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HUMAN BEINGS AND HUMAN DOINGS

What Makes It Human Trafficking? How Understanding Our Ability to Recognise Human Trafficking Provides a Rational Basis for Expanding the Scope of the Palermo Protocol

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Abstract: There is something about human trafficking that enables us – regardless of our experience or education – to almost immediately recognize which ones are simply acts of kidnapping or prostitution and which ones involve human trafficking. This article considers why this occurs and the impact that understanding the basis for our recognition can have on the international legal framework for combatting human trafficking. To the first, Aquinian metaphysics provides a way of understanding why this recognition of human trafficking occurs through the lens of substance and accident: our recognition of human trafficking is grounded in our perception of the essential nature, the substance of human trafficking. The article then turns to the Palermo Protocol, the basis for the international legal framework for combatting human trafficking, examining the need for an analytical approach grounded in substance and accident due to the fundamental dependence of the Protocol's definition of human trafficking on a non-exclusive list of examples (as opposed to articulating specific criteria). The article concludes by proposing that the substance of all the Palermo Protocol's examples – and thereby human trafficking – can be best understood through Nussbaum's articulation of objectification, the process by which a person becomes an object. Such an approach allows us to understand our ability to recognize human trafficking and provides a rational basis for identifying human trafficking beyond the listed examples of the Protocol.

Keywords: Human Trafficking, Exploitation, Objectification, Palermo Protocol.

1 Introduction

The very nature of human trafficking seems to give human beings an almost innate ability to recognise it, to know it when we see it. Notwithstanding our ability to do this, the exact nature of how we recognise human trafficking's defining features is far from clear, especially when seen through the current basis for understanding human trafficking in international law (Palermo Protocol, 2000, Art. 3(a)). After first examining why our innate but unspoken recognition of human trafficking constitutes an insufficient basis for a legal standard for identifying human trafficking, this article will then analyse the basis for our ability to recognise the essential character of things generally, with human trafficking being addressed. Next, a close examination is made of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (Palermo Protocol), focusing on its unarticulated criteria and the legal basis for addressing this lacuna within the scope of current legislation. Consideration is then given to the fundamental assumptions underlying current legislation and its close connection to feminist thinking, which allows for the objective interpretation of the legislative text in its current form. This provides the basis for my contention that while not expressly stated, the legislative text itself reveals the essential character of human trafficking to be objectification. Knowing objectification to be the unarticulated essential characteristic of human trafficking not only allows us to understand the basis for our recognition of human trafficking but also provides an articulable and rational basis for identifying instances of human trafficking beyond the specific examples found in current law (Palermo Protocol, 2000, Art. 3(a)).

2 Knowing it when we see it is not enough

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it. (Stewart, 1964, p. 197).

In criminal legislation and litigation, an ongoing source of friction and frustration is being able to identify something without being able to articulate the basis for that

identification. This is because, while "knowing it when you see it" is a universal human experience *(see below)*, by itself the intuitive recognition of something will never be sufficient for the interests of justice, whether in terms of protecting the victims of crime, or in terms of giving notice of what is being criminalised and made subject to punishment (European Convention on Human Rights, 1950, Art. 7).

3 Recognising human trafficking

Imagine two police reports, both reports involving acts of prostitution in violation of the same statute, both with similar victims, both from the same law enforcement agency – but with only one of them involving human trafficking. Upon reviewing both of those reports, almost without trying, you and I will quickly form impressions of which report involves human trafficking.

Whether we are considering a pair of police reports, a couple of witness statements, or multiple media accounts of crimes such as kidnapping or prostitution, there is something about the nature of human trafficking that enables us – regardless of our experience or education – to almost immediately form impressions and identify it as something outwith simple acts of kidnapping or prostitution.

Why is this so? What is it about human trafficking that makes it so immediately identifiable on an almost intuitive level? What is it about human trafficking that allows us to ‘know it when we see it’?

4 Why it matters

The answer to these questions has implications beyond simply understanding our seemingly innate ability to instinctively recognise anything, including human trafficking. The answer to these questions also has the potential to address a lacuna which exists in the current basis in international law for our understanding of human trafficking, to provide an articulable and rational basis for objectively identifying instances of human trafficking beyond the specific examples found in current law (Palermo Protocol, 2000, Art. 3(a)). At the heart of the legal framework for identifying human trafficking is an intentional silence, one that impairs the ability to identify instances of human trafficking

that do not neatly fit within the confines of the specific instances articulated by that framework.

5 How do we know it when we see it

To answer these questions, we must first understand the basis for our instinctive recognition of human trafficking or, indeed, of anything. We must ask what it is about something that allows us to "know it when we see it"?

Doing this requires more than merely being aware of the existence of a thing, of perceiving what Aristotle identified as its matter and form (Burrell, 1993, p. 62). Rather a deeper distinction is required, which Aquinas provides by building on Aristotle's fundamental understanding, observing that separate from the existence of any specific thing is the essence of that thing (Burrell, 1993, p. 62). Critical to this understanding of the nature of a thing is something that is almost instinctive in humans: the ability of the observer to separate from the thing the fundamental nature of a thing. That fundamental nature, "what makes something to be what it is" (Burrell, 1993, p. 63), was labelled by Aquinas as its substance.

Characteristics that "are incidental to the thing, [that] can come and go without the thing losing its identity" (Kerr, 2025, 4. Substance and Accident), are what Aquinas terms as the thing's accidents. That is, to be able to identify anything as representative of a class of things requires the observer to perceive its essential character and substance, apart from the accidents or non-essential characteristics of the occurrence being observed. Perceiving this substance, which can be both material and immaterial (Kerr, 2025, 4. Substance and Accident), allows us to identify the recurrence of a thing, irrespective of the particular accidents of its appearance in a specific instance or context. It is the perception of this essence, this substance, that allows us to know something when we see it.

A common instance of this instinctive recognition occurs with our observation of dogs. That is, we have a similar instinctive recognition upon seeing a dog – any dog. That a particular dog is large or small, black or white, belonging to a breed that we know well or is like none that we've ever seen before does not prevent us from recognising it as being a dog. This recognition occurs for us, irrespective of that dog's size, colour, breed,

etc. This suggests that there is a characteristic, a feature, that is shared by all dogs that allows us to know a dog when we see it.

To help us understand this recognition, Aquinas explains that anything which can be perceived by our senses (including dogs) is a composite of both matter and form (Galluzzo, 2007). That is, a specific dog has both a matter that we perceive in terms of its size, colour, breed, etc., as well as a form which allows us to connect that dog to other dogs. This is possible because there is a character, a fundamental "dogness" (if you will) that we perceive each time that we recognise an animal as a dog. Aquinas describes this form which we perceive as the essence of a thing, which is unaffected by the particulars of a specific instance of that thing (Galluzzo, 2007).

Drawing this distinction more clearly, Aquinas labels the essence of a thing that we perceive in its form as substance, holding that “to know a thing itself in the most perfect way absolutely is to know what it is, and this is to know its substance” (Aquinas, 1961, par 379). This “substance of a thing remains throughout every transmutation, although its attributes may change, both over time and in comparison with other instances of the thing” (Aquinas, 1961, par 74). This substance stands in contrast to the accidents of a thing, which change and vary without any impact on its substance.

To put it in terms of human trafficking, human trafficking has an essential character: a substance. As such, it is distinct from the accidents of a specific instance of human trafficking. In other words, the essential character of human trafficking is both distinct and distinguishable from the circumstances in which a specific instance of human trafficking occurs (the accidents of human trafficking), even when those circumstances are themselves crimes (such as prostitution or kidnapping). If the accidents of a specific instance of human trafficking were suddenly changed from those of prostitution to those of kidnapping or even to those of forced labour, such a change would not (and could not) affect the substance of human trafficking. The occurrence of human trafficking in that specific instance would still be capable of observation and recognition. It is this dynamic, the fixed quality of the substance of human trafficking (apart from the accidents of a specific instance) that allows an observer to recognise not only when an act of prostitution occurring in a rural American jurisdiction involves human trafficking, but also when a kidnapping occurring in London does so. It likewise

allows identification of when the occurrence of such offences does not involve human trafficking.

If the essential character of human trafficking is what allows its presence to be so readily recognised, then it must be asked: what is the essential character, the substance of human trafficking, that makes it so readily identifiable, irrespective of the accidents of a specific instance of human trafficking?

6 Palermo Protocol

To answer this question, we must examine the foundation for our understanding of human trafficking. The basis for our common understanding of human trafficking is grounded in the United Nations' *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* ('Palermo Protocol'), as this legislation establishes the basis for, and minimum provisions of, the criminal human trafficking laws of State Parties (Palermo Protocol, 2000, Art. 5(1)). The Palermo Protocol provides a three-part definition of human trafficking (referred to in the Protocol as "trafficking in persons"), comprised of action, means, and purpose; it is the confluence of these three requirements that provides the basis for our understanding of human trafficking (Palermo Protocol, 2000, Art. 3(a); Scalia & Garner, 2012). These three requirements form a conjunctive test and are intended to be understood in the context of their relationship to each other.

The required action is "the recruitment, transportation, transfer, harbouring or receipt of persons" (Palermo Protocol, 2000, Art. 3(a)). The means required is:

> 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 (Palermo Protocol, 2000, Art. 3(a)).

The language used for the first two requirements provides criteria sufficient to allow the objective determination of whether specific actions and particular means are within the ambit of the Protocol's definition of human trafficking.

7 What is Exploitation?

This level of clarity, however, is not maintained with the third requirement – that of purpose – which the Protocol labels "exploitation". The Protocol's language describing exploitation begins with, "Exploitation shall include, at a minimum," (Palermo Protocol, 2000, Art. 3(a)). The inclusion of "at a minimum" means that the examples of exploitation that follow this phrase are intended to be understood as a non-exclusive list. After providing several listed examples, the description of exploitation ends.

The construction of "at a minimum", alongside a brief description of examples considered to be exploitation means that, for exploitation, the Protocol's language offers neither the certainty of an exclusive list (a construction seen in the language used by the Protocol for the first two requirements) nor the clarity of set criteria that can be used to determine whether a specific circumstance should be understood as exploitation. Instead, this construction as a non-exclusive list without further interpretative guidance means that while it is certain that the listed examples qualify as exploitation, that certainty begins and ends with the listed examples (Parrenas, 2012). Beyond this point, advocacy regarding the meaning of exploitation ranges from equating all prostitution with sex trafficking (Kara, 2009) to conflating human trafficking with all forms of slavery (Bales, 2007) with no consensus in sight.

As to the items contained in the non-exclusive list, they are "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" (Palermo Protocol, 2000, Art. 3(a)). As noted, the description of exploitation ends with the non-exclusive list, offering no indication as to why any of the listed instances are definitive instances of exploitation. For legislative enactments which expand the definition of exploitation, Moldova has the broadest example, which includes using a woman as a surrogate mother or for reproductive purposes and using a person in an armed conflict. Similar to the Protocol, however, Moldova does this without explaining why such circumstances should definitively be considered as instances of exploitation (Allain, 2019).

Because of this lack of exhaustive examples or articulation, if a court or legislature were to determine whether an incident not listed explicitly within the scope of the stated instances of exploitation qualifies as human trafficking, the Palermo Protocol would offer no guidance to the description of such exploitation. The Protocol does, however, include a general principle for interpretation found in the full name of the Protocol. The full name of the Palermo Protocol – the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* – reveals the Protocol's relationship to the United Nations Convention against Transnational Organized Crime, indicating the context within which the Protocol's language is to be understood (Palermo Protocol 2000; Convention against Transnational Organized Crime 2000). This context is further reinforced in the Protocol's Preamble statement, that the Protocol is intended to supplement the Convention against Transnational Organized Crime (Palermo Protocol, 2000, Preamble). However, the Convention against Transnational Organized Crime makes no mention of exploitation and offers no guidance for interpreting the Protocol's non-exclusive list of examples of exploitation or for determining whether an incident fits within the scope of those examples. This means that instances that could instinctively be understood to be human trafficking might fall outside the scope of prosecution.

8 Interpretative Conventions

Beyond the interpretive guidance contained within the text of the Palermo Protocol, the interpretation of the Protocol is also governed by the Vienna Convention (1969) on the Law of Treaties which, notwithstanding its title, is applicable to all international agreements, including the Protocol. Found in Article 31, the primary interpretative conventions of the Vienna Convention function as a form of textualism (Scalia & Garner, 2012; Scalia 1997). Not to be confused with strict construction, the textualism espoused by the Vienna Convention operates as a *via media* between literalism and nihilism, recognising that words "have a limited range of meaning, and no interpretation that goes beyond that range is permissible" (Scalia, 1997, p. 24). Within this focus, Article 31 provides that an international agreement "be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context

and in the light of its object and purpose" (Vienna Convention, 1969, Art. 31(1)). Article 31 clarifies that the context for understanding an international agreement includes the text of the agreement itself together with "its preambles and annexes" (Vienna Convention, 1969, Art. 31(2)). There have been no annexes to the Palermo Protocol and (apart from its relationship to the Convention against Transnational Organized Crime) the guidance provided in the Protocol's Preamble consists of a single reference to exploitation, reiterating the Protocol's overall purpose to "combat the exploitation of persons, especially women and children" without further elaboration (Palermo Protocol, 2000, Preamble).

Where the interpretative conventions of Article 31 of the Vienna Convention leave the meaning of a term "ambiguous or obscure" (as in the present case), Article 32 of the Convention allows the use of what it terms "supplementary means of interpretation", which includes the consideration of the "preparatory work" of an international agreement (Vienna Convention, 1969, Art. 32). The preparatory work for legislative texts of the United Nations are compiled as *travaux préparatoires* and include interpretative notes detailing the intentions of the drafters and subsequent stakeholders regarding the legislative text, both as originally introduced and as amended during the course of the pre-adoption legislative process. The interpretative notes addressing exploitation from the *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (*Travaux Préparatoires*, 2006) do offer explanations regarding two of the specific instances of exploitation:

> The removal of organs from children with the consent of a parent or guardian for legitimate medical or therapeutic reasons (Travaux Préparatoires, 2006, p. 347).

are to be excluded from the meaning of exploitation. What the interpretative notes term "illegal adoptions", defined by the references in the notes as adoptions "with a view to the exploitation of the child or young person or of his labour" (*Supplementary Convention,* 1956, Art. 1(d)) are considered as within the meaning of exploitation, as "practices similar to slavery" (Palermo Protocol, 2000, Art. 3(a); *Travaux Préparatoires,* 2006).

In addition to these explanations, the interpretative notes from the Palermo Protocol's *Travaux Préparatoires* do address the silence regarding two other listed instances of exploitation (and, by extension, could offer a rationale for the broader silence of the Protocol itself regarding exploitation):

> The terms 'exploitation of the prostitution of others' or 'other forms of sexual exploitation' are not defined in the protocol, which is therefore without prejudice to how States parties address prostitution in their respective domestic laws (*Travaux Préparatoires*, 2006, p. 347).

This rationale for the Protocol's silence is repeated and amplified elsewhere in the Protocol's preparatory work. However, no mention is made of the grounds which a State might rely on to expand those definitions in a manner that would rationally relate to the Palermo Protocol's non-exclusive list of examples. While at first blush, this might seem unproblematic, or pass as an innocent oversight, this silence creates a significant practical limitation to the use of domestic criminal statutes enacting the provisions of the Palermo Protocol, as State Parties are required to do (Palermo Protocol, 2000, Art. 5). The European Convention on Human Rights (1950) provides that:

> [n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. (European Convention on Human Rights, 1950, Art. 7(1)).

This means that the criminal statutes of a nation must provide notice of the conduct that is prohibited by them, although it does allow for the "natural, foreseeable development" of the understanding of the scope of the conduct where the basis for such development is present within the law (*R v R,* 1992, 1 AC 599). Where such a basis exists, judges construing statutes enacting the provisions of the Palermo Protocol have the ability to consider whether specific conduct which does not precisely fit within one of the instances of exploitation, specified by the Palermo Protocol, should nonetheless be subject to criminal culpability, while still meeting the notice requirements of the European Convention on Human Rights (European Convention on Human Rights, 1950, Art. 7(1); *R. v R,* 1992, 1 AC 599). However, given the complete silence of the Palermo Protocol on the rationale for its specified instances being considered definitive

instances of exploitation, there is no ready way for a court to criminalise conduct which does not fall squarely within the specified instances without creating a strong basis upon which the defendant could appeal any conviction for the lack of notice required under the European Convention on Human Rights (European Convention on Human Rights, 1950, Art. 7(1)).

Under Article 32 of the Vienna Convention, preparatory work also includes work related to the "circumstances of its conclusion" and may also be used as a supplementary means of interpretation (Vienna Convention, 1969, Art. 32). For the Palermo Protocol, work related to the circumstances of its conclusion includes the official guidance to States for its implementation, the *Legislative Guide for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* (*Legislative Guide,* 2020), meaning that this work is intended to be used to interpret the language of the Palermo Protocol. The rationale for the silence of the Protocol regarding the lack of definitions for the two instances of exploitation listed in the interpretative notes of the *Travaux Préparatoires* could logically be extended to all the items on the Protocol's list of instances of exploitation – and expressly is so extended by the *Legislative Guide* (2020). Echoing the language of the interpretative notes of the *Travaux Préparatoires*, the *Legislative Guide* observes that by:

> keeping this list non-exhaustive, the [Palermo] Protocol allows for other, new, or less common forms of exploitation to be included in the scope of trafficking (*Legislative Guide*, 2020, p. 33).

While this flexibility is intended to empower proactive domestic legislation by States (with the listed instances of exploitation serving as a minimum scope for legislation), the silence of the text that provides the basis for this flexibility does not offer any explanation as to why any of the instances listed in the Protocol are definitively instances of exploitation (Palermo Protocol, 2000, Art. 3(a); *Legislative Guide*, 2020). With this silence, the *Legislative Guide* offers no direct guidance for States wishing to expand their legislative enactments to include instances of exploitation beyond those instances expressly listed in the Protocol.

The language of the Palermo Protocol, the record of its making, and the guidance provided for States to enact legislation to bring the Protocol into effect represents the entirety of the context authorised to guide interpretation of the Protocol's language under the form of textualism required by the Vienna Convention (Vienna Convention, 1969, Arts. 31 & 32). Although there is an absence of express guidance for interpretation within the Protocol itself and its authorised context under the Vienna Convention, the Protocol does provide one additional resource for understanding exploitation within the ambit of the Vienna Convention's particular required textualism: the text itself, including the listed instances of exploitation. These must be examined to see what (if any) guidance may be gleaned from them to provide a basis for the rational expansion of exploitation beyond the specific instances of exploitation listed in the Protocol.

9 Examining the Text

As previously noted, the Protocol's three-part definition of human trafficking is constructed to function as a conjunctive test, requiring a specific instance to fulfil all three requirements for action, for means, and for purpose, in order to qualify as human trafficking (Palermo Protocol, 2000, Art. 3(a)). Because of this, not only does the confluence of these three requirements provide the basis for our understanding of human trafficking, it also provides the context within which the Protocol's description of each of the three requirements (including the present focus of exploitation) is to be understood. That is, exploitation cannot be understood outside of its relationship to both action and means.

10 Action and Means in Focus

As noted above, the required action is "the recruitment, transportation, transfer, harbouring or receipt of persons" (Palermo Protocol, 2000, Art. 3(a)). The purpose of each of these items relates to the movement of persons: either directly by transportation and transfer of persons, or through the facilitation of their movement – by enticing persons into movement through recruitment, by harbouring persons during the process of movement, or by receiving persons at the end of their process of movement. Because

of this, the required action for human trafficking can be accurately represented as requiring the movement of persons (Parrenas, 2012).

The required means is:

> 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 (Palermo Protocol, Art. 3(a)).

The purpose of each of these items is to overcome the resistance, to ensure the compliance, of a person: either directly through force or threat of force, coercion, deception, abuse of a position of power, or indirectly by benefiting someone having control over that person. Because of this, the required means for human trafficking can be accurately represented as the control of persons.

Given this, the context for understanding exploitation is found within the coincidence of the movement of persons and the exercise of control over those persons. It is within this context of the movement of and control over persons, that the Protocol's text relating to exploitation is to be understood.

11 Exploitation in Focus

As noted above, exploitation is not defined but rather is described in the Palermo Protocol with a non-exclusive list of six specific instances (Palermo Protocol, 2000, Art. 3(a)). The language of the instances themselves suggests certain groupings.

The first two items on the list of instances of exploitation "the exploitation of the prostitution of others or other forms of sexual exploitation" (Palermo Protocol, 2000, Art. 3(a)) are constructed as the description of a broad category, preceded by the description of a specific instance of behaviour within that broad category. As the first item (by its own terms) is a subset of the second, the first two items can therefore accurately be summarily described by the description of the larger category – as "sexual exploitation".

The next three items on the list of instances of exploitation are intended to be understood as describing additional instances of exploitation apart from sexual exploitation. The three specific instances – "forced labour or services, slavery or

practices similar to slavery, servitude" (Palermo Protocol, 2000, Art. 3(a)) – differ only in matters of degree and detail, and can be considered as addressing one end of a scale or spectrum (forced labour or services), the other end of that spectrum (slavery or practices similar to slavery), and a point lying somewhere between either end of that spectrum (servitude). Given this, the category of these three items can be summarily described by the ends of that spectrum – as "forced labour and slavery".

The final listed instance of exploitation – "the removal of organs" (Palermo Protocol, 2000, Art. 3(a)) – is a singular circumstance that stands apart from the previous groupings. As such, it is most accurately described as its own unique category.

To determine whether there is a rational connection between these three categories – sexual exploitation, forced labour and slavery, and the removal of organs[1] – that is capable of articulation, it will be helpful to first recall that, as previously noted, each of these categories is itself identifiable because each of these categories has an essence, a substance that allows human observation to determine whether a specific instance should properly be considered to have at its core that substance, notwithstanding the accidents of a specific instance. But for such categories (as specific instances of exploitation) to form an intelligible whole as exploitation, there must also be a shared substance, a character common to each of these instances that represents the essence of what can be properly considered to be exploitation.

12 The Substance of Exploitation

To address this, we must consider questions that grow out of the analysis of the context created by the terms action, means, and exploitation: Within exploitation itself, is there an essential character, a substance that is shared by sexual exploitation, forced labour and slavery, and the removal of organs? And, if so, what is that shared substance? If such a shared substance can be identified, then it will provide the guidance needed

[1] Author's note: while my preceding analysis is original, on the eve of publication I discovered that a summary description of exploitation using three substantially similar categories (without supporting analysis) can also be found in Section 1 of Ireland's Criminal Law (Human Trafficking) 2008.

for the rational expansion of exploitation beyond the specific instances listed in the Protocol.

With the first requirement, that of movement of persons – "the recruitment, transportation, transfer, harbouring or receipt of persons" (Palermo Protocol, 2000, Art. 3(a)) – the listed items are either direct references to the movement of persons or are actions that facilitate the movement of persons. In short, there is nothing in the listed instances that points to an essential character or substance beyond that of movement itself. While the movement of persons is an integral part of what differentiates human trafficking from other crimes, it offers little guidance for understanding the third requirement of exploitation.

The second requirement, however, relates to control over persons. The instances used in the Protocol to describe it:

> 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 (Palermo Protocol, Art. 3(a))

– offer much more to consider. As a matter of first impression, individually and collectively the instances described fly squarely in the face of the Kantian formula of humanity, declaring that the human person is "an end in itself, not merely a means to be used" (Kant, 1997, p. 37).

The central truth of Kant's formula is the undergirding for understanding institutions and practices that have the effect of denying "people's equal moral status" (Meith 2023, p. 211). This is equally applicable to the Palermo Protocol and to Dworkin's and MacKinnon's analyses of pornography (all of which give the Kantian formula practical effect), observing that even when appearing to be consensual (i.e., when done with the active assistance of the exploited person, when compensation is provided to that person, etc.) damage is unavoidably done to the humanity of the person being exploited (Dworkin, 1979). Once begun, with respect to the instrumentalisation of human trafficking, this almost mechanical process creates a relationship that inherently denies the agency of the exploited person, leaving the role of object as the only space for the exploited person to exist (MacKinnon, 1987). As both Dworkin and MacKinnon

observe - certain practices inextricably result in objectification, turning persons into things (Dworkin, 1979; MacKinnon, 1987; *see also* Gardner, 2007). In her examination of Dworkin's and MacKinnon's approaches to objectification, Nussbaum catalogues the nature and particulars of this process of dehumanisation, revealing exactly how the process occurs by identifying seven concepts central to objectification:

> 1. *Instrumentality:* The objectifier treats the object as a tool of his or her purposes.
> 2. *Denial of autonomy:* The objectifier treats the object as lacking in autonomy and self-determination.
> 3. *Inertness:* The objectifier treats the object as lacking in agency and perhaps also in activity.
> 4. *Fungibility:* The objectifier treats the object as interchangeable (a) with other objects of the same type, and/or (b) with objects of other types.
> 5. *Violability:* The objectifier treats the object as lacking in boundary-integrity, as something that it is permissible to break up, smash, break into.
> 6. *Ownership:* The objectifier treats the object as something that is owned by another, can be bought or sold, etc.
> 7. *Denial of subjectivity:* The objectifier treats the object as something whose experience and feelings (if any) need not be taken into account (Nussbaum, 1995, p. 257; *see also* Gardner, 2007).

13 Objectification and Control

Upon closer examination, the connections between the Palermo Protocol's second requirement of control over persons and the central concepts of objectification identified by Nussbaum become apparent (Gardner, 2007). The means listed in the Protocol's second requirement of control over persons are readily linked to the concepts that Nussbaum identifies as central to objectification, specifically:

Second Requirement – Control:	Objectification – Central Concepts:
"by means of the threat or use of force or other forms of coercion,"	"2. *Denial of autonomy:* The objectifier treats the object as lacking in autonomy and self-determination."
"of abduction, of fraud, of deception,"	"3. *Inertness:* The objectifier treats the object as lacking in agency and perhaps also in activity."

"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"	"6. *Ownership:* The objectifier treats the object as something that is owned by another, can be bought or sold, etc."
Palermo Protocol, 2000, Art. 3(a)	Nussbaum, 1995, p. 257

In summation, consideration of Nussbaum's delineation of the central concepts of objectification reveals that three of the seven central concepts of objectification closely correlate with the specific means listed in the Protocol's second requirement of control over persons.

14 Objectification and Exploitation

With objectification being so closely connected to the Palermo Protocol's second requirement, that of control over persons, it is reasonable to ask whether objectification could also have a role in guiding our understanding of the meaning of the Protocol's third requirement, that of exploitation. As previously discussed, the specific instances of exploitation set forth in the requirement of exploitation can be accurately summarised by three categories: sexual exploitation, forced labour and slavery, and the removal of organs, and are readily linked to the concepts that Nussbaum identifies as central to objectification, specifically:

Third Requirement – Exploitation:	Objectification – Central Concepts:
Sexual exploitation	"1. *Instrumentality:* The objectifier treats the object as a tool of his or her purposes. 2. *Denial of autonomy:* The objectifier treats the object as lacking in autonomy and self-determination. 4. *Fungibility:* The objectifier treats the object as interchangeable (a) with other objects of the same type, and/or (b) with objects of other types.

	6. *Ownership:* The objectifier treats the object as something that is owned by another, can be bought or sold, etc."
Forced labour and slavery	"1. *Instrumentality:* The objectifier treats the object as a tool of his or her purposes. 2. *Denial of autonomy:* The objectifier treats the object as lacking in autonomy and self-determination. 4. *Fungibility:* The objectifier treats the object as interchangeable (a) with other objects of the same type, and/or (b) with objects of other types. 6. *Ownership:* The objectifier treats the object as something that is owned by another, can be bought or sold, etc."
Removal of organs	"3. *Inertness:* The objectifier treats the object as lacking in agency and perhaps also in activity. 5. *Violability:* The objectifier treats the object as lacking in boundary-integrity, as something that it is permissible to break up, smash, break into. 7. *Denial of subjectivity:* The objectifier treats the object as something whose experience and feelings (if any) need not be taken into account."
Palermo Protocol, 2000, Art. 3(a)	Nussbaum, 1995, p. 257

In comparison to the requirement of control of persons, the examination of the Protocol's third requirement of exploitation demonstrates an even closer correlation, connecting the Protocol's listed instances of exploitation to all seven of the key concepts in Nussbaum's approach to objectification, revealing the essence of the Protocol's third requirement of exploitation to be objectification. With this understanding of the substance of exploitation, the three requirements of the Protocol's understanding of human trafficking can be accurately represented as movement, control over persons, and objectification.

15 Impact on the Palermo Protocol

This understanding that the essence of exploitation is objectification, when coupled with the other requirements of movement and control over persons, provides an articulable and rational basis for identifying instances of human trafficking beyond

the Palermo Protocol's listed instances of exploitation. Instead of merely providing States with flexibility by not dictating to them how to address "exploitation of the prostitution of others" or "other forms of sexual exploitation" (*Travaux Préparatoires*, 2006, p. 347) and by passively allowing "for other, new, or less common forms of exploitation to be included in the scope of trafficking" (*Legislative Guide*, 2020, p. 33), this understanding of exploitation as objectification provides the legislatures and courts of States with guidance for determining whether "other, new, or less common forms of exploitation" (*Legislative Guide*, 2020, p. 33) should also be considered human trafficking, in addition to those instances expressly listed in the Protocol. Just as importantly, because this understanding construes the international legislative text in its current form, it does not require courts and legislatures to wait for amendments to be made to the Palermo Protocol before acting. Because it is grounded in plain language of the text and well within the "natural, foreseeable development" of the scope of current language of the Palermo Protocol, this understanding of its meaning will also satisfy the notice requirements of the European Convention on Human Rights (European Convention on Human Rights, 1950, Art. 7(1); *R v R,* 1992, 1 AC 599). This new guidance for understanding human trafficking exploitation as objectification could pave the way for new inclusive policies and legislature because, no matter how accurate our intuitive recognition of human trafficking may be, as it stands, the interests of justice can never be satisfied by merely knowing it when we see it.

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