Res 217 A (III), A/810 at 71 (1948) (UDHR) prohibits only slavery, servitude and slave trade but not forced labour. Article 8 International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (ICCPR), Article 4 European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS 5 (ECHR) and Article 6 American Convention on Human Rights 1969, 1144 UNTS 123 (ACHR) prohibit slavery, servitude and forced labour (ACHR also prohibits slave trade and traffic in women). Article 5 African Charter of Human and Peoples' Rights 1981, 1520 UNTS 217 (ACHPR) prohibits 'all forms of exploitation and degradation of man' and lists explicitly slavery and slave trade alongside torture, cruel, inhuman or degrading punishment and treatment. The newer human rights instruments including Article 5 Charter of Fundamental Rights of the European Union 2000, 2000/C 364/01 ('EU Charter'), Article 10 Arab Charter on Human Rights 2004, 12 IHRR 893 ('Arab Charter') and para 13 Association of Southeast Asian Nations (ASEAN) Human Rights Declaration 2012 ('ASEAN Declaration') explicitly prohibit human trafficking alongside slavery servitude and forced labour (ASEAN Declaration does not mention forced labour but it includes human smuggling).

⁶ Article 3 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000, 2237 UNTS 319 (Palermo Protocol).

⁷ *Rantsev v Cyprus and Russia* Application No 25965/04, Merits and Just Satisfaction, 7 January 2010.

⁸ EU Charter; Arab Charter; ASEAN Declaration.

⁹ Allain, 'Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery' (2010) 10 *Human Rights Law Review* 546.

¹⁰ The construction 'necessary and sufficient conditions' is commonly used in the traditional conceptual analysis in legal philosophy. See Einar Himma, *Reconsidering a Dogma: Conceptual Analysis, the Naturalistic Turn, and Legal Philosophy* (2007) at 6 (noting that traditional conceptual analysis 'seeks to identify the content of the sense of the relevant word—eg the meaning of "law"; and it does this by identifying properties that distinguish things that fall under the relevant concept from things that do not. These properties are usually thought expressible in the form of necessary and sufficient conditions for applying the concept.');

exploitation of a sufficient gravity to engage the right to be free from slavery, servitude and forced or compulsory labour. The article articulates such necessary and sufficient conditions in the context of *this* right,¹¹ arguing that these conditions distinguish exploitation from other wrongs, such as abuse, fraud or extortion.

This study has both a practical and theoretical value. Setting the parameters of exploitation helps determine which conducts meet the criteria of the open-ended list of exploitative purposes within the definition of human trafficking, as a distinct prohibition under the right to be free from slavery, servitude and forced or compulsory labour. This contributes to the legal certainty while leaving enough room for a further refinement of the concept in domestic jurisprudence. Beyond such a practical value, the analysis of the concept of exploitation is one of the pioneering attempts at elucidating the very core of the prohibition of slavery, servitude, forced or compulsory labour and human trafficking in human rights law.

The following Section describes the insufficient engagement with the notion of exploitation in international law, focusing specifically on the legal frameworks developed to address human trafficking and the prohibition of slavery, servitude and forced or compulsory labour. The subsequent discussion of moral philosophy literature provides guidance as to the possible common elements of the general concept of exploitation, while the last Section elaborates on such elements in the context of the human rights prohibition of modern slavery.

2. THE INSUFFICIENT ENGAGEMENT WITH THE NOTION OF EXPLOITATION AND INTERNATIONAL LAW

Susan Marks rightly wonders:

When activists invoke international law to challenge exploitation, when lawyers advise on rights and duties regarding exploitation under international law, and when academics discuss the theme of exploitation in international legal writing, what is it that they have in mind?¹²

She observes that international legal instruments refer to exploitation in both the ‘positive or neutral sense’ and in a ‘pejorative sense’, to name a problem and to secure the redress of something considered bad.¹³ Those positive or neutral references concern exploitation of a thing whereas negative examples usually refer to exploitation of human beings.¹⁴ In the latter sense, Marks notices that exploitation features most prominently in international legal

Conditions’ in Zalta (ed.) *The Stanford Encyclopedia of Philosophy* (Summer 2017 Edition), available at: <https://plato.stanford.edu/archives/sum2017/entries/necessary-sufficient/> [last accessed 18 June 2020] (pointing out that ‘[a] handy tool in the search for precise definitions is the specification of necessary and/or sufficient conditions for the application of a term, the use of a concept, or the occurrence of some phenomenon or event.’). See also Kramer, *Where Law and Morality Meet* (2008) (especially chapter 3 ‘On Morality as a Necessary or Sufficient Condition for Legality’); Hart, *The Concept of Law*, 2nd edn by Raz and Bulloch (1994) at 116.

¹¹ Notably, the article does not attempt to articulate a general account of exploitation beyond these most severe forms of exploitation, even though it accepts that these forms are not the only types of exploitation that need to be addressed, as argued by Mantouvalou, *supra* n 4 at 192.

¹² Marks, ‘Exploitation as an International Legal Concept’ in Marks (ed.), *International Law on the Left: Re-examining Marxist Legacies* (2008) at 293.

¹³ See also Pearsall and Trumble (eds), *Oxford English Reference Dictionary*, 2nd edn (1996).

¹⁴ Allain, *supra* n 2 at 2.

provisions concerning children,¹⁵ instruments associated with human trafficking,¹⁶ and in the work of International Labour Organisation (ILO) focused on preventing the exploitation of different categories of vulnerable workers (indigenous people,¹⁷ people with disabilities¹⁸ or migrants¹⁹). Lastly, she observes that '[a] final category of international norms and standards which is widely understood to touch on issues of exploitation, even if ... the term is not actually used, has to do with slavery, forced labour and pay and conditions at work'.²⁰

These diverse references to exploitation in international law however fail to supply any meaning of the concept as such, prompting a conclusion that a new kind of engagement with the problem of exploitation needs to be developed in international law.²¹

The focus of the article is exploitation in the context of the human rights prohibition of slavery, servitude, forced or compulsory labour and human trafficking. The following subsections first explore the conceptualisation of exploitation in human trafficking instruments and subsequently examines its relationship with the prohibition of slavery, servitude and forced or compulsory labour in human rights instruments and jurisprudence.

A. Exploitation and Human Trafficking Instruments

The concept of exploitation features most prominently in the discussions of human trafficking. It represents the sole purpose of a trafficking act. Thus, the universal definition of human trafficking adopted in the Palermo Protocol, which is said to have been 'well entrenched in international, regional and national normative frameworks developed since',²² defines trafficking in the following terms:

'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.²³

¹⁵ Article 19 (1) Convention on the Rights of the Child 1989, 1577 UNTS 3 (CRC); Article 3 (1) Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000, 2171 UNTS 227.

¹⁶ Article 1 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1950, 96 UNTS 271; Article 3 Palermo Protocol; Article 4 Convention on Action against Trafficking in Human Beings 2005, CETS 197 ('European Anti-Trafficking Convention').

¹⁷ ILO, Recommendation concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, R104 (1957), 26 June 1957, at para 36(g).

¹⁸ ILO, Recommendation concerning Vocational Rehabilitation and Employment (Disabled Persons), R168 (1983), 20 June 1983, at para 11(m).

¹⁹ ILO, Recommendation concerning Employment Policy, R169 (1984), 26 June 1984, at para 43(b); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990, 2220 UNTS 3.

²⁰ Marks, *supra* n 12 at 298.

²¹ *Ibid.* at 299.

²² Gallagher, *The International Law of Human Trafficking* (2010) at 42. See also United Nations Office on Drugs and Crime (UNODC), *Global Report on Trafficking in Persons 2014* (2014) at 52, available at: https://www.unodc.org/res/cld/bibliography/global-report-on-trafficking-in-persons_html/GLOTIP_2014_full_report.pdf [last accessed 18 June 2020].

²³ Article 3 Palermo Protocol.

Notably, instead of defining exploitation, the trafficking definition provides *examples* of exploitation leaving the list of exploitative practices open-ended. However, what something refers to is distinct from what it means.²⁴ Wolff explains this pertinently:

To give a complete explanation of how a term is to be used is to fix the reference: it is to give an infallible way of picking out that object or those objects to which the term refers. In itself doing this may convey little understanding, or only partial understanding. Another task is to give, or we might better say explain, the meaning of the term.²⁵

The Palermo Protocol's reference to exploitation fails to deliver on both accounts. Not only does it fail to offer any insight into the nature and meaning of exploitation itself, but it also fails to provide a 'reference-fixing' definition as 'a way of picking out all and only cases of where exploitation takes place'.²⁶ In other words, the open-ended list of exploitative practices does not provide an obvious way of selecting other acts that may be classified as such in future. According to the interpretative notes of the negotiation of the Palermo Protocol, this concern was raised during negotiations by one (unnamed) delegation, which 'felt that any definition of exploitation needed careful examination and restriction', whereas another delegation 'expressed its concern that a definition might end up being too broad, which in turn might hamper the implementation of the protocol'.²⁷ However, these concerns were not given further consideration during negotiations and the final definition of human trafficking remained open-ended. Accordingly, Heide Uhl is right to conclude that in the absence of a definition of the term 'exploitation' in international law the Palermo definition of trafficking 'lacks terminological clarity'.²⁸

Allain, by contrast, argues that this taxonomical account of exploitation is sufficient and that any attempts to uncover the meaning of the concept itself is not necessary.²⁹ He purports that:

It would be a mistake to attempt to deduce common characteristics from these various activities and to then seek to establish in law what might be considered exploitation. The manner in which the provision is laid out is not definitional but categorical.... exploitation should, in the legal context of the definition of trafficking in persons, be understood as the sum of its parts.³⁰

This view nonetheless would only hold if the Palermo definition provided a *definite* list of exploitative practices. In the circumstances where such a list is left open-ended and the meaning of exploitation is left undefined, it is virtually impossible to predict what other conducts are deemed exploitative without allowing for a high degree of arbitrariness.³¹

²⁴ Kripke, *Naming and Necessity* (1980) at 53–9 (emphasizing a difference between how a word is to be used and how it is to be understood).

²⁵ Wolff, 'Marx and Exploitation' (1999) 3 *The Journal of Ethics* 105 at 108.

²⁶ *Ibid.* at 118.

²⁷ UNODC, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2006) at 352, available at: https://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf [last accessed 18 June 2020].

²⁸ Heide Uhl, 'Lost in Implementation? Human Rights Rhetoric and Violations — A Critical Review of Current European Anti-trafficking Policies' (2010) 2 *Security and Human Rights* 119 at 125.

²⁹ Allain, *supra* n 2 at 350.

³⁰ *Ibid.* However, in his recent publication, Allain argues that 'the time is ripe to move away from an understanding of exploitation based on various types ... and to start thinking of exploitation as a concept'. See Allain, *supra* n 4 at 3. See below at section 4 a further discussion of his proposed conceptualization of exploitation.

³¹ In his insightful analysis of the human rights prohibition of 'inhuman and degrading treatment', Waldron criticizes the recent practice of the Strasbourg Court of creating precedents to supply these terms with the meaning. He points out that, '[n]either judges nor scholars spend much time reflecting on the meaning of the predicates that

The Working Group on Trafficking in Persons rightly emphasized the importance of clearly defining ‘either the term exploitation or individual forms of exploitation in order to ensure uniformity of interpretation’.³² The United Nations Office on Drugs and Crime (UNODC) has subsequently published a study on the concept of exploitation in the Palermo Protocol.³³ The study represents the third in a series of studies aimed at addressing ‘the risk that important concepts contained in the [Palermo] Protocol are not clearly understood and, therefore, are not consistently implemented and applied’.³⁴ It includes an overview and analysis of the international legal and policy framework around exploitation with a particular focus on the Palermo Protocol, a survey of national law and practice of States representing different regions and legal traditions, and a guidance on policy and practice for further consideration. The study first noted that the concept of exploitation, as it appears in the Palermo Protocol, did not arise in a vacuum with a range of disciplines — from law to philosophy, from economics to politics — having long been occupied with examining and seeking to establish what it means, or should mean. However, it observes that ‘this has not resulted in agreement and the concept remains ambiguous’.³⁵

Despite its promising title, the UNODC study is overly focused on explaining the *examples* of exploitation, at the expense of elucidating the elements of the *concept* itself, for which, according to the study, ‘there was no apparent appetite’ to be defined during the negotiations of the Palermo Protocol. Instead, the study claims that ‘the forms of exploitation listed in the Trafficking in Persons Protocol are an integral part of its substantive content.’³⁶ Consequently, it is claimed that the substance and scope of these forms of exploitation, taken together, ought to provide the minimum parameters of the notion of exploitation. While this is an interesting proposal, the study does not proceed to distil such parameters that characterize all the examples of exploitation it had meticulously described. Thus, the only reference to the meaning of the concept itself states that exploitation, as it relates to trafficking, ‘appears to be broadly consistent with its general meaning of one person taking unfair advantage of another person, their vulnerability or their situation’.³⁷ Furthermore, while the UNODC study notes that Member States were concerned ‘to not unduly narrow the exploitative purpose of trafficking’ by providing a non-exhausting list of exploitative purposes, it acknowledged that there are limits in terms of the potential for expansion. These limits ‘may potentially include a *threshold of seriousness* that operates to prevent the expansion of the concept of trafficking to less serious forms of exploitation such as labour law infractions’.³⁸ However, the study concludes that the Palermo Protocol does not clearly establish any such threshold. Similarly, Gallagher argues

are incorporated in the Article 3 standard — “inhuman” and “degrading”—and explaining how the Court is guided by their meanings in generating its principles, presumptions and benchmarks. The Court simply announces its finding that certain practices are inhuman or degrading while others are not’. Waldron argues that such an approach is not helpful when a court is confronted with an unprecedented practice alleged to be inhuman or degrading: ‘How should a court approach the task of establishing a new precedent in this area? How should counsel in such a case frame their arguments? Should they proceed by a process of analogy with the list of practices already condemned as violations of the standard? Or should they go back to the original standard and reflect on the fundamentals of its application to this new set of circumstances?’ He strongly advocates for the latter. See Waldron, ‘The Coxford Lecture Inhuman and Degrading Treatment: The Words Themselves’ (2010) 23 *Canadian Journal of Law & Jurisprudence* 269 at 273-4.

³² Working Group on Trafficking in Persons, *supra* n 3 at para 23.

³³ UNODC, *The Concept of Exploitation in The Trafficking in Persons Protocol* (Issue Paper 2015) available at: https://www.unodc.org/documents/congress/background-information/Human_Trafficking/UNODC_2015_Issue_Paper_Exploitation.pdf [last accessed 18 June 2020].

³⁴ *Ibid.* at 6.

³⁵ *Ibid.* at 21.

³⁶ *Ibid.* at 27.

³⁷ *Ibid.* at 39.

³⁸ *Ibid.* at 8 (emphasis added).

that ‘most activists and scholars appear to accept the validity of some kind of a “seriousness” threshold’,³⁹ but does not provide any reference to support her claim. Thus, in the absence of the severity threshold, the open-ended list of exploitative practices from the Palermo definition, does not provide any guidance for defining the concept itself.

Therefore, one of the ‘key findings’ of the study is ‘[t]he absence of clear definitions in the law (both of exploitation and of stipulated forms of exploitation) ... providing individuals with a measure of interpretative discretion that can lead to inconsistency’.⁴⁰ While the study is useful in elucidating these problems, it does very little to offer specific guidance as to how the concept ought to be framed in international law and national legislation. Rather, it questions whether there could be a universal understanding of what constitutes exploitation for purposes of trafficking and whether it would be possible to provide guidance that could be useful for all States and national contexts in the light of substantial differences between States.⁴¹

However, it may well be argued that such universal guidance needs not establish definite and uniform *rules* for deciding when a situation would constitute exploitation. Instead, it could identify the necessary and sufficient conditions for the use of the concept that would serve as a frame of reference to be further specified on a national level. Thus, whereas international law and human rights law, in particular, are well-placed to articulate such necessary and sufficient conditions in order to provide the universal parameters of the concept of exploitation, it is for national legislatures and judiciaries to give them a specific expression in a domestic context.

B. Exploitation and the Human Rights Prohibition of Slavery, Servitude and Forced or Compulsory Labour

The relationship between the regime created to address human trafficking and the general human rights law is a complex one. While human trafficking has often been characterized as a grave violation of human rights,⁴² the existing literature fails to offer a convincing account of the relationship between human trafficking and human rights law. Thus, if human trafficking is indeed a grave human rights violation, what human right is violated and how could States be found responsible for such a violation?

For an act to represent a human rights violation two conditions are necessary. First, it needs to be determined which human right is engaged and whether a conduct in question falls within its scope. Second, it ought to be established whether a State’s act or omission with regard to such a conduct has breached a duty owed to a victim. The specialized anti-trafficking instruments impose on States a three-pronged duty⁴³ comprising of measures to prevent trafficking, punish traffickers and protect victims.⁴⁴ While such obligations vary in their scope and intensity between different international instruments,⁴⁵ they generally require States to establish a legal and institutional framework to address human trafficking. However, the specialized anti-trafficking instruments do not create a claim for a victim against a State for

³⁹ Gallagher, *supra* n 22 at 49.

⁴⁰ *Ibid.* at 11.

⁴¹ See also Allain, *supra* n 2 at 369.

⁴² Preamble, European Anti-Trafficking Convention; Preamble, ASEAN Convention Against Trafficking in Persons, Especially Women and Children 2015 (‘ASEAN Anti-Trafficking Convention’).

⁴³ These are known as ‘3Ps’. See Preamble, Palermo Protocol. The fourth ‘P’, which amounts to ‘partnerships’ between different actors involved in anti-trafficking action has been added subsequently. See GA Res 64/293, The United Nations Global Plan of Action to Combat Trafficking in Persons, 30 July 2010.

⁴⁴ Palermo Protocol; European Anti-Trafficking Convention; Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101/1 (‘EU Anti-Trafficking Directive’); ASEAN Anti-Trafficking Convention.

⁴⁵ Jovanovic, ‘International Law and Regional Norm Smuggling: How the EU and ASEAN Redefined the Global Regime on Human Trafficking’, *American Journal of Comparative Law* (forthcoming in 2020).

failing to do so. In other words, these specialized anti-trafficking instruments are *not* human rights instruments even though some of these instruments have a strong victim protection dimension.⁴⁶ As such, they do not establish a right of a victim not to be trafficked that gives rise to individual human rights claims against States.

Still, in the years since the adoption of the Palermo Protocol, such claims have been examined by human rights tribunals, which have ruled that States have certain human rights obligations towards trafficking victims. The ECtHR was the first to establish an express link between human trafficking and the European Convention on Human Rights (ECHR), which does not contain any reference to it. Thus, the Strasbourg Court ruled that human trafficking, as defined in the Palermo Protocol, is prohibited under the ECHR *in and of itself*.⁴⁷ The implied prohibition of human trafficking is said to fall within the scope of the right to be free from slavery, servitude and forced or compulsory labour *because* of its very aim of exploitation.⁴⁸ Whereas this conclusion has been reinforced in its subsequent jurisprudence,⁴⁹ the ECtHR has not yet explained the *meaning* of exploitation, which bounds together human trafficking and other expressly prohibited conducts within this right.

This lack of rigour opened the door to the fierce criticism of the Strasbourg Court.⁵⁰ The critics argued that by absorbing the definition of human trafficking the right to be free from slavery has been somewhat contaminated. Stoyanova is particularly critical of such a development arguing that ‘the material scope of article is enlarged to cover any exploitation’.⁵¹ A concern about the potential expansion of the material scope of Article 4 has proven well founded. Thus, in the most recent case of *SM v Croatia*, the Strasbourg Court extended the scope of Article 4 beyond human trafficking (and the express prohibition of slavery, servitude and forced labour) by adding ‘exploitation of prostitution’ as a self-standing prohibition within this right.⁵² This is criticized by the dissenting judge Koskelo as a ‘significant and obscure’ enlargement of Article 4, which is introduced ‘without any real analysis, without proper discussion or explanation, and without clarity or openness’.⁵³

Nonetheless, the uncertainty about the range of practices prohibited by this right is not necessarily a consequence of (allegedly) erroneous inclusion of human trafficking within its scope, but results from the lack of clarity as to the concept of exploitation that bounds such practices together. Thus, an argument that in order to restore the integrity of Article 4, the notion of human trafficking ought to be discarded and the focus instead reoriented towards expressly prohibited practices of slavery, servitude and forced labour is misguided.⁵⁴ The prohibitions of human trafficking on the one hand, and of slavery, servitude and forced or

⁴⁶ For example, European Anti-Trafficking Convention.

⁴⁷ *Rantsev v Cyprus and Russia*, supra n 7 at para 282.

⁴⁸ *Ibid.* at para 281.

⁴⁹ *M and Others v Italy and Bulgaria* Application No 40020/03, Merits and Just Satisfaction, 31 July 2012; *CN and V v France* Application No 67724/09, Merits and Just Satisfaction, 11 October 2012; *CN v The United Kingdom* Application No 4239/08, Merits and Just Satisfaction, 13 November 2012; *LE v Greece* Application No 71545/12, Merits and Just Satisfaction, 21 January 2016; *Chowdury and Others v Greece* Application No 21884/15, Merits and Just Satisfaction, 30 March 2017; *J and Others v Austria* Application No 58216/12, Merits and Just Satisfaction, 17 January 2017; *SM v Croatia* Application No 60561/14, Merits and Just Satisfaction, 19 July 2018.

⁵⁰ Allain, supra n 9; Stoyanova, ‘Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case’ (2012) 30 *Netherlands Quarterly of Human Rights* 163.

⁵¹ Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (2017) at 301. See also Hathaway, ‘The Human Rights Quagmire of “Human Trafficking”’ (2008) 49 *Virginia Journal of International Law* 1 (criticising the inclusion of human trafficking within the human rights framework).

⁵² *SM v Croatia*, supra n 49 at para 54.

⁵³ *Ibid.* at Dissenting Opinion of Judge Koskelo, paras 18 and 21.

⁵⁴ Stoyanova, supra n 50 at 185-6.

compulsory labour, on the other, are not mutually exclusive. This is so because the latter represent manifestations of exploitation whereas human trafficking is a process leading to such exploitation.⁵⁵ In his lengthy concurring opinion in *J and Others*, judge De Albuquerque rightly observes that ‘the trafficking process itself is a preparatory stage of the ensuing exploitation and therefore is attached to each of the three proscribed conducts in Article 4’.⁵⁶ Given the severity of the threat of such exploitation materialising, human rights law warrants pre-emptive action by a State in circumstances where there is a real and immediate risk to an identifiable individual. This is not a novel proposition but instead a well-trodden path of the ECtHR when deciding cases that engage ‘absolute’ human rights,⁵⁷ which ‘enshrine[s] one of the basic values of the democratic societies making up the Council of Europe.’⁵⁸ These rights impose on States obligations to pre-empt violations in certain well-defined circumstances that include: the presence of a real and immediate risk to an identifiable individual; States’ awareness of that risk; and that the required State action was within the scope of the powers of authorities which, judged reasonably, might have been expected to avoid such risk.⁵⁹ States are therefore obliged to protect against imminent exploitation (slavery, servitude and forced or compulsory labour) in the same vein as they are bound to protect against the real and immediate risk of torture or of the violation of the right to life. Since the trafficking offence is complete before any exploitation has materialized, being subject to human trafficking creates a real and immediate risk of being subject to exploitation triggering States’ duties to act to prevent severe rights violations. That human trafficking as imminent exploitation, and slavery, servitude and forced or compulsory labour, as materialized exploitation, are not mutually exclusive is further supported by the fact that the Charter of Fundamental Rights of the European Union (EU Charter) and the newer human rights instruments expressly prohibit human trafficking alongside slavery, servitude and forced labour in the same provision.⁶⁰

It then becomes apparent that the contours of the right contained in Article 4 ECHR hinge on the interpretation of the notion of exploitation that underpins practices prohibited (expressly or implicitly) by this right. Yet, as observed by Judge De Albuquerque in *J and Others*,

⁵⁵Allain, *supra* n 2 at 355 (describing practices of human trafficking as ‘the international supply chain into exploitation’).

⁵⁶*J and Others v Austria*, *supra* n 49 at Concurring Opinion of Judge Pinto De Albuquerque, joined by Judge Tsotsoria, para 40.

⁵⁷ These include the right to life, the prohibition of torture, the prohibition of slavery, and the prohibition of retroactive punishment. However, the term ‘absolute’ rights is contested since it implies the hierarchy of rights that has not been explicitly recognized in international human rights instruments. Instead, the term ‘non-derogable’ rights has been suggested as more appropriate. See Ashworth and Redmayne, *The Criminal Process*, 4th edn (2010) at 37. See also Greer, ‘Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really “Absolute” in International Human Rights Law?’ (2015) 15 *Human Rights Law Review* 101; Mavronicola, ‘Is the Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment Absolute in International Human Rights Law? A Reply to Steven Greer’ (2017) 17 *Human Rights Law Review* 479.

⁵⁸*Siliadin v France* Application No 73316/01, Merits and Just Satisfaction, 26 July 2005 at para 82; *CN v The United Kingdom*, *supra* n 49 at para 65.

⁵⁹ McBride, ‘Protecting Life: A Positive Obligation to Help’ (1999) *European Law Review* 43 at 45. See ECHR cases: *Osman v The United Kingdom* Application No 23452/94, Merits and Just Satisfaction, 28 October 1998; *Kilic v Turkey* Application No 22492/93, Merits and Just Satisfaction, 28 March 2000; *Z and Others v The United Kingdom* Application No 29392/95, Merits and Just Satisfaction, 10 May 2001; *Denizci and Others v Cyprus* Application Nos 25316-25321/94 and 27207/95, Merits and Just Satisfaction, 23 May 2001; *E and Others v The United Kingdom* Application No 33218/96, Merits and Just Satisfaction, 26 November 2002; *M and Others v Italy and Bulgaria*, *supra* n 49; *Calvelli and Ciglio v Italy* Application No 32967/96, Merits and Just Satisfaction, 17 January 2002; *Öneryıldız v Turkey* Application No 48939/99, Merits and Just Satisfaction, 30 November 2004; *Opuz v Turkey* Application No 33401/02, Merits and Just Satisfaction, 9 June 2009; *Kontrova v Slovakia* Application No 7510/04, Merits and Just Satisfaction, 31 May 2007.

⁶⁰ See *supra* n 8.

‘exploitation itself is not defined in law’,⁶¹ resulting in a failure of the international jurisprudence to explain the *fundamental wrong* underpinning this absolute human right.

Beyond the ECtHR, which emphasized exploitation as *raison d’être* for including human trafficking within the scope of the prohibition of slavery, servitude and forced or compulsory labour, but failed to elaborate on its meaning, the limited jurisprudence of other regional human rights bodies has avoided addressing this challenge.⁶² As a consequence, the boundaries of this right remain porous and, as revealed in the most recent case of *SM v Croatia*, could be further expanded. In such circumstances, articulating and explaining the legal parameters of exploitation would significantly strengthen the interpretation of this right and the following Sections offer guidance in that respect.

3. EXPLOITATION IN MORAL PHILOSOPHY

The lack of engagement with the notion of exploitation in international human rights law justifies turning to the philosophical debates, which seek to elucidate its meaning. These philosophical discussions provide a groundwork for articulating the necessary and sufficient conditions for the concept of exploitation in the context of the prohibition of slavery, servitude, forced or compulsory labour and human trafficking.

A. Moralized and Non-Moralized Exploitation

In everyday discourse, it is frequently claimed that some act, practice, or transaction is exploitative and the concept of exploitation is typically invoked without much analysis or argument, ‘as if its meaning and moral force were self-evident’.⁶³ Yet, the term itself does not necessarily carry a negative connotation. Thus, exploitation may refer to ‘the action of extracting or harvesting natural resources from a place’⁶⁴ and it may also mean ‘taking advantage of something or someone in an unfair or unethical manner’.⁶⁵

Wood has blamed philosophers who reflect on the concept of exploitation for providing a ‘moralized’ account of exploitation because they tend to follow the practice of dictionaries, distinguishing a ‘non-moral’ sense of exploitation from a ‘moral’ sense, and taking the latter to involve the idea of making use of someone or something unjustly or unethically. Hence, he claims that since these philosophers suppose that only the latter or ‘pejorative’ meaning of the term is of interest for social critics, they provide a so called ‘moralized’ account of exploitation that ‘already has wrongfulness or moral badness built into its very meaning’.⁶⁶ By contrast, he suggests that, in spite of a popular belief, exploitation is ‘not unjust’ by definition, although it ‘is nearly always a bad thing’.⁶⁷ He further claims that a non-moralized account of exploitation would not necessarily preclude using the term pejoratively. It would merely deny that the moral wrongness was built into the very meaning of the term ‘exploitation’. Accordingly, Wood argues that there is no semantic distinction between ‘pejorative’ and ‘non-pejorative’ senses of exploitation, ‘any more than the words seizure and payment mean something different when

⁶¹ *J and Others v Austria*, supra n 49 at Concurring Opinion of Judge Pinto De Albuquerque, para 43.

⁶² The jurisprudence of other international tribunals concerning the prohibition of slavery is extremely limited. For a good overview of such case-law see Duffy, ‘Litigating Modern Slavery in Regional Courts: A Nascent Contribution’ (2016) 14 *Journal of International Criminal Justice* 375.

⁶³ Wertheimer and Zwolinski, ‘Exploitation’ in Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2015 Edition) available at: <http://plato.stanford.edu/archives/sum2015/entries/exploitation/> [last accessed 18 June 2020].

⁶⁴ Oxford English Dictionary, available at: <https://www.oed.com/> [last accessed 18 June 2020].

⁶⁵ *Ibid.*

⁶⁶ Wood, ‘Exploitation’ (1995) (12) 2 *Social Philosophy and Policy* 136 at 137.

⁶⁷ *Ibid.* at 136.

the seizure is wrongful or the payment involves a breach of ethics'.⁶⁸ What is more, he claims that a moralized account of exploitation results in labelling actions 'wrongful because [they are] exploitative'.⁶⁹

Furthermore, Wood argues that 'exploitation consists in the exploiter's using something about the person for the exploiter's ends by playing on some weakness or vulnerability in that person'.⁷⁰ This 'basic idea behind all exploitation involving human objects' is said to apply equally to cases where exploitation is commonly considered unfair, wrongful, or unethical and to cases where it is not. Accordingly, he claims that nobody thinks it is wrong or unethical for a chess player to exploit her opponent's inattention in order to win the game. Therefore, he wonders why we should suppose that exploitation has a special meaning when applied to cases of injustice or wrongdoing.⁷¹ Feinberg, by contrast, argues that it is precisely the element of 'wrongfulness' that distinguishes the term 'exploitation' from 'nonexploitative utilization'.⁷²

Nevertheless, Wood acknowledges that even on his own account of exploitation, which 'applies equally to cases where exploitation is commonly considered unfair, wrongful, or unethical and to cases where it is not', exploitation would, nevertheless, be 'morally objectionable', not because the meaning of the word itself, but because of moral convictions which most of us hold.⁷³ Thus, he contends that while there is no *semantic* distinction between 'pejorative' and 'non-pejorative' senses of exploitation 'what there may be is a distinction between some cases in which exploitation is (or is taken to be) morally innocent, and other cases in which, *on the basis of substantive moral principles* exploitation is taken to be morally objectionable'.⁷⁴ These substantive moral principles, which he claims most of us hold, and which make exploitation objectionable, are based on the moral belief 'that when people are weak or vulnerable, others should not use their weakness or seek to benefit from it, but instead should seek to help them and rescue them from their bad situation'.⁷⁵ Thus, 'it is an affront to people's human dignity to have their weaknesses used, and shameful to use the weaknesses of others'.⁷⁶ This moral belief, he submits, is widely shared, and it is why the term 'exploitation' seems to refer to something bad, unfair, or unethical, which he argues, has nothing to do with the meaning of the word itself.

This is an important question for the discussion of exploitation in the context of the human rights prohibition of slavery because it is argued that exploitation represents a distinct *wrong* underpinning this right. If exploitation as a term is neutral, we may well need to reconsider what is wrong with slavery and human trafficking and why they ought to be outlawed. However, even though exploitation as a general term does not necessarily carry a negative connotation, exploitation of a certain kind or quality may well do so. What distinguishes (morally innocent) exploitation of a chess player from (morally objectionable) exploitation of a child in a sweatshop — both satisfying Wood's semantically neutral definition of exploitation as 'using something about the person for the exploiter's ends by playing on some weakness or vulnerability in that person' — is the understanding of weakness or vulnerability that are being used for the exploiter's ends, and also the manner in which they are being used.

Hence, the account of exploitation ultimately depends on the meaning of its constitutive elements. Further refining and specifying such elements does not undermine the definition itself. Therefore, an action may be rightly labelled wrongful 'because exploitative' provided

⁶⁸ Ibid. at 147.

⁶⁹ Ibid. at 141.

⁷⁰ Ibid. at 147.

⁷¹ Ibid. at 138.

⁷² Feinberg, *The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing* (1990) at 199.

⁷³ Wood, *supra* n 66 at 152.

⁷⁴ Ibid. at 147.

⁷⁵ Ibid. at 150.

⁷⁶ Ibid. at 158.

that the conditions that qualify an action as exploitative are clearly established. However, the concept of exploitation lacks clearly defined necessary and sufficient conditions that govern its application.⁷⁷

Furthermore, it is argued that in addition to establishing the true conditions for an exploitation claim, a theory of exploitation needs to consider the moral force of exploitation. In other words, what, if anything, should be done in response? Thus, it was noted that, ‘the wrongness of exploitation does not dictate the way in which these moral questions should be answered.’⁷⁸ The following two Sections examine philosophers’ views on both the necessary and sufficient conditions for the application of the term and on its moral force.

B. The Necessary and Sufficient Conditions for the Concept of Exploitation in Moral Philosophy

Philosophical discussions of the concept of exploitation are mainly associated with the Marxist thought.⁷⁹ In essence, Marxist theory sees exploitation as a structural feature of capitalism where capital accumulation depends on labour exploitation, which is a function of the inequalities of bargaining power that arise from class divisions.⁸⁰ There are variations of this account but they generally engage with the question of the extent to which, and the ways in which, one section of society had prospered at the expense of another.⁸¹

The focus of human rights law in modern slavery cases is not on such *structural* or *systemic* but *interpersonal* exploitation.⁸² Nonetheless, Marks rightly questions whether structural or systemic exploitation can be so neatly separated from interpersonal exploitation. In other words, it is doubtful whether the latter could truly materialize without being embedded in larger structural formations. Thus, she concludes that ‘despite the very different context in which we study capitalism today, Marx’s account of exploitation still remains relevant’.⁸³ In fact, the moral core of the Marxist view of exploitation is not unique to Marxism. Thus, the Marxist account is said to employ ‘the ordinary notion that one party exploits another when it gets unfair and undeserved benefits from its transactions or relationships’.⁸⁴

Beyond the Marxist thought, contemporary political and moral philosophy is said to have been largely unconcerned with exploitation. Wertheimer, therefore, notes that:

John Rawls’s *A Theory of Justice* has virtually nothing to say about exploitation, as such. Nozick discusses the Marxian account of exploitation in *Anarchy, State, and Utopia*, but, not surprisingly, only to reject it as a basis for interfering with (most) transaction.... Although the American Society for Political and Legal Philosophy’s annual NOMOS volumes ... have covered many of the important concepts in political philosophy, there is no volume on exploitation.⁸⁵

Notwithstanding this criticism, there has been a decent amount of literature on exploitation, both of non-Marxist and Marxist orientation, which may be useful for identifying a plausible

⁷⁷ Hill, ‘Exploitation’ (1994) 79 *Cornell Law Review* 631 at 635.

⁷⁸ Wertheimer and Zwolinski, *supra* n 63.

⁷⁹ Wood, ‘The Marxian Critique of Justice’ (1972) 1 *Philosophy and Public Affairs* 244; Holmstrom, ‘Exploitation’ (1977) 7 *Canadian Journal of Philosophy* 353; Wolff, *supra* n 25 at 105.

⁸⁰ Marks, *supra* n 12 at 281.

⁸¹ *Ibid.*

⁸² For a difference between interpersonal and structural exploitation see Wolff, ‘Structures of Exploitation’ in Collins, Lester and Mantouvalou, *supra* n 4.

⁸³ Marks, *supra* n 12 at 289.

⁸⁴ Wertheimer and Zwolinski, *supra* n 63.

⁸⁵ Wertheimer, *Exploitation* (1995) at 6-7.

account of exploitation in the context of the prohibition of slavery, servitude, forced or compulsory labour and human trafficking.

These different philosophical accounts of exploitation overlap in many respects. Therefore, most accept that exploitation involves, at minimum, some *gain* for the exploiter,⁸⁶ which is sometimes called a benefit⁸⁷ or advantage.⁸⁸ Furthermore, they generally agree that such gain is obtained by *using* another party's *vulnerability* or *weakness*.⁸⁹ What they tend to disagree on, however, is whether such weakness or vulnerability are simply taken advantage of (the opportunistic use),⁹⁰ or it was generated by the exploiter using *coercion*. Accordingly, some accounts insist on the coercion element arguing that the exploited are forced to benefit others,⁹¹ whereas others claim that coercion and exploitation are two different wrongs.⁹² Wolff holds that, 'exploitation is typically a matter of using another person's vulnerability to your own advantage. Coercion, on the other hand, typically proceeds by first creating another's vulnerability and then exploiting it'.⁹³ Accordingly, not all exploitation is coercion. Similarly, Wood explains that:

Perhaps it will be said that people in such desperate straits are forced or coerced into making such deals.... This is often true in the sense that the exploited have no acceptable alternative to the arrangement under which they are exploited. But it does not follow that the exploiters themselves are coercing the exploited. (This is true only if the exploiters themselves are the ones who put the exploited in their vulnerable situation).⁹⁴

Furthermore, some authors require at least a defect in the quality of the consent by using fraud, manipulation or other means while others maintain that exploitation can be fully voluntary.⁹⁵ Wertheimer, nevertheless, notes that it might be objected that perfectly rational and (otherwise) uncoerced choices are not appropriately consensual if made under conditions of desperation or from an inequality of bargaining power, or under unjust background conditions.⁹⁶ However, he refuses to classify such transactions as nonconsensual, because 'we would still have to contrast the cases that are nonconsensual because of coercion or fraud and those that are allegedly nonconsensual in other ways.'⁹⁷

⁸⁶ Mayer, 'What's Wrong with Exploitation?' (2007) 24 *Journal of Applied Philosophy* 137.

⁸⁷ Valdman, 'A Theory of Wrongful Exploitation' (2009) 9 (6) *Philosophers' Imprint* 1.

⁸⁸ Wertheimer, *Exploitation*, supra n 85.

⁸⁹ Mayer, supra n 86; Goodin, 'Exploiting a Situation and Exploiting a Person', in Reeve (ed.), *Modern Theories of Exploitation* (1987); Wood, supra n 79.

⁹⁰ Mayer, supra n 86.

⁹¹ Buchanan, 'Exploitation, Alienation, and Injustice' (1979) 9 *Canadian Journal of Philosophy* 121; Reiman, 'Exploitation, Force, and the Moral Assessment of Capitalism: Thoughts on Roemer and Cohen' (1987) 16 *Philosophy & Public Affairs* 3; Panichas, 'Vampires, Werewolves, and Economic Exploitation' (1981) 7 *Social Theory and Practice* 125; Schwartz, 'What's Wrong with Exploitation?' (1995) 29 *Noûs* 158.

⁹² Mayer, supra n 86 at 146-8 (Observing an important distinction between taking unfair advantage and putting at a disadvantage, for example by coercing another agent. He explains that 'while exploiters prey upon the vulnerable, often they have not created the vulnerabilities of which they take unfair advantage'. Instead, many who gain at the expense of others are said to be simply opportunists who exploit the disadvantages, which they encounter).

⁹³ Wolff, supra n 25 at 11. Mayer, supra n 86 at 143 explains this vividly: 'A master who exploits a slave fails to benefit her as fairness dictates and thus gains at her expense. The master also oppresses the slave, but this is a separate wrong. The oppression makes the exploitation possible by putting the slave at a disadvantage, but putting at a disadvantage is not the same as taking unfair advantage.... The coercion is only instrumental, and exploitation is the aim of the perpetrators, but without the disadvantage which the coercion inflicts the exploitation could not happen'.

⁹⁴ Wood, supra n 66 at 149.

⁹⁵ Wertheimer and Zwolinski, supra n 63.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

Furthermore, in the course of taking advantage of other's vulnerability or weakness, the exploited person⁹⁸ may well be *harmed*. While no one disputes that possibility, philosophers disagree on whether such harm is a necessary condition of wrongful exploitation. Munzer, for example, thinks that 'persons are exploited if (1) others secure a benefit by (2) using them as a tool or resource so as (3) to cause them serious harm'.⁹⁹ Others tend to disagree claiming that moral wrongness of harmful exploitation is not difficult to explain. Thus, it is argued that:

It is trivially true that it is wrong for A to gain from an action that unjustifiably harms or coerces B. And even a libertarian will grant that some harmful exploitation may be legitimately prohibited by the state, if only because it is harmful (or rights violating) rather than because it is exploitative.¹⁰⁰

Instead, it is more intriguing to examine those instances where exploitation is mutually beneficial, where an exploited person too gains from the transaction or an act. In fact, Wertheimer claims that it is precisely the fact that an exploitee has a lot to gain from the exploitative relation that he wants to be exploited.¹⁰¹ Similarly, Wood argues that:

Since being benefited and being exploited are often merely two sides of the same coin, and people may often be in dire need of the benefits in question, they can often be eager to be exploited. The point is that it goes along with being vulnerable, or in a weak bargaining position, that you should have a lot to gain from being taken advantage of, and a lot to lose if you cannot find someone able and willing to take advantage of your vulnerability.¹⁰²

Accordingly, while exploitation often harms an exploited person, it may not necessarily do so. Furthermore, there are different understandings of what constitutes harm. Those philosophers who invoke the Kantian notion that one wrongfully exploits when one treats another merely as a means to an end argue that the instrumental use of one person is a distinctive harm on its own.¹⁰³ Mayer, on the other hand, sees 'a failure to benefit others as some norm of fairness requires' as the fundamental wrong of exploitation in every case. Accordingly, 'as an exploiter, the master inflicts losses and thus *harms* by failing to benefit his victim as fairness requires'.¹⁰⁴

In sum, while philosophical accounts of exploitation are not settled on the question of whether harm and coercion are necessary elements of wrongful exploitation, most of them agree that the exploitative practice represents a *wrongful gain* for the exploiter by taking advantage of some *weakness* or *vulnerability* on the part of an exploited person. Thus, even if the transaction does not leave an exploited person worse off than before, it leaves him worse off than he *might* or *ought to be* judging from the standpoint of fairness.¹⁰⁵ Mayer, thus, uses an example of a sweatshop noticing that while sweated labourer is better off than before, he is still insufficiently compensated. What fairness requires is, however, difficult to discern. Mayer admits that 'conceptions of desert drive this concept and make exploitation the most

⁹⁸ The term 'exploitee' also features in philosophical discussions.

⁹⁹ Munzer, *A Theory of Property* (1990) at 171.

¹⁰⁰ Wertheimer and Zwolinski, *supra* n 63.

¹⁰¹ Wertheimer, 'Two Questions about Surrogacy and Exploitation' (1992) 21 *Philosophy and Public Affairs* 211 at 223. See also Valdman, *supra* n 87 at 3.

¹⁰² Wood, *supra* n 66 at 148-149.

¹⁰³ Kant, 'Groundwork of the Metaphysics of Morals' in Paton (transl), *The Moral Law* (1948) at 90-1 (According to Kant, 'to exploit someone is to treat that person purely as a means to your own ends, and not as an "end in themselves"'). See also Wood, 'What Is Kantian Ethics?' in Wood (ed.), *Rethinking the Western Tradition* (2002); Wolff, *supra* n 25.

¹⁰⁴ Mayer, *supra* n 86 at 142.

¹⁰⁵ *Ibid.* at 141; See also Wertheimer, *supra* n 85.

contentious form of wrongful gain'.¹⁰⁶ It has been said that there will be 'as many competing conceptions of exploitation as theories of what persons owe to each other by way of fair treatment'.¹⁰⁷

Exploitation, then, according to Mayer, becomes 'a thoroughly politicized concept' because contestable ideas about what fairness requires determine whether taking unfair advantage is recognized or not. He gives an example of Aristotle who did not view slavery as exploitative because he did not think slaves suffered a loss from the standpoint of fairness. Today, however, we tend to view slavery as 'paradigmatically exploitative because slaves are thought to receive much less than they deserve'.¹⁰⁸

Valdman offers a plausible account of exploitation that explains both a wrongful gain for the exploiter and weakness or vulnerability of an exploited person that has been taken advantage of, which are the conditions on which most philosophers agree. This account is used to frame the notion of exploitation in the context of the prohibition of slavery, servitude, forced or compulsory labour and human trafficking canvassed in Section 4.

According to Valdman, the deepest wrong of exploitation lies in 'our moral obligation not to extract excessive benefits from people who cannot, or cannot reasonably, refuse our offers'.¹⁰⁹ On this view, there are two necessary conditions for an exploitation claim: first, that one extracts excessive benefits, and second, that these benefits are extracted from someone who is unable to reasonably refuse an offer. As for the latter condition — being unable to reasonably refuse an exploitative offer — Valdman emphasizes the difference between 'being wrongly exploited' and 'let oneself being used' where the former refers to situations where a person has little control over her actions and choices. On the contrary, 'when a rational person has acceptable options but nevertheless allows someone to extract excessive benefits from her, she may be a victim of exploitation but she is also complicit in her victimhood'.¹¹⁰ Thus, he claims 'to wrongly exploit someone is to extract excessive benefits from him — it is to use the fact that his back is to the wall, so to speak, to get him to accept lopsided and outrageous terms of exchange'.¹¹¹ Still, Valdman doubts that a clear demarcation exists between being wrongly exploited and letting oneself be used. Whether someone has 'acceptable options' depends on one's perceptions and not only on objective conditions and it is not clear which of these two Valdman has in mind.

In elaborating the first element — the extraction of excessive benefits — Valdman argues that extracted benefits are excessive 'insofar as they deviate from the benefits we would expect A to receive were he transacting with someone who was rational, informed, and could reasonably refuse his offer'.¹¹² However, he admits that 'because it is not always possible to tell whether extracted benefits are excessive or whether one is in no position to refuse an offer, my theory will not always deliver a clear verdict'.¹¹³ In principle, Valdman's theory is useful for setting the parameters of the concept of exploitation underpinning the practices prohibited by the right to be free from slavery, servitude, forced or compulsory labour and human trafficking, but it requires further refinement to be suitable for practical application. Thus, it requires specifying conditions in which people 'cannot, or cannot reasonably, refuse our offers' as well as clarifying the meaning of 'excessive'. Yet, once international law supplies the definition of exploitation, which articulates its parameters, it will be a task for domestic

¹⁰⁶ Mayer, *supra* n 86 at 144.

¹⁰⁷ Arneson, 'Exploitation', in Becker and Becker (eds), *Encyclopedia of Ethics* (1992) at 350.

¹⁰⁸ Mayer, *supra* n 86 at 144.

¹⁰⁹ Valdman, *supra* n 87 at 1.

¹¹⁰ *Ibid.* at 10.

¹¹¹ *Ibid.* at 13.

¹¹² *Ibid.* at 12.

¹¹³ *Ibid.* at 13.

legislators and judiciary to specify these conditions taking into consideration local circumstances.

In sum, philosophical discussions of the concept of exploitation point out to a number of conditions that explain a specific wrong inherent in this notion. These include: the use of another, harm, coercion, fairness, abuse of vulnerability, a failure of reciprocity, or the combination thereof. Still, two conditions — *abuse of vulnerability* of an exploited person to acquire an *excessive gain* from her — appear as common denominators of all these accounts. Accordingly, a further elaboration of these conditions may well represent the first step towards a workable concept of exploitation in the context of modern slavery.

C. The Moral Force of Exploitation

In addition to establishing the true conditions for an exploitation claim, a theory of exploitation needs also to consider the *moral force* of exploitation.¹¹⁴ In other words, what, if anything, should be done in response? This is important in order to determine the rationale and scope of the human rights provisions that prohibit slavery, servitude, forced or compulsory labour and human trafficking as a means of addressing such exploitation.

Wertheimer argues that the questions as to what agreements should be treated as invalid and what behaviours should be prohibited will be settled by moral argument informed by empirical investigation rather than conceptual analysis.¹¹⁵ Regardless of the approach to resolving this question, it is important to notice that philosophers tend to recognize different levels of severity of exploitation ranging from ‘non-consensual or harmful’ to ‘consensual and mutually advantageous’.¹¹⁶ Wolff, for example, explicitly notes there are different dimensions of strength, or moral seriousness, of exploitation. These range from ‘a paradigm case of the deepest type of exploitation’ that involves the employment of young children at very low wages in extremely hazardous and life-shortening jobs, to ‘shallow exploitation’ that refers to a trader who, purely as a matter of brute good fortune, has large stocks during a temporary shortage, and who hikes the price simply because local consumers now have no alternative but to pay up.¹¹⁷

In light of this sliding scale approach, an appropriate State intervention in exploitative practices may well require the use of different means and strategies for different levels of severity, ranging from criminal law to social policy measures or warrant no intervention at all. Furthermore, Wolff warns that by interfering with exploitative arrangements, we may prevent one person from taking advantage of another's weakness, but in doing so we also risk consigning the vulnerable person to an even worse fate than being exploited.¹¹⁸ Therefore, a line between what ought to be prohibited by criminal law and what is best to be dealt by other legal instruments or measures of social policy should be drawn carefully. Thus, the UNODC report points out that:

The literature review confirmed support for understanding exploitation — in the sense of taking unfair advantage — as a continuum, albeit one that is poorly defined and highly contested... From a legal perspective, the idea of a continuum is particularly useful because points on that continuum can be set with reference to the legal regime they fall within (and vice-versa).¹¹⁹

¹¹⁴ Wertheimer and Zwolinski, *supra* n 63.

¹¹⁵ Wertheimer, ‘Remarks on Coercion and Exploitation’ (1996-97) 74 *Denver University Law Review* 889 at 890.

¹¹⁶ Wertheimer and Zwolinski, *supra* n 63.

¹¹⁷ Wolff, *supra* n 25 at 114-15.

¹¹⁸ *Ibid.* at 113.

¹¹⁹ UNODC, *supra* n 33 at 21-22.

Accordingly, the term ‘modern slavery’ encompasses practices that represent the most abhorrent cases of exploitation, which States ought to criminalize, leaving aside practices that could or should be dealt with by other means. Importantly, State intervention by means of criminal law is a *minimum safeguard* necessary to secure this ‘absolute’ right and should not be considered as the only or even predominant method of dealing with the most egregious cases of exploitation.¹²⁰

4. THE EMERGING CONTOURS OF THE CONCEPT OF EXPLOITATION IN HUMAN RIGHTS LAW

The philosophical accounts of exploitation discussed in the previous Section coalesce around two common elements — the abuse of vulnerability of an exploitee and excessive gain for an exploiter. These common elements serve as a starting point for sketching out the account of exploitation in the context of the human rights prohibition of slavery, servitude, forced or compulsory labour and human trafficking. The remaining Sections thus elaborate the necessary and sufficient conditions for the notion of exploitation that bounds together practices listed in the definition of human trafficking¹²¹ (including slavery, servitude and forced or compulsory labour).¹²² These are: a) abuse of vulnerability of an exploitee; b) excessive (disproportionate) gain acquired through the actions of an exploitee; c) sustained action (the practice takes place over a period of time). The three necessary and sufficient conditions help distinguish exploitation from other, often related wrongs, such as abuse, fraud or extortion, which are commonly observed in the cases of human trafficking but are not inherent in its notion. Furthermore, these necessary and sufficient conditions distinguish exploitation in the context of modern slavery from those practices that may well be considered exploitative in the general meaning of the term but do not reach a level of severity necessary to trigger protection afforded by this ‘absolute’ right.

Before proceeding to elaborate the necessary and sufficient conditions that encapsulate the notion of exploitation in the context of modern slavery, it is worth reflecting on the important work of Jean Allain who takes the opposite view from the one pursued here by arguing that exploitation ‘should not be understood by undertaking an inductive search of the commonalities among the various instances deemed exploitative.’¹²³ Instead, he suggests that exploitation is best understood by utilizing Wertheimer’s theory, which defines exploitation as ‘taking unfair advantage’.¹²⁴ ‘Taking unfair advantage’ is said to essentially amount to ‘defect in the process’.¹²⁵ In cases of human trafficking, Allain argues that ‘the defect in the process is the means of compulsion ... allowing for the movement of a person’.¹²⁶ Building an understanding of the concept of exploitation based on ‘the illicit means of compulsion as set out in the Palermo Protocol’,¹²⁷ Allain concludes that:

¹²⁰ For a criticism of the excessive reliance on criminal law to respond to exploitation of persons see Costello, ‘Migrants and Forced Labour: A Labour Law Response’ in Bogg et al. (eds), *The Autonomy of Labour Law* (2015); Collins, ‘Exploitation of Persons and the Limits of the Criminal Law’ (2017) *Criminal Law Review* 169.

¹²¹ See below at subsection C a discussion on organ removal as one of the purposes of human trafficking, which is argued to represent an anomaly among other exploitative practices listed in the definition of human trafficking.

¹²² For an excellent analysis of these concepts see Weissbrodt and Anti-Slavery International, *Abolishing Slavery and its Contemporary Forms*, United Nations High Commissioner for Human Rights (OHCHR), HR/PUB/02/4 (2002); Allain, ‘R v Tang: Clarifying the Definition of “Slavery” in International Law’ (2009) 10 *Melbourne Journal of International Law* 246; Allain, ‘On the Curious Disappearance of Human Servitude from General International Law’ (2009) 11 *Journal of the History of International Law* 303.

¹²³ Allain, *supra* n 4 at 8.

¹²⁴ Wertheimer, *supra* n 85.

¹²⁵ Allain, *supra* n 4 at 7.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.* at 8.

Having been compelled to enter the chain of movement by a defect in the process, *any utilizations* of that person would constitute exploitation.... With this reading, the various types of exploitation set out in the Palermo protocol are demonstrably of no consequence.¹²⁸

While Allain's work is significant for drawing attention to 'an ever-growing list of activities deemed exploitative',¹²⁹ which threatens to rid the concept of its content, and to the paramount necessity of engaging with it in the academic literature and jurisprudence, the suggested conceptualisation of the notion of exploitation is not without the problems. For example, his suggestion that that 'central to exploitation is the means of compulsion by which a person is compelled to travel the chain of movement' is problematic because 'movement' is not a necessary element of either human trafficking itself or of the types of exploitation enumerated in its definition.¹³⁰ Furthermore, the sole focus on the means of compulsion that vitiates consent¹³¹ risks stretching the concept of exploitation too far because the use of such means could constitute an element of other wrongs such as fraud or abuse.¹³² This is best illustrated by Allain's claim that 'any *utilisation* of a person' resulting from vitiated consent would amount to exploitation. In addition, this statement proposes to replace one undefined term ('exploitation') with another arguably even more vague ('utilization').

The following Sections thus demonstrate that the use of certain means that vitiate consent, while necessary is not a sufficient condition to define either human trafficking itself or various exploitative practices listed as its purpose.

A. Abuse of Vulnerability

It is generally accepted that vulnerability and its abuse are 'central to any understanding of trafficking'¹³³ and 'the common feature of all forms of exploitation' contained in Article 4 ECHR.¹³⁴ Thus, it is said that 'to a large extent [human trafficking] is about exploiting vulnerable individuals'.¹³⁵ Human traffickers 'prey on people who are poor, isolated and weak'.¹³⁶ The UNODC observes that 'in both politics and philosophy, "exploitation", when

¹²⁸ Ibid. (emphasis added).

¹²⁹ Ibid. at 3.

¹³⁰ European Commission, *EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016*, COM(2012) 286 final, 19 June 2012 at 2. The Strategy notes that 'there is no need to cross a border or be physically transported'; United States Department of State, *Trafficking in Persons Report* (2008) at 6, available at: <https://2001-2009.state.gov/g/tip/rls/tiprpt/2008//index.htm>. [last accessed 18 June 2020]. The Report states that '[a] victim need not be physically transported from one location to another in order for the crime to fall within the [trafficking] definitions'.

¹³¹ Article 3 Palermo Protocol defines these as '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'.

¹³² Van Krimpen, 'The Interpretation and Implementation of Labour Exploitation in Dutch Case Law' in Rijken (ed.), *Combating Trafficking in Human Beings for Labour Exploitation* (2011) at 502-7.

¹³³ UNODC, *Abuse of a Position of Vulnerability and Other "Means" within the Definition of Trafficking in Persons* (Issue Paper 2013) at 5, available at: https://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf [last accessed 18 June 2020].

¹³⁴ *Chowdury and Others v Greece*, supra n 49 at para 82.

¹³⁵ Council of Europe Parliamentary Assembly, *Trafficking of Migrant Workers for Forced Labour*, 4 January 2013, Doc. 13086 Report at para 1.

¹³⁶ UNODC, *An Introduction to Human Trafficking: Vulnerability, Impact and Action* (Background paper 2008) at 3, available at: https://www.unodc.org/documents/human-trafficking/An_Introduction_to_Human_Trafficking_-_Background_Paper.pdf [last accessed 18 June 2020].

attached to a person, is commonly understood as being linked to some weakness or vulnerability, which becomes the object of exploitation'.¹³⁷

Vulnerability is described as 'a social condition of powerlessness ascribed to individuals with certain characteristics that are perceived to deviate from those ascribed to the prevailing definitions of a national'.¹³⁸ The term 'vulnerable victim' is used to refer to 'a victim who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to criminal conduct'.¹³⁹ The explanatory report to the Council of Europe Anti-Trafficking Convention notes that:

The 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 administrative 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.¹⁴⁰

The notion of vulnerability is thus associated with a set of victims' personal characteristics, such as a person's age, disability, immigration or socio-economic status. For example, in the Dutch jurisprudence, 'a person is in a "vulnerable position" if there is a combination of illegal residence, a poor economic situation and being unable to speak the Dutch language'.¹⁴¹ Furthermore, it is noted that, 'people that are vulnerable to exploitation are people that reside illegally in the Netherlands, especially minors, and members of closed migrant communities in the Netherlands'.¹⁴² Irregular migration status is said to create vulnerability 'in the sense of disadvantage both factual and legal, engendering openness to exploitation or abuse'.¹⁴³

In addition to irregular migrants and migrant workers who are declared 'a particularly vulnerable group and therefore deserve specific attention from States',¹⁴⁴ the Strasbourg Court has recognized other groups as vulnerable including children,¹⁴⁵ Roma minority,¹⁴⁶ persons with mental disabilities,¹⁴⁷ women subject to domestic violence,¹⁴⁸ and asylum-seekers.¹⁴⁹

Importantly, it is the *abuse of vulnerability*, not vulnerability per se, that is a necessary condition for the notion of exploitation. It is thus noted that 'to exploit a person is to use a weakness in order to gain substantial control over the person's life or labour'.¹⁵⁰ Wolf similarly argues that 'one's vulnerability is exploited if the other person uses this weakness to obtain

¹³⁷ UNODC, *supra* n 33 at 21.

¹³⁸ Bustamante, 'Immigrants' Vulnerability as Subjects of Human Rights' (2002) 36 *International Migration Review* 333 at 340.

¹³⁹ 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' (2005) 14 (2) *Tulane Journal of International and Comparative Law* 29 at 30.

¹⁴⁰ Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, 16 May 2005, CETS 197 at para 83.

¹⁴¹ Heemskerk and Rijken, 'Combating Trafficking in Human Beings for Labour Exploitation in the Netherlands' in Rijken, *supra* n 132 at 77.

¹⁴² *Ibid.* at 89.

¹⁴³ Freedland and Costello, 'Migrants at Work and the Division of Labour Law' in Costello and Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (2014) at 1.

¹⁴⁴ Council of Europe Committee of Ministers, Reply to Parliamentary Assembly Recommendation 2011, 16 July 2013, Doc 13287 at para 2.

¹⁴⁵ *A v The United Kingdom* Application No 25599/94, Merits and Just Satisfaction, 1 October 1998 at para 22.

¹⁴⁶ *Oršuš and Others v Croatia* Application No 15766/03, Merits and Just Satisfaction, 16 March 2010 at para 147.

¹⁴⁷ *Alajos Kiss v Hungary*, Application No 38832/06, Merits and Just Satisfaction, 20 May 2010 at para 42.

¹⁴⁸ *Opuz v Turkey*, *supra* n 59 at para 160.

¹⁴⁹ *MSS v Belgium and Greece* Application No 30696/09, Merits and Just Satisfaction, 21 January 2011 at paras 232-3 and 252.

¹⁵⁰ Honderich (ed.), *The Oxford Companion to Philosophy*, 2nd edn (2005).

agreement to, or at least acquiescence in, a course of action that one would not have accepted had there not been this asymmetry in power'.¹⁵¹

The notion of 'abuse of a position of vulnerability' figures as one of the means of human trafficking in its tripartite definition, which invalidates victims' consent.¹⁵² Arguably, the abuse of vulnerability represents the least coercive means of inducing consent 'without relying upon direct physical abuse, threats or fraud'.¹⁵³ But the abuse of vulnerability is instrumental to both human trafficking as a process leading to exploitation and to manifestations of such exploitation in the form of slavery, servitude and forced or compulsory labour. Thus, the International Labour Organisation and the European Commission list separately indicators for 'recruitment by abuse of vulnerability' as one of the means of human trafficking, and indicators of 'abuse of vulnerability at destination' (at the exploitation stage).¹⁵⁴ Specific indicators may well differ between the recruitment and exploitation stages or between different countries without affecting the fact that 'abuse of vulnerability' is integral to such practices.

Overall, the term 'abuse of vulnerability', according to the *travaux préparatoires* to the Palermo Protocol, is understood to refer to 'any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved'.¹⁵⁵ The EU Anti-Trafficking Directive mirrors this statement.¹⁵⁶

Clearly, the abuse of vulnerability requires, first, recognizing specific traits as constituting vulnerability and, second, explaining the dynamics in which such vulnerability is played upon to ensure control over a victim. Hence, the notion of control (power) is inherent in this element and it is contingent upon a number of circumstances, which may not always stem from coercion. For instance, when a child is in a dependant position with respect to her carers, or in cultures where male family members have the power over female family members, control over an individual creates or exacerbates their vulnerability, which may then be abused to exploit that person.¹⁵⁷

The ILO study thus observes that vulnerability can result from some *innate characteristic* of the victim (physical or mental deficiency, ill health, or youth) or may develop due to the *situation* the victim finds him/herself in within a destination country (poverty, precarious administrative status).¹⁵⁸ Significantly, the study notes that actions of a trafficker could also either *create* or *worsen* a victim's vulnerability (extremely poor wages causing poverty, restricted movement causing isolation, seizure of identity documents causing fear of deportation). This allows an exploiter to extract disproportionate gains from a person by abusing such vulnerability (innate or constructed).

As discussed in Section 3, most philosophers do not treat coercion as a necessary condition for exploitation, although they do accept that it would often be present in exploitative situations.¹⁵⁹ When it is present, coercion serves to either create or exacerbate vulnerability.

¹⁵¹ Wolff, *supra* n 25 at 111.

¹⁵² UNODC, *supra* n 133 at 78-9.

¹⁵³ Malpani, *Legal Aspects of Trafficking for Forced Labour Purposes in Europe*, ILO Working Paper, 04 January 2006 at 4, available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_082021.pdf [last accessed 18 June 2020].

¹⁵⁴ ILO and European Commission, *Operational Indicators of Trafficking in Human Beings: Results from a Dephi Survey implemented by the ILO and the European Commission* (2009), available at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_105023.pdf [last accessed 18 June 2020].

¹⁵⁵ UNODC, *supra* n 27 at 347.

¹⁵⁶ Article 2 (2) EU Anti-Trafficking Directive.

¹⁵⁷ Collins, *supra* n 120 at 11 (drawing attention to recent research on grooming, which examines how exploiters seek to set themselves in positions of domination over vulnerable persons).

¹⁵⁸ Malpani, *supra* n 153 at 5.

¹⁵⁹ See text with *supra* n 91-4.

Therefore, both intrinsic and created vulnerability can be subject to abuse in order to induce control over a victim, making her susceptible to ‘agree’ to exploitation. However, the difference between coercion alone and the abuse of vulnerability (intrinsic or created) is that the latter is an integral part of the notion of exploitation. Namely, a person may be coerced by one individual while being exploited by others. Whether or not exploiters also coerce a victim, they always abuse victim’s vulnerability that was either given or created/exacerbated by the use of coercion. Thus, the abuse of vulnerability, as a means of vitiating consent, is the minimum necessary condition of exploitation in the context of modern slavery.

The existence and abuse of vulnerability is said to be ‘contextually relative’ and is thus best assessed on a case-by-case basis.¹⁶⁰ Still, determining in which instances there was an abuse of a vulnerable position is challenging, especially in situations where irregular migrants approach predatory employers themselves. This was the case in the seminal ‘Chinese restaurant workers case’ by the Dutch Supreme Court concerning the exploitation of Chinese workers with irregular migration status in the Netherlands.¹⁶¹ The workers were employed in a restaurant under very poor conditions. Large numbers of them slept together in the same room, they worked long hours and had no days off. However, they had come to the Netherlands voluntarily and approached the restaurant owners themselves. The Supreme Court ruled that ‘to prove misuse of a vulnerable position, for example, it is enough that the perpetrator recognises the vulnerable position and takes advantage of this position.’¹⁶² It established that ‘a certain initiative and positive act by the perpetrators is presumed, by which they consciously misuse the weaker or vulnerable position of the victims’.¹⁶³

Establishing that a person had no realistic alternative due to the abuse of vulnerability might be a weighty task that requires assessing factual circumstances, but it is the one that national courts engage with on a daily basis. Thus the UNODC study reviewed national legislations across the world and concluded that ‘a number of countries have integrated abuse of vulnerability into their understanding of exploitation’¹⁶⁴ noting that specific vulnerability factors were remarkably similar across very different countries of origin, transit and destination.

B. Disproportionate Gain

The second element of the notion of exploitation requires that an exploiter gains excessively from the actions of an exploited person. It is shown that most philosophers use a reference to an unfair or excessive gain, advantage, or benefit acquired by using another (vulnerable) individual to describe the situations of morally wrongful exploitation. It is also considered that an exploited person may sometimes ‘benefit’ from being exploited.¹⁶⁵ Such benefit, however, is always significantly less than ‘what it might or ought to be’, judged from the stand-point of fairness.¹⁶⁶

Exploitation, thus, always implies the notion of excess — an unfair gain at the expense of an exploited person — distinguishing this type of wrong from others. In all situations of exploitation, an exploitee gives significantly more than she receives in return. Thus, in the case of *Van der Musselle v Belgium*, the Strasbourg Court made use of the notion of a ‘disproportionate burden’ to determine whether a lawyer had been subjected to compulsory

¹⁶⁰ UNODC, supra n 133 at 72.

¹⁶¹ Supreme Court of the Netherlands, LJN: BI7099, 27 October 2009, cited in van Krimpen, supra n 132 at 500-2.

¹⁶² Ibid. at 499.

¹⁶³ Ibid. at 498.

¹⁶⁴ UNODC, supra n 133 at 4.

¹⁶⁵ Wertheimer, supra n 101 at 223; Mayer, supra n 86 at 3; Wood, supra n 66 at 148-9.

¹⁶⁶ Mayer, supra n 86 at 141.

labour when required to defend clients free of charge.¹⁶⁷ In this case, a pupil-advocate complained of the lack of remuneration and of reimbursement of expenses arguing that these constituted forced and compulsory labour under Article 4 ECHR. However, the Court held that such prejudice ‘went hand in hand with advantages and had not been shown to be *excessive*’.¹⁶⁸ Thus, the Court concluded that while remunerated work may also qualify as forced or compulsory labour, ‘the lack of remuneration and of reimbursement of expenses constitutes a relevant factor when considering what is *proportionate* or in the normal course of business’.¹⁶⁹ Similarly, the African Commission on Human and Peoples' Rights established a clear link between exploitation and the lack of ‘just and favourable remuneration’ and ruled that Mauritania violated Article 5 of the African Charter on Human and Peoples' Rights that protects against ‘all forms of exploitation and degradation of man’.¹⁷⁰

Furthermore, what counts as an excessive (disproportionate) gain is not necessarily expressed in monetary terms. Thus, the Strasbourg Court recently considered allegations of servitude and forced or compulsory labour by two orphaned Burundi sisters aged sixteen and ten years, on the basis of their unremunerated domestic chores in their aunt and uncle’s home.¹⁷¹ The Court noted that ‘the type and amount of work involved ... help distinguish between “forced labour” and a helping hand which can reasonably be expected of other family members or people sharing accommodation’.¹⁷² Distinguishing between the situations of the two sisters, the Strasbourg Court found that the older one was forced to work ‘so hard that without her aid Mr and Mrs M. would have had to employ and pay a professional housemaid’.¹⁷³ The second sister, by contrast, was said not to have contributed ‘in any *excessive* measure to the upkeep of Mr and Mrs M.’s household’.¹⁷⁴

It is clear that all circumstances of the case need to be taken into account when assessing whether actions required from an individual were disproportionate to the benefits she received in return. Like the assessment of ‘no realistic alternative’ for the element of abuse of vulnerability, this is a factual question for the courts. Hence, in the previously discussed ‘Chinese restaurant workers case’, the Dutch Supreme Court held that a finding of exploitation depends heavily on the circumstances of the case. It ruled that in the case before them, relevant factors include ‘the nature and duration of the employment, the restrictions to the employee resulting from such employment, and the financial gain of the employer’.¹⁷⁵ Importantly, it noted that standards in Dutch society should be adopted as the frame of reference for weighing those factors. In the concrete case, it was proven that the Chinese workers were put to work on an average of eleven to thirteen hours a day, six days a week, for a wage far below the minimum wage. Similarly, the explanatory report to Article 273f of the Dutch Criminal Code noted that an extremely long working week for disproportionately low pay under poor working conditions represents an example of exploitation.¹⁷⁶ It is therefore clear that the economic benefit of an

¹⁶⁷ *Van der Musselle v Belgium* Application No 8919/80, Merits and Just Satisfaction, 23 November 1983 at paras 34-41.

¹⁶⁸ *Ibid.* at para 40.

¹⁶⁹ *Ibid.*

¹⁷⁰ 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98, *Malawi African Association and Others v Mauritania* 13th Annual Activity Report (1999-2000) at para 135.

¹⁷¹ *CN and V v France*, supra n 49.

¹⁷² *Ibid.* at para 74.

¹⁷³ *Ibid.* at para 75.

¹⁷⁴ *Ibid.* (emphasis added).

¹⁷⁵ Heemskerk and Rijken, supra n 141 at 80.

¹⁷⁶ Cited in The Dutch National Rapporteur on Trafficking in Human Beings, *Trafficking in Human Beings: Case law on Trafficking in Human Beings 2009-2012: An Analysis*, BNRM (2012) at 85, available at: https://www.nationaalrapporteur.nl/binaries/appporteur-on-trafficking-in-human-beings-and-sexual-violence-against-children.case-law-on-trafficking-2009-2012-tcm64-496913_tcm23-34765.pdf [last accessed 18 June 2020].

exploiter together with other conditions of work play a decisive role in establishing exploitation.

Furthermore, the requirement of an excessive gain distinguishes exploitation from abuse — wrongs which are different in nature while often interrelated. The difference is best explained using the examples of sexual exploitation and sexual abuse. Accordingly:

The term ‘sexual exploitation’ means any actual or attempted *abuse of a position of vulnerability*, differential power, or trust, for sexual purposes, including, but not limited to, *profiting* monetarily, socially or politically from the sexual exploitation of another. Similarly, the term ‘sexual abuse’ means the actual or threatened *physical intrusion* of a sexual nature, whether by force or under unequal or coercive conditions.¹⁷⁷

This distinction, nevertheless, has not always been recognized. Thus, Amar argues that child abuse should be seen as slavery under The Thirteenth Amendment of the US Constitution.¹⁷⁸ However, this confuses the distinctive wrongs of exploitation, which represents the core of practices such as slavery or human trafficking, and abuse. Thus, while victims of exploitation are also nearly always abused, the same cannot be said for the opposite. The case of *Hadijatou Mani Koraou* decided by the Economic Community of West African States (ECOWAS) Court of Justice illustrates this difference.¹⁷⁹ The Court endorsed the position of the Nuremberg Military Tribunals, which held that:

Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves.... We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery — compulsory *uncompensated labour* — would still remain.¹⁸⁰

C. Sustained Action

Inherent in the notion of exploitation is the idea of repetitiveness. Exploitation takes place (or is intended to) over a period of time. One-off situations may qualify as fraud or abuse but exploitation in the context of modern slavery involves sustained activity. Bales thus notes that ‘indeterminate temporal nature is one of the defining characteristics of the crime of slavery’.¹⁸¹ According to him, ‘it is fundamental to the conceptualization of slavery that, once enslaved, a person cannot affect the period of their bondage.’¹⁸² Similarly, inherent in the notion of servitude is a victim’s feeling that her condition is permanent and that the situation is unlikely to change.¹⁸³ When it comes to the concept of forced labour, it is evident that ‘labour’ implies work that stretches over a period of time — not a one-off transaction.

This view, nonetheless, might sit uneasily with human trafficking for the purpose of organ removal, which is considered as a one-off venture. It must be noted however that human

¹⁷⁷ United Nations Secretariat, *Special Measures for Protection from Sexual Exploitation and Abuse*, ST/SGB/2003/13, 9 October 2003 at section 1 (emphasis added).

¹⁷⁸ Amar, ‘Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney’ (1992) *Yale Law School, Faculty Scholarship Series*, Paper 1038.

¹⁷⁹ *Koraou v Niger*, Judgment No ECW/CCJ/JUD/06/08, 27 October 2008, at para 79.

¹⁸⁰ *The United States of America v Oswald Pohl et al.* (Case No 4) United States Military Tribunal II, Trials of Major War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10, Volume V (1950) at 970 (emphasis added).

¹⁸¹ Datta and Bales, ‘Slavery in Europe: Part 1, Estimating the Dark Figure’ (2013) 35 *Human Rights Quarterly* 817 at 821.

¹⁸² *Ibid.* at 822.

¹⁸³ *CN and V v France*, supra n 49 at para 91.

trafficking for the purpose of organ removal is a unique form of mistreatment that does not share many similarities with other exploitative practices listed in the Palermo Protocol's definition of human trafficking. This has been spelled out in the recent UNODC study, which concludes that "[r]emoval of organs" is unique among the stipulated forms of exploitation in that unlike slavery, servitude, exploitation of prostitution and sexual exploitation, it does not constitute a practice that may be considered inherently exploitative'.¹⁸⁴ Instead, human trafficking for organ removal is considered a subset of trafficking in human organs, which may well square better with the notions of inhuman or degrading treatment than exploitation.

Namely, despite attempts to separate trafficking in persons for organ removal and trafficking in human organs¹⁸⁵ it has been noted that the two crimes are difficult to distinguish in practice.¹⁸⁶ Hence, the European Parliament noted recently that:

The term 'trafficking in organs' groups together a whole range of illegal activities that aim to commercialise human organs and tissues for the purpose of transplantation. It *encompasses* the trafficking of persons with the intent to remove their organs.¹⁸⁷

Similarly, the joint study by the Council of Europe and United Nations noted earlier that 'trafficking in human beings for the purpose of organ removal was a small part of the bigger problem of trafficking in [organs, tissues and cells]'.¹⁸⁸ The study nonetheless insists on distinguishing between the two phenomena but its explanation remains largely unpersuasive. Thus, it purports that in the case of trafficking in organs, 'the object of the crime is the organs', whereas in the case of human trafficking for organ removal, the object of the crime is 'the trafficked person'.¹⁸⁹ While such distinction might possibly be maintained in the context of criminal law, it becomes largely irrelevant in the human rights setting where the focus is on a victim — in both instances the organ donor.

The adoption of the Council of Europe Convention against Trafficking in Human Organs¹⁹⁰ — the first international treaty addressing organ trafficking and providing its definition — further collapses the distinction between human trafficking for the purpose of organ removal and trafficking in organs. Namely, Article 4 (1) of the new Convention requires States to criminalize 'the removal of human organs from living or deceased donors' when 'the removal is performed without the free, informed and specific consent of the living or deceased donor'

¹⁸⁴ UNODC, *supra* n 33 at 8.

¹⁸⁵ Caplan et al., *Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs*, Joint Council of Europe/United Nations Study, 12 October 2009 at 11, available at https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/council-un_study_on_trafficking_in_organs_2009_en_1.pdf [last accessed 18 June 2020]; Organization for Security and Co-operation in Europe (OSCE), *Trafficking in Human Beings for Purposes of Organ Removal in the OSCE Region: Analysis and Findings*, Occasional Paper Series No 6, 9 July 2013 at 11-12, available at: <https://www.osce.org/files/f/documents/e/b/103393.pdf> [last accessed 18 June 2020].

¹⁸⁶ UNODC, *Assessment Toolkit: Trafficking in Persons for the Purpose of Organ Removal* (2015) at 19, available at https://www.unodc.org/documents/human-trafficking/2015/UNODC_Assessment_Toolkit_TIP_for_the_Purpose_of_Organ_Removal.pdf [last accessed 18 June 2020]. See also Marty, *Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo*, Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights (Draft Report), AS/Jur (2010) 46, 12 December 2010. Even though the latter addresses the issue of 'illicit trafficking in human organs' what it describes fits more into the definition of trafficking in people for organ removal. Thus paragraphs 3 and 4 state that 'numerous concrete and convergent indications confirm' that people were held prisoner in secret places of detention in northern Albania, were subjected to inhuman and degrading treatment, before ultimately disappearing and that organs were removed from some of them to be taken abroad for transplantation'.

¹⁸⁷ European Parliament, Policy Department, Director General for External Policies, *Trafficking in Human Organs* (2015) at 8 (emphasis added).

¹⁸⁸ Caplan et al., *supra* n 185 at 11.

¹⁸⁹ *Ibid.*

¹⁹⁰ Council of Europe Convention against Trafficking in Human Organs 2014, CETS 2016.

or when ‘in exchange for the removal of organs, the living donor, or a third party, has been offered or has received a financial gain or comparable advantage’. Moreover, Article 7 (1) requires States to punish ‘the solicitation and recruitment of an organ donor or a recipient, where carried out for financial gain or comparable advantage for the person soliciting or recruiting or for a third party’. On this basis, it is difficult to see how human trafficking for the purpose of organ removal is any different from the removal of organs by ‘the solicitation and recruitment’ of the donor and ‘without [his] free, informed and specific consent’. This is because the tripartite definition of human trafficking recognizes ‘recruitment’ as one of the ‘acts’ of human trafficking, and vitiated consent as one of the ‘means’ of human trafficking, with exploitation (in this case organ removal) being the third and final element.¹⁹¹

It is therefore questionable whether, in light of the newly adopted Convention against Trafficking in Human Organs, organ removal should still be classified as a form of exploitation. Instead, it could be argued that even though *tactics* (*means*) used to subject people to illicit removal of organs may well be the same as in the cases of trafficking for other purposes, *conceptually* the former represents a distinctive practice that fits better with the notion of inhuman or degrading treatment rather than exploitation. Thus, widely reported practices of forced organ harvesting from non-consenting prisoners of conscience in the People’s Republic of China¹⁹² are deemed a violation of the freedom from torture and other cruel, inhuman or degrading treatment or punishment.¹⁹³ Furthermore, in his report on Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo, Dick Marty refers to ‘allegations of inhuman treatment, including those relating to possible organ trafficking’ making a direct link between the two.¹⁹⁴

In sum, based on the premises that human trafficking for the purpose of organ removal is a subset of trafficking in human organs, and that illicit organ removal and trafficking amount to inhumane or degrading treatment, it could be concluded that organ removal as a purpose of human trafficking sits uneasily with other practices deemed exploitative by the definition of human trafficking.

This illustrates the urgency of defining exploitation, especially because of the increasing number of practices that have been deemed ‘exploitative’.¹⁹⁵ Thus, Van Krimpen criticizes a new development in the Dutch case law, which concerns ‘rather “new” types of forced services as exploitation. A characteristic in these cases is that the services are only performed over a short period of time, sometimes only once’.¹⁹⁶ For example, she points out the cases involving ‘exploitation by forced subscribing to phone contracts’ (after which victims had to give the phones to the suspect). In one of these cases, the domestic court declared the suspect guilty of fraud, while the latter cases led to a conviction for human trafficking.¹⁹⁷ In one of the latter examples, however, in spite of convicting the accused of human trafficking, the court noted that the term ‘fraud’ did better fit common parlance and the public perception of the facts of this case.¹⁹⁸ Van Krimpen condemns the courts for ‘overstepping the mark’ since these rulings imply that almost every case of deception or fraud to induce victims to make themselves available for performing services, could now be defined as human trafficking. She rightly

¹⁹¹ Article 3 Palermo Protocol.

¹⁹² The Independent Tribunal into Forced Organ Harvesting from Prisoners of Conscience in China, Judgment, 1 March 2020, available at: https://chinatribunal.com/wp-content/uploads/2020/03/ChinaTribunal_JUDGMENT_1stMarch_2020.pdf [last accessed 18 June 2020].

¹⁹³ Norbert et al., ‘Human Rights Violations in Organ Procurement Practice in China’ (2017) 18 (11) *BMC Medical Ethics* 1 at 7.

¹⁹⁴ Marty, *supra* n 186 at para 12.

¹⁹⁵ Allain, *supra* n 4.

¹⁹⁶ Van Krimpen, *supra* n 132 at 502-6 (emphasis added).

¹⁹⁷ Dordrecht District Court, LJN: BM1743, 20 April 2010 cited in van Krimpen, *supra* n 132 at 504.

¹⁹⁸ Haarlem District Court, LJN: BO8985, 8 December 2010, cited in van Krimpen, *supra* n 132 at 505.

concludes that cases such as those involving forced subscription to phone contracts ‘do rather remind of a form of fraud’.¹⁹⁹ Accordingly, what distinguishes exploitation from mere fraud or extortion is the fact that an exploited person is required to perform an action over a period of time — to offer her work or services of some kind — that benefit another disproportionately in a situation where she has no acceptable alternatives.

To conclude, this Section has articulated an account of exploitation in the context of the human rights prohibition against modern slavery, which is grounded in the philosophical debates and jurisprudence of international and domestic courts. On this view, to exploit is *to acquire disproportionate gains from the actions of an individual by abusing her position of vulnerability over a sustained period of time*. The discussion has demonstrated that all three identified conditions (‘abuse of vulnerability’, ‘excessive gain’ and ‘sustained action’) are factual, which leaves room for domestic courts to use national parameters when interpreting potentially exploitative practices, while preserving the universality of the definition itself. The proposed definition of exploitation thus serves both to distinguish exploitation from other wrongs and to separate practices that trigger protection under the right to be free from slavery, servitude, forced or compulsory labour and human trafficking from lesser forms of exploitation, which are to be dealt by other means. In the latter sense, it provides the severity threshold that has been missing from the jurisprudence on modern slavery. This definition is not however intended to replace the existing definitions of slavery, servitude, forced or compulsory labour and human trafficking, but to explain why these practices are prohibited under the same right, to elucidate their theoretical and normative grounding, and to offer guidance to national adjudicators and policy makers when applying the relevant instruments.

5. CONCLUSION

The article addresses an obvious gap in international law — the lack of sufficient engagement with exploitation — the concept central for an understanding of human trafficking and practices commonly referred to as modern slavery. Neither the specialized anti-trafficking instruments, nor general human rights treaties and tribunals, offer any guidance as to the *meaning* of exploitation in the context of modern slavery. Instead, the universally accepted definition of human trafficking refers to practices that *amount to* exploitation without stating the criteria used for classifying such diverse practices as exploitative or offering any normative guidance as to how this list may be expanded. Exploitation has not been elaborated in human rights law either leaving the theoretical foundations of the prohibition of slavery and human trafficking shaky.

The article addresses this shortcoming by articulating the necessary and sufficient conditions for the notion of exploitation in *this* context only — exploitation that warrants State action as a matter of the right to be free from slavery, servitude, forced or compulsory labour and human trafficking. Philosophical discussions of the general notion of exploitation are used as a starting point for such analysis. Building on those findings, the article identifies and explains the necessary and sufficient conditions for exploitation that reaches the threshold of severity to engage the human rights prohibition of slavery, servitude, forced or compulsory labour and human trafficking. Such necessary and sufficient conditions include: ‘abuse of vulnerability’, ‘excessive gain’ and ‘sustained action’, thus distinguishing exploitation from other wrongs such as abuse, fraud or extortion. These conditions provide the universal frame of reference for the notion of exploitation underpinning the practices of modern slavery, while allowing for its further specification in domestic legal practice.

¹⁹⁹ Van Krimpen, *supra* n 132 at 506-7.