



Revisiting the Notion of Exploitation: The Blind Spot in Anti-Trafficking Law

LEWIS NJABULO SIBANDA 

ARTICLES



ABSTRACT

This article examines the indeterminacy of the definition of human trafficking, attributing it to the persistent ambiguity surrounding the notion of exploitation in anti-trafficking law. Although exploitation is central to determining which practices fall within the scope of trafficking, it remains under-theorised and conceptually elusive. As a result, anti-trafficking discourse has become a site of ideological contestation in which States and advocacy groups compete to shape its meaning. Therefore, responding to calls for a new engagement with exploitation in international legal scholarship, this paper seeks to provide a measure of clarity to the concept. It offers both theoretical and practical insights by engaging with Marxist and Kantian accounts on the fundamental wrong that the anti-trafficking framework seeks to address. It unpacks the purpose element of the trafficking definition and provides criteria for identifying practices that fall within its ambit. The paper identifies coercion and wrongful gain as the fundamental wrongs underpinning exploitation, arguing that the degree of severity required to establish trafficking should be determined contextually on a case-by-case basis. It also argues that the severity threshold is lower in cases involving the abuse of vulnerability as a mode of coercion.

CORRESPONDING AUTHOR:

Lewis Njabulo Sibanda

Lecturer in Law, The Open University, UK

lewis.sibanda@open.ac.uk

KEYWORDS:

Palermo Protocol; human trafficking; exploitation; coercion; abuse of vulnerability; wrongful gain

TO CITE THIS ARTICLE:

Lewis Njabulo Sibanda, 'Revisiting the Notion of Exploitation: The Blind Spot in Anti-Trafficking Law' (2026) 22(2) Utrecht Law Review 45–62. DOI: <https://doi.org/10.36633/ulr.1276>

The concept of exploitation is central to the understanding of the human trafficking (HT) phenomenon and many other legal concepts such as slavery, forced labour, child labour and bonded labour.¹ Despite the long history of international law-making, the concept remains largely under-theorised and under-adjudicated.² Notwithstanding many references to exploitation in international law, none of the legal instruments that are committed to the protection of children from economic, social and sexual exploitation,³ or those that place obligations on States to suppress the trafficking of women and their exploitation in prostitution defines it.⁴ The concept of exploitation is captured in the Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons (the Palermo Protocol).⁵ The Palermo Protocol provides an internationally accepted definition of HT with exploitation as one of its essential elements.⁶

The Palermo Protocol, however, does not define what exploitation means. Instead, it enumerates extreme cases of abuse that are to be considered as involving exploitation. Some scholars have suggested that these listed examples are only a minimum and reflect that exploitation is a broader problem.⁷ Because this list of exploitations that can be considered HT is not exhaustive, the definition in the Palermo Protocol is indeterminate. As a result, there is a possibility of considering in this framework a continuum ‘which moves from free labour to exploitation; to abuse through servile situations including forced labour; and finally, to the most extreme type of coercion manifest as enslavement’.⁸ The degree of exploitation and what the definition covers are impossible to predict.⁹ The indeterminacy of the concept is evidence of the fact that exploitation is a broader problem that needs to be addressed. It also points to the need to theorise exploitation to avoid the arbitrary or political interpretation of what constitutes problematic forms of exploitation by States. To adequately address and prevent the sole purpose of HT (exploitation), international legal scholarship must theorise exploitation in a manner true to the realities of the predatory political economy. Marks aptly advocates for ‘a new kind of international legal engagement with exploitation’, which the following sections will attempt to do.¹⁰ She argues that the various references to exploitation in international law fail to give meaning to the concept, requiring further engagement with exploitation in international legal scholarship and law.¹¹

Accordingly, the article argues that the indeterminacy of the HT definition can be addressed by establishing legal parameters for determining conduct that fits within the ambit of the open-ended list of exploitative purposes found in the Palermo Protocol. It identifies coercion and wrongful gain as the fundamental wrongs underpinning trafficking-related exploitation. Through unpacking these concepts, the article develops an understanding of exploitation that

¹ Marija Jovanovic, *State Responsibility for ‘Modern Slavery’ in Human Rights Law: A Right Not to Be Trafficked* (OUP 2023) 64.

² *ibid* 65.

³ Convention on the Rights of the Child (adopted 20 November 1989, entered into force on 2 September 1990) 1577 UNTS 3 (CRC), art 19(1); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force on 3 January 1976) 993 UNTS 3 (ICESCR), art 10(3); Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and pornography (adopted 25 May 2000, entered into force on 18 January 2002) 2171 UNTS 227, art 3(1).

⁴ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force on 3 September 1981) 1249 UNTS 13 (CEDAW), art 6.

⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (The Palermo Protocol), art 3.

⁶ *ibid* art 3(1).

⁷ Virginia Mantouvalou, ‘Legal Construction of the Structures of Exploitation’ in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (OUP 2018) 192.

⁸ Jean Allain, *The Law and Slavery: Prohibiting Human Exploitation* (BRILL 2015) 345.

⁹ UNODC, ‘Travaux Préparatoires de the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’ (United Nations 2006) 343 <https://www.unodc.org/documents/treaties/UNTOC/Publications/Travaux%20Preparatoire/04-60074_ebook-e.pdf> accessed 15 November 2025; Janie A Chuang, ‘Exploitation Creep and the Unmasking of Human Trafficking Law’ (2014) 108(4) *American Journal of International Law* 609, 632.

¹⁰ Susan Marks, ‘Exploitation as an international legal concept’ in Susan Marks (eds), *International Law on the Left: Re-Examining Marxist Legacies* (CUP 2008) 282–83.

¹¹ Jovanovic (n 1) 67.

allows States to identify exploitative practices that fall within the scope of the HT definition. However, it notes that the severity of exploitation required to establish HT cannot be determined in the abstract and should instead be assessed on a case-by-case basis. Ultimately, the article contends that the severity threshold is lower where exploitation involves the abuse of vulnerability as a mode of coercion.

2 INTERNATIONAL LAW AND EXPLOITATION

To fully understand the contemporary conception of exploitation under anti-trafficking laws, the historical development of the phenomenon on the international legal scene must be considered. This is crucial in assessing how the law has evolved and how past legal instruments have shaped current understandings of what constitutes HT for exploitation. Legal systems and their values are the culmination of a long historical and cultural development; studying such developments reveals useful insight into the concept's evolution.¹² Therefore, this section discusses how the international law on anti-trafficking has conceptualised exploitation in the past and present, together with its shortcomings.

The concept of HT in international law emerged in the twentieth century. It referred to 'white slavery', a term used to highlight the recruitment of women into prostitution.¹³ 'White slavery' was used to describe HT in the early days as the practice fundamentally resembled traditional slavery.¹⁴ However, this term had a different meaning to that of transatlantic slavery, which involved the transport, subordination, dehumanisation and exploitation of people from Africa to Europe and the United States (US). Instead, 'white slavery', as the phrase suggests, was more concerned with the exploitation of white (European) people in Europe. The term has its origin in describing female factory workers in England but later became associated with the exploitation of white women through prostitution.¹⁵ European women were trafficked across the continent for exploitation in brothels.¹⁶ Therefore, fuelled by the conservative attitudes towards women's sexuality and the perceived threats to the 'purity' of white women, trafficking became an issue for international treaty-making.¹⁷

The earliest treaty explicitly referring to exploitation in the context of HT was the International Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others in 1949 (the 1949 Convention).¹⁸ Article 1(2) of the 1949 Convention imposes an obligation on States to punish any person that 'exploits the prostitution of another person, even with the consent of that person'. The 1949 Convention did not define exploitation, but the inference is that it considered both forced and consented prostitution as exploitation. In international law, exploitation often carries either a positive or a pejorative connotation. Instances where the term is used positively may be seen in discussions about the exploitation of the seabed under the law of the sea and of trademarks under intellectual property law. When exploitation is used in human rights or anti-trafficking law, it is always in the negative sense, referring to a problem that needs to be addressed.¹⁹ The key distinction between the positive and negative framing lies in the subject of exploitation. When the subject refers to natural resources or intangible property, the term is often used in the positive sense. However, when the subject is a person, as is the case with both human rights and anti-trafficking law, the term is used to highlight abusive practices that must be prevented or addressed. Therefore, there is a moral judgment made on the wrongfulness of the conduct in question. With this in mind, the 1949 Convention identified HT as a phenomenon that was a consequence of the

¹² Ishwara Bhat, *Idea and Methods of Legal Research* (OUP 2019) 206–08.

¹³ Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (CUP 2017) 19.

¹⁴ Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (Martinus Nijhoff Publishers 2006) 13.

¹⁵ *ibid* 13.

¹⁶ Janie Chuang, 'Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-trafficking Law and Policy' (2010) 158 *University of Pennsylvania Law Review* 1655, 1666.

¹⁷ Stoyanova (n 13) 20.

¹⁸ International Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (adopted 2 December 1949, entered into force on 25 July 1951) 96 UNTS 271 (1949 Convention).

¹⁹ Marks (n 10) 293–94.

existence of prostitution itself.²⁰ As seen from this Convention, the early reference to exploitation in international law centred around the movement of women and girls in Europe for purposes of prostitution.²¹ Exploitation was framed in this limited sense of the sexual exploitation of women and girls, grounded in the moral anxieties surrounding prostitution and the so-called white slavery. This has shaped contemporary debates on the conceptualisation of problematic exploitation as shown in the next section.

2.1 THE PALERMO PROTOCOL AND THE CONCEPTUALISATION OF EXPLOITATION

The concept of 'exploitation' has appeared as a crucial element of the first-ever internationally accepted definition of HT constructed by the Palermo Protocol.²² It is also found in the Council of Europe's Convention on Action against Trafficking in Human Beings (COE Convention), which reproduces verbatim the definition of HT in the Palermo Protocol.²³ This definition emerged as the culmination of what became known as the Vienna Process, which marked the first serious attempt by the international community to leverage international law in the battle against transnational organised crime.²⁴ This process began with the establishment of a special intergovernmental ad hoc committee tasked with developing an international legal framework to address the trafficking of women and children, the smuggling of migrants and the illicit trade in firearms.²⁵ Despite the fact that men can be victims of HT, the recurrent framing of 'women and children' together within anti-trafficking discourse reveals the enduring gendered assumptions rooted in the earlier treaties on 'white slavery'. This legacy of anti-trafficking conventions grounded in paternalist attempts to control women's sexuality and mobility is clearly reflected in the Palermo Protocol's title, which specifically references women and children. As shown above, HT has historically been understood as a form of sexual exploitation through prostitution, predominantly perceived to affect women and girls.²⁶ This discursive linkage between women and children infantilises women, effectively undermining their agency and autonomy over their own bodies.²⁷ It does this through the over-protective framing of laws that groups women with children as inherently vulnerable subjects, resulting in the adoption of protective laws targeting an occupation primarily performed by women, denying them the same decision-making autonomy granted to men.²⁸

The issue of what constituted trafficking-related exploitation resurfaced as a central point of contention during the negotiations of the Palermo Protocol. The Human Rights Caucus, one of the lobbying non-governmental organisation (NGO) groups, argued for a broad and inclusive definition emphasising the use of coercive means and exploitation as key indicators of problematic relations.²⁹ Additionally, they distinguished between adults and children, contending that in cases involving children coercion was not required due to their lack of legal capacity to give consent. To add to this was the participation of an informal coalition of intergovernmental agencies, which included the United Nations (UN) High Commissioner for Human Rights, the United Nations Children's Fund, the International Organization for Migration and the UN High Commissioner for Refugees. According to Gallagher, who was representing the

²⁰ See the preamble to the 1949 Convention (n 18), which stipulates that 'whereas prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person ...'

²¹ Ali Miller and Alison Stewart, 'Report from the Roundtable on the Meaning of "Trafficking in Persons": A Human Rights Perspective' (1998) 20 Women's Rights Law Reporter 11, 14.

²² Palermo Protocol (n 5) art 3.

²³ Convention on Action Against Trafficking in Human Beings (adopted 16 May 2005, entered into force on 1 February 2008) CETS 197 (COE Convention), art 4.

²⁴ Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 Human Rights Quarterly 975, 976.

²⁵ UNGA, 'Resolution adopted by the General Assembly [on the report of the Third Committee (A/53/616)] 53/111. Transnational organized crime' UN Doc A/RES/53/111 (20 January 1999), para 10.

²⁶ Judy Fudge, *Constructing Modern Slavery: Law, Capitalism, and Unfree Labour* (CUP 2025) 17–18.

²⁷ Melissa Ditmore and Marjan Wijers, 'The Negotiations on the UN Protocol on Trafficking in Persons. Moving the focus from morality to actual conditions' (2003) 4 *Nemesis* 79, 82.

²⁸ *ibid.*

²⁹ *ibid* 81–83.

High Commissioner for Human Rights during the negotiations, one of the goals of this coalition was to secure 'a definition of trafficking sufficiently broad to encompass the most prevalent forms of contemporary exploitation'.³⁰ In addition to advocating for this broad definition, the coalition sought to persuade States to commit to the protection of victims and the safeguarding of existing rights and obligations.³¹ Thus, in order to accommodate the various interests and to facilitate the speedy adoption of the Palermo Protocol, the HT definition was left broad and vague. Article 3(a) defined HT as:

The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, *for the purpose of exploitation. 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.*³²

The Palermo Protocol essentially defines HT as involving actions, such as recruitment, harbouring or receipt of persons through non-consensual methods for the purpose of exploitation. However, while the Palermo Protocol identifies 'exploitation' as the sole purpose of HT and, accordingly, an indispensable element of it, the instrument did not define the concept.³³ It merely provided a non-exhaustive list of exploitative practices that would, at a minimum, be exploitation for the purposes of HT. Similar to the 1949 Convention, exploitation is understood to include sexual exploitation and the prostitution of others. However, the Protocol goes further than previous instruments by providing a non-exhaustive list of practices that fall within the definition of exploitation, including forced labour, practices akin to slavery, servitude and the removal of organs. The indeterminacy of the definition of HT is further compounded by the fact that the concept of exploitation has never been clearly defined in international law. Consequently, it attracts varying interpretations that are influenced by different ideological perspectives.³⁴ Therefore, instead of resolving the political contestation around the definition of HT, the Palermo Protocol has amplified legal uncertainty over what practices fall within the ambit of its provisions.

This position is supported by Uhl, who has criticised the HT definition as lacking terminological clarity based on its failure to define the term 'exploitation'.³⁵ The contention is that without a clear understanding of the meaning of exploitation, it will be difficult to establish whether HT has taken place as the act and means of trafficking must be done to exploit the person.³⁶ Allain, however, contends that the enumerated list of exploitative practices is adequate and flexible enough to allow for more exploitative practices to be included in the HT definition.³⁷ He noted:

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. The manner in which the sentence starts, that 'exploitation shall include, at a minimum' speaks to adding various new type (sic) of exploitive behaviour rather than seeking to establish what constitutes 'exploitation'.³⁸

³⁰ Anne Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (2009) 49(4) *Virginia Journal of International Law* 789, 790.

³¹ *ibid.*

³² Palermo Protocol (n 5) (emphasis added).

³³ Jovanovic (n 1) 68.

³⁴ Roger Plant, 'Forced Labour, Slavery and Human Trafficking: When do definitions matter?' (2015) 5 *Anti-Trafficking Review* 153.

³⁵ Bärbel 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, 125.

³⁶ Stoyanova (n 13) 61.

³⁷ Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Brill 2013) 350.

³⁸ *ibid.*

Allain's argument only holds if it is possible, in practice, to predict what other exploitative practices of lesser severity than the categories specifically mentioned in the instrument would satisfy the threshold for HT without arbitrariness.³⁹ However, the Palermo Protocol itself offers no effective means of addressing this lack of terminological clarity. Without a treaty body responsible for enforcing the Palermo Protocol and an option for an individual's complaint procedure, a State has more leeway to arbitrarily interpret the vague definition of HT. To clarify which exploitative practices meet the HT threshold, the Palermo Protocol's definition of exploitation must specify how the term should be used or understood. Wolff argued:

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.⁴⁰

The reference to exploitation in the Palermo Protocol's definition of HT fails to give an infallible or predictable way of establishing other forms of exploitation that may be classified as meeting the necessary and sufficient conditions for HT. In other words, it fails to establish a reference or criterion against which future forms of exploitation may be evaluated to determine whether they fall within the ambit of the HT phenomenon. The non-exhaustive list of exploitative practices in the definition provides no obvious way of identifying other forms of exploitation. In any event, if it was argued that the categories of exploitation allow for a flexible way to develop future forms of exploitation,⁴¹ the critique that this approach conveys only a partial understanding of the concept still stands. With no treaty body to provide flesh to the skeletal definition in the Palermo Protocol and the inadequacy of the Article 15 procedure as highlighted above, the provision's vagueness only promotes conflicting constructions of HT at the national level based on political choices. In addition to the failure to fix a reference, the definition fails to explain the nature and meaning of the exploitation concept itself.⁴² Therefore, it is necessary to engage with exploitation in a manner that gives meaning to the concept for it to provide the much-needed terminological clarity to the anti-trafficking framework.

2.2 DEFINING EXPLOITATION: A MATTER FOR NATIONAL LAW OR INTERNATIONAL CONSENSUS?

One question that comes to mind is whether there could be a universal understanding of what constitutes exploitation for the purposes of HT, taking into consideration the differences between States.⁴³ Stoyanova argues that the 'dilemma of how to conceptualize exploitation needs to be ultimately resolved at national level, since international law does not offer a solution'.⁴⁴ However, this results in HT turning into what Fudge terms a 'floating signifier' that has its meaning contingent on the social and political context within which it is utilised.⁴⁵ This process generally reflects a top-down approach to problematisation, particularly within crime-related discourses such as HT, where political elites (such as policymakers and senior government officials) play a dominant role in defining the problem.⁴⁶ In this way, the conceptualisation of the trafficking problem by the elite produces hegemonic narratives that exclude alternative conceptualisations. This includes perspectives of NGOs that were involved in the negotiation of the Palermo Protocol, such as the Human Rights Caucus, which advocated for a more expansive understanding of HT. A predictable outcome, as shown below, is the

³⁹ Stoyanova (n 13) 67 states that: 'The definition of human trafficking indicates that exploitation shall include, 'at a minimum' the abuses of slavery, servitude, etc. This might be interpreted as a suggestion that exploitation is more expansive since it might conceivably be interpreted to include other abuses potentially involving a lower level of harm'.

⁴⁰ Jonathan Wolff, 'Marx and Exploitation' (1999) 3 *The Journal of Ethics* 105, 108.

⁴¹ Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (n 37) 350.

⁴² Jovanovic (n 1) 68.

⁴³ *ibid* 70–71.

⁴⁴ Stoyanova (n 13) 68.

⁴⁵ Fudge (n 26) 132.

⁴⁶ Rose Broad and Nick Turnbull, 'From Human Trafficking to Modern Slavery: The Development of Anti-Trafficking Policy in the UK' (2019) 25 *European Journal on Criminal Policy and Research* 199, 121–22.

creation of a narrow idea of victimhood that marginalises types of exploitation that do not fall within the dominant framing. A multi-country study published by the Global Alliance Against Traffic in Women confirmed this to be the case:

Other states which have ratified the UN Trafficking Protocol also still choose to put the emphasis on one particular form of exploitation (usually exploitation of the prostitution of others) in their anti-trafficking work, meaning that trafficking for other forms of exploitation receives little or no attention and that individuals who have been trafficked into forms of forced labour other than forced prostitution usually receive inadequate protection and assistance. Despite the provisions of the UN Trafficking Protocol, anti-trafficking measures are also still being used to justify a raft of measures which are aimed at suppressing sex work in general, rather than at the specific situations in which people are forced into prostitution.⁴⁷

Thus, despite the Palermo Protocol adopting a broad definition of HT, the first years after its entry into force saw a predominant focus on sexual exploitation by major destination countries. In practice, anti-trafficking efforts largely centred on rescuing women coerced into prostitution. However, influenced by the enduring legacy of the 1949 Convention, many States have continued to conflate trafficking for sexual exploitation with consensual sex work. This tendency has been compounded by the unilateralism of the US, which has sought to impose its domestic interpretation of HT through extraterritorial enforcement reinforced by aid conditionalities. As a result, early anti-trafficking efforts were highly influenced by the US government's priorities in the conceptualisation and combatting of trafficking-related exploitation. The US administration, under George W Bush (2001–09), adopted the position that prostitution by its very nature was exploitative and that it should be abolished.⁴⁸ Similarly, other major destination countries in the European Union and the United Kingdom (UK) initially concentrated their anti-trafficking efforts on sexual exploitation, mainly targeting migrant sex workers while neglecting other forms of HT (such as labour exploitation). In a white paper released by the UK government, HT was framed as a consequence of illegal migration and organised crime.⁴⁹ The paper distinguished between trafficking for sexual exploitation and labour exploitation, although predominately focusing on migration for prostitution purposes. The paper noted:

We will also be bringing forward detailed legislation to cover people trafficking, both internationally and within this country, as soon as possible. The legislation will cover those being trafficked for both labour and sexual exploitation. But such measures go wider than is possible in immigration legislation. *We need to act now to deal with the gross abuse represented by those who traffic people here from abroad for their sexual exploitation. We will therefore use the forthcoming immigration legislation to introduce a new offence of trafficking people from abroad to this country for the purposes of sexual exploitation.*⁵⁰

Thus, in the UK trafficking has been subsumed under 'illegal' immigration requiring the adoption of more laws to criminalise the movement of people for sexual exploitation. It is conceptualised as an issue involving criminal gangs or individual perpetrators who must be prosecuted. The proposed solution is to address the demand for prostitution, which the UK government views as inextricably linked to trafficking for sexual exploitation.⁵¹ In this way, anti-trafficking rhetoric has functioned as a mechanism through which the government targets migrant sex workers, effectively criminalising prostitution under the guise of fulfilling its obligations under the Palermo Protocol.⁵² While theoretically recognising the need to address both labour and

⁴⁷ Global Alliance Against Traffic in Women, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (2007) 17 <https://gaatw.org/Collateral_Damage_Final/singlefile_CollateralDamagefinal.pdf> last accessed 17 November 2025.

⁴⁸ Fudge (n 26) 25.

⁴⁹ UK Home Office, 'Safe Borders, Safe Haven: Integration with Diversity in Modern Britain' (2001) 88 <<https://assets.publishing.service.gov.uk/media/5a7ba528ed915d1311060959/cm5387.pdf>> last accessed 26 October 2025.

⁵⁰ *ibid* 83 (emphasis added).

⁵¹ UK Home Office, 'Tackling the Demand for Prostitution: A Review' (November 2008) 6–8 <<https://data.parliament.uk/DepositedPapers/Files/DEP2008-2766/DEP2008-2766.pdf>> last accessed 26 October 2025.

⁵² Fudge (n 26) 155.

sexual exploitation, the implementation of anti-trafficking policies has tended to be biased towards sexual exploitation overlooking other non-sex work forms of exploitation. In relation to labour exploitation, the approach has often emphasised immigration controls as both a means of protecting migrants from exploitation and a way of safeguarding ‘the competitiveness of decent employers who comply with employment law’.⁵³ It is noteworthy that the concept of ‘exploitation’ itself is left undefined. Instead, it is described as harmful to both the victim and local businesses that comply with labour regulations. This framing positions illegal working and labour market irregularities as the principal causes of exploitation, in turn diverting attention from structural inequalities and precarious labour practices that facilitate abuse.⁵⁴ This aligns with the current anti-trafficking framework, which views exploitation as constituting random and autonomous relations of domination rather than a normal result of the functioning and coherent global political economy that relies on cheap exploitable labour.⁵⁵

While the strategic ambiguity of the definition enabled the swift adoption of the Palermo Protocol, the trade-off was it allowed States to develop their own construction of HT as shown above.⁵⁶ The ambiguous definition has turned the anti-trafficking discourse into a battleground for hegemonic struggles. Consequently, hegemonic powers have imposed their own understanding of exploitation, prioritising a criminal justice approach that emphasises sexual exploitation. In this way, the Palermo Protocol’s definition has been operationalised in a manner that confines its application to a small number of deserving victims. Although it may be argued that such vagueness enables States to exceed the minimum standards in addressing HT, this remains unlikely as criminal law provisions in the Palermo Protocol are couched in a peremptory tone, whereas victim protection provisions have a permissive tone. Thus, it is not unreasonable to assume that the construction of exploitation by States in the context of HT may be restricted to the most extreme forms of abuse.

While recognising that no legal definition of HT can adequately reflect the lived experiences of HT victims, this article argues that international law need not provide a universal definition of exploitation but should provide some necessary and sufficient conditions to identify problematic relations.⁵⁷ International law, and anti-trafficking law in particular, is well placed to articulate the necessary and sufficient conditions of trafficking for exploitation. The vague and undefined reference to exploitation in the current HT definition allows for arbitrary and divergent interpretations at the national level.⁵⁸ In the absence of conceptual clarity around the term ‘exploitation’, the scope of practices falling within the ambit of the Palermo Protocol remains unclear.⁵⁹ The need to set legal parameters becomes more apparent when one considers that the Palermo Protocol does not have a treaty monitoring body to resolve interpretative disputes and enforce State obligations to prevent HT.⁶⁰ The following sections will conceptualise exploitation with reference to philosophical debates on what the term entails and, more particularly, what the conceptual parameters for exploitative and non-exploitative labour are.

3 EXPLOITATION AND THE FUNDAMENTAL WRONG

During the negotiation stage of the Palermo Protocol, the ‘exploitation’ concept was debated from various angles, including, but not limited to, legal, philosophical, economic and political

⁵³ UK Home Office ‘Safe Borders, Safe Haven: Integration with Diversity in Modern Britain’ (n 49) 84.

⁵⁴ UK Home Office, ‘Restoring Control over the Immigration System: Presented to Parliament by the Secretary of State for the Home Department by Command of His Majesty’ (May 2025) 61 <<https://assets.publishing.service.gov.uk/media/6821aec3f16c0654b19060ac/restoring-control-over-the-immigration-system-white-paper.pdf>> last accessed 29 October 2025.

⁵⁵ Genevieve Lebaron and Alison J Ayers, ‘The Rise of a ‘New Slavery’? Understanding African Unfree Labour Through Neoliberalism’ (2013) 34(5) Third World Quarterly 873, 878.

⁵⁶ Fudge (n 26) 22.

⁵⁷ Anne Gallagher, *The International Law of Human Trafficking* (CUP 2010) 52.

⁵⁸ Chuang, ‘Exploitation Creep and the Unmasking of Human Trafficking Law’ (n 9) 616.

⁵⁹ Prabha Kotiswaran, ‘Feminist Approaches to Criminal Law’ in Markus Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (OUP 2014).

⁶⁰ Palermo Protocol (n 5) art 9(1).

perspectives.⁶¹ As a fluid concept that acquires a different meaning depending on the lens used, no agreement was reached on what the purpose element of the HT definition entails. As highlighted above, the concept was left indeterminate in the final text of the Protocol and can support different interpretations. The failure of international anti-trafficking law to adequately define exploitation or set legal parameters for establishing exploitative practices justifies the need to explore the meaning of the term with reference to interdisciplinary literature. In particular, the sections below draw on literature on classical liberalism, political economy, Marxism and critical legal studies. The sections contend with the complexities of defining exploitation, what it means to exploit someone, what is wrong with exploitation and the structural dimensions of the concept.

3.1 WHAT IS EXPLOITATION?

In an abstract sense, exploitation can be defined as taking advantage of someone in a way that is unfair.⁶² Exploiters interact with their victims in ways that advance their interests at the expense of the victim's interests. The victim might be harmed by experiencing a loss relative to the position they would have had if the interaction had not taken place.⁶³ However, this is not always the case since the victim may benefit from an interaction that is still unfair to them.⁶⁴ In such instances, the interaction would be deemed exploitative if it makes them worse off than they should be.⁶⁵ How well off someone must be is ascertained based on the respective transaction using the normative concept of fairness. What fairness demands is discussed further in the following sections. Suffice it to say here that there would be an exploitative practice where the exploiter takes advantage of someone in a manner that violates fairness norms.

The exploitative relation is often characterised by an exploiter(s) and the exploited person(s). Wood argues that the exploiter must be a human being or an entity with a legal personality capable of having objectives and using means to achieve those ends.⁶⁶ Here, exploitation suggests that the exploiter will have to manipulate the object of exploitation in some way or other, which essentially requires that they exercise some degree of control over the exploited person.⁶⁷ It is important to distinguish between exploiting a person's circumstances, that is, exploiting the power one has over another, and exploiting the person. Having circumstances that can be exploited is akin to being vulnerable.⁶⁸ This abuse of a position of vulnerability is a common theme in HT cases, where exploitation is often linked to some weakness or vulnerability of the victim.⁶⁹ Wood outlined the link between exploitation and vulnerability in the following terms:

If exploitation is use, then what I exploit about a person must be useful to me – some capacity or resource. In order to exploit these, I need to get them under my control. *I do this by finding in the person some vulnerability of which I am in a position to take advantage. To exploit your labor, I must find you in a position where you need to work for me on my terms.*⁷⁰

Exploitation in the context of HT works by taking advantage of a victim's weakness or vulnerability, which is used to advance the interests of the trafficker. While it may be argued that anyone can become a victim of exploitation, even in the absence of vulnerability generating factors,

⁶¹ UNODC, 'Issue Paper: The Concept of Exploitation in the Trafficking in Persons Protocol' (United Nations 2015) 21 <https://www.unodc.org/documents/congress/background-information/Human_Trafficking/UNODC_2015_Issue_Paper_Exploitation.pdf> last accessed 21 July 2023.

⁶² Matt Zwolinski, 'Structural Exploitation' (2012) 29 Social Philosophy and Policy 154, 156.

⁶³ Jonathan Wolff, 'Structures of Exploitation' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (OUP 2018) 176.

⁶⁴ Zwolinski (n 62) 156.

⁶⁵ Wolff, 'Structures of Exploitation' (n 63) 176.

⁶⁶ Allen Wood, 'Exploitation' (1995) 2 Social Philosophy and Policy 136, 141.

⁶⁷ *ibid* 141–42.

⁶⁸ Wolff, 'Marx and Exploitation' (n 40) 111.

⁶⁹ UNODC, 'Issue Paper: The Concept of Exploitation in the Trafficking in Persons Protocol' (n 61) 21.

⁷⁰ Allen Wood, 'Unjust Exploitation' (2016) 54 The Southern Journal of Philosophy 92, 95 (emphasis added).

it is important to note that the presence of vulnerability increases the risk of exploitation. An understanding of this relationship between vulnerability and exploitation is essential, as vulnerability not only creates the conditions in which exploitation is more likely to occur but is also inextricably linked with the exploitation of the person. A person's vulnerability can be used to coerce them into transacting on unfair terms. The exploiter will occupy a position of bargaining power relative to the victim because the power between the parties is asymmetrical. Consequently, abuse of vulnerability in HT cases occurs when a person's bargaining weakness is used to obtain a contract or persuade them to agree to a course of action they would not have agreed to without the asymmetry of power between the parties. An interpretative note in the *travaux préparatoires* to the Palermo Protocol stipulates that abuse of vulnerability refers to 'any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved'.⁷¹ The Protocol negates, as a matter of public policy, any consent or agreement obtained where any of the means set out in the Protocol are used, including the abuse of a position of vulnerability.⁷²

This brings us to the question of the exploitation of the person as opposed to the exploitation of their circumstances. As previously stated, for a person to be exploited, they must occupy a position of vulnerability in relation to the exploiter, which the latter abuses to take an unfair advantage of the former.⁷³ There can be no exploitation of a person's abilities or services without some level of weakness or vulnerability, as there will be no decisive bargaining advantage over them. The person is exploited by having their attributes used unfairly to derive some benefit for the exploiter or to achieve an end. From a Kantian moral philosophical perspective, exploiting someone would be to use them as a means to an end and not consider them as an end in themselves.⁷⁴ In explaining what it means to treat a person as a means to an end and not an end in themselves, Wolff gives an analogy of a tool or instrument used to achieve some purpose by the handler to suggest that exploiting someone would be akin to using them as a tool.⁷⁵ This is in line with the Kantian moral philosophy, which posits that rational beings are not to be used as instruments at the discretion of other entities; instead, they should direct their interactions based on their individual choices as an end in themselves.⁷⁶ An emphasis is placed on an individual's choice and will: A person is an end in themselves if they are 'capable of agreeing or disagreeing with proposed courses of action'.⁷⁷ In the HT context, one would not be considered as making choices based on individual choices where their vulnerability is taken advantage of or they are contracting on terms they would not have otherwise agreed to. This position was established in *Chowdury and Others v Greece*, where the European Court of Human Rights (ECtHR) found that when an employer abuses their power or exploits the vulnerability of workers, those workers cannot be considered to have offered themselves to work voluntarily.⁷⁸ Because of their weakness or vulnerability, the attributes, capacities and labour of trafficking victims are treated as tools for achieving objectives set by the exploiter. In this sense, both their person and their circumstances are exploited.

3.2 WHAT IS WRONG WITH EXPLOITATION?

Having defined exploitation and the link between vulnerability and exploitation, we must now examine the fundamental wrong in exploitative relations. This section explores the merits of different perspectives on the wrongfulness of exploitation, which will be useful in understanding the fundamental wrong to be addressed in the purpose element of the HT definition. Different accounts of exploitation overlap in many aspects; for instance, most accept that exploitation

⁷¹ International Human Rights Law Group, 'The Annotated Guide to the Complete UN Trafficking Protocol: Consisting of the *Travaux Préparatoires*' 7 (May 2002) (prepared by Ann D Jordan) <https://documentation.lastradainternational.org/Isidocs/UN%20Trafficking%20Protocol_Ann%20Jordan.pdf> last accessed 25 April 2022.

⁷² Palermo Protocol (n 5) art 3(a).

⁷³ Wood, 'Exploitation' (n 66) 146.

⁷⁴ Immanuel Kant, *Groundwork of the Metaphysics of Morals* in Mary Gregor and Christine Korsgaard (eds) (CUP 1997) 37.

⁷⁵ Wolff, 'Marx and Exploitation' (n 40) 112.

⁷⁶ Kant (n 74) 37.

⁷⁷ Wolff, 'Marx and Exploitation' (n 40) 112.

⁷⁸ *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 June 2017) ECLI:CE:ECHR:2017:0330JUD002188415, para 96.

involves some gain for the exploiter and that this gain is extracted by abusing another person's vulnerability.⁷⁹ Furthermore, they confirm that exploitation is one of the many faces of oppression.⁸⁰ As to the abuse of vulnerability, disagreement exists on whether such vulnerability is simply taken advantage of or is generated by coercion.⁸¹ Two main schools of thought on the wrongfulness of exploitation result. One argues that exploitation is wrong because it is coercive and that exploited people are forced to benefit others.⁸² The second locates the wrongfulness of exploitation in the failure to benefit others as fairness requires.⁸³

3.2.1 Coercion as the fundamental wrong of exploitation

The meaning of coercion depends on whether one adopts a structural or transactional lens. The main difference between the two is that transactional accounts focus more on opportunistic exploitation, which looks at instances of HT as random autonomous instances of domination that can be remedied through the use of criminal and human rights law. In contrast, structural accounts of exploitation are more concerned with how legal and economic structures create a special vulnerability for certain groups of people, making them more susceptible to exploitation. The main contention being that exploitation is not simply the result of individual wrongdoing but is embedded in and reproduced by broader structural conditions. As it shall be shown, it is the opportunistic accounts of exploitation that represent the current HT approach as evidenced by the adoption of the Palermo Protocol which mandates the criminalisation of prohibited acts that fit within the established definition of HT. This reflects a limitation of the liberal international legal system, which is designed to focus on micro-level injustices rather than broader injustices. Hence, structural and transactional accounts of exploitation reveal a clear tension, as each seeks to emphasise a particular dimension of coercion that the other tends to overlook. This has practical and theoretical implications on the practices that can be categorised as problematic forms of exploitation triggering the anti-trafficking framework. Instead of overlooking the tension between the two accounts of exploitation, the following discussion examines the concept of coercion through these two perspectives in order to develop a more nuanced understanding of the fundamental wrong of exploitation. The discussion will begin with an analysis of a structural account of exploitation grounded in the Marxist tradition, with particular emphasis on vulnerability as a mode of coercion.

The Marxist theory of exploitation is centred around structural unfairness, emphasising market structures designed to place workers in a position of perpetual vulnerability. This viewpoint argues that exploitation is akin, both structurally and morally, to coercion.⁸⁴ If this is confirmed, it would clarify both the nature and wrongfulness of exploitation. In this school of thought, labour is often used to illustrate the relationship between coercion and exploitation. Some have suggested that exploitation can be best understood when coercion is used to compel labour.⁸⁵ In abstract terms, labour is either voluntary or coerced. Labour is coerced when a party is 'offered a choice between disagreeable alternatives and chooses the lesser of evils'.⁸⁶ In practice, economic coercion often plays a fundamental role in trapping people with limited options in exploitative relations.⁸⁷ The severity threshold is lower in the case of abuse of vulnerability, which is determined on a case-by-case basis in the HT context.⁸⁸ Therefore, it is argued that if one party to an exchange has a stronger bargaining position, the power asymmetry strictly constitutes a vulnerability for the party occupying a weaker position.⁸⁹ The severity of that

⁷⁹ Robert Mayer, 'What's Wrong with Exploitation?' (2007) 24 *Journal of Applied Philosophy* 137, 148; Jovanovic (n 1) 76.

⁸⁰ Iris Marion Young, *Justice and the Politics of Difference* (Princeton UP 1990) 48–49.

⁸¹ Jovanovic (n 1) 76.

⁸² Jeffrey Reiman, 'Exploitation, Force and the Moral Assessment of Capitalism: Thoughts on Roemer and Cohen' (1987) 16 *Philosophy & Public Affairs* 3.

⁸³ Mayer (n 79) 144.

⁸⁴ Wolff, 'Marx and Exploitation' (n 40) 111.

⁸⁵ Allain, *The Law and Slavery: Prohibiting Human Exploitation* (n 8) 348.

⁸⁶ Robert J Steinfeld, *Coercion, Contract and Free Labor in the Nineteenth Century* (CUP 2001) 14.

⁸⁷ *Chowdury and Others v Greece* (n 78) paras 96–98.

⁸⁸ *ibid.*

⁸⁹ Wood, 'Exploitation' (n 66) 144.

vulnerability will depend on how it interacts with other personal (age, gender, nationality, ethnicity), situational (legal status, poverty, unemployment) and contextual (discriminatory laws and policies) dimensions to limit a person's options, increasing their risk of exploitation.⁹⁰ Consequently, the party occupying a weaker position is exploited if that vulnerability is used to make them agree to less favourable terms.⁹¹

Most cases of economic exploitation would satisfy this account of coercion, especially when a Marxist account of class exploitation is taken into account. According to Marx, exploitation is a feature that is an innate characteristic of all modes of production based on social divisions, with capitalism being the prime example.⁹² Reiman argued that 'a society is exploitative when its social structure is organized so that unpaid labor is systematically forced out of one class and put at the disposal of another'.⁹³ Thus, the exploitation of one class is ingrained in the economic structure of the society that depends on such unpaid labour. This is the economic structure of capitalism, where the ruling class owns the means of production and the working class owns nothing but their labour power, resulting in their exploitation for profit.⁹⁴ Through the privatisation of relations of production (property and workforce), capitalism in essence compels workers to sell their labour to owners of capital or starve to death.⁹⁵ Accordingly, workers only agree to exploitative working conditions because they have no other option.⁹⁶

Mantouvalou highlights how certain legal frameworks exacerbate the vulnerability of the unemployed poor by imposing coercive conditionalities, turning them into working yet exploited and poor individuals.⁹⁷ This depicts the situational vulnerability experienced by unemployed and poverty-stricken individuals. The case of coercive conditionalities highlights how structural factors exacerbate vulnerability, for instance, the denial of benefits through strict welfare-to-work schemes that push people into precarious work.⁹⁸ As a result of their diminished bargaining power, people experiencing various intersecting vulnerabilities are used as a means to an end, which is the accumulation of profit from their surplus labour.⁹⁹ Both the abuse of a position of vulnerability and the exploitation of the person are present in these interactions.

Wolff, however, notes that coercion and exploitation are two different things.¹⁰⁰ This is because exploitation has to do with taking advantage of someone else's vulnerability and persuading them to contract on terms less favourable to them. On the other hand, coercion 'typically proceeds by first creating another's vulnerability and then exploiting it'.¹⁰¹ Wolff talks about the paradox of exploitation: exploitation is not always coercive as people seem to agree to exploitative arrangements.¹⁰² The idea is that people want to be exploited as exploitation can be mutually beneficial. Robinson commented on the paradox by noting that 'the misery of being exploited by capitalists is nothing compared to the misery of not being exploited at all'.¹⁰³ By taking advantage of the vulnerability people find themselves in, it is argued that the exploiter is not coercing the victim as they did not create that vulnerability. Wood contends:

90 The Inter-Agency Coordination Group against Trafficking in Persons (ICAT), 'Addressing Vulnerability to Trafficking in Persons: Issue Brief 12' (2022) 2–4 <https://www.icmpd.org/file/download/57956/file/icat_issue_brief_12_vulnerability_to_tip_published.pdf> accessed 17 November 2025.

91 Wood, 'Exploitation' (n 66).

92 Marks (n 10) 286.

93 Reiman (n 82) 3.

94 Marks (n 10) 286.

95 Zwolinski (n 62) 158.

96 Karl Marx, *Capital I: A Critique of Political Economy* (translated by Samuel Moore and Edward Aveling, edited by Frederick Engels) (Progress Publishers 1887) 543–44; Wolff, 'Structures of Exploitation' (n 63) 178.

97 Virginia Mantouvalou, *Structural Injustice and Workers' Rights* (OUP 2023) 146.

98 United Nations Human Rights Council, 'Visit to the United Kingdom of Great Britain and Northern Ireland: Report of the Special Rapporteur on extreme poverty and human rights' (2019) UN Doc A/HRC/41/39/Add.1, para 4 <<https://documents.un.org/doc/undoc/gen/g19/112/13/pdf/g1911213.pdf>> accessed 17 November 2025; Mantouvalou, *Structural Injustice and Workers' Rights* (n 97) 113.

99 John Roemer, 'Should Marxists be Interested in Exploitation?' (1985) 14(1) *Philosophy and Public Affairs* 30.

100 Wolff, 'Marx and Exploitation' (n 40) 111.

101 *ibid.*

102 *ibid.* 113.

103 Joan Robinson, *Economic Philosophy* (Penguin 1964) 46.

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).¹⁰⁴

The case is made that coercion is not necessary for exploitation as most exploiters will not have created the vulnerabilities they take advantage of. Instead, the claim is that those who exploit others are simply opportunistic and playing by the rules of the game.¹⁰⁵ However, the fact that coercion is not central to individual accounts of exploitation does not detract from Marx's contention that coercion is structural. The vulnerability was created historically through a process of 'violent dispossession, imperial conquest and repression', which has left a group of people forced by circumstances to work for the capitalist class.¹⁰⁶ Therefore, it is not the actions of individuals but systemic pressures and constraints that coerce people to accept exploitative arrangements.¹⁰⁷ This is a key characteristic of structural accounts of exploitation, which recognise the role of background structures that constrains all parties and forces them to play by the rules of the game to stay competitive. McKeown argues that corporations face the 'structural imperative of exploit or fail'.¹⁰⁸ In such circumstances where both individuals and corporations are constrained, the practical reality of the employment contract is that it conceals the various modalities of unfreedom present in capitalist relations of production. Consequently, free and unfreedom are not opposites, as suggested by the transactional conception of exploitation. A fluidity of modes of coercion exists on a continuum in capitalist relations of production.

This brings us to the question of what coercion means in the context of HT, and its relationship with exploitation. The current framework for establishing coercion adopts a transactional analysis of relations of domination. Transactional accounts of exploitation focus on what exploitation is, emphasising individual relations of domination rather than socioeconomic relations that underpin the growth of such problematic relations. Jovanovic argues that coercion requires a defect in the consent of the exploited person as a result of threats, force, manipulation or fraud. This argument fits well within the dominant anti-trafficking criminal law framework.¹⁰⁹ The benchmark of establishing coercion and consequent exploitation was outlined by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v Kunarac and others*, where it considered four types of exploitation: forced labour, slavery, slavery-like practices and servitude.¹¹⁰ This decision has been quoted with approval in judgments of the ECtHR and the Economic Community of West African States (ECOWAS) Court in cases dealing with the four types of exploitation, depicting how it has shaped HT jurisprudence.¹¹¹ The tribunal noted the following indicators:

elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions.¹¹²

¹⁰⁴ Wood, 'Exploitation' (n 66) 149.

¹⁰⁵ Mayer (n 79) 148.

¹⁰⁶ Richard Miller, 'Marx's Legacy' in Robert Simon (eds), *The Blackwell Guide to Social and Political Philosophy* (Blackwell Publishers 2002) 134–35.

¹⁰⁷ Allen Wood, *Karl Marx* (first published 1981, 2nd edn, Routledge 2004) 253.

¹⁰⁸ Maeve McKeown, 'The law's contribution to deliberate structural injustice: The case of the global garment industry' in Virginia Mantouvalou and Jonathan Wolff (eds), *Structural Injustice and the Law* (UCL Press 2024) 88.

¹⁰⁹ Jovanovic (n 1) 77.

¹¹⁰ *Prosecutor v Kunarac and others* (Judgment) IT-96-23-T and IT-96-23/1-T (22 February 2001).

¹¹¹ *Siliadin v France* App no 73316/01 (ECtHR, 26 October 2005) ECLI:CE:ECHR:2005:0726JUD007331601; *Hadijatou Mani Koraou v Niger* (27 October 2008) No ECW/CCJ/JUD/06/08 (Judgment).

¹¹² *Prosecutor v Kunarac and others* (n 110) para 542.

Two elements are crucial to establish exploitation: As reflected in the *Kunarac* judgment, these are elements of control and lack of consent. The control element is commonly associated with the enumerated types of exploitation in the Palermo Protocol's HT definition (ie, forced labour, the exploitation of the prostitution of others, servitude and the removal of organs). In some instances, the traffickers may exercise continuous control over the victim for a long period, which would *de facto* amount to exercising the right to ownership (slavery).¹¹³ The control element has led to a myth that an HT victim must have significant restraints on their freedom of movement; the expectation is often that they should be so restrained during their exploitation.¹¹⁴ In the *Chowdury* case the ECtHR rejected this position noting that restrictions on freedom of movement were not a prerequisite for establishing the various types of exploitation covered by the HT definition.¹¹⁵ Similarly, the *Kunarac* case above recognised that high psychological control can be sufficient.¹¹⁶ Additionally, subsequent cases from regional human rights courts have found that subtle forms of coercion, such as an abuse of vulnerability, will suffice to establish HT.¹¹⁷ However, a study by the United Nations Office on Drugs and Crime (UNODC) has noted the importance, in practice, of a lack of freedom of movement for establishing exploitation in HT cases and that a case can be undermined if it is proven that the victim had a degree of liberty to come and go during their exploitation.¹¹⁸ The UNODC study provided a comprehensive analysis of domestic court approaches to conceptualising HT, showing the high probative value of evidence highlighting significant constraints on a victim's freedom.

Another necessary element is lack of consent, which according to the *Kunarac* judgment means the victim cannot exercise personal autonomy because of coercion and other prohibited means. Concerning lack of consent, there is a direct correlation between the control element and being compelled to do something against one's will.¹¹⁹ Allain contends that coercion is a crucial element in determining exploitation in the HT context.¹²⁰ He notes that all the other means outlined in the HT definition (threat or use of force, abduction, the abuse of power or vulnerability) can be assimilated into the coercion element.¹²¹ This assertion is supported in a working paper commissioned by the International Labour Organisation, which identifies the abuse of a position of vulnerability as a mode of coercion.¹²² Through coercion, as manifested in the other means outlined in the HT definition, victims are often maintained in exploitative situations. The control established through these coercive means leads to a relationship where the trafficker perpetually benefits from the inability of the victim to break the bonds of exploitation.

A. Reflection on coercion and exploitation in international law

The construction of coercion and exploitation in international law, with its emphasis on control and lack of consent, is reflective of the dominant modern slavery abolitionism approach.¹²³ This approach views HT as a grave moral wrong akin to slavery, imposing a legal duty to criminalise and prosecute the wrongdoers.¹²⁴ Additionally, by focusing on the most serious forms of exploitation that mimic slavery due to elements of control and lack of consent, the

¹¹³ Obokata (n 14) 20.

¹¹⁴ Jack Murphy, 'Combating the "myth of physical restraint" in human trafficking and modern slavery trials heard in the Crown Court' (2022) 26(1) *The International Journal of Evidence and Proof* 3, 4.

¹¹⁵ *Chowdury and Others v Greece* (n 78) para 123.

¹¹⁶ *Prosecutor v Kunarac and others* (n 110) 543.

¹¹⁷ *Krachunova v Bulgaria* App no 18269/18 (ECtHR, 28 February 2024) ECLI:CE:ECHR:2023:1128JUD001826918, paras 148–49.

¹¹⁸ UNODC, 'Evidential Issues in Trafficking in Persons Cases: Case Digest' (United Nations 2017) 8, 80 and 105 <https://www.unodc.org/documents/human-trafficking/2017/Case_Digest_Evidential_Issues_in_Trafficking.pdf> accessed 17 November 2025.

¹¹⁹ Allain, *The Law and Slavery: Prohibiting Human Exploitation* (n 8) 350.

¹²⁰ *ibid.*

¹²¹ *ibid.*

¹²² Rohit Malpani, 'Working Paper: Legal Aspects of Trafficking for Forced Labour Purposes in Europe' (ILO Geneva April 2006) 8–10 <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_082021.pdf> accessed 17 November 2025.

¹²³ Navid Pourmokhtari, 'Global Human Trafficking Unmasked: A Feminist Rights-Based Approach' (2015) 1 *Journal of Human Trafficking* 156, 159.

¹²⁴ Mantouvalou (n 7) 193.

approach fuels a criminal justice construction of the problem. This does not, however, account for instances where exploitation is *prima facie* voluntary but is instead coerced through background injustices. The effect of this conceptualisation of exploitation is twofold. Firstly, it permits States to exclude victims who do not fit within the narrow conception of an innocent and unwilling victim. There is a need for a more nuanced understanding of how coercion operates on a continuum to compel labour by taking advantage of structural vulnerabilities (for example, in labour and immigration frameworks) to create and sustain exploitative practices. Chuang has argued that contrary to the mainstream approach, coercion in HT cases does not always take the form of physical suffering or threats thereof.¹²⁵ In most HT cases, using what has been dubbed ‘situational coercion’, exploitation of trafficked workers is sustained by more subtle forms of non-violent pressures.¹²⁶ There is, therefore, a need for a structural construction of coercion and exploitation that considers the lived experiences of HT victims. This should allow for an inclusive understanding of HT that considers the more subtle but compelling power dynamics employed to create and sustain exploitation.

Additionally, by focusing on the actions of individual perpetrators and criminal organisations, the approach ignores and leaves intact the legal and social structures that create a special vulnerability to exploitation for certain groups of people. Bernstein accurately captures the limitations of this current approach:

For modern-day abolitionists, the dichotomy between slavery and freedom poses a way of addressing the ravages of neoliberalism that effectively locates all social harm outside of the institutions of corporate capitalism and the state apparatus. In this way, the masculinist institutions of big business, the state, and the police are reconfigured as allies and saviours, rather than enemies, of unskilled migrant workers, and the responsibility for slavery is shifted from structural factors and dominant institutions onto individual, deviant men: foreign brown men (as in the White Slave trade of centuries past) or even more remarkably, African American men living in the inner city ...¹²⁷

Businesses and the State can always exploit an individual’s vulnerabilities, which can be personal or structural.¹²⁸ The current understanding of coercion and exploitation within international law ignores the need to identify structural legal and market practices that create a special vulnerability for certain groups of workers. These structures affect persons disproportionately and reduce their bargaining power because of global disparities in wealth, governmental policies of social exclusion and discrimination ingrained in immigration and labour laws. Thus, trafficking related exploitation entails coercion that operates on a continuum while taking advantage of background injustices that make certain groups of people more vulnerable to exploitative practices.

3.2.2 Exploitation: a wrongful gain or failure to benefit others?

This perspective argues that the fundamental wrong in exploitation is the ‘failure to benefit others as some norm of fairness requires’.¹²⁹ Mayer notes that while most scholars agree that exploitation involves taking an unfair advantage of someone, little attention has been directed to the fundamental wrong, which is that the exploiter gains at the victim’s expense.¹³⁰ Gaining at another’s expense only becomes wrongful when the victim suffers an undeserved loss. The loss suffered by the victim is not absolute but relative; ‘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’.¹³¹

¹²⁵ Chuang, ‘Exploitation Creep and the Unmasking of Human Trafficking Law’ (n 9) 640.

¹²⁶ Kathleen Kim, ‘The Coercion of Trafficked Workers’ (2011) 96 Iowa Law Review 409.

¹²⁷ Elizabeth Bernstein, ‘The Sexual Politics of the New Abolitionism’ (2007) 18(5) Differences 128, 144.

¹²⁸ Mantouvalou (n 7) 189.

¹²⁹ Mayer (n 79) 142.

¹³⁰ *ibid* 140.

¹³¹ Jovanovic (n 1) 78.

The most common way exploiters fail to benefit others as fairness requires in the HT context concerns a failure to benefit victims sufficiently.¹³² This is in addition to the use of some mode of coercion that negates the consent of the individual. An example of a sweatshop labourer shows how victims' losses are relative. The sweated labourer benefits from being exploited (judging from their status quo ante); otherwise, they would not consent to work in the sweatshop.¹³³ However, the exploiter gains at the expense of the labourer from the perspective of not paying them what they deserve. Thus, the exploited person suffers a loss based on what is owed to them through fairness standards.¹³⁴ What fairness requires when establishing exploitation is, however, a highly contested concept. Arneson had the following to say in this regard: 'There will ... be as many competing conceptions of exploitation as theories of what persons owe to each other by way of fair treatment'.¹³⁵ Because of this, what constitutes fairness for exploitation purposes is highly politicised as it constructs a subjective line between what is considered free labour and unfree or coerced labour. In practice, this also determines what relations will be problematised as exploitative under the HT framework.

Two main theories are often used to determine what fairness requires to determine exploitative practices. The first is the neo-classical theory of competitive equilibrium, which posits a perfect market free from exploitation and entry barriers.¹³⁶ Fairness under the equilibrium market is judged through 'just price', which is calculated by reference to what a party 'with a secure standard of living would accept'.¹³⁷ Thus, determining a fair exchange requires imagining a counterfactual scenario with the vulnerability removed. To put it differently, the personal, situational and contextual factors limiting the victim's choices and compelling them to accept an unjust arrangement must be removed. A reasonable person would consider the 'just price' to be whatever is seen as a fair exchange in that case. Exploitation, therefore, occurs when the 'just price' determined by a free competitive market is not honoured due to an abuse of any vulnerability-generating factors.¹³⁸ To trigger the provisions of anti-trafficking law, it must be proven that an individual's vulnerability was intentionally taken advantage of to secure their consent and that the person believed that submitting to the will of the abuser was the only real option available to them.¹³⁹ This theory of competitive equilibrium has been criticised for conflating the textbook self-regulated perfect market with the unregulated capitalistic market, which has an inherent tendency to imperfect competition.¹⁴⁰ By assuming a perfect market, it fails to recognise that vulnerability is created by the natural workings of the market, prompting the need to interfere through regulations that attempt to make the market fair. Also, the determination of a 'just price' is not as straightforward as the theory suggests. In this globalised market, where developed States export production to less developed States, it is unclear whether a just price would be calculated concerning what a non-disadvantaged party in the developed State would accept.

The neo-Marxist perspective on fairness is based on the labour theory value, which conceives fairness as requiring that each worker should command with their wages the same amount of labour that they expend.¹⁴¹ The idea is that exploitation is based on a supposed unequal exchange between labour and goods in that the 'exploited person just never gets back what he or she puts into the labour process'.¹⁴² The problem with this conception of what fairness

¹³² Mayer (n 79) 142.

¹³³ *ibid* 141.

¹³⁴ *ibid*.

¹³⁵ Richard Arneson, 'Exploitation' in Lawrence Becker and Charlotte Becker (eds), *Encyclopedia of Ethics* (Routledge 1992) 350.

¹³⁶ Wolff, 'Structures of Exploitation' (n 63) 180.

¹³⁷ Mayer (n 79) 145.

¹³⁸ *ibid*.

¹³⁹ UNODC, 'Guidance Note on abuse of a position of vulnerability as a means of trafficking in persons in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime' (October 2012), paras 5.1 and 5.2 <https://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Guidance_Note_-_Abuse_of_a_Position_of_Vulnerability_E.pdf> accessed 17 November 2025.

¹⁴⁰ Wolff, 'Structures of Exploitation' (n 63) 180.

¹⁴¹ Roemer (n 99) 30–31.

¹⁴² Wolff, 'Marx and Exploitation' (n 40) 107.

demands is that it is not relational and is based on the economy as a whole rather than on the exploited person's particular circumstances. The effect in this globalised economy would be that no one in the developed world (even the worst paid) is exploited as they can 'command a great deal of those in the third world'.¹⁴³ There is more to exploitation than the unequal exchange of goods and labour. However, the collapse of the labour theory of value is not synonymous with the collapse of the Marxist theory of exploitation, as argued by Nozick.¹⁴⁴ Three aspects of the Marxist theory remain largely relevant: the relation between exploitation and coercion, the relation between exploitation and class, and the connection between exploitation and structural injustice.¹⁴⁵

4 KEY FEATURES OF EXPLOITATION AND CONCLUSION

It has been shown from different perspectives that exploitation is problematic for the following reasons: use of another, coercion, fairness, abuse of vulnerability, a duty to not exploit or a combination of these wrongs. From these inherent wrongs of exploitation, two common denominators are seen: abuse of vulnerability and wrongful gain.

The abuse of vulnerability is a mode of coercion. Coercion can be interpersonal and based on duress, as seen in the conceptualisation of exploitation in the anti-trafficking framework. Often, exploitation is voluntary and mutually beneficial, as precarious circumstances can coerce a person to enter exploitative arrangements. This is not to suggest that wage labour is indistinguishable from forced and/or trafficked labour, nor that the severity of exploitation is the same. Coercion not only comes from physical threats, violence or fraud but also from the limitation of options and the denial of opportunities. A common theme in all schools of thought on the wrongfulness of exploitation identifies the presence of a vulnerability that is taken advantage of or that gives the exploited person a weaker bargaining position. A pressing concern in the Marxist tradition, therefore, is whether a substantial group of people exist who share a common structural disadvantage that makes them collectively exploitable. This is vital if the anti-trafficking promise to eliminate and prevent HT is to be achieved. Anti-trafficking measures need to tackle questions of systemic vulnerability, the presence of oppression and exclusion rather than simply focusing on individual accounts of opportunistic exploitation.

The question of wrongful gain also features in all schools of thought on the fundamental problem of exploitation. Furthermore, a look at the instruments of international law discussed above shows the international community's interest in preventing the pursuit of gain at the 'unfair' expense of the exploited persons. As argued, to exploit is to use someone as a means to an end. The end is often, but not always, the accumulation of profit using the exploited person as a tool. This could be exploitation for prostitution purposes, forced labour or services or slavery-like practices. In addition to these extreme instances, it could also include voluntary and mutually beneficial forms of abuse, as seen in exploitative employment contracts. Therefore, an elaboration of these two common denominators provides the conceptual foundation for a reference-fixing definition of exploitation. Accordingly, the coercive commodification or exploitation of a person defines HT. These two cumulative necessary and sufficient conditions provide factual parameters, permitting both international and domestic courts to use them as legal parameters when interpreting potential HT cases while maintaining the universality of the definition. Additionally, this is flexible enough to preserve the conception of exploitation as a continuum avoiding the anti-trafficking pitfall of sharp distinctions between freedom and unfreedom. Such a definition establishes a normative criterion against which practices can be evaluated to determine whether they fall within the ambit of HT. This structural account of exploitation proceeds from an understanding that the same structures that render individuals vulnerable to mild forms of exploitation in the global economy also enable more severe forms of exploitation. Accordingly, HT should be understood as a form of structural injustice involving powerful actors that exploit socially oppressed groups for profit. In doing so, it brings much-needed clarity to the indeterminate purpose element of the Palermo Protocol and grounds anti-trafficking law in a more coherent theory of justice.

¹⁴³ *ibid.*

¹⁴⁴ Robert Nozick, *Anarchy, State and Utopia* (Blackwell Publishers 1974) 253–62.

¹⁴⁵ Roemer (n 99) 64–65; Marks (n 10) 289.

ACKNOWLEDGEMENTS

I am particularly grateful to Prof. Olga Jurasz, Dr. Neil Graffin and Prof. Simon Lee for their helpful comments and discussions. I am also very grateful to anonymous reviewers for their comments.

FUNDING INFORMATION

Open University.

COMPETING INTERESTS

The author has no competing interests to declare.

AUTHOR AFFILIATIONS

Lewis Njabulo Sibanda  orcid.org/0000-0002-1560-6959
Lecturer in Law, The Open University, UK

TO CITE THIS ARTICLE:

Lewis Njabulo Sibanda,
'Revisiting the Notion of
Exploitation: The Blind Spot in
Anti-Trafficking Law' (2026)
22(2) *Utrecht Law Review*
45–62. DOI: [https://doi.
org/10.36633/ulr.1276](https://doi.org/10.36633/ulr.1276)

Published: 29 October 2026

COPYRIGHT:

© 2026 The Author(s). This is an open-access article distributed under the terms of the Creative Commons Attribution 4.0 International License (CC-BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited. See <https://creativecommons.org/licenses/by/4.0/>.

Utrecht Law Review is a peer-reviewed open access journal published by Utrecht University School of Law.

