Applying the Definition of Torture to the Acts of Non-State Actors: The Case of Trafficking in Human Beings

Lorna McGregor

Human Rights Quarterly, Volume 36, Number 1, February 2014, pp. 210-241 (Article)

Published by The Johns Hopkins University Press
DOI: 10.1353/hrq.2014.0000

HUMAN RIGHTS QUARTERLY

Applying the Definition of Torture to the Acts of Non-State Actors: The Case of Trafficking in Human Beings

*Lorna McGregor**

ABSTRACT

The question of whether the prohibition of torture and other ill-treatment extends to the acts of non-state actors continues to reflect a contentious issue in international human rights law. Through one of the most recent and under-analyzed manifestations of the debate, this article explores the extent to which the prohibition applies to trafficking in human beings. In doing so, it provides an analysis of the inherent limitations of the prohibition as applied to the acts of non-state actors, as well as suggesting possibilities for extension of the scope of the prohibition through the principle of due diligence. By defining the parameters in this way, this article submits that victims will receive more concrete protection, as opposed to assertions that trafficking constitutes torture on the basis of the severity of the act and attraction to the special stigma of the label alone.

* *Lorna McGregor* is a Reader in the School of Law and Director of the Human Rights Centre at the University of Essex. She is a Co-Chair of the American Society of International Law's Interest Group on Transitional Justice, Co-Chair of the European Society of International Law's Interest Group on Human Rights, member of REDRESS' Legal Advisory Council and a trustee of the AIRE Centre.

The author would like to thank Professor Janie Chuang, Professor Geoff Gilbert, Professor Vanessa Munro, Dr. Lutz Oette, Professor Ryszard Wilson Piotrowicz, Professor Sir Nigel Rodley, and Professor Annecoos Wiersema for invaluable comments on previous drafts of this article; Professor Françoise Hampson for very helpful discussions on the topic; the organizers and participants at a conference hosted by Amnesty International and REDRESS on Gender and Torture at which a version of this paper was presented, and Professor Bert Lockwood and Nancy Ent.

I. INTRODUCTION

The UN Convention on the Prohibition of Torture and Other Cruel, Inhuman or Degrading Ill-Treatment or Punishment (Convention Against Torture) is one of the few international instruments to provide a definition of torture. It defines torture in Article 1 as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[1]

Since its adoption, the Convention has engendered substantial criticism for its perceived focus on the actions of public officials or persons acting in an official capacity, to the exclusion of the commission of similar acts by non-state actors, such as armed groups, corporations, and other private individuals.[2] Feminist scholarship has been particularly rich[3] in this critique through layered arguments that the definition focuses on male violence and privileges violence in the public sphere,[4] with the consequence that violence against women committed in private, such as domestic violence, is excluded[5] and "trivialized."[6] The prohibition of torture and other cruel, inhuman, and degrading treatment or punishment ("other ill-treatment") has therefore been subject to many efforts to expand its application to the acts of non-state actors.

One of the latest manifestations of such efforts relates to trafficking in human beings (trafficking). Both the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime

---

1. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., art. 1, U.N. Doc. A/39/51 (1985), 1465 U.N.T.S. 85 (*entered into force* 26 June 1987).
2. *See, e.g.,* Robert McCorquodale & Rebecca La Forgia, *Taking off the Blindfolds: Torture by Non-State Actors*, 1 Hum. Rts. L. Rev. 189, 217–18 (2001); Andrew Clapham, Human Rights Obligations of Non-State Actors 342–46 (2006).
3. The literature in this area is vast and diverse. *See, e.g.*, Hilary Charlesworth & Christine Chinkin, The Boundaries of International Law: A Feminist Analysis 234–35 (2000); Alice Edwards, *The "Feminizing" of Torture under International Human Rights Law*, 19 Leiden J. Int'l L. 349, 352–58 (2006); Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture,* 25 Colum. Hum. Rts. L. Rev. 291, 296 (1994).
4. Edwards, *supra* note 3, at 352; Copelon, *supra* note 3, at 297.
5. Edwards, *supra* note 3, at 355.
6. Copelon, *supra* note 3, at 295.

2000 (Palermo Protocol)[7] and the Council of Europe Convention on Action against Trafficking in Human Beings 2005 define trafficking as:

> [T]he 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.[8]

As the Palermo Protocol and Council of Europe Convention are predominantly focused on criminal law, their definition of trafficking does not automatically translate into international human rights law. To date, most treatments of trafficking under international human rights law have centered on the prohibition of slavery, servitude, and forced labor.

In recent years, however, the UN Committee against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (Committee against Torture) has begun to regularly dedicate at least one paragraph of its Concluding Observations to trafficking.[9] While it first referenced trafficking in 1990,[10] it was not until 2006 that it explicitly found that it fell under Article 16 dealing with other ill-treatment.[11] In the majority of Concluding Observations since then that have addressed trafficking, the Committee has dealt with the practice under Article 16 alone or in conjunction with other articles, such as Articles 2, 4, 7, 10, 12, and 14.[12] In 2009, in the Committee's Concluding Observations on Yemen, it also found that Article 1 on

---

7. G.A. Res. 55/25, Annex II, Art. 3(a), A/RES/55/25 (15 Nov. 2000).
8. Council of Europe, Convention on Action against Trafficking in Human Beings, art. 4(a), *opened for signature,* 16 May 2005, (*entered into force* 1 Feb. 2008).
9. The 2005 Report on Bosnia and Herzegovina is one of the first reports in which the Committee dedicates substantial attention to the practice of trafficking. Committee against Torture (CAT), *Conclusions and Recommendations of the Committee against Torture*: *Bosnia and Herzegovina,* ¶ 21, U.N. Doc. CAT/C/BIH/CO/1 (15 Dec. 2005).
10. CAT, *Report of the Committee against Torture,* ¶ 257, U.N. Doc. A/45/44 (21 June 1990) (Cameroon).
11. CAT, *Conclusions and Recommendations of the Committee against Torture*: *Togo,* ¶ 140–55, U.N. Doc. CAT/C/TGO/CO/1 (28 July 2006).
12. To take 2011 as an example, see CAT, *Concluding Observations of the Committee against Torture*: *Bosnia and Herzegovina,* ¶ 23, U.N. Doc. CAT/C/BIH/CO/1 (20 Jan. 2011) (violating arts. 2, 4 16); CAT, *Concluding Observations of the Committee against Torture*: *Mongolia,* ¶ 21, U.N. Doc. CAT/C/MNG/CO/1 (20 Jan. 2011) (violating arts. 2, 12, 13, 16); CAT, *Concluding Observations of the Committee against Torture*: *Ghana,* ¶ 21, U.N. Doc. CAT/C/GHA/CO/1 (15 June 2011) (violating arts. 2, 12 16); CAT, *Concluding Observations of the Committee against Torture*: *Kuwait,* ¶ 21, U.N. Doc. CAT/C/KWT/CO/2 (28 June 2011) (raising arts. 2, 4, 16); CAT, *Concluding Observations of the Committee against Torture*: *Slovenia,* ¶ 16, U.N. Doc. CAT/C/SVN/CO/3 (20 June 2011) (raising arts. 2, 4,16).

torture was engaged by trafficking in addition to Articles 2, 12, and 16.[13] While it has not yet found an independent violation of Article 1, it has since dealt with trafficking as a violation of Articles 1 and 16 combined on six occasions,[14] although in other instances it continues to deal with trafficking under Article 16 only.

Similarly, the UN Special Rapporteur on Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (Special Rapporteur on Torture) addressed trafficking of women for "sexual or labour servitude or other forms of exploitation" in a report dedicated to strengthening the protection of women from torture.[15] The European Court of Human Rights (European Court) in *Rantsev v. Cyprus and Russia* also found that in cases in which a specific allegation of other ill-treatment is not made, "any inhuman or degrading treatment" suffered by the victim "was inherently linked to the alleged trafficking and exploitation" and thus appropriate to deal with under the prohibition of slavery, servitude, and forced labor alone.[16]

While suggesting that trafficking could violate the prohibition of torture and other ill-treatment, none of these international bodies has advanced detailed reasoning to support this view. Characterizing trafficking as torture or other ill-treatment without further explanation gives rise to three issues in need of resolution. First, trafficking is typically carried out by non-state actors within states or across multiple jurisdictions, whereas international human rights law, including the prohibition of torture and other ill-treatment, is concerned with state responsibility. Thus, it is not immediately clear how the prohibition could apply. Second, trafficking is "a process that involves a number of interrelated actions rather than a single act at a given point in

---

13. CAT, *Provisional Concluding Observations of the Committee against Torture*: *Yemen*, ¶ 30, U.N. Doc. CAT/C/YEM/CO/2 (17 Dec. 2009). It previously referred to trafficking within a range of prohibited practices under Articles 1 and 16 in its Concluding Observations on Benin, CAT, *Conclusions and Recommendations of the Committee against Torture*: *Benin*, ¶ ¶ 22, 24, U.N. Doc. CAT/C/BEN/CO/2 (19 Feb. 2008), making it difficult to draw definitive conclusions on the categorization of trafficking.
14. CAT, *Concluding Observations of the Committee against Torture*: *Jordan*, ¶ 22, U.N. Doc. CAT/C/JOR/CO/2 (25 May 2010) (arts. 1, 2, 4, 12, 16); CAT, *Concluding Observations of the Committee against Torture*: *Syrian Arab Republic*, ¶ 28, U.N. Doc. CAT/C/SYR/CO/1 (25 May 2010) (arts. 1, 2, 4, 12, 16); CAT, *Concluding Observations of the Committee against Torture*: *Yemen*, ¶ 30, U.N. Doc. CAT/C/YEM/CO/2/Rev.1 (25 May 2010) (arts. 1, 2, 12, 16); CAT, *Concluding Observations of the Committee against Torture*: *Cambodia*, ¶ 20, 22, U.N. Doc. CAT/C/KHM/CO/2 (20 Jan. 2011) (arts. 1, 2, 4, 12, 16); CAT, *Concluding Observations of the Committee against Torture*: *Ethiopia*, ¶ 33, U.N. Doc. CAT/C/ETH/CO/1 (20 Jan. 2011) (arts. 1, 2, 12, 16); CAT, *Concluding Observations of the Committee against Torture: Estonia*, ¶ 13 U.N. Doc. CAT/C/EST/CO/5 (17 June 2013) (arts. 1, 2, 4, 10, 12, 13, and 14).
15. Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak*, ¶ 56–8, U.N. Doc. A/HRC/7/3 (15 Jan. 2008) [hereinafter *Nowak Report*].
16. Rantsev v. Cyprus and Russia, 51 Eur. H.R. Rep. 1, ¶ 252 (7 Jan. 2010).

time."[17] It is carried out for diverse purposes such as sexual services, domestic, construction, and agricultural labor, forced begging, criminal activity,[18] and organ harvesting. Each case presents "complex external and individual circumstances"[19] and the treatment of victims varies greatly between cases. The complex and composite nature of trafficking means that it is not immediately obvious which aspect(s) would violate the prohibition of torture or other ill-treatment and whether all cases would fall under the definition. Third, as suggested by the European Court, justification for the application of the prohibition of torture and other ill-treatment is necessary, if the prohibition of slavery, servitude, and forced labor also applies. This is the case as the same facts may be used to find violations of both prohibitions.

If the way in which the prohibition applies remains unclear or unexplored, labeling an act as torture or other ill-treatment carries very little legal significance and does not offer concrete protection to victims of trafficking. In addition, regardless of the appeal of referring to an act as torture due to its "special stigma"[20] and recognized profile,[21] expansion of the prohibition to cover acts not traditionally considered to fall within its purview, while possible, requires careful consideration in order to preserve the integrity of the prohibition and avoid its unprincipled dilution. This article provides a possible expansion of the prohibition, while acknowledging its inherent limitations.

Part II of this article argues that the potential contribution of the prohibition of torture and other ill-treatment to dealing with trafficking under international human rights law is hampered by tendencies to focus on the nature of the underlying act without consideration to how international human rights law is concretely engaged. The treatment of trafficking as torture or other ill-treatment is inherently restricted as it is typically carried out by non-state actors and international human rights law is confined to determining state responsibility. The prohibition will therefore only be engaged in cases in which there is direct involvement of state officials, or more typically, where the authorities fail to prevent or protect victims of trafficking from torture or

17. General Assembly, *Report of the Special Rapporteur on Trafficking, Especially in Women and Children*, ¶ 93, U.N. Doc. A/64/290 (12 Aug. 2009).
18. Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims and Replacing Council Framework Decision 2002/629/JHA, 2011 O.J. (L 101/1) ¶ 11.
19. Klara Skrivankova, *Forced Labour: Understanding and Identifying Labour Exploitation*, *in* Human Trafficking Handbook: Recognising Trafficking and Modern-day Slavery in the UK 27, 51 (Parosha Chandran ed., 2011) [hereinafter Handbook]; *See also* Vanessa Munro, *A Tale of Two Servitudes: Defining and Implementing a Domestic Response to Trafficking of Women for Prostitution in the UK and Australia*, 14 Soc. & Leg. S. 91, 94 (2005).
20. As first recognized by the European Court of Human Rights in Case of Ireland v. The United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 59 (1978).
21. *Nowak Report, supra* note 15, ¶ 26.

other ill-treatment by non-state actors. In the latter situation, the state must be on notice (or constructive notice) of an allegation of ill-treatment. These requirements present serious challenges to the expansion of the prohibition of other ill-treatment to trafficking by non-state actors. The engagement of the prohibition of torture is even more difficult as the act of the state (in this case the failure to prevent or protect a victim) must have been carried out with a specific state purpose which rules out the vast majority of cases of trafficking.

Rather than critiquing these limitations, I argue that by acknowledging and working within them, the application of the prohibition can move away from mere rhetoric, and instead focus on how states understand and implement their duty to identify potential victims and the strength of their prevention and protection systems. States' due diligence obligations reflect an underdeveloped area of international human rights law which is often neglected in favor of a focus on the characterization of the underlying acts alone. However, the enforcement of these obligations is the site of greatest potential for the concrete protection of victims of trafficking under international human rights law at least. Within these confines, in Part III, I argue that as a general matter, the prohibition of torture and other ill-treatment provides a recognized framework of severity to the duty to prevent and protect victims of trafficking. If applied properly, the prohibition of torture and other ill-treatment also challenges a narrow view that only some types of trafficking such as for the purpose of sexual exploitation reach the requisite level of severity by widening and individualizing the experience of trafficking away from generalized assumptions that certain forms of trafficking involve harm and others do not. For example, beyond physical violence, the application of the prohibition of torture and other ill-treatment underscores the severity of psychological methods such as threats and intimidation as well as the fear and uncertainty created by being trafficked—all of which appear to occur routinely in a range of trafficking cases. Psychological ill-treatment within trafficking is often referred to in passing in the literature and jurisprudence, but has received very little attention as a legal matter with the risk that only cases of trafficking involving overt physical violence are taken seriously when they come to the attention of state authorities, resulting in under-protection. The extension of the prohibition of torture and other ill-treatment to trafficking would therefore provide a vehicle for its fuller characterization under international human rights law and an expansion of the prevention and protection systems in place for victims.

While trafficking is typically dealt with under the prohibition of slavery, servitude, and forced labor, in certain cases the coverage of this prohibition is incomplete. In Part IV therefore, I challenge the European Court's *obiter dicta* that physical and psychological ill-treatment committed in the context of trafficking is and should be covered by the prohibition of slavery, servi-

tude, or forced labor exclusively. Rather, I argue that a separate application of the prohibition of torture and other ill-treatment is both legally justified and appropriate as a policy matter in order to underscore the severity of certain victims' treatment and to recognize the nature of trafficking as a multiple violation of international human rights law. Again, when framed within the context of states' due diligence obligations, the fuller application of international human rights law should contribute to heightened protection of victims. I conclude the article by arguing that advocates of the expansion of the prohibition of torture and other ill-treatment need to refocus efforts on the development of the state's duty to prevent and protect individuals from violence by non-state actors rather than the characterization of the underlying acts alone.

II. THE PARAMETERS FOR APPLYING THE PROHIBITION OF TORTURE AND OTHER ILL-TREATMENT TO THE ACTS OF NON-STATE ACTORS

The prohibition of torture and other ill-treatment can only be engaged where a state nexus to the act can be established.[22] International human rights law does not apply directly to the acts of non-state actors with the exception of the acts of non-state actors who exercise effective control of territory, particularly in the absence of central government.[23] As in other cases in which advocates seek to characterize an act carried out by a non-state actor as a human rights violation, the state nexus requirement is often overlooked in favor of a focus on the nature of the act.[24] Yet, this is the wrong starting point as the satisfaction of the state nexus requirement is a condition precedent to the engagement of international human rights law generally, and the prohibition of torture and other ill-treatment specifically. This is why a move away from a broad assertion that trafficking constitutes torture and other ill-treatment to a detailed analysis of its application is so critical to providing meaningful protection to victims of the practice.

The state nexus requirement may be satisfied in two ways. First, state officials may be involved in trafficking. Such direct involvement is unlikely to be the result of an official state policy but rather may emanate from situations such as accessing the services of trafficked persons out of working hours and corruption and abuse of an official position, for example by guaranteeing

---

22. Nigel Rodley, *Can Armed Opposition Groups Violate Human Rights?, in* Human Rights in the Twenty-First Century: A Global Challenge 297, 313 (Kathleen E. Mahoney & Paul Mahoney eds., 1993).
23. Elmi v. Australia, U.N. Doc. CAT/C/22/D/120/1998 (14 May 1999).
24. Ryszard Piotrowicz, *The Legal Nature of Trafficking in Human Beings*, 4 Intercultural Hum. Rts. L. Rev. 175 (2009).

protection in return for a fee or facilitating entry or exit visas. Even if the actions of the official or person acting in an official capacity do not form part of a state policy, state responsibility may still ensue as international law will attribute acts to the state where officials act with apparent authority,[25] regardless of whether the actions are *ultra vires* or in contravention of instructions.[26] The corrupt border official example provides the clearest paradigm of an *ultra vires* action.[27] However, state responsibility may also extend to situations in which the official uses his or her official position to access the services of trafficked persons, even if entirely out of working hours, through the promise of state inaction or protection.[28]

Second, the state nexus requirement may be satisfied through state officials' failure to prevent or protect victims of trafficking even if they are not directly involved. Articles 1 and 16 of the Convention against Torture foresee the satisfaction of the state nexus where acts of torture and other ill-treatment are carried out with the consent or acquiescence of an official or person acting in an official capacity. The regional human rights bodies have advanced a similar formula through the development of the principle of due diligence, which in addition to the requirement of the adoption of general measures to prevent or protect victims from the acts of non-state actors, obligates states to take operational action where they are aware of a real and immediate risk to an identifiable individual at the hands of a third party.[29] Thus, where officials turn a blind-eye[30] or fail in their duty to prevent or protect a victim of trafficking from a third party,[31] the state nexus requirement may be satisfied.

The due diligence principle therefore confirms that acts by non-state actors, such as trafficking, are not "unequivocally a human rights viola-

---

25. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, Y.B. Int'l L. Comm. Vol. II, Pt. Two 46, art. 7 (2001).
26. *Id.* art.7 provides that:

    > The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

27. *See, e.g.*, reports by the Committee against Torture raising concerns about alleged complicity of the police and border control in trafficking in human beings, CAT, *Concluding Observations of the Committee against Torture*: *Kazakhstan*, ¶ 31, U.N. Doc. CAT/C/KAZ/CO/2 (21 Nov. 2008).
28. *See* Anne Gallagher, The International Law of Human Trafficking 227 (2010).
29. Dzemajl v. Yugoslavia, ¶ 9.2, U.N. Doc. CAT/C/29/D/161/2000 (2002).
30. Nigel Rodley with Matt Pollard, The Treatment of Prisoners under International Law 89, 92 (3rd ed. 2009).
31. During the drafting process, the United States was particularly intent on the inclusion of the term acquiescence within the definition of torture to underline the duty to prevent torture even if committed by actors other than the state. Economic and Social Council, *Questions of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, Particularly Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 29, U.N. Doc. E/CN.4/1314 (19 Dec. 1978).

tion,"[32] but only become one through a failure in the state's duty to prevent or protect victims from violence by non-state actors. Despite this important point, jurisprudence on due diligence, consent, and acquiescence remains thin and underdeveloped. Yet, it is in this realm that international human rights law offers the most concrete protection to victims of trafficking as it is the point at which the state's duty to prevent trafficking and protect victims is engaged and therefore requires much greater attention.

This section addresses the circumstances in which a failure to prevent or protect victims of trafficking might engage the prohibition of torture and other ill-treatment. It also underscores that even when engaged, it will have limited meaning in practice unless the link between the duty of states to adopt general measures to protect victims of trafficking, and the duty to take operational measures in specific cases, is strengthened. This is necessary in order to ensure that such cases actually come to the attention of the authorities, thus triggering their duty to prevent or protect.

A. The Level of Awareness Required to Make a Finding of Torture Specifically

The engagement of the prohibition of torture specifically for a failure in a duty to prevent or protect victims of trafficking is likely to face significant challenges, even where the authorities are aware of concrete allegations of the requisite severity. Three ways in which to distinguish torture from other ill-treatment have been advanced. First, the European Commission depicted inhuman treatment[33] as requiring severe pain or suffering, and described torture as an aggravated form of inhuman treatment "with the implication that some higher threshold of pain and suffering applies to torture than does to inhuman treatment."[34] While the Convention against Torture does not encapsulate this definition, it continues to appear in the jurisprudence of the European Court.[35] Second, the Convention against Torture maintains a relative severity approach but only requires that torture constitutes severe suffering without the element of aggravation thus suggesting a lower threshold than that originally advanced by the European Commission.[36] Third, the purposive element of torture as set out in Article 1 of the Convention against

32. Copelon, *supra* note 3, at 294. See Piotrowicz, *supra* note 24, for a general discussion on the limitations of applying international human rights law to trafficking cases due to their principal commission by non-state actors.
33. Inhuman treatment is defined as a component of cruel, inhuman, or degrading treatment or punishment, abbreviated as "other ill-treatment."
34. Rodley with Pollard, *supra* note 30, at 87, 99.
35. *See, e.g.*, Ilascu v. Moldova and Russia, 40 Eur. H.R. Rep. 46, ¶ 426 (8 July 2004).
36. Rodley with Pollard, *supra* note 30, at 99.

Torture offers a means to distinguish between torture and other ill-treatment. Nigel Rodley and Matt Pollard favor the purposive distinction on its own or in conjunction with the second relative severity test but reject the first as outdated and no longer applicable.[37] Applying the Convention against Torture, the European Court often requires the establishment of purpose, although not consistently.[38]

While distinction on the basis of purpose generally presents a simpler process and reduces the risk of arbitrary and subjective assessments of severity, if applicable in trafficking cases, it may result in particular obstacles to their characterization as torture specifically. Article 1 of the Convention against Torture provides an illustrative but not closed list[39] of purposes as "obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind." As trafficking does not mirror the classical torture setting of state detention, the first purpose is unlikely to apply. Rather, the central purpose of the trafficker usually relates to the exploitation of the victim through provision of a service for monetary return.

On its face, the purpose of discrimination appears to present a ground on which to characterize at least certain trafficking cases as torture, for example, where a woman is trafficked for sexual exploitation or more generally because the person is from a group in a position of vulnerability. Indeed, it is often argued that the rape of a woman would automatically fulfill the purposive element of torture on this basis.[40] The difficulty with discrimination under the Convention definition, however, is that it requires a specific purpose of discrimination, as opposed to international human rights law more generally which can find discrimination on grounds of discriminatory effect. For example, the European Court and Inter-American Court of Human Rights have found a violation of the prohibition of other ill-treatment and the right to equality and non-discrimination. However, they did so by using the separate equality and non-discrimination provision in their respective conventions. They were therefore able to find a violation on the basis of discriminatory effect as they did not need to use the discriminatory purpose element of the torture prohibition.[41] As the threshold to satisfy the

37. *Id.*
38. The European Court often requires the demonstration of a purpose although not consistently. *See, e.g.*, Salman v. Turkey, 34 Eur. H.R. Rep. 17, ¶ 114 (27 June 2000).
39. Manfred Nowak & Elizabeth McArthur, The United Nations Convention against Torture: A Commentary 39 (2008).
40. Clare McGlynn, *Rape, Torture and the European Convention on Human Rights*, 58 Int'l & Comp. L. Q. 565, 568 (2009); Copelon, *supra* note 3, at 322; *Nowak Report*, *supra* note 15, ¶ 56.
41. *See, e.g.*, Case of González et al. v. Mexico, Judgment, Inter-Am. Ct. Hum. Rts. (ser. C) No. 205, ¶ ¶ 398–402 (16 Nov. 2009) [hereinafter *Cotton Field*] (finding a violation of Article 1(1) on discrimination read together with Articles 4(1), 5(1), 5(2), 7(1)); Opuz v. Turkey, 50 Eur. H.R. Rep. 28, ¶ ¶ 179, 200 (9 June 2009) (finding a violation of Article 14 read together with Article 3, although ruling out a discriminatory intent).

discriminatory purpose is much higher than that of discriminatory effect, it may render this purposive element less far-reaching than is often assumed.

Where physical or psychological methods are used as a means of coercion, intimidation into compliance, or as punishment for an attempt to escape, they would appear sufficient to meet the purposive test. However, the *travaux preparatoires* to the Convention and a range of torture experts contend that Article 1 requires a state purpose.[42] Rodley with Pollard note that, "[i]t is no accident that the purposive element of torture reflects precisely state purposes, or, at any rate, the purposes of an organised political entity exercising effective power."[43] Herman Burgers and Hans Danelius submit that the "words 'such . . . as' [in the Convention] imply that the other purposes must have something in common with the purposes expressly listed."[44] Manfred Nowak and Elizabeth McArthur read this to mean that the purpose of torture must be to further the interests of the state.[45]

The requirement of a state purpose would render the purpose of the trafficker irrelevant even if it satisfied the requirements of Article 1. While not determinative for the purposes of attribution, it would also appear to rule out a characterization of torture where the state official acting under apparent authority does so for corrupt purposes or for personal gain only, although Burgers and Danelius note that:

> it can often be assumed that where a public official performs such an act, there is also to some extent a public policy to tolerate or to acquiesce in such acts. Only in exceptional cases should it therefore be possible to conclude that the infliction of severe pain or suffering by a public official would not constitute torture as meant in the definition on the ground that he acted for purely private reasons.[46]

In due diligence cases, the requirement of a state purpose for a failure to prevent or protect a victim from trafficking would exclude almost all cases from characterization as torture unless a state policy of purposive discrimination could be established. Interestingly, whether and how the purposive element applies in due diligence cases has been side-stepped by the courts so far. In *Opuz* and *Cotton Field,* for example, the respective courts simply did not consider the possibility that the violations concerned could constitute torture and thus did not advance a test for distinguishing between torture and other ill-treatment in due diligence cases. In *Opuz v. Turkey*, despite the applicant's submission that the acts amounted to torture,[47] the European Court

---

42. J. Herman Burgers & Hans Danelius, The United Nations Convention against Torture: A Handbook on The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 118 (1988).
43. Rodley with Pollard, *supra* note 30, at 88.
44. Burgers & Danelius, *supra* note 42, at 118.
45. Nowak & McArthur, *supra* note 39, at 39; *But cf.* Burgers & Danelius, *supra* note 42, at 119.
46. Burgers & Danelius, *supra* note 42, at 119.
47. *Opuz*, *supra* note 41, ¶ 155.

found that the "violence suffered by the applicant, in the form of physical injuries and psychological pressure, were sufficiently serious to amount to ill-treatment" without even addressing the applicant's arguments.[48]

In her separate opinion in *Cotton Field*, Judge Medina Quiroga suggests that the Inter-American Court's failure to label the acts as torture derives from a reluctance to extend the coverage of the prohibition of torture to acts not directly carried out by the state.[49] She criticizes this outcome on the basis that the Court had, on many previous occasions, made a specific finding of torture in cases of similar severity.[50] Her assessment dovetails with critiques advanced by feminist writers such as Rhonda Copelon who questioned "whether state involvement in the commission of the offense is the *sine qua non* of the definition of torture as a violation of international human rights."[51]

The explicit requirement of a state purpose would appear to set the bar unworkably high in due diligence cases. Similarly, the evasive approach of the regional human rights tribunals in *Cotton Field* and *Opuz* suggests that very few, if any, trafficking cases could constitute torture through a failure of the duty of due diligence. While the due diligence test had not been developed at the time of the adoption of the Convention against Torture, both readings appear contrary to its original aims in that the justification for a primary focus on torture by state actors was premised on the expectation that the state would "take action according to its criminal law against private persons having committed acts of torture against other persons."[52]

Accordingly, this shortcoming indicates the need for a re-assessment of the standards applicable to the classification of acts as torture when state responsibility is established through a failure to prevent or protect victims from the acts of third parties, which may require a different approach to that applied to the direct acts of state officials. For now, however, it suggests that states are unlikely to be found responsible under the prohibition of torture specifically for a failure to prevent or protect victims of trafficking from the acts of non-state actors.

B. The Level of Awareness Required to Engage the Prohibition of Other Ill-Treatment

The limitations posed by the application of the prohibition of torture do not necessarily extend to the prohibition of other ill-treatment which may

48. *Id.* ¶ 161.
49. Concurring Opinion of Judge Cecilia Medina Quiroga in *Cotton Field, supra* note 41, ¶ 7; *see generally* McGlynn, *supra* note 40, at 588.
50. *Cotton Field, supra* note 41, ¶ 2.
51. Copelon, *supra* note 3, at 342.
52. Burgers & Danelius, *supra* note 42, at 45.

be engaged provided the acts are of the requisite severity and the state authorities are on notice of them but fail to prevent or protect the victim of trafficking. Whether or not the state is on notice of ill-treatment, however, not only depends on a case of trafficking coming to its attention but also on how it understands what trafficking entails. As this section demonstrates, the prohibition of other ill-treatment may be engaged in three ways: first, with concrete allegations of ill-treatment; second, through a case fitting a pattern of trafficking known to involve ill-treatment; and third, by authorities presuming any type of trafficking to involve other ill-treatment. As developed in the next section, such a presumption would not derive from physical acts of violence which are not apparent in all cases of trafficking but from psychological ill-treatment. The first two scenarios will have limited coverage and will be dependent on substantial knowledge and reporting of the type of trafficking at issue and may thus result in a narrow understanding of what trafficking entails with the accompanying potential for under-protection. The third scenario, however, may broaden understanding of the harm involved in trafficking regardless of its purpose and composite nature and may result in state authorities taking a wider range of trafficking cases seriously, thus heightening the protection offered to victims.

1. Responsibility Where Direct Allegations of Ill-Treatment are Made

Regardless of the possibility of establishing state responsibility for other ill-treatment and even torture in trafficking cases through the failure to act, that possibility will have little meaning if the cases do not come to the attention of the authorities. As noted above, states are under an obligation to adopt general measures to protect individuals from torture and other ill-treatment by state and non-state actors alike.[53] Furthermore, in certain circumstances they are obligated to undertake operational measures to prevent or protect a specific victim where the authorities are aware or should have been aware of a specific risk of other ill-treatment. While the latter obligation appears far-reaching, its significance (and thus the significance of labeling trafficking as torture or other ill-treatment more generally) may be limited by an under-examination of the connection between general and operational measures that would increase the likelihood of trafficking cases coming to the attention of the authorities.

The requirement of awareness of a risk to an identifiable individual presents a high threshold to overcome in order to trigger the duty of the state to take operational measures to prevent or protect trafficking victims. In the majority of due diligence cases dealt with by the regional human rights courts, the authorities became aware of a risk through a complaint by the victim or his or her family. Trafficking victims, however, are associ-

53. CAT, *General Comment No. 2: Implementation of Article 2 by States Parties*, ¶ 18, U.N. Doc. CAT/C/GC/2 (24 Jan. 2008).

ated with low levels of reporting which may be due to a range of factors including physical inability to escape to complain, a distrust of authorities to protect them if they do complain (a distrust that may be well-founded),[54] and threats and violence used to prevent the reporting of the situation to the police, including instilling the belief in victims that they will be prosecuted if they do so (which again may be well-founded where the individuals are not identified as trafficking victims but treated as illegal immigrants and/or engaged in criminal activity).[55] Thus, unless the general measures adopted by states include tailored complaints mechanisms as well as address ways in which states can meet their obligations to independently identify trafficking victims, it is unlikely that many cases will trigger the obligation to take operational measures.

Notably, other than the UN Office of the High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking[56] and the UN Draft Basic Principles on the Right to a Remedy for Victims of Trafficking,[57] the international and regional instruments adopted on trafficking to date pay very little attention to the nature of complaint mechanisms and states' duties to independently identify victims of trafficking. For example, the Palermo Protocol does not provide for complaint mechanisms beyond noting that states should enable victims of trafficking to pursue compensation and does not explicitly set out a duty to identify victims of trafficking. However, in *Rantsev*, the European Court read Article 10 of the Palermo Protocol, which requires the training of officials, to find that the Cypriot authorities had failed in their duty of due diligence by failing to identify the applicant's daughter as a potential victim of trafficking when she was brought to the police station by the cabaret club owner, thus emphasizing the state's own duty to take proactive measures to identify and protect victims.[58] The facts of this case are quite peculiar,

---

54. Special Rapporteur on Torture, *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children: Mission to Argentina*, ¶ 50, U.N. Doc. A/HRC/17/35/Add.4 (24 May 2011).
55. Jessica Elliott, *(Mis)Identification of Victims of Trafficking: The Case of R v. O,* 21 Int'l J. Refugee L. 727, 732 (2009) (*citing* Home Office/Scottish Government, UK Action Plan on Tackling Human Trafficking 48 (2007)). *See also* Parosha Chandran, *The Identification of Victims of Trafficking, in* Handbook, *supra* note 19, at 45–6.
56. UN High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking,* at 6, U.N. Doc. E/2002/68/Add.1 (20 May 2002).
57. UN Special Rapporteur on Trafficking in Persons, Especially in Women and Children, *Draft Basic Principles on the Right for an Effective Remedy for Trafficked Persons*, Annex I, ¶ ¶ 3, 6(a), U.N. Doc. A/HRC/17/35 (13 Apr. 2011) (although notably these Principles are more focused on access to justice for the purpose of obtaining reparation rather than triggering the duty to take operational measures specifically).
58. *Rantsev, supra* note 16, ¶ 296. *See also Opinion No. 6/2010 of the Group of Experts on Trafficking in Human Beings of the European Commission*, 20 Int'l J. Refugee L. 673, 674 (2010).

however, as the cabaret club owner, allegedly involved in the trafficking at the exploitation phase, took the victim to the police station, thus putting the police on notice. This is unlikely to happen frequently and therefore does not answer the question of how far authorities must go to identify potential victims when they do not come to the authorities directly.

The lack of detailed attention to complaint mechanisms and the duty to identify are particular deficiencies that impact the level of engagement and protection that international human rights law can offer. Accordingly, they require much closer and creative consideration in order to ensure that complaints mechanisms are tailored and accessible for victims of trafficking, that they are aware of them, that they are not at risk of prosecution themselves, and that protection is not made conditional on cooperation with authorities in the prosecution of traffickers. Moreover, the ways in which states fulfill their duty to identify trafficking victims requires careful consideration in order to ensure that authorities are proactive without using this duty to pursue aggressive immigration or anti-prostitution agendas under the auspices of the protection of victims of trafficking.[59] For the purposes of this article, these deficiencies underscore that characterizing trafficking as involving other ill-treatment will carry little meaning if direct complaints by victims are relied upon to put the state on notice.

2. Responsibility for Other Ill-Treatment Where no Specific Allegation of Violence is Made

As set out in the introduction, trafficking involves a wide range of acts not all of which necessarily involve physical violence at least that would be deemed to reach the threshold of other ill-treatment. In the abstract, therefore, if the victim does not disclose the treatment to which he or she has been subjected, it may be difficult to assert that trafficking involves acts at the level of other ill-treatment or that a presumption in this regard should be made, due to the range of treatment that may be involved.

The situation may be different, however, if the authorities are aware of the type of trafficking involved even if they are not on notice of specific allegations of violence. For example if the authorities are aware that the trafficking is for the purpose of sexual exploitation that could lead to the presumption that it involves the commission of acts of the required severity under the prohibition of other ill-treatment. While other types of trafficking may render such a finding more challenging, this challenge may be overcome if the state is aware of a broader pattern of similar cases that have involved forms of physical or psychological harm that would meet the severity

59. Janie Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. Pa. L. Rev. 1655, 1666–8 (2010).

threshold, even if the type of trafficking at issue does not immediately raise such concerns. For example, in *Rantsev v. Cyprus and Russia*, the European Court held that the state had violated Article 4 (on the prohibition of slavery, servitude, and forced labor) as, once the cabaret owner brought the victim to the police station, the police failed to inquire whether she might be a victim of trafficking,[60] but rather returned her to the custody of the cabaret club owner.[61] The Court found that the police returned her despite their awareness both that Ms. Rantseva was a Russian national holding an artiste visa,[62] and the broader context of the trafficking of foreign women on artiste visas, particularly from former Soviet states to Cyprus, for the purpose of sexual exploitation by the owners and managers of cabaret clubs.[63] While the Court declined to consider the applicability of Article 3 (on torture and other ill-treatment) in this case, it could be argued that the state's knowledge of the type of trafficking and the particular victim's profile was sufficient to engage the prohibition, given the sexual exploitation typically involved in such cases.

Such a conclusion is supported by the findings of the regional human rights courts in other cases concerning due diligence. For example, in *Gonzalez et al (Cotton Field) v. Mexico*, the Inter-American Court of Human Rights noted that before the disappearances at issue in the case were reported to the police, the state was aware of a general pattern of violence against women and had failed in its obligation to adopt a policy to prevent such violence by private actors.[64] Due to this contextual knowledge, once the disappearances were reported to the police, it found the state responsible on the basis that it became aware of a "real and imminent danger for a specific . . . group of individuals"[65] but failed to take reasonable preventive action.[66]

While such an approach would extend the range of cases falling under the prohibition beyond direct allegations by victims, it would involve broad distinctions between types of trafficking cases and would also be reliant on studies of trafficking patterns and may therefore still limit the application of the prohibition of other ill-treatment through the principle of due diligence. As demonstrated by *Rantsev*, where trafficking patterns are available (in this case, patterns evidenced in reports by the Council of Europe and national ombudsman) this could trigger the state's positive obligations under the prohibition of other ill-treatment.[67] Reports by the Council of Europe, other

60. *Rantsev*, *supra* note 16, ¶ 296–97.
61. *Id.* ¶ 298.
62. *Id.* ¶ 295.
63. *Id.* ¶ 294.
64. *Cotton Field, supra* note 41, ¶ ¶ 242, 279–83, Concurring Opinion of Judge Diego Garcia-Sayan, ¶ 11.
65. *Id.* ¶ 280.
66. *Id.* ¶ 284.
67. *Rantsev*, *supra* note 16, ¶ 294.

international, regional, or national bodies may provide important information on trafficking patterns. Through a state's engagement with such reports, it is put on notice thus engaging its duty to prevent and protect victims from other ill-treatment.[68] For example, the United States Department of State's annual Trafficking in Persons (TIP) Report documents the extent to which 185 states of origin, transit, or destination, including the United States itself, provide adequate preventive and protective measures for victims of trafficking, and details the continuing deficiencies of national law and practice in this regard.[69] Anne Gallagher observes that while the quality, evidential support, and detail of the TIP reports have improved since their inception in 2001, they still suffer from deficiencies in their coverage of the types of trafficking cases at issue in certain states (particularly beyond trafficking for sexual exploitation) and the measures taken to prevent and protect victims.[70] In the context of deportation decisions, Gallagher and others also argue that the reports can be over-relied upon by national judiciaries to justify removing asylum applicants, even where the TIP reports only indicate an improvement in a state's ability or willingness to prevent and protect victims of trafficking from reprisals or re-trafficking rather than a full compliance with their due diligence obligations.[71] Through such over reliance on the information in TIP reports as if they are sources of "definitive statement[s] of fact,"[72] there is a risk that patterns will not be fully identified. Thus, while country reports increase the likelihood of state knowledge or constructive knowledge of ill-treatment in certain types of trafficking cases, information of patterns still may not always be publicly available. This route to the establishment of state responsibility would also exclude individual cases, which do not form a part of a broader pattern, from the coverage of the prohibition of ill-treatment, thus emphasizing the limitations of the prohibition when engaged on this basis.

Accordingly, where state authorities do not have concrete allegations or are not able to make presumptions from the type of trafficking at issue, how trafficking is understood and the severity with which it is treated in general may play a critical role in their response and the seriousness with which they treat cases. If trafficking is dealt with narrowly to focus on physical violence, it could lead to under-protection since, as discussed in the next

---

68. Anne Gallagher, *Human Rights and Human Trafficking: A Reflection on the Influence and Evolution of the U.S. Trafficking in Persons Reports, in* From Human Rights to Human Trafficking: Reframing Contemporary Slavery 172, 190 (Alison Brysk & Austin Choi-Fitzpatrick eds., 2012).
69. *See* US State Dep't, Trafficking in Persons Report (2012).
70. *Id.* at 179, 181.
71. *See* Gallagher, *Human Rights and Human Trafficking, supra* note 68, at 184. *See also* Anna Dorevitch & Michelle Foster, *Obstacles on the Road to Protect: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law*, 9 Melbourne J. Int'l L. 1, 22–24 (2008).
72. Gallagher, *Human Rights and Human Trafficking, supra* note 68, at 188.

section, not all cases of trafficking involve physical violence. However, the prohibition of other ill-treatment can provide wider coverage when properly applied to include psychological ill-treatment which, as discussed in the next section, appears to occur most frequently and reflect a greater degree of commonality between the varying types of cases of trafficking, than physical violence. Focusing on psychological ill-treatment would provide all trafficking cases with a presumptive baseline of severity and would largely avoid the need to unpick each case of trafficking to assess the level of violence involved. However, a significant conceptual shift is still needed to fully appreciate psychological harm, particularly as the jurisprudence and standards on psychological methods alone as torture and other ill-treatment are underdeveloped.

Thus, state responsibility for other ill-treatment may be established where the authorities knew or ought to have known that the trafficking involved violence of such severity to engage the prohibition of other ill-treatment and failed to act. The outstanding question remains whether courts will derive such knowledge in the absence of specific allegations from specific types of trafficking cases or whether they will infer all trafficking cases to involve such a risk due to the psychological methods of ill-treatment often involved.

3. Multiple State Responsibility for Other Ill-Treatment

A related issue concerns which state(s)' responsibility is engaged under the prohibition of other ill-treatment given that trafficking can constitute a multi-jurisdictional practice. One approach might be to find that each state is only responsible for the physical and/or psychological harm that occurs on its territory or under its control. However, this approach may be under-inclusive, for example, in cases in which the acts take place in the territory or under the control of the destination country but where the (in)action of the state of origin and/or transit contributes to the ultimate exposure of the victim to such treatment. Article 47 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts 2001 recognizes the possibility of multiple state responsibility "for the wrongful conduct as a whole."[73] Therefore, a finding would not be barred on that ground.

However, it may still prove challenging to establish state responsibility in the country of origin when acts that could constitute torture or other ill-treatment have not yet taken place. Where a state is both on notice that a person has been abducted or taken by force on its territory and it knows or ought to have known that the circumstances fit a broader pattern of cases that have led to trafficking, it may be found responsible for a failure

73. James Crawford, The International Law Commission Articles on State Responsibility: Introduction, Text and Commentaries 272 (2005).

to prevent or protect the person from being trafficked. It may also be found responsible for a failure to protect or prevent the victim from any torture or other ill-treatment committed subsequently, where it can be established that had it taken preventative action, the person would likely not have been trafficked. Again, however, this may be limited to cases in which the state has knowledge of the type of trafficking involved or broader patterns of torture and other ill-treatment in similar cases.

Where an individual leaves a state voluntarily only to later discover that he or she has been deceived, however, it may be more difficult to establish the responsibility of the state of origin. In such cases, the state may not be on notice of the departure at all, particularly where it does not issue exit visas. Moreover, states generally cannot deny citizens their right to freedom of movement and to leave a state's territory. For example, in *Rantsev v. Cyprus and Russia*, the applicant alleged that Russia had failed to take "the necessary measures to protect Ms. Rantseva from the risk of trafficking and exploitation."[74] The Court found that it could examine Russia's actions as the alleged trafficking commenced in Russia,[75] but noted that "although Russian authorities appear to have been aware of the general problem of young women being trafficked to work in the sex industry in foreign States, there is no evidence that . . . there was a real and immediate risk to Ms. Rantseva herself prior to her departure for Cyprus."[76]

In such cases, it is difficult to see how it could be held responsible for eventual violence committed in another state, particularly if as in the case of *Rantsev,* "the Russian authorities took steps to warn citizens of trafficking risks."[77] Equally, however, the state of origin may be found liable for a procedural violation of the prohibition if the type of trafficking or patterns appeared to engage the prohibition and the authorities had not investigated and taken general measures to address recruitment on its territory. For example, in *Rantsev,* the Court found that "the Russian authorities therefore had an obligation to investigate the possibility that individual agents or networks operating in Russia were involved in trafficking Ms. Rantseva to Cyprus."[78]

Accordingly, as this section has shown, establishing that the prohibition of torture and other ill-treatment is engaged in cases of trafficking (and other cases involving acts by non-state actors) is complex and nuanced and cannot simply be assumed by the nature of the underlying act. By analyzing its application to the case of trafficking, however, the underdevelopment of the law on due diligence is exposed and it is at this juncture that much greater attention is needed in trafficking cases and non-state actor cases more generally.

---

74. *Rantsev, supra* note 16, ¶ 207.
75. *Id.* ¶ 207.
76. *Id.* ¶ 305.
77. *Id.* ¶ 305.
78. *Id.* ¶ 307.

III. THE SATISFACTION OF THE SEVERITY THRESHOLD IN SOME BUT NOT ALL TRAFFICKING CASES

Once the starting point of focusing on the state's responsibility to prevent and protect victims of trafficking is clear, the prohibition of other ill-treatment at least can make a significant contribution to how trafficking is understood and the seriousness with which it is treated—in all its varied forms—by authorities. An accurate portrayal of trafficking within international human rights law should have the effect of focusing states' activities on enhancing the prevention and protection mechanisms in place, including ensuring that they are able to identify and respond effectively to the needs of victims of the full range of trafficking cases through effective complaint mechanisms and independent means.

In many instances, narratives of violence experienced in cases of trafficking align with the types of treatment that courts and international bodies consider to fall within the ambit of the prohibition of torture and other ill-treatment. Thus, as noted above, where the victim provides detail of his or her treatment or the purpose of the trafficking or the types of violence associated with the type of trafficking is documented, the satisfaction of the severity threshold of the prohibition of other ill-treatment should be clear. Physical manifestations of violence present the most obvious cases in which the prohibition would be engaged, although, as discussed below, the composite nature of trafficking means that physical violence varies greatly between different forms of trafficking and in individual cases. Accordingly, any assertion that all trafficking involves physical violence that would meet the severity threshold of torture and other ill-treatment would seem inaccurate. Equally, while psychological methods of coercion and intimidation as well as the fear and uncertainty associated with trafficking appear to reflect a more consistent feature,[79] their legal significance has been underplayed to date. This is an area in which the prohibition of other ill-treatment might be of particular relevance and contribute to a fuller recognition of victims' experience within the trafficking process and an individualized and widened understanding by states of the nature of trafficking and the response all cases require.

A. Physical Violence During Trafficking as Torture and Other Ill-Treatment

Beatings and other forms of physical violence employed to abduct, intimidate, or prevent or punish attempts to escape present obvious examples of the

79. Skrivankova *supra* note 19, at 55.

types of violence that might be of sufficient severity to constitute torture or other ill-treatment. This level of severity may be reached by a single instance or an accumulation of physical violence.[80]

The commission of rape either as a means of exploitation or on a singular or repeated basis, through opportunism, for example, in cases of domestic servitude in which women may be "raped by male members of the family . . . as a means of control and assertion of power,"[81] presents a clear example of a physical act of violence that would reach the threshold of other ill-treatment, if not torture. Although less attention has been paid to other acts of sexual violence, presumably they would also fall with the definition, either singularly or on a cumulative basis.[82]

While trafficking for the purpose of sexual exploitation tends to receive the most attention, as already noted, trafficking encompasses a broader range of practices including trafficking into agriculture, domestic service, restaurants, hotels, manufacturing, and construction.[83] Very little jurisprudence exists on whether the nature of the labor itself, particularly hard labor and excessive hours, might violate the prohibition of torture and other ill-treatment, although presumably the argument could be made in certain cases, particularly if on a cumulative basis. Similarly, the forced use of drugs or forced organ removal could also fall within the definition.

Thus, in a number of cases acts of physical violence carried out at any point in the trafficking process may reach the severity threshold of the prohibition of torture and other ill-treatment. Equally, as noted above, broad assertions that all trafficking involves violence of this nature would not be possible, thus limiting determinations of severity to the facts of individual cases and possibly to certain types of trafficking such as trafficking for the purposes of sexual exploitation.

B. Psychological Methods of Torture and Other Ill-Treatment

Beyond physical acts of violence, the psychological dimension to the prohibition of torture and other ill-treatment may be particularly relevant in

---

80. Rodley with Pollard, *supra* note 30.
81. Skrivankova, *supra* note 19, at 55.
82. Miguel Castro-Castro Prison v. Peru, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 306 (25 Nov. 2006).
83. *See* Alice Edwards, *Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor* 36 Denv. J. Int'l L. & Pol'y 9, 45–46 (2007) (discussing the limited focus on trafficking to date as an "anti-prostitution instrument"); Grace Chang and Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s),* 3 Stan. J.C.R. & C.L. 317, 320–23 (2007) (critiquing US enforcement agencies purported focus on trafficking of sex workers); Munro, *supra* note 19, at 92; Skrivankova, *supra* note 19, at 49.

trafficking cases. Common psychological methods used in the trafficking process include threats of physical violence, deportation and imprisonment of the trafficked person and his or her family if any attempt to escape or complaint is made, cutting off the person from the outside world completely either through actual restraint or the employment of psychological means of control, the uncertainty and fear associated with such isolation, or other subtler methods of control and manipulation.[84]

Such psychological methods mirror many of those used in the more traditional scenarios of torture and other ill-treatment by state actors. For example, Herman Reyes points to particularly severe forms of psychological ill-treatment such as threats of torture and/or death made against the person and/or his or her family, solitary confinement, or sleep deprivation, which may constitute torture or other ill-treatment.[85] He also refers to other methods that may appear relatively "minor" on their own such as "constant taunting; verbal abuse; intimidations . . . petty and less petty harassments . . . verbal threats of further torment," but when grouped together "form a system deliberately designed to wear and break down, and ultimately also to disrupt the senses and personality" and emphasizes that "the use of cumulative methods over time is aggravated both by the unpredictability of the situation and by the total lack of any real control."[86]

As with these more traditional cases, psychological methods of ill-treatment may be used in trafficking cases in conjunction with physical forms. As Reyes notes, this reality has led to jurisprudential deficiencies in which courts often fail to clearly assert whether and when psychological methodology alone would meet the severity threshold of torture and other ill-treatment due to their tendency to deal with both physical and psychological forms of torture and other ill-treatment together.[87] He argues that the lack of separation risks the portrayal of torture as "mainly a 'physical phenomenon.'"[88] Equally, some jurisprudence has emerged on when psychological violence alone would constitute other ill-treatment. For example, in the case of *Gaefgen v. Germany,* the European Court found that the threat alone of "real and immediate" ill-treatment over the course of ten minutes which was "premeditated and calculated in a deliberate and intentional manner" in the context of police custody and thus a "state of vulnerability" although

84. Burgers & Danelius, *supra* note 42; *Nowak Report, supra* note 15, ¶ 56.
85. Hernan Reyes, *The Worst Scars are in the Mind: Psychological Torture,* 89 Int'l Rev. Red Cross 591 (2007).
86. *Id.* at 612.
87. *Id.* at 601. Examples of this approach include, Estrella v. Uruguay, Hum. Rts. Comm., U.N. Doc. CCPR/C/OP/2 (1990), ¶ 8.3; Akkoc v. Turkey, 2000-X Eur. Ct. H.R. 389, ¶ 116; Case of Tibi v. Ecuador, Judgment, Inter-Am Ct. H.R. (ser. C) No. 114, ¶ 146 (7 Sep. 2004).
88. Reyes, *supra* note 85, at 602.

without any evidence of "long-term adverse psychological consequences" constituted inhuman treatment.[89] Such findings are particularly important in the trafficking context as psychological methods appear to reflect the more consistent feature between diverse cases, some of which may not involve physical violence.

Finally, in extreme cases in which victims have been abducted, are unable to contact the outside world, and their families do not know of their whereabouts, the process as a whole may be considered to violate the prohibition of torture and other ill-treatment. While this argument has not yet been considered in a judicial or quasi-judicial forum in relation to trafficking specifically, parallels may be drawn from the jurisprudence on enforced disappearance. For example, the UN Human Rights Committee has repeatedly found that the practice of enforced disappearance in and of itself constitutes a violation of Article 7 of the International Covenant on Civil and Political Rights[90] as a result of the "degree of suffering involved in being held indefinitely without contact with the outside world."[91]

From the foregoing, the employment of physical and psychological methods of torture and other ill-treatment in some but not all cases of trafficking either as a means of control, as a form of exploitation, or simply because of the opportunity presented would satisfy the severity requirement of the prohibition of other ill-treatment. Understanding the experience of victims from this perspective can therefore expand the protection offered by international human rights law as a result; heighten the seriousness with which authorities treat potential cases of all forms of trafficking not just those in which physical violence is evident or assumed and potentially impact upon the level of reparation states are obligated to provide where a violation of the duty of due diligence is found.

IV. THE APPROPRIATENESS OF APPLYING THE PROHIBITION OF TORTURE AND OTHER ILL-TREATMENT TO TRAFFICKING CASES

While certain acts and possibly the process as a whole could fall within the prohibition of torture and other ill-treatment, as set out in the introduction, to date trafficking has been dealt with under the prohibition of slavery, servitude, and forced labor. Accordingly, it remains necessary to establish whether both prohibitions can apply to trafficking cases and whether this is normatively desirable.

---

89. Gäfgen v. Germany, 52 Eur. H.R. Rep. 1, ¶¶ 101–08 (1 June 2010).
90. *See, e.g.*, Madhoui v. Algeria, ¶ 7.4, Hum. Rts. Comm., U.N. Doc. CCPR/C/94/D/1495/2006 (1 Dec. 2008).
91. Alwani v. Libya, ¶ 6.5, Hum. Rts. Comm., U.N. Doc. CCPR/C/90/D/1295/2004 (29 Aug. 2007).

The majority, if not all, trafficking cases are covered by the prohibition of slavery, servitude, and forced labor. This may have been the reason behind the European Court's finding in *Rantsev* that it did not need to specify which aspect of Article 4 (on the prohibition of slavery, servitude, and forced labor) was violated.[92] While trafficking is often referred to as "slavery" or a "slavery-like"[93] practice, as of yet, no court has found that it constitutes slavery although the jurisprudence remains embryonic such that definitive conclusions cannot yet be drawn. A "small fraction"[94] of trafficking cases may fall under the prohibition of slavery, although the size of the fraction will depend on the definition of slavery adopted. Ownership is generally considered to constitute the central element to slavery.[95] On its most restrictive reading, this element limits the coverage of the prohibition to chattel ownership and would thus exclude most cases of trafficking.[96] However, the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Kunarac* found that the definition extends to situations involving the exercise of rights associated with ownership rather than ownership of chattel alone.[97] This reading would encompass both *de jure* and *de facto* ownership thereby covering more cases if a factual situation of ownership could be proven, despite the lack of recognition before the law.[98]

While trafficking may not always meet the definition of slavery, courts appear more willing to treat the practice as servitude or forced labor. The International Labour Organisation's (ILO) Convention No. 29 provides that forced or compulsory labor is "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[99] Many cases of trafficking are likely

92. *Rantsev*, *supra* note 16, ¶ 279.
93. James Hathaway, *The Human Rights "Quagmire" of Human Trafficking*, 49 Va .J. Int'l L. 1, 7 (2008) (characterizing trafficking as a sub-set of slavery but noting the constraints of the Palermo Protocol in this respect); Anne Gallagher, *Using International Human Rights Law to Better Protect Victims of Trafficking: The Prohibitions of Slavery, Servitude, Forced Labour and Debt Bondage, in* The Theory and Practice of International Criminal Law: Essays in Honour of M. Cherif Bassiouni 397 (Leila Nadya Sadat & Michael P. Scharf eds., 2008).
94. Chuang, *supra* note 59, at 1709.
95. Convention to Suppress the Slave Trade and Slavery, art. 1(1), *adopted* 25 Sept. 1926, 60 L.N.T.S. 253 (*entered into force* 9 Mar. 1927) (providing that "[s]lavery is the status or condition of a person over whom any or all the powers attaching to the right of ownership are exercised."); Supplementary Convention on the Abolition of Slavery, Slave Trade and Institutions of Similar Practices, art. 7(a) *adopted* 7 Sept. 1956, 226 U.N.T.S. 3 (*entered into force* 30 Apr. 1957) (maintaining this focus); s*ee* Jean Allain, *The Definition of Slavery in International Law*, 52 How. L. J. 239, 241 (2009).
96. Siliadin v. France, 43 Eur. H.R. Rep. 16, ¶122 (26 July 2005) (finding that slavery required the exercise of "a genuine right of legal ownership . . . reducing her to the status of an 'object.'").
97. Prosecutor v. Kunarac, IT-96-23& IT-96-23/1-A, Judgment, Appeals Chamber, ¶ ¶ 117–19 (Int'l Crim. Trib. for the Former Yugoslavia 12 June 2002).
98. Allain, *supra* note 95, at 258.
99. Convention Concerning Forced or Compulsory Labour (ILO No. 29), art. 2(1), 39 U.N.T.S. 55, *entered into force* 1 May 1932. *See also* Stummer v. Austria, 54 Eur. H.R. Rep. 11, ¶ 118 (7 July 2011) (noting that Article 4(2) of the Convention bears "a striking similarity" to this definition).

to violate the prohibition of forced labor although questions persist over certain practices such as trafficking for sexual exploitation, due to issues surrounding whether sexual exploitation can constitute work[100] and organ removal.[101] Thus, while it may provide more expansive coverage, it is by no means comprehensive.

Finally, like slavery, servitude is an absolute prohibition that appears to sit between slavery and forced labor as a catch-all provision. The UNODC Model Law against Trafficking in Persons defines servitude as "the labour conditions and/or the obligation to work or to render services from which the person in question cannot escape and which he or she cannot change."[102] Since it refers to services as well as labor, it may apply to the forms of trafficking not covered by forced labor and thus fill in any gaps left by slavery and forced labor. As set out in the introduction, the European Court found in *Rantsev v. Cyprus and Russia* that:

> There is no evidence that Ms Rantseva was subjected to ill-treatment prior to her death. However, it is clear that the use of violence and the ill-treatment of victims are common features of trafficking . . . . The Court therefore considers that, in the absence of any specific allegation of ill-treatment, any inhuman or degrading treatment suffered by Ms Rantseva prior to her death was inherently linked to the alleged trafficking and exploitation. Accordingly, the Court concludes that it is not necessary to consider separately the applicant's Article 3 complaint and will deal with the general issues raised in the context of its examination of the applicant's complaint under Article 4 of the Convention.[103]

These *obiter dicta* can be read in two ways. First, that the Court suggests that it would not be legally possible to use the same set of facts to find a violation of both Article 3 on the prohibition of torture and other ill-treatment and Article 4 on the prohibition of slavery, servitude, and forced labor as Article 4 subsumes such acts if "inherently linked to the alleged trafficking and exploitation."[104] Alternatively, that as a matter of "procedural economy" acts that would normally violate Article 3 should only be considered under Article 4.[105] This section therefore considers whether space exists for the dual

---

100. Gallagher, *Using International Human Rights Law*, *supra* note 93, at 26 (noting that "the reluctance to identify typical end results of trafficking, particularly sex work, as labor is one reason for this failure to mount what would appear to be a fairly obvious line of attack" referring to the low use of the prohibition of forced and compulsory labor in trafficking cases). *See also* Munro, *supra* note 19, at 96; Jo Doezema, *Now You See Her, Now You Don't: Sex Workers at the UN Trafficking Protocol Negotiation*, 14 Soc. & Leg. S. 61 (2005).
101. International Labour Organisation (ILO), Forced Labour and Human Trafficking Casebook of Court Decisions 9 (2009).
102. UNODC, *Model Law against Trafficking in Persons*, art. 5(1)(r), V.09-81990 (E) (5 Aug. 2009).
103. *Rantsev*, *supra* note 16, ¶ 252.
104. *Id.*
105. Karl Joseph Partsch, *Discrimination, in* The European System for the Protection of Human Rights 571, 583 (R. St. J. Macdonald, F. Matscher & H. Petzold eds., 1993) (discussing this approach in relation to Article 14).

application of the prohibition of slavery, servitude, and forced labor and the prohibition of torture and other ill-treatment. The resolution of this question presents an issue of key importance to understanding the rationale for resorting to the prohibition of torture and other ill-treatment in the first place.

1. The Legal Space for the Dual Application of the Prohibitions of Torture and Other Ill-Treatment and Slavery, Servitude, and Forced Labor

An analysis of whether the definition of slavery, servitude, and forced labor has to encompass physical violence or psychological methods of ill-treatment such as intimidation, threats, and the fear and uncertainty associated with trafficking are frustrated by the minimal jurisprudence on slavery, servitude, and forced labor generally,[106] and the even fewer cases that raise physical and/or psychological methods of fear and intimidation on their facts. For example, until *Siliadin* and *Rantsev*, none of the cases decided by the European Court under Article 4 of the Convention alleged ill-treatment but rather related to whether the work at issue fell within the scope of Article 4(2) on forced labor.

As discussed above, the legal definitions of slavery, servitude, and forced labor focus on the juridical status and level of ownership and control asserted over a person.[107] Thus, a simple distinction might be made between the two prohibitions to allow their parallel application. On the one hand, the prohibition of slavery, servitude, and forced labor could be treated as addressing the levels of control of the person, and on the other, the prohibition of torture and other ill-treatment as dealing with the severity of treatment employed against a person within such a context. Indeed, in *Kunarac*, the ICTY observed that:

> Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery—compulsory uncompensated labour—would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.[108]

---

106. ILO, *supra* note 101, at 7 (noting that "situations of state-imposed forced labour or prison labour almost never end up in court. Nor are there any cases contained here involving traditional chattel slavery.").
107. Gallagher, The International Law of Human Trafficking, *supra* note 28, at 182.
108. *Kunarac*, *supra* note 97, ¶ 123 (citing U.S. v. Oswald Pohl and Others, Judgment (3 Nov. 1947) *in* Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council No. 10, Vol. 5 (1949)).

This observation suggests that any physical or psychological acts employed while a person is held as a slave fall outside of the legal definition of slavery and should therefore be dealt with elsewhere in the applicable law (in this case, international criminal law). Such a distinction would be akin to that made between the legality of a person's detention and the treatment received while in detention.

However, the assessment is complicated by the role played by any physical or psychological ill-treatment as indicia of slavery, servitude, and forced labor. In *Kunarac*, for example, despite the analysis advanced above, the ICTY set out the indicia of slavery as including acts which may violate the prohibition of torture and other ill-treatment as:

> [C]ontrol of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.[109]

As an "[i]ndicator of enslavement" the ILO also observes that 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 forced or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability . . . [and] psychological oppression.[110]

The inclusion of physical and psychological acts that may meet the threshold of torture or other ill-treatment as indicia of slavery potentially provides support for the first interpretation of *Rantsev* on the basis that the same facts cannot be used twice to find two separate violations.

In *Siliadin v. France*, the European Court found violations of both the prohibition of forced labor and the prohibition of servitude. Its finding of servitude involved "an obligation to provide one's services that is imposed by the use of coercion,"[111] taking into account factors such as the number of hours in the day that the applicant was required to work, her status as a vulnerable minor without resources, her lack of consent, the confiscation of her documentation, the threats of arrest, and her inability to leave the house except to take the children to school.[112] If coercion constitutes the central

---

109. *Id.* ¶ 119 (citing with approval Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶543 (Int'l Crim. Trib. for the Former Yugoslavia 22 Feb. 2001).
110. ILO, *supra* note 101, at 20.
111. *Siliadin*, *supra* note 96, ¶124.
112. *Id.* ¶ ¶ 124–29. *See* Holly Cullen, Silidian v. France: *Positive Obligations under Article 4 of the European Convention on Human Rights*, 6 Hum. Rts. L. Rev. 585, 592 (2006) (arguing that that Article 4 of the European Convention does not present three distinct concepts and that the lines between slavery, servitude, and forced labor are more blurred than would initially appear. She interprets the Court in *Siliadin* to therefore allow "the concept of servitude to fill any gap between" slavery and forced labor).

element of servitude, the relationship between the prohibition of torture and other ill-treatment and servitude is even more pronounced, as the means of coercion used may be physical and psychological acts that reach the level of torture or other ill-treatment.

The Court's finding of forced labor turned on the threats made to the applicant of the "menace of [a] penalty" of arrest, the promise of regularization of her visa status, and her lack of consent to the work required of her.[113] While it appeared to reserve the more severe aspects of the applicant's treatment to its finding of servitude, it nonetheless commented that forced labor "brings to mind the idea of physical or mental constraint,"[114] thus suggesting a potential overlap. The ILO has also noted that physical violence and/or psychological methods of threats and intimidation can act as indicators of forced labor.[115] Similarly, in *Krnojelac*, the ICTY used a different definition of forced labor focused only on involuntariness which it found satisfied through a "climate of fear" which was maintained through a range of physical and psychological methodologies.[116]

Accordingly, acts that may violate the prohibition of torture and other ill-treatment form part of the indicia used to establish slavery, servitude, and forced labor. In such cases, it might be argued that the acts cannot then be used again to reach a finding of torture or other ill-treatment. This would then mean that the prohibition of torture and other ill-treatment would only be relevant in trafficking cases if it could be demonstrated that the acts at issue were performed gratuitously and thus unrelated to the overall status of ownership or control. An argument on this basis is unlikely to succeed, however, as it would necessitate complicated assessments of when the status of slavery, servitude, or forced labor was secured in order to argue that anything subsequent was unrelated to the maintenance of such a position. It is improbable that it would be possible to point to such a moment in time as control is more likely to emanate from an ongoing set of factors or as the ICTY framed it, a prevailing climate of fear.

At least in the international criminal law context, the ICTY has allowed for the simultaneous application of both prohibitions in cases in which physical violence and psychological methods of threats and intimidation act as indicators of slavery, servitude, and forced labor. In *Krnojelac*, for example, the Appeals Chamber upheld the Trial Chamber's finding of persecution as a crime against humanity on the basis of the living conditions of the detainees, including "isolation," "overcrowding," "lack of protection from the cold," "undernourishment," "lack or insufficiency of medical care,"

---

113. *Siliadin*, *supra* note 96, ¶ ¶ 117–20.
114. *Id.* ¶ 117 (*citing* Van der Mussle v. Belgium, 70 Eur. Ct. H.R. (ser. A) ¶ 34 (1983)).
115. Skrivankova, *supra* note 19, at 55.
116. Prosecutor v. Krnojelac, IT-97-25-A, ¶194 (Int'l Crim. Trib for the Former Yugoslavia 17 Sept. 2003).

"psychological suffering," and "effects of these conditions on the detainees' physical and psychological state."[117] It also upheld the finding of the Trial Chamber of superior responsibility for the beatings of the detainees[118] and reversed the acquittals of torture.[119]

The key hurdle to applying both seems to be the concern about avoiding multiple convictions based on the same facts.[120] However, there is another way to consider this. The Appeals Chamber, despite its frequent protestations, actually used the same facts to make a finding of forced labor in addition to the finding of torture and other ill-treatment.[121] Taking into account the totality of the detention conditions, including the torture of certain detainees and the fear of other detainees that they would be subjected to similar treatment, it found that "a reasonable trier of fact should have arrived at the conclusion that the detainees' general situation negated any possibility of free consent."[122] Such an interpretation would thus allow the employment of the same underlying facts to find a violation of torture and other ill-treatment and slavery, servitude, or forced labor.

The foregoing suggests that the indicia merely form part of the evidence that contributes to the establishment of a situation of forced labor rather than constituting an intrinsic part of its definition. The reasoning employed by the Appeals Chamber in *Kunarac* supports this conclusion. In that case, it found that a lack of consent does not constitute an element of the crime of slavery which is concerned with ownership and therefore does not need to be proven. However, it acknowledged its relevance "from an evidential point of view as going to the question whether the Prosecutor has established the element of the crime."[123] This appears to be the most accurate legal reading of the relationship from both the perspective of the prohibition of slavery, servitude, and forced labor and the prohibition of torture and other ill-treatment, and would therefore reject the first interpretation of the European Court's *obiter dicta* in *Rantsev*. Thus no legal barrier would appear to exist to the simultaneous finding of slavery, servitude, or forced labor, and torture or other ill-treatment in trafficking cases.

2. The Policy Reasons for the Dual Application of Both Prohibitions

Such a conclusion still requires the consideration of the second interpretation of the *obiter dicta* in *Rantsev* that as a policy matter only the primary viola-

---

117. *Id.* at 24, n.61 (citing Prosecutor v. Krnojelac, IT-97-25-T, ¶ ¶ 134, 135, 137, 139, 141, 142–43, 146–48 (Int'l Crim. Trib. for the Former Yugoslavia 15 Mar. 2002).
118. *Id.* ¶ 188.
119. *Id.* ¶ 172.
120. *See, e.g., id.* ¶ 188.
121. *Id.* ¶ 191.
122. *Id.* ¶ 194.
123. *Kunarac, supra* note 97, ¶ 120.

tion should be addressed. Where physical violence or psychological methods of threats and intimidation reach the severity threshold of torture and other ill-treatment, a failure to address them separately under the prohibition of torture and other ill-treatment would underplay their commission and leave the extent of the suffering unacknowledged, even if a finding as serious and stigmatized as slavery was reached. As the ICTY noted in *Kunarac*, a finding of slavery, servitude, and forced labor is not dependent on violence at the level of torture and other ill-treatment although it may contribute to the evidence needed to make such a finding. The failure to consider acts reaching the threshold of torture or other ill-treatment separately would equate such cases to those in which other indicia of slavery, servitude, or forced labor were at play. This would suggest that violence at the level of torture and other ill-treatment was merely incidental to the overall situation of slavery, servitude, or forced labor and would thus seriously diminish the severity with which it was treated.

More broadly, insistence on the treatment of trafficking under one provision of international human rights law fails to recognize its composite and diverse nature. As noted at the outset, trafficking encompasses a wide range of cases and situations that may not be conducive to containment within one prohibition in international human rights law. For example, Vanessa Munro points to empirical work that "indicates a substantial variability in the treatment of its victims."[124] Similarly, Alice Edwards argues that the Palermo Protocol may be "too blunt an instrument" to capture the myriad types of trafficking that may require "distinct responses and solutions."[125] In the same way, one provision of international human rights law may not capture the full extent of the victim's suffering. Notably, while more recent literature and jurisprudence focuses on the prohibition of slavery, servitude, and forced labor, a study conducted by David Weissbrodt and Anti-Slavery International in 2000 treated trafficking as a multiple human rights violation potentially involving violations of the right to liberty and security of the person, the prohibition of torture and other ill-treatment,[126] "the right to liberty of movement and freedom to choose their residence," the "right of access to the courts and to fair trial,"[127] the right to marry and to establish a family, and the right to "freedom of expression, their right to receive and impart information, their right of peaceful assembly, and their freedom of association."[128]

---

124. Vanessa Munro, *Of Rights and Rhetoric: Discussions of Degradation and Exploitation in the Context of Sex Trafficking*, 35 J. L. & Soc'y 240, 249 (2008).
125. Edwards, *supra* note 83, at 15.
126. UN Commission on Human Rights, *Contemporary Forms of Slavery: Updated Review of the Implementation of and Follow-Up to the Conventions on Slavery: Working Paper Prepared by Mr. David Weissbrodt and Anti-Slavery International*, ¶ 24, U.N. Doc. E/CN.4/Sub.2/2000/3 (26 May 2000).
127. *Id.* ¶ 25.
128. *Id.* ¶ 26.

Such an approach presents the optimal legal and policy approach to the treatment of trafficking under international human rights law which would include the application of the prohibition of torture and other ill-treatment in appropriate cases even where a finding of slavery, servitude, or forced labor is made. This is important for three reasons. First, slavery, servitude, or forced labor may only be deemed to have occurred at the exploitation stage of the trafficking process.[129] If this is the case, the means of securing the person and any physical or psychological ill-treatment employed en route to the destination country may not be covered. Second, even during the exploitation stage, as discussed above, a finding of slavery, servitude, or forced labor would not necessarily cover the range of potential human rights violations that may be committed. Third, properly characterizing trafficking under international human rights law will focus states' attention on the seriousness of the crime and their duty in preventing its commission and protecting victims. It will also ensure that compensation and other forms of reparation are accurately calculated taking into account the full extent of the harm.

V. CONCLUSION

In responding to the developments before the Committee against Torture, the UN Special Rapporteur, and the European Court, this article has demonstrated that while the prohibition of torture and other ill-treatment can make a significant contribution to the characterization of trafficking under international human rights law, its applicability is complex and nuanced. Much depends on the applicable tests employed for engaging states' responsibility through due diligence and the willingness of courts and human rights' bodies to treat psychological methods such as threats, intimidation, and inducing fear and uncertainty, in particular, as torture and other ill-treatment. While these limitations do not call into question the utility and strategic value of resorting to the prohibition of torture and other ill-treatment, they underline the need to avoid blanket assertions that a particular provision of international human rights law, such as the prohibition of torture, applies, in favor of the treatment of trafficking as a multiple human rights violation within which the prohibition of torture and other ill-treatment may, but not always, play a part.

Accordingly, the European Court's *obiter dicta* and the findings of the Special Rapporteur on Torture and the Committee against Torture should not only be read as confirmation that in some instances trafficking may violate the prohibition of torture and other ill-treatment but as a catalyst for the

129. Jean Allain, Book Review: Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery*, 20 Eur. J. Int'l L. 453, 455 (2009).

reframing of trafficking under international human rights law to capture its diversity and maximize its protection. This would not require the rejection of the prohibition of slavery, servitude, and forced labor or the prohibition of torture and other ill-treatment but would reserve its application to appropriate cases[130] without excluding others from the protection of international human rights law as a result. This would allow for different preventive, protective, and reparative strategies to be applied[131] and minimize the risk that the threshold is raised so much that only a minimal number of cases are capable of inclusion.

Finally, from the perspective of the prohibition of torture and other ill-treatment, trafficking is situated within a range of attempts to expand the definition to include cases beyond the classical detention situation. As already noted, expansion can risk the integrity, meaning, and gravitas of the prohibition and therefore, it is not always wise to stretch existing definitions under international human rights law to accommodate new practices because of the potential inefficacy and meaninglessness that dilution can entail. When analyzing the application of the prohibition to trafficking, therefore, the instrumental benefits to trafficking victims cannot constitute the only consideration.

Equally, the construction of the prohibition as set out in this article largely constrains radical expansion or reconceptualization. The history and negotiations to the Convention against Torture illustrate the prohibition's concern with state involvement in torture and other ill-treatment and until broader international human rights law affirmatively departs from this centrality, this is unlikely to change. At the same time, while an imperfect tool for addressing all aspects of violence by non-state actors, the prohibition of torture and other ill-treatment offers a focused way in which to capture and address the state's fulfillment of its obligations for acts primarily carried out by non-state actors that has not yet been fully clarified, as well as deepen understandings of underdeveloped aspects of the definition, such as psychological methods of torture and other ill-treatment and the role of the state purpose requirement in due diligence cases. This approach would fortify rather than undermine the integrity of the prohibition of torture. Certain trafficking cases would offer strong test cases to bring clarity to the reach of the definition. Its inclusion in a concrete, legal way, rather than under a vague advocacy banner, offers significant support to the establishment of the parameters of the definition of torture and other ill-treatment.

130. Edwards, *supra* note 83, at 15.
131. *Id.*