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COMPARING TRANSNATIONAL LEGAL ORDERS: CRIMINALISATION, LABOUR LAW AND FORCED LABOUR

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Abstract Two transnational legal regimes aim to counter some of the most severe forms of labour exploitation: one centred on the Palermo Protocol supplemented to the UN Convention against Transnational Organised Crime (UNTOC) and the other on the International Labour Organisation (ILO) Conventions. This article focuses on the relationship between transnational criminal law (TCL) and transnational labour law (TLL) and their effectiveness in tackling labour exploitation. Criminalisation and labour regulation have been seen as competing ‘paradigms’ in tackling human trafficking and modern slavery. TCL has been effective in diffusing criminal law norms around the world, but the modest number of resulting prosecutions can do little tackle the huge global market in forced or severely exploited labour. TLL, with its more decentralised and pluralistic structure, offers greater hope of achieving some alleviation of labour exploitation.

Keywords: Criminal Justice; labour law; transnational law; modern slavery; ILO; Qatar.

Introduction

A number of international conventions require the parties to criminalise certain forms of conduct and to co-operate with other states in prosecuting and preventing them, together with the domestic laws that purport to comply with those conventions. The combination of these ‘suppression conventions’, the domestic laws that purport to implement them, and the forms of cooperation associated with them has been dubbed by Neil Boister and others ‘transnational criminal law’ (TCL). TCL concerns itself a wide range of activities, many of which involve forms of ‘trafficking’, whether in drugs, arms or wildlife. In this article we focus on trafficking in human beings and the allied offences sometimes categorised as ‘modern slavery’ – including breaches of the human right to be free from slavery, servitude and forced or compulsory labour.

TCL is one variety of ‘transnational law’,¹ a broad concept which in by Philip Jessup’s classic formulation consists of ‘all law which regulates actions or events that transcend national frontiers’.² Transnational law can involve a wide range of networks of varying degrees of formality linking states, private actors and supranational organisations. Shaffer and Halliday have designated these networks as ‘transnational legal orders’, each comprising ‘a collection of formalized legal norms and associated organizations and actors that authoritatively order the

¹ Sabine Gless, ‘Bird’s-eye view and worm’s-eye view: towards a defendant-based approach in transnational criminal law’ (2015) 6 *Transnational Legal Theory* 117, 118.

² Philip Jessup, *Transnational Law* (Yale University Press 1956), 2.

understanding and practice of law across national jurisdictions'.³ One transnational legal order of particular interest for our purposes is transnational labour law (TLL). TLL is a more pluralistic, less state-centred legal order than TCL, and the central argument of this article is that these characteristics make TLL better adapted than TCL to countering human trafficking for the purposes of labour exploitation. While recognising that criminal law has a part to play in combating human trafficking, we shall argue that transnational criminal law should be 'decentred'⁴ in favour of an approach more focussed on international labour standards and the underlying causes of extreme labour exploitation.

Our focus will be on human trafficking as defined in the 2000 UN Convention against Transnational Organized Crime (UNTOC) and its Protocol on Trafficking in Persons, known as the Palermo Protocol.⁵ Although Article 5 of the Protocol calls upon states to criminalise human trafficking,⁶ it leaves the specific means of doing this to domestic law, so that states remain in control of policy and security choices in their jurisdictions.⁷ For our present purposes, singling out indirect criminalization as the defining feature of TCL usefully includes not only such 'suppression conventions' as the Palermo Protocol and the Council of Europe Convention on Action Against Trafficking in Human Beings but, for example, article 4 of the European Convention of Human Rights, which has been authoritatively interpreted to require the criminalization of human trafficking.

In analysing TCL we bring together two strands of theorising about transnational law, which may appear to be strange bedfellows. One is HLA Hart's model of primary and secondary rules, as elaborated in the transnational context by Detlef von Daniels.⁸ The other is rooted in the work of Michel Foucault, particularly his texts about 'governmentality',⁹ and focusses on the role of TCL in the management of populations (including migration, the economy and sexuality)¹⁰ and as a transnational form 'government at a distance' through various forms of 'benchmarking'.¹¹ Though Hart and Foucault at first sight have little in common, they both seek to show that modern systems of law and government cannot be accurately described by a theory of sovereignty where power is equated with the ability to exact obedience by threats.¹² Hart's model of law, dispensing with the sovereign and replete with flexible standards,

³ Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in: Terence C. Halliday & Gregory Shaffer (eds.), *Transnational Legal Orders* (Cambridge University Press, 2015), 3, 5 (elaborating the concept); Terence C. Halliday & Gregory Shaffer, *Researching Transnational Legal Orders*, in: Halliday & Shaffer, *Transnational Legal Orders*, 475.

⁴ Shahrzad Fouladvand, 'Decentering the prosecution-oriented approach: Tackling both supply and demand in the struggle against human trafficking' (2018) 52 *International Journal of Law, Crime and Justice* 129

⁵ The United Nations Convention against Transnational Organised Crime (UNTOC), entered into force 29 September 2003.

⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol), adopted by resolution A/RES/55/25 of 15 November 2000 and entered into force on 25 December 2003. Article 5.

⁷ Anne Gallagher, 'Two Cheers for the Trafficking Protocol' (2015) 4 *Anti-Trafficking Review*, 14

⁸ HLA Hart, *The Concept of Law* (2nd ed., Oxford University Press, 1994); Detlef von Daniels, *The Concept of Law in a Transnational Context* (Abingdon: Routledge, 2016)

⁹ Michel Foucault, 'Governmentality' in J. D. Faubion (ed.) *Power: Essential Works of Michel Foucault 1954-1984, vol. 3* (Penguin, 2000).

¹⁰ Sharron A. FitzGerald 'Vulnerable Geographies: Human Trafficking, Immigration and Border Control in the UK and Beyond', (2016) 23 *Gender, Place & Culture*, 181.

¹¹ André Broome and Joel Quirk, 'Governing the World at a Distance: The Practice of Global Benchmarking' (2015) 41 *Review of International Studies* 819.

¹² Victor Tadros, 'Between Governance and Discipline: The Law and Michel Foucault' (1998) 18 *OJLS* 75,

penumbras of uncertainty, and rules to facilitate the private creation of structures of power, allows decentralised and largely discretionary forms of governance to be formally reconciled with the rule of law. Within this framework we can see how, in Foucault's terms, the 'juridical form' of a liberal legal order is compatible with the 'effective mechanisms' of disciplinary and governmental power.¹³

Hart argued that mature legal systems are characterised by a combination of primary, duty-imposing rules and secondary rules which remedy the inefficiency of a 'primitive' system of primary rules alone. The secondary rules provide criteria for the recognition of valid primary rules and procedures to make or change rules, adjudicate alleged violations and impose sanctions.¹⁴ Controversially, Hart claimed that international law as it existed around 1960 resembled a 'primitive' system consisting only of primary rules.¹⁵ In contrast to Hart's assumption that the alternative to formal adjudication governed by secondary rules was an inefficient system of 'diffuse social pressure',¹⁶ Foucault pointed to the existence of forms of 'social pressure' that were highly organised but operated outside of formal, rule-bound adjudication. Characteristic of these systems is the *grading* of conduct in accordance with its *degree* of conformity to a norm. Foucault moved from the study of disciplinary systems,¹⁷ in which pressure to conform is exerted through the surveillance of individuals, to his analysis of 'governmentality'.¹⁸ In governmentality, the focus is on gathering information about populations rather than individuals, through various forms of statistics and auditing, and individuals are incentivized to govern themselves in accordance with the norms that government seeks to instil. Punitive power still has a part to play, but it is one of intervening in criminal markets to make them less attractive, rather than disciplining and reforming individual wrongdoers.¹⁹

In the first two sections that follow, we show how the formal structure of TCL creates a 'gap' that is filled by various apparatuses of inspection and quantification, which aim at the global dissemination of a programme of criminalizing certain extreme forms of labour exploitation. These methods, we argue in section 3, have been very successful in disseminating norms of criminal law, but by their own measures they have failed to make any significant impact on an enormous global market in severely exploited labour. In section 4 we turn to an analysis of transnational labour law, arguing that it affords a better prospect than TCL of bringing about some modest amelioration of severe labour exploitation. Section 5 illustrates this point by considering the case of forced labour in Qatar. In conclusion we offer some thoughts on the relationship between these two forms of transnational law.

1. The form of TCL: Linkage Rules and the Adjudication Gap.

Whatever the (de)merits of Hart's analysis of international law in general,²⁰ his view of the incompleteness of a system with few or no secondary rules makes considerable sense when

¹³ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Harmondsworth: Penguin, 1979), 222.

¹⁴ Hart, *The Concept of Law* (n. 8), 94-9.

¹⁵ *Ibid.*, 227.

¹⁶ *Ibid.*, 93.

¹⁷ Foucault, (n. 13), 210-228.

¹⁸ Foucault, 'Governmentality' (n. 9).

¹⁹ Thomas Lemke, *Foucault's Analysis of Modern Governmentality* (London: Verso, 2019), 253-6.

²⁰ For a sharp critique, see Jeremy Waldron 'International Law: A "Relatively Small and Unimportant" Part of Jurisprudence?' (October 2013). NYU School of Law, Public Law Research Paper No. 13-56,

applied to TCL. According to Boister, TCL constitutes ‘a system of laws’, but it is not ‘a coherent legal order with a hierarchy of rules and an ultimate arbiter of the meaning of those rules’.²¹ Rules of international law *indirectly criminalise* certain conduct: they do not directly create crimes punishable by international criminal tribunals, but rather require states to enact and enforce criminal laws. Boister points out that in order to preserve state sovereignty over criminal justice, the ‘treaty provisions are “incomplete”’, leaving it ‘to national law to complete them by giving them penal authority within domestic conceptions of legality’.²² Implicitly, this recalls Hart’s discussion of the ‘completion relation’ as one of the ways in which international law can be connected with domestic law without the two necessarily forming a single system.²³ Detlef von Daniels argues that the ‘completion relation’ is one of several types of ‘linkage rule’ characteristic of transnational legal orders. Such rules, von Daniels argues, have features of both primary and secondary rules as conceptualised by Hart. They are like primary rules in that they impose obligations on states, in this instance, to criminalise certain conduct or to cooperate in other ways in its suppression. But these rules, or some of them, are also like secondary rules in that they are rules *about* primary rules of criminal law, and provide standards for determining whether domestic criminal laws should be recognised as contributing to the transnational regime of prohibition.²⁴

In the case of TCL, however, the linkage rules remain radically incomplete in the absence of any formal mechanism for determining whether a given domestic law complies with the rule or not. This is the crucial difference between TCL and *international* criminal law, which in other respects it closely resembles.²⁵ In respect of the violations of international criminal law which states are obliged to criminalise,²⁶ there is an authoritative independent judicial body, the International Criminal Court (ICC), with jurisdiction over natural persons for international crimes when a state is ‘unwilling or unable’ to carry out the investigation or prosecution of the person concerned. In determining whether the state is able or willing to investigate crimes such as genocide for itself, the ICC exercises a supervisory power over national mechanisms of enforcement, which arguably is one of its most important functions.²⁷ This contrasts with the ‘adjudication gap’ that arises in TCL between the ‘suppression conventions’ promoted by the United Nations – as the key actor in creating multilateral conventions in the field of transnational crime with a ‘securitisation’ agenda since 1980s²⁸ – and their domestic implementation.

< <https://ssrn.com/abstract=2326758> > accessed 4 Jan 2022; for a more charitable view, see Carmen E. Pavel, ‘Is International Law a Hartian System?’ (2018) 31 *Ratio Juris* 307.

²¹ Neil Boister, *An introduction to transnational criminal law* (2nd edn, Oxford University Press 2018), 32.

²² Boister, ‘Further reflections’, (n. 2), 23.

²³ H. L. A. Hart, ‘Kelsen’s Doctrine of the Unity of Law’ in *Essays in Jurisprudence and Legal Philosophy* (Oxford: Clarendon Press, 1983), 314-7.

²⁴ Detlef von Daniels, *The Concept of Law in a Transnational Context* (Abingdon: Routledge, 2016), 158-161.

²⁵ The similarities are emphasised by Prabha Kotiswaran and Nicola Palmer, ‘Rethinking the ‘international law of crime’: provocations from transnational legal studies’ (2015) 6 *Transnational Legal Theory* 55.

²⁶ See Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford: Oxford University Press, 2008), Ch. 2.

²⁷ Shahrzad Fouladvand, ‘Complementarity and Cultural Sensitivity: Decision-Making by the International Criminal Court Prosecutor in the Darfur Situation’, (2014) 14 *Int’l Crim L Rev* 1028.

²⁸ Valsamis Mitsilegas, ‘Legal responses to transnational crime: A Global Perspective’ in Valsamis Mitsilegas, Saskia Hufnagel and Anton Moiseienko (eds), *Research Handbook on Transnational Crime* (Edward Elgar, 2019), 5-6.

2. Filling the gap

From a Hartian perspective, the adjudication gap looks like ‘a lack...a defect one day to be repaired’.²⁹ From a Foucauldian perspective, it is more like a space in which experts can wield normalising or governmental powers beyond the constraints of formal legality. Isobel Roele has advanced a Foucauldian analysis of one area of TCL where this kind of power is particularly formidable, namely the suppression of money-laundering and terrorist financing.³⁰ Roele coins the term ‘disciplinary infra-law’ to describe the processes of examination, grading and ‘normalization’ as an assessment tool which, for example, has been carried out by the Financial Action Task Force and its regional bodies. ‘Disciplinary infra-law’ is strictly speaking an oxymoron – ‘infra-law’, a ‘more meticulous’ extension of legal rules to an ‘infinitesimal level’ of individual conduct, is, for Foucault, what disciplinary power *appears* to be but in fact is not³¹ – but it is quite an apt term for what is not in any literal sense disciplinary power over the human body, but rather the surveillance and control of law-making and law enforcement.

The adjudication gap is filled by various mechanisms to refine states’ obligations and to promote compliance with TCL. These include for example the International Drug Enforcement Conference, the Counter-Terrorism Committee of the UN Security Council and the Group of States Against Corruption (GRECO).³² What all these mechanisms have in common is a reliance on various forms of expert auditing and monitoring to provide an ostensible objective measure of the degree to which states are conforming to their international obligations. The legitimacy accorded to expertise and systematic practices of measurement and grading³³ compensates for the lack of judicial or legislative authority in the absence of the relevant secondary rules.

This is true even of one mechanism that does have international judicial authority, namely the role of the European Court of Human Rights which has developed the doctrine that compliance with the Anti-Trafficking convention is necessary to comply with ECHR art 4. This follows from the positive obligation of states to protect their citizens against slavery, servitude and forced or compulsory labour,³⁴ and from the decision in *Rantsev v. Cyprus and Russia*³⁵ that human trafficking as defined by Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the ECHR/ The Court deemed it unnecessary to decide which of the specific rights – against slavery, servitude or forced or compulsory labour – had been violated.³⁶

²⁹ Hart (n. 8), 230.

³⁰ Isobel Roele, ‘Sideline Subsidiarity: United Nations Security Council Legislation and its Infra-law’, (2016) 79 *Law and Contemporary Problems* 189.

³¹ Foucault, *Discipline and Punish* (n. 13), 222.

³² Boister, *An Introduction to Transnational Criminal Law* (n. 21), 103, 117, 154.

³³ Sally Engle Merry, *The seductions of quantification : measuring human rights, gender violence, and sex trafficking* (Chicago series in law and society, The University of Chicago Press 2016) Ch. 2. David McGrogan, ‘The Population and the Individual: The Human Rights Audit as the Governmentalization of Global Human Rights Governance’ (2018) 16 *I•CON* 1073.

³⁴ *Siliadin v France* (2006) 43 EHRR 188

³⁵ (2010) 51 EHRR 1.

³⁶ *Ibid.*, [113]

Both the Anti-Trafficking Convention and the Court in *Rantsev* follow the Palermo Protocol's definition of trafficking but place it in a context where the protection of the human rights of victims, rather than migration control and criminalisation, is central. This is made explicit in the Explanatory Report to the Convention:

As a complement to and development of this United Nations protocol, which emphasis the crime prevention aspect of trafficking, the Council of Europe Convention clearly defines trafficking as being first and foremost an issue of violation of human rights and emphasis the victim protection aspect of trafficking. The aim is to improve the protection afforded by it and to develop the standards contained therein.³⁷

Compliance with the CoE Convention is monitored by GRETA, the Group of Experts on Action Against Trafficking in Human Beings. Several of GRETA's experts are lawyers and a part of their work is concerned with identifying discrepancies between national legislation and the Convention. This panel of experts publishes reports on the implementation of the Convention.³⁸ In *Chowdury v Greece*, its key judgment on trafficking for labour exploitation, the ECtHR acknowledged that it in interpreting ECHR art 4 it was 'guided by that Convention and the manner in which it has been interpreted by GRETA.'³⁹ In *VCL v UK* the Court acknowledges that it has no authority to interpret the Anti-Trafficking Convention as such,⁴⁰ so by treating every breach of the convention as interpreted by GRETA as *ipso facto* a breach of ECHR art 4, the Court shows a remarkable degree of deference to this expert body.

In its 'Thematic Chapter' on labour exploitation, published in the wake of *Chowdury*, GRETA reports that it has 'asked 10 countries to amend the national definition of trafficking in human beings in order to ensure that all forms of exploitation provided for by the Convention, and in particular forced labour or services, slavery or practices similar to slavery, and servitude, are covered' and that France, Ireland, Poland and Portugal have all amended their laws as a result.⁴¹ However, GRETA's recommendations, in keeping with the Convention's emphasis on human rights and victim protection, range far beyond criminal law to include, for example, labour law and 'administrative, educational, social, cultural or other measures to discourage demand for the services of victims of trafficking'.⁴² For example in its 2021 evaluation report on the UK, GRETA further considers that capacity of labour market inspectorates should be strengthened to combat and reduce labour exploitation.⁴³ Thus GRETA acknowledges that an effective anti-trafficking strategy has to include a wide range of governmental techniques to influence the labour market. Nevertheless, the terms of the Anti-Trafficking convention means that criminal law enforcement necessarily occupies a central place in GRETA's strategy.

In contrast to the judicial endorsement accorded to GRETA, the USA has unilaterally taken it upon itself to act as 'global sheriff'⁴⁴ through the publication of annual reports by the State

³⁷ Council of Europe, Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings (Treaty Series no 187, 2005), [49].

³⁸ See GRETA <<https://www.coe.int/en/web/anti-human-trafficking/greta>> accessed 7 January 2022.

³⁹ *Chowdury v Greece*, Application no 21884/15 (ECtHR 30 March 2017) [104].

⁴⁰ *VCL and A.N. v the United Kingdom*, Applications nos. 77587/12 and 74603/12. (ECtHR 16 Feb 2021).

⁴¹ GRETA, *Human Trafficking for the Purpose of Labour Exploitation* (Council of Europe, 2017), 11

⁴² *Ibid*, 31; Convention on Action Against Trafficking in Human Beings Art 6.

⁴³ GRETA, Third Evaluation United Kingdom on *trafficking victims' access to justice and effective remedies* page 5. <rm.coe.int/greta-third-evaluation-report-on-the-united-kingdom/1680a43b36> accessed 7 January 2022.

⁴⁴ Janie Chuang, 'The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking' (2006) 27 Mich J Int'l L 437.

Department on the anti-trafficking efforts, or lack thereof, of almost every country in the world. Its annual Trafficking in Persons Reports are ‘a prime example of the use of benchmarking as an exercise in statecraft that seeks to compel global action in accordance with the expectations and agenda of the US government’.⁴⁵ They assign countries to four tiers (numbered 1-3 with the addition of a ‘Tier 2 watch list’).⁴⁶ Those in tier 3, found to be neither complying nor making significant efforts to comply with the standards set out in the US Trafficking Victims Protection Act, face financial sanctions in the form of exclusion from US aid, and US opposition to aid being granted by international bodies such as the IMF. Countries currently on Tier 3 include some whose regimes regularly attract US hostility, such as Venezuela, Cuba and Iran, along with some less obvious countries such as Papua New Guinea and the Gambia.

Although the US unilateral mechanism has been criticised⁴⁷ the Reports have played an important role in reinforcing the core provisions of the UN Trafficking Protocol. The Reports also address some additional important issues such as public sector corruption that directly impact on how trafficking happens and how it is responded to.⁴⁸ In numerous countries they identify both significant problems of official complicity or involvement in trafficking and inadequate or non-existent attempts by the governments concerned to investigate and prosecute such activities. In the 2021 report, 105 countries out of 188 are described in these terms, ranging from Russia to the tiny Pacific island nation of Palau. Four are EU member states: Bulgaria, Cyprus, Greece and Romania. The evidence for these accusations comes largely from unnamed civil society sources in the countries concerned.⁴⁹ In relation to human trafficking, the US State Department has largely taken on the role which Article 32 of the UNTOC allocated to the ‘Conference of the Parties’ that was ‘to promote and review the implementation of this Convention’. It was not until October 2018⁵⁰, nearly two decades after entry into force that the Conference of the Parties (COP) to the UNTOC finally agreed on the creation of a Review Mechanism. The review mechanism consists largely of desk-based peer review by governments of information provided by governments, the results of which will not be published without the consent of the government under examination.⁵¹ A Pilot Review Program was conducted by the UNODC to test methods of implementation. Less than thirty state parties participated and overall they were unable to agree on a final review mechanism. However, the COP has established some working groups and intergovernmental meetings including a ‘Working Group in Trafficking in Persons’ for strengthening the implementation of the UNTOC Trafficking Protocol.⁵²

⁴⁵ Broome and Quirk, ‘Governing the World’ (n. 11), 836

⁴⁶ US State Department *Trafficking in Persons Report June 2019*, <www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf> accessed 7 January 2022.

⁴⁷ For example see: A T Gallagher, ‘The trafficking watch list may be flawed, but it's the best measure we have’, *The Guardian*, 27 June 2014, retrieved 8 July 2014, <www.theguardian.com/global-development/poverty-matters/2014/jun/27/human-trafficking-watchlist-report> accessed 7 January 2022.

⁴⁸ See, for example, the Azerbaijan and Thailand country reports: *ibid.*, pp. 85—87, 372—376.

⁴⁹ U.S. Department of State, 2021 Trafficking in Persons Report www.state.gov/reports/2021-trafficking-in-persons-report/ accessed 7 January 2022.

⁵⁰ Conference of the Parties to the United Nations Convention against Transnational Organized Crime <www.unodc.org/unodc/en/organized-crime/intro/conference-of-the-parties.html> accessed 7 January 2022.

⁵¹, Cecily Rose, ‘The Creation of a Review Mechanism for the UN Convention Against Transnational Organized Crime and Its Protocols’ (2020) 114 *The American Journal of International Law* 51, 64-5.

⁵² www.unodc.org/unodc/en/treaties/CTOC/working-group-on-trafficking-2021.html

The Guiding Principles of the Review Mechanism expressly state that it will ‘[n]ot produce any form of ranking’ and is to be ‘non-punitive’.⁵³ Rather than using rankings as disciplinary measures, the review mechanism aims at encouraging and assisting states to conform to international norms. At the end of the review process the reviewing state and the state under review are to agree a ‘list of observations, gaps, challenges, best practices, suggestions and, when necessary, technical assistance needs’.⁵⁴ This will remain confidential (unless the state under review decides otherwise), with only the state’s responses to the initial self-assessment questionnaire being made available to other States Parties (not to the public). States are encouraged, but not obliged, to share with the Conference of the Parties the progress they have made in following up these lists.⁵⁵ In short, the Guidelines bend over backwards to reassure states that they will be subject to the softest possible form of soft law, with a minimal degree of transparency or coercive power.⁵⁶ These facts lend some support to Rose’s suggestion that one reason for the prolonged resistance of many states to establishing an effective review mechanism under UNTOC, and in particular their resistance to civil society involvement in the process, is a desire to avoid exposure of their involvement in state-organised crime.⁵⁷

What these mechanisms of transnational governance cannot do is to produce authoritative, binding interpretations of the obligations placed on states by the Conventions. Disagreements about the meaning of legal obligations can therefore persist without any prospect of authoritative resolution. These divergent interpretations can reveal significant political and ideological differences between states. For example, the 2021 report from the US State Department complains that ‘Inconsistent with international law, the laws in England, Wales, and Northern Ireland required the element of movement of a victim in the definition of “trafficking.”’⁵⁸ The supposed inconsistency arises because the USA interprets the word ‘harbouring’ in the Palermo Protocol’s phrase ‘the recruitment, transportation, transfer, harbouring or receipt of persons’ as covering exploitative practices that take place in a single location. As Chuang points out, such an interpretation takes little account of the Vienna Convention on the Law of Treaties which requires the words of a treaty to be interpreted ‘in their context and in the light of its object and purpose’. The relevant phrase as a whole, the purpose and structure of the Protocol and the *travaux préparatoires* all support the view that it is concerned with migration.⁵⁹ As Chuang points out, much more is involved in this controversy than a technical quibble over the meaning of ‘human trafficking’ or ‘exploitation’.⁶⁰ It also reflects a turf war between different bureaux within the State Department; a conflict between the US and the ILO; and the ideological appeal of broad definitions of trafficking to anti-prostitution activists and, latterly, labour rights activists as well.

⁵³ Annex to UNOTC Resolution 9/1, <www.unodc.org/documents/treaties/UNTOC/Review%20Mechanism/Resolution/English.pdf>, para 4 (b) and (f) accessed 7 January 2022.

⁵⁴ *Ibid.*, para 39.

⁵⁵ *Ibid.*, para 46.

⁵⁶ Rose, ‘The Creation of a Review Mechanism’ (n 51).

⁵⁷ *Ibid.*,

⁵⁸ U.S. Department of State, 2021 Trafficking in Persons Report <www.state.gov/reports/2021-trafficking-in-persons-report/>, 581. accessed 7 January 2022.

⁵⁹ Janie Chuang, ‘Exploitation Creep and the Unmaking of Human Trafficking Law’ (2014) 108 AJIL 609, 630.

⁶⁰ *Ibid.*, 609.

3. The Politics of TCL and Human Trafficking

As we discussed earlier, the UNTOC identified human trafficking as a transnational crime which was regarded by political leaders as ‘one of the three ‘evils’ to haunt the globe’ alongside terrorism and drug trafficking.⁶¹ The narratives⁶² around this issue started to inform law enforcement efforts to control immigration and transnational organised crime but also states policies and interventions to regulate sex industries, sex workers, bonded labourers, and undocumented migrants.⁶³ There can be no doubt that TCL has been effective in persuading states to enact laws criminalising trafficking. According to the UNODC, ‘As of August 2020, 169 countries among the 181 assessed, have legislation in place that criminalises trafficking in persons broadly in line with the United Nations Trafficking in Persons Protocol’.⁶⁴

As Simmons et al argue, this impressive rate of transnational legal diffusion has been achieved by ‘framing’ the trafficking issue as one of transnational organised crime, rather than human rights or labour exploitation.⁶⁵ The ‘transnational organised crime frame’, depicting ‘traffickers as a challenge to state authority and societal well-being... can be used to justify action that empowers various arms of the state, from the police to border-control agents to the military, while minimally obligating the state to respect individual rights or to protect (often foreign) victims.’⁶⁶ This form of organised crime – as one of the priority areas in in the EU cycle on serious and organised crime – has been also linked to irregular migration which has been seen as one of the major challenges for the UE internal security. It has closely interlinked with the EU Strategy to Tackle Organised Crime 2021-2025.⁶⁷ It has further figured as one of the main areas of cooperation prominently in the Budapest Process of discussions on irregular migration between the EU and various Asian states.⁶⁸

The framing of issues of labour, migration and sex work in terms of the exploitation of innocent victims by organized crime (rather than wider and more complex problems of economic and gender relations) is itself arguably a major function of transnational criminalization. Like criminal law in general, TCL does not simply respond to moral concerns but helps to construct, reinforce and dramatize moral categories.⁶⁹ The emotionally-charged categories of human trafficking and modern slavery, in particular, provide valuable resources for politicians seeking to define complex social problems as struggles between good and evil. To take two recent

⁶¹ Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik, *Trafficking and prostitution reconsidered : new perspectives on migration, sex work, and human rights* (Second edition.. edn, Boulder, Colo. : Paradigm Publishers 2012),vii.

⁶² Luckoo F, Tzvetkova M. Combating trafficking in persons: a directory of organisations. London: Change, 2002.

⁶³ Kempadoo, (n. 61), vii.

⁶⁴ UNODC, *Global Report on Trafficking in Persons 2020*, 61

⁶⁵ Beth A Simmons, Paulette Lloyd and Brandom M Stewart, ‘The Global Diffusion of Law: Transnational Crime and the Case of Human Trafficking’ (2018) 72 *International Organization* 209.

⁶⁶ *Ibid.*, 255

⁶⁷ European Commission on the EU Strategy on Combatting Trafficking in Human Beings, 2021-2025 [ec.europa.eu/home-affairs/system/files_en?file=2021-04/14042021_eu_strategy_on_combatting_trafficking_in_human_beings_2021-2025_com-2021-171-1_en.pdf](https://ec.europa.eu/home-affairs/system/files/en?file=2021-04/14042021_eu_strategy_on_combatting_trafficking_in_human_beings_2021-2025_com-2021-171-1_en.pdf)> accessed 7 January 2022.

⁶⁸ Magee Lee, *Trafficking and Global Crime Control* (London: Sage, 2011), Ch 4; M Caparini ‘Human Trafficking and Organized Crime’ in W Hofmeister and P Rueppel (eds.), *Trafficking in Human Beings: Learning from Asian and European Experiences* (Singapore: Konrad Adenauer Stiftung, 2014).

⁶⁹ David Garland, *Punishment and Modern Society* (Oxford University Press, 1990), 252.

examples from the UK, Home Secretary Priti Patel ‘has accused Labour of siding with people traffickers by blocking new immigration laws.’⁷⁰ And thanks to a legal definition that allows young drug ‘mules’ to be classed as victims of human trafficking, Boris Johnson can sell the government’s new strategy and drugs as bringing hope to the ‘vulnerable victims of the vile county lines gangs, dragged into the world of organised crime from as young as seven’.⁷¹

International relations scholars have also highlighted the importance of criminal justice concerns as a tool of foreign policy. According to Andreas and Nadelmann, ‘international crime control is one of the most important – and one of the most overlooked – dimensions of US hegemony in global politics...Globalization and Americanization increasingly mean the same thing in this domain.’⁷² As Wylie argues, however, ‘the bleak calculation of interests or exercise of hegemony seem too parsimonious an explanation’ of the energy successive US administrations have devoted to anti-trafficking activism.⁷³ In the period leading up to and following the signing of the Human Trafficking Protocol, anti-trafficking laws and activities in the United States were shaped by a focus on sex trafficking with a view of the abolition of prostitution, as part of a wider ‘war’ or organized crime. The Clinton administration’s International Crime Control Strategy⁷⁴ in the late 1990s grouped the ‘acquisition and sale of weapons of mass destruction, transfer of sensitive American technology to rogue foreign states [and] trade in banned or dangerous substances’ together with ‘trafficking in women and children’ as ‘dangerous activities’ posing ‘a grave threat to the security, stability, values and other interests of the entire world community of which the United States is a leading member.’⁷⁵ The preamble and art. 2 of the Palermo Protocol specifically highlight the trafficking of women and children, and the negotiations leading to its signing witnessed intensive lobbying by rival coalitions of feminist groups with opposing views of sex work.⁷⁶

This ‘securitization’ of sex trafficking has been linked to a wider securitization of migration: a concern that ‘the more open our borders are, the more freely people can travel... the more vulnerable we are to people who would seek to undermine the very fabric of civilized life’.⁷⁷ Beyond this instrumental concern with diverting unwanted migrants and criminal enterprises, the criminalization of trafficking has contributed to a ‘securitisation’ of public discourse around migration and policing – a growing tendency to frame social problems as threats demanding a coercive response.⁷⁸ Gregoriou and Ras’s analysis of British press coverage of trafficking found that metaphors of a ‘spreading unwanted substance’ were pervasive: trafficking is ““epidemic”, “widespread”, or “rampant”. What spreads seems to be both the victims and the perpetrators of this crime; there is an “influx” of those prone to trafficking “pour[ing]” into

⁷⁰ David Wooding, ‘On the Wrong Side’, *Sun* 6 Nov 2021

⁷¹ Boris Johnson, Foreword, in HM Government, *From Harm to Hope: A 10-year Drugs Plan to Cut Crime and Save Lives* (December 2021), 3.

⁷² Peter Andreas and Ethan Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations* (Oxford: OUP, 2008), 10.

⁷³ Gillian Wylie, *The International Politics of Human Trafficking* (Basingstoke, Palgrave, 2016), 85-6.

⁷⁴ <clintonwhitehouse4.archives.gov/WH/EOP/NSC/html/documents/iccs-frm.html> accessed 7 January 2022.

⁷⁵ *Ibid.*,

⁷⁶ Jo Doezema, 'Now you see her, now you don't: sex workers at the UN trafficking protocol negotiations' (2005) 14 *Social & legal studies* 61, 75-9.

⁷⁷ Public Papers of the Presidents of the United States, William J. Clinton, 29 April 1996, Remarks on the National Drug Control Strategy in Coral Gables, Florida, page 657. See also <https://fas.org/irp/offdocs/iccs/iccsviii.html>

⁷⁸ Ian Loader, 'Policing, securitization and democratization in Europe' (2002) 2 *Criminology & criminal justice* 125

the UK,⁷⁹ Numerous analyses of media coverage confirm that they focus on ‘ideal victims’ – young, naive women, brutally coerced into prostitution, or innocent children⁸⁰ – while adult male victims of labour trafficking are more likely to be defined as illegal, smuggled economic migrants.⁸¹ Kempadoo and Sharma claim that through such a ‘securitarian paradigm’, states actively promote a false image of human trafficking and illegal migration in order to ‘draw attention away from the dependence of big capital on the cheap and malleable workers that populate the unregulated and unprotected labour market’.⁸²

The relationship between human trafficking, sex work and forced labour remains debatable.⁸³ Kotiswaran and Palmer distinguish three phases of anti-trafficking law since the negotiation of the Palermo Protocol 15 years ago. The first, between 2000 and 2009, was the heyday of ‘sex work exceptionalism’, in which trafficking tended to be conflated with sex work and all sex work was seen as incompatible with human dignity.⁸⁴ As Chuang observed, ‘those trafficked into non-sex sectors tend to be viewed simply as exploited migrants rather than trafficked persons; the problem is viewed as one of hiring illegal immigrants, not of abusive labor conditions.’⁸⁵ In the second phase, between 2009 and 2014, closer attention was paid to labour trafficking which rendered visible the competing frames of ‘modern slavery’ and ‘forced labour’. This can be seen in the International Organization of Migration’s data on ‘identified victims’ of trafficking over this period, which (in contrast to prosecution statistics) show labour trafficking overtaking sex trafficking to become the predominant form of known offending.⁸⁶ The third phase from 2014, saw legal interventions framed in terms of slavery and forced labour, including the Modern Slavery Act 2015.⁸⁷ The International Labour Organisation (ILO), on the other hand, through its 2005 report *A Global Alliance against Forced Labour*⁸⁸ argued for an expansive understanding of trafficking to include both sexual and labour exploitation. The ILO initiated internal dialogue and reoriented institutional priorities by setting up the Special Program Against Forced Labour.

As Simmons et al argue, human trafficking can be ‘framed’ not only by security concerns but also in terms of human rights. The increased prominence of human rights in the 1970s and 1980s ‘stimulated awareness of human trafficking and encouraged the view that trafficked

⁷⁹ Christiana Gregoriou and Ilse A. Ras, ‘Call for Purge on the People Traffickers’: An Investigation into British Newspapers’ in Christiana Gregoriou (ed), *Representations of Transnational Human Trafficking: Present-day News Media, True Crime, and Fiction* (London, Palgrave 2019) 30.

⁸⁰ Erin O’Brien, ‘Ideal Victims in Trafficking Awareness Campaigns’ in Kerry Carrington, Mathew Ball, Erin O’Brien E and J Tauri (eds) *Crime, Justice and Social Democracy: International Perspectives* (Basingstoke, Palgrave 2013)

⁸¹ Gregoriou and Ras, ‘Representations of Transnational Human Trafficking: A Critical Review’ (n 80).

⁸² Kamala Kempadoo, ‘From Moral Panic to Global Justice: Changing Perspectives on Trafficking,’ in Kamala Kempadoo, Jyoti Sanghera, and Bandana Pattanaik, *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work and Human Rights* (Boulder, CO: Paradigm, 2005):xiv; Nandita Sharma, ‘Travel Agency: A Critique of Anti-Trafficking Campaigns’ (2003) 21 *Refuge* 53

⁸³ For example see United Nations Action for Cooperation Against Trafficking in Persons (UN-ACT), UN-ACT Research Strategy: Vulnerabilities, Trends and Impact (UN-ACT, 2015).

⁸⁴ For critical accounts of this phase see K Kempadoo (ed) *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work and Human Rights* (2nd ed., London, Routledge 2016)

⁸⁵ Janie A. Chuang, ‘Rescuing trafficking from ideological capture: prostitution reform and anti-trafficking law and policy’ (2010) 158 *U Penn L Rev* 1655

⁸⁶ <migrationdataportal.org/themes/human-trafficking>accessed 7 January 2022.

⁸⁷ Kotiswaran and Palmer, (n. 25), 74

⁸⁸ Int’l Labour Office, *A Global Alliance Against Forced Labour* 12–14 (2005), <www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/rep-i-b.pdf> accessed 7 January 2022.

persons are not simply “vulnerables” to be protected, but individuals with agency who must be respected’.⁸⁹ As we have noted, the role of the ECtHR and GRETA in overseeing European anti-trafficking policy has tended to lend relatively greater prominence to human rights. As the ECtHR put it in *Rantsev v Cyprus*, by treating ‘human beings as commodities’, human trafficking ‘threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention.’⁹⁰

The demand for cheap labour has facilitated cross border labour migration. However, we can see such ‘securitisation’ again in relation to criminalisation of migration⁹¹ where tightened immigration laws and policies have increased the vulnerabilities of some labour migrants to exploitation and abuse.⁹² This securitization in the name of protecting states from transnational criminality has, in fact, extended the reach of the state and as James Hathaway put it ‘the focus of the transnational effort against human trafficking on the prevention of cross-border movements created a legal slippery slope ...’.⁹³ Using criminal law to control immigration – through linking migration to organised crime – has shown limited impact on preventing the irregular entry to transit or destination countries and furthermore, it provided limited safeguards for vulnerable labour migrants⁹⁴ where they are exposed to conditions of severe exploitation by means of coercion, fraud, deception or force.

The success of TCL in getting anti-trafficking laws enacted around the world has not been matched by a level of prosecutions remotely commensurate with the perceived scale of the problems the law is meant to tackle. Any notion that human trafficking or modern slavery could be precisely quantified is illusory, because the varying degrees of agency exercised by putative victims make the application of legal definitions of trafficking a difficult interpretative problem that can only be approached on a case-by-case basis.⁹⁵ The estimates published by the International Labour Organisation (ILO) and the Walk Free Foundation, extrapolated from a survey of over 17,000 households in 48 countries, can nevertheless convey an idea of the scale of the phenomena that could be categorized as modern slavery. They estimate that 40.3 million people are in modern slavery, including 24.9 million in forced labour and 15.4 million in forced marriage. Out of the 24.9 million people trapped in forced labour, 16 million people experienced non-sexual exploitation by the private sector such as domestic work, construction or agriculture; 4.8 million persons in forced sexual exploitation, and 4 million persons in forced labour imposed by state authorities.⁹⁶ According to the latest US State Department Report, in 2020 there were 9,876 prosecutions for some form of human trafficking; they were predominantly for prostitution-related offences, with only 1115 being for labour trafficking.

⁸⁹ Simmons, et. al. (n. 66), 252.

⁹⁰ (2010) 51 EHRR 1 [251-2].

⁹¹ Valsamis Mitsilegas, *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law* (Springer 2015), 48.

⁹² Svati P. Shah, ‘Sex and Work: Understanding Sexual Commerce in an era of ‘Globalisation’ in Ryszard Piotrowicz, Conny Rijken and Baerbel Heide Uhl (eds), *Routledge Handbook of Human Trafficking* (Routledge 2018); p. 319.

⁹³ James C. Hathaway, ‘The human rights quagmire of “human trafficking”’ (2008) 49 Virginia journal of international law 1, 5.

⁹⁴ Mitsilegas, *The Criminalisation of Migration* (n. 91), 74.

⁹⁵ Merry, *The Seductions of Quantification*(n. 32).

⁹⁶ ILO and Walk Free Foundation, *Global Estimates of Modern Slavery: Forced Labor and Forced Marriage* (Geneva: ILO, 2017), 10.

Labour trafficking cases did, however, account for nearly quarter of identified victims – 14,448 out of 109,216. There were only 5,271 convictions for human trafficking worldwide.⁹⁷ Aronowitz suggests that the low numbers may indicate that trafficking is prosecuted under other legislation or may reflect problems in reporting or recording offenses.⁹⁸ There is nothing to suggest, however, that criminal prosecutions contribute more than marginally to combatting forced labour.

It is hard to escape the conclusion that the ‘war on trafficking’ based on criminal prosecution and tighter border controls has failed by its own standards. This raises the question of whether an alternative strategy of control, centred on labour law rather than criminalisation, would be more effective.

4. Transnational Labour Law

Criminal law and labour law have sometimes been viewed as completing ‘paradigms’ in relation to human trafficking and forced labour. According to Kotiswaran, ‘The criminal law paradigm views trafficking as an exceptional aberration to otherwise normal circuits of commerce and exchange in a globalised world, thus warranting the use of the heavy, corrective hand of the criminal law.’⁹⁹ In contrast, in the labour paradigm extolled by Hila Shamir, ‘the difference between exploitation of workers and trafficking is a matter of degree and not kind. All forms of labor entail some degree of human commodification; forced labor and trafficking are perhaps its most extreme manifestations.’¹⁰⁰ The labour approach therefore focusses on reducing levels of exploitation, through labour market regulation, improving the legal position of migrant workers, and defending unionisation and collective action. Situating slavery, servitude and trafficking as lying on a continuum with less overtly coercive forms of exploitation, Shamir argues that measures which improve conditions at the less coercive end of the spectrum are also the most effective way to tackle extreme forms of coercion.

Shamir’s approach has some common ground with a recent joint report by the ILO, OECD, International Organisation of Migration and UNICEF.¹⁰¹ The report calls for the effective enforcement of both criminal and labour laws while stressing that labour inspectorates, in particular, are often woefully under-resourced and cannot effectively monitor the informal economy. While stressing the need for ‘due diligence’ by corporate purchasers of exports that may have been made by forced or child labour, it also points out that such measures will be of limited value if they simply displace forced labour from export-oriented to domestic sectors of the economy. The promotion of ‘decent work’, trades unions, social protection systems and education are all seen as means of reducing the pressure on the poor to accept extreme forms of exploitation for themselves and their children. In short, the argument is that specific forms of labour exploitation will be tackled effectively only in the context of much broader policies

⁹⁷ United States Department of State, *Trafficking in Persons Report June 2021* at www.state.gov/wp-content/uploads/2021/09/TIPR-GPA-upload-07222021.pdf 7 January 2022, 60.

⁹⁸ Alexis A. Aronowitz, 'Understanding the Complexity of Trafficking in Human Beings' in Mangai Natarajan (ed), *International and Transnational Crime and Justice* (Cambridge: Cambridge University Press 2019), 14.

⁹⁹ *Ibid.*,

¹⁰⁰ Hila Shamir, 'A labor paradigm for human trafficking' (2012) 60 *UCLA law review* 76, 110.

¹⁰¹ *Ending Child Labour, Forced Labour and Human Trafficking in Global Supply Chains*. (Geneva: International Labour Organization, Organisation for Economic Co-operation and Development, International Organization for Migration and United Nations Children’s Fund, 2019).

to address issues of poverty, weak governance, corporate irresponsibility and the lack of ‘decent work’.

This approach is entirely in keeping with Foucault’s ‘governmentality’. Direct prohibition of exploitation, though still part of the policy mix, is decentred in favour of policies that intervene in the economy in order to restructure the incentives faced by employers and the poor, and these interventions are not simply the work of the state but of a range of institutions including trade unions and schools. To apply the ‘governmentality’ label to this strategy is not, however, to condemn it. On the contrary, we want to argue that a strategy of this kind is the only one that can realistically be expected to bring even modest amelioration of the more extreme forms of human commodification. The legal framework for such a strategy is provided by transnational labour law (TLL).

Bob Hepple defines TLL as:

hard and soft rules and procedures which apply across national boundaries, that is in more than one jurisdiction. They may be unilateral, applied by one country to another without agreement, or bilateral as a matter of treaty between two countries, or regional by treaty between a number of states within a particular region of the world, or multilateral such as WTO agreements. These rules may be directed at states, or corporations or individuals.¹⁰²

In addition, TLL like many other forms of transnational law cuts across the distinction between public and private legal ordering. The ILO conventions or other international standards¹⁰³ may be implemented through commercial or employment contracts, collective agreements, international trade agreements, ‘soft law’ guidance from various bodies, or corporate ‘due diligence’ policies which employees are contractually obliged to implement. Some scholars, such as Adelle Blackett, go further and regard the informal ‘living law of the workplace’ as part of the fabric of labour law which international standards seek to influence.¹⁰⁴ What Blackett calls ‘living law’ could be described in Foucauldian terms as disciplinary power, with its control over the bodies of workers, its ‘small-scale legal systems and parallel judges’ operating largely beyond the purview of formal legal regulation.¹⁰⁵ In Marx’s terms it is the ‘hidden abode of production’, far removed from the market-place where capitalists and workers agree contracts ‘of their own free will’.¹⁰⁶

To describe the inclusion of private legal ordering within the concept of transnational law as a ‘paradigm shift in legal theory’¹⁰⁷ seems something of an exaggeration when we recall how central to Hart’s paradigm is the legal recognition of rights and duties created by

¹⁰² Bob Hepple, *Labour laws and global trade* (Oxford, Hart 2005)

¹⁰³ E.g. the UN Guiding Principles on Business and Human Rights, at (2011) <www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> accessed 7 January 2022.

¹⁰⁴ Adelle Blackett, *Everyday Transgressions: Domestic Workers’ Transnational Challenge to International Labor Law* (Ithaca, NY: ILR Press 2018), 43. For another example see Petra Mahy, ‘The Functional Approach in Comparative Socio-Legal Research: Reflections Based on a study of Plural Work Regulation in Australia and Indonesia’ (2016) 12 *Int J Law in Context* 420.

¹⁰⁵ Foucault, *Discipline and Punish*, (n. 13), 222.

¹⁰⁶ Karl Marx, *Capital vol. 1* (1867), Ch 6, www.marxists.org/archive/marx/works/1867-c1/ch06.htm accessed 7 January 2022/.

¹⁰⁷ Peer Zumbansen, ‘Transnational Legal Pluralism’ (2010) 1 *Transnational Legal Theory* 141, 151

private transactions.¹⁰⁸ What transnational law adds to this picture is that besides the rules by which domestic legal systems confer legal recognition on employment contracts, there are standards within international law by which such contracts and their implementation can be appraised. These standards can be found in international rulings, or recommendations and conclusions by the ILO Conference Committee on the Application of Standards (CAS)¹⁰⁹, or mandatory corporate due diligence rules¹¹⁰. Such standards can also be a source of normative pressure on states to change the rules by which private contractual arrangements are recognised and regulated.

This collection of rules and standards comprises a transnational legal order in Halliday and Shaffer's sense of 'a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions'.¹¹¹ The decentralised character of TLL reflects wider changes in the nature of international legal rules:¹¹² the shift from 'government' to 'governance' or from 'hard' to 'soft' law,¹¹³ with an increasing emphasis on the involvement of non-state actors and regulatory networks.

TLL does, however, possess a central, formal standard-setting body in the ILO, an organisation whose procedures are based on tripartism, that is a search for consensus among representatives of workers, employers and governments. The ILO's first Director, Albert Thomas, described it as 'a car in which workers acted as the engine, governments as the wheel, and employers as the brakes.'¹¹⁴ The tripartite principle is reflected in the 'very sophisticated enforcement system' devised in 1919 and modified in 1946.¹¹⁵ The system is one of investigation and recommendation rather than coercive enforcement. The Governing Body, for example, can appoint an independent commission of inquiry to consider a complaint made by a worker or employer delegate or co-parties of a particular Convention (such as the Forced Labour Convention). The Commission can report its findings and recommendations. If a government disagrees with the recommendations then the issue can (in theory) be brought before the International Court of Justice (ICJ) for a final decision.¹¹⁶ The tripartite constituents can, though they virtually never do, bring any question or dispute relating to the interpretation of Conventions before the ICJ.¹¹⁷

Thus in contrast to TCL, TLL does possess a formal adjudicatory mechanism but hardly ever uses it, reflecting a choice made early in the ILO's history to rely on voluntary cooperation and

¹⁰⁸ Hart, *The Concept of Law*, (n. 8), 27-8.

¹⁰⁹ Introduction by the Editorial Team, (2020)6(1) *International Labor Rights Case Law*1..

¹¹⁰ European Commission (2021) *On Due Diligence for EU Businesses to Address the Risk of Forced Labour in their Operations and Supply Chains*, <trade.ec.europa.eu/doclib/docs/2021/july/tradoc_159709.pdf> accessed 7 January 2022.

¹¹¹ Halliday and Shaffer, *Transnational Legal Orders* (n. 3) 475.

¹¹² Anne-Marie Slaughter and William Burke-White, 'The future of international law is domestic (or, the European way of law)' (2006) 47 *Harvard international law journal* 327

¹¹³ Kerry Rittich, 'The future of law and development: second generation reforms and the incorporation of the social' (2004) 26 *Michigan journal of international law* 199, 233.

¹¹⁴ Francis Maupain, 'Revisiting the future' (2015) 154 *International Labour Review* 103, 112.

¹¹⁵ Steve Charnovitz, 'The International Labour Organization in its Second Century' (2000) 4 *Max Planck yearbook of United Nations law* 147, 176.

¹¹⁶ *Ibid.*, p. 171

¹¹⁷ Claire La Hovary, 'Article 37 of the ILO Constitution: an unattainable solution to the issue of interpretation?' (2017) 38 *Comparative labor law & policy journal* 337, 344.

the pressure of public opinion rather than formal enforcement.¹¹⁸ Under the ILO Constitution, art. 37, only the International Court of Justice is competent to make definitive interpretations of any of the Conventions – but it has done so only in one case in 1932.¹¹⁹ The ILO is also empowered by art 37(2) to set up an internal tribunal to resolve interpretive disputes, but it has never used this power. The ILO’s Governing Body decided in January 2020 to hold informal consultations to address legal certainty and interpretation of the international labour Conventions under article 37 of the ILO Constitution for the operation of an independent body.¹²⁰ So far, the ILO remains reliant on the work of a combination of supervisory bodies, which combine expert examinations of national practice with political decision-making within the ILO’s distinctive tripartite structures.¹²¹

The Committee of Experts on Application of Conventions (CEACR) examines government reports as well as comments from employer and worker organisation. It is made up of lawyers and its examination is mainly about questions and concerns regarding a country’s compliance with the law.¹²² The observations made by CEACR are examined by the Conference Committee on the Application of Standards (CAS) which is a ‘political body’ with representatives from governments, workers and employers.¹²³ The CAS selects a list of 25 countries which CEACR had concerns of non-compliance and these countries appear to be publicly criticised and defend or explain their implementation efforts at the International Labour Conference.¹²⁴ The shortlisting is done by the employers’ and the workers’ group in the CAS but states do not participate in the shortlisting process.¹²⁵

Shortlisting is in effect a ‘naming and shaming process’ and member states have frequent recourse to shaming to bring other members into line.¹²⁶ In addition to the potential economic consequences mentioned above, reputational cost is another aspect of naming and shaming as an enforcement strategy.¹²⁷ Although naming by CEACR and shaming by CAS has been seen as a sanctioning mechanism, the ILO can also offer technical assistance in order to ‘help countries address problems in legislation and practice to bring them into line with the obligations under ratified instruments’.¹²⁸ In essence, these are complementarity mechanisms and they have the ability to mutually constitute transnational legal order.¹²⁹

¹¹⁸ Charnovitz, (n. 115), 171-2.

¹¹⁹ See <www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/jur/legal-instruments/WCMS_711647/lang--en/index.htm> accessed 7 January 2022. This page provides a link to the relevant case.

¹²⁰ www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_824976.pdf

¹²¹ J J Brudney JJ, ‘The Internationalization of Sources of Labor Law’ (2017) 39 *University of Pennsylvania Journal of International Law* 65.

¹²² ILO, *Monitoring Compliance with International Labour Standards*, <www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_730866.pdf> accessed 7 January 2022, 23.

¹²³ Faradj Koliev and James H. Lebovic, ‘Selecting for Shame: The Monitoring of Workers’ Rights by the International Labour Organization, 1989 to 2011’ (2018) 62 *International Studies Quarterly* 437, 438.

¹²⁴ www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang--en/index.htm accessed 7 January 2022.

¹²⁵ www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/conference-committee-on-the-application-of-standards/lang--en/index.htm accessed 7 January 2022.

¹²⁶ Faradj Koliev, ‘Shaming and democracy: Explaining inter-state shaming in international organizations’ (2019) *International Political Science Review* 1-2.

¹²⁷ Koliev and Lebovic, (n 123), 441.

¹²⁸ The ILO Technical assistance and training <www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/technical-assistance-and-training/lang--en/index.htm> accessed 7 January 2022.

¹²⁹ We thank Adelle Blackett for her suggestions on this point.

The ILO's procedures, even though they involve 'expert' fact-finding rather than a court, do incorporate central features of adjudication, in the sense that a decision-maker reaches a judgment on questions of fact and law following an exchange of arguments and proofs between parties.¹³⁰ In addition, the supervisory bodies can draw on the case law of the ECHR and Inter-American Court of Human Rights, particularly in relation to the concept of forced labour.¹³¹ The ILO's transnational function has also extended by providing technical assistance first in Eastern Europe and then in Asia, North Africa and Latin American.¹³² Louis claims that the ILO's technical cooperation expertise can be more effective to improve global labour conditions rather than its legally-binding standards setting procedures¹³³ to improve global labour conditions.

The area of forced labour is one in which the ILO is able to take relatively firm action. The Forced Labour Convention of 1930 (No. 29) alongside the related Abolition of Forced Labour Convention, 1957 (No. 105) is one of the 'core conventions' with which states face strong pressures to comply. The labour standards have found their way into trade agreement clauses and non-compliance can have significant economic consequences. The European Union (EU) and the United States, for example, have condemned several countries for their violations and threatened them to suspend their preferential trade agreements.¹³⁴ A recent study showed that ninety-nine countries initiated labour reforms between 2007-2017 due to the World Bank doing business labour indicators.¹³⁵ At transnational level, labour protection and labour standards have been influenced also by Foreign Trade Agreements (FTAs) where they can set some goals to trade and investment.¹³⁶ One reason why states are willing to support the enforcement of the Forced Labour Convention is that it is considerably less controversial than some other core conventions, in particular those on freedom of association and non-discrimination. In recent years, forced labour has figured prominently in the ILO's campaigns for 'social justice' and 'decent work'. The next section presents one recent example of the ILO's work in this area.

5. A case study: Forced Labour in Qatar

In her critique of 'modern slavery' discourse, Julia O'Connell Davidson argues that the dominant, criminal law-infused discourse of trafficking, with its emphasis on extremes of suffering and wicked individual perpetrators, depoliticises the issue of severe labour exploitation. Severely exploited migrant workers are not necessarily people who have been deceived, coerced, or smuggled across borders. Many are legal migrants who accept extremely

¹³⁰ Lon L. Fuller and Kenneth I. Winston, 'The Forms and Limits of Adjudication' (1978) 92 Harvard law review 353

¹³¹ Brudney, 'The Internationalization of Sources of Labor Law', (n. 121)

¹³² Véronique Plata-Stenger, 'Europe, the ILO and the Wider World (1919–1954)' <ieg-ego.eu/en/threads/transnational-movements-and-organisations/international-organisations-and-congresses/veronique-plata-stenger-europe-the-ilo-and-the-wider-world-1919-1954> accessed 7 January 2022

¹³³ Marieke Louis, 'Who Decides? Representation and Decision-making at the International Labour Organization' in Christophe Gironde and Gilles Carbonnier (eds), *The ILO @ 100: Tackling Today's Dilemmas and Tomorrow's Challenges* (Leiden: Brill 2019)), 91.

¹³⁴ Koliev, 'Shaming and Democracy', (n. 126).

¹³⁵ Arvo Kuddo, *Labour Regulations throughout the World: An Overview*. Jobs Working Paper, No. 16. World Bank, Washington, DC. <openknowledge.worldbank.org/handle/10986/30106> accessed 7 January 2022.

¹³⁶ Tarja Halonen and Ulla Liukkonen, *International Labour Organization and Global Social Governance* (1st ed. 2021. edn, Springer International Publishing 2021), 42.

harsh working conditions because they offer a way out of the impoverished conditions in their countries of origin.¹³⁷

To illustrate how TLL may provide a more effective means than TCL of challenging this sort of exploitation, we focus on one of the examples mentioned by O’Connell Davidson, that of mostly Indian and Nepali construction workers in Qatar. The harsh conditions under which they work often on projects connected with the 2022 World Cup, have left to hundreds of deaths.¹³⁸ A study in the journal *Cardiology* found that two to three Nepali migrant workers died in Qatar every week between 2009 and 2017 and the correlation between death rates and temperatures indicated that many of the 571 deaths attributed to cardiovascular disease were due to severe heat-stroke, which could have been prevented by effective heat protection.¹³⁹

One of the main ways in which states seek to ensure that admittance onto their territory will not allow temporary migrant workers to claim or enjoy the freedoms that accrue to citizens is by ensuring that their immigration status attaches them to the employer that sponsors them. In the majority of the Gulf Cooperation Council states this system is called *kafala*.¹⁴⁰ It imposes heavy restrictions on migrant workers – such as not being able to move between employers or leave the country without the *kafeel*’s (sponsor’s) approval – while it gives extensive power to the employers.¹⁴¹ Systems of this kind are by no means confined to the Middle East and ‘guest worker’ schemes which restrict migrant workers’ rights are common to many countries, including the UK regime for overseas domestic workers.¹⁴² As O’Connell Davidson argues, the objective of *kafala* and guest-worker programmes is ‘to allow the temporary migrant worker’s labour-power to be bought and consumed as a “thing”, without having to acknowledge that worker as a “person”’.¹⁴³

Qatar’s migrant worker population has rapidly expanded, with large numbers of Nepalese, Philippino and Indian construction workers contributing to the country’s preparations to host the 2022 World Cup. They have been much in the news: an investigation by the *Guardian* newspaper, for example, revealed that they were living in overcrowded, filthy hostels, some had had their passports and other documents confiscated, had not been paid, and had been denied access to free drinking water in the desert heat.¹⁴⁴ Amnesty International also reported on the migrant workers¹⁴⁵ – who were not employed directly on World Cup projects – and heavily criticised the exploitative practices and particularly problems with *kafala* system. Trade

¹³⁷ Janie A. Chuang, ‘Contemporary Debt Bondage, “Self-Exploitation” and the Limits of Trafficking’ in Kotiswaran and Palmer, *Rethinking the 'international law of crime* (n 25).

¹³⁸ Julia O’Connell Davidson, *Modern slavery : the margins of freedom* (Basingstoke:Palgrave Macmillan 2015) 133-5.

¹³⁹ B. Pradhan, T. Kjellstrom, D. Atar, P. Sharma, B. Kayastha, G. Bhandari and P. K. Pradhan, ‘Heat Stress Impacts on Cardiac Mortality in Nepali Migrant Workers in Qatar’ (2019) 143(1) *Cardiology* 37.

¹⁴⁰ P Pardis Mahdavi, *Gridlock : labor, migration, and human trafficking in Dubai* (Stanford, California : Stanford University Press 2011), 2011)

¹⁴¹ O’Connell Davidson, *Modern slavery : the margins of freedom* (n. 138)

¹⁴² V. Mantouvalou, ‘Am I Free Now? Overseas Domestic Works in Slavery’ (2015) 42 *JLS* 329.

¹⁴³ O’Connell Davidson, *Modern slavery : the margins of freedom* (n 138) 88, 145.

¹⁴⁴ P. Pattison ‘Revealed: Qatar’s World Cup “slaves”’, *Guardian*, 25 September 2013; see also D. Conn, ‘Qatar Migrant Workers Still Being Exploited, says Amnesty Report’ *Guardian* 26 September 2018.

¹⁴⁵ Amnesty International *The Ugly Side of the Beautiful Game: Exploitation of Migrant Workers on a Qatar 2022 World Cup Site* (2016) <www.amnesty.org/download/Documents/mde2237412016english.pdf> accessed 7 January 2022.

Unions also initiated actions based on transnational solidarity to put pressure on Qatar government about working circumstances of the migrant workers at construction sites.¹⁴⁶

In 2013 the International Trade Union Confederation of Building and Wood Workers International lodged a representation with the ILO alleging breaches of the Forced Labour Convention 1930.¹⁴⁷ A representation is a less formal procedure than a complaint, and merely empowers the ILO Governing Body to invite the government concerned to respond.¹⁴⁸ The ILO appointed an ad hoc tripartite committee comprising an employer's representative from the UAE, a workers' representative from Nepal, and a government representative from China. The committee concluded that the allegations of forced labour were credible. It pointed out that some workers had agreed to come to Qatar under one contract only to find a new and less generous one substituted when they arrived (a deceptive practice that raised these cases to the level of human trafficking);¹⁴⁹ that many were in debt to recruitment agencies in their home countries making it difficult to leave their employment especially as their wages were often unpaid; and that legal restrictions on changing employment or leaving the country made it difficult for them to leave their jobs, so that their remaining in employment could not be considered truly voluntary.¹⁵⁰

Interestingly, the Qatari government's response to the representation relied heavily on its compliance with transnational *criminal* law, in particular the criminalisation of trafficking, and also its system of administrative penalties for employment malpractice.¹⁵¹ The Committee on the other hand pointed to the lack of evidence of effective enforcement of the law, arguing that adequate penalties have an important deterrent effect.¹⁵² They recommended a number of measures the government needed to take to eradicate forced labour, with technical assistance from the ILO. The report illustrates both how criminal law can play a complementary role to labour law, and the risk that criminalisation will be used for cosmetic purposes, endorsing the international consensus against forced labour and trafficking without actually doing anything to stop those practices.

In response to this report, several worker delegates to the 2014 International Labour Conference filed a formal complaint under art 26 of the ILO Constitution.¹⁵³ Without establishing the Commission of Inquiry requested in the complaint, the ILO stepped up pressure on Qatar, sending a high-level delegation, followed by a report from the CEACR. The recommendations made by the delegation and the CEACR appear to have been effective in persuading the Qatar government to go farther with its legal reforms than it was initially

¹⁴⁶ T. Grell, 'FIFA's Responsibility for Human Rights Abuses in Qatar – Part I: The Claims against FIFA', *Asser International Sports Law Blog*, 28 February, 2017. See for a more elaborate discussion of this case in comparison with the currently discussed Swiss OECD NCP: B. ter Haar, 'FIFA 2022 World Cup and Labour Rights – Seizing the moment for labour law reforms in Qatar' (2018) 5(1) *Kutafin U L Rev* 139.

¹⁴⁷ ILO Governing Body GB.331.INS/13(Rev.) www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_586479.pdf accessed 7 January 2022.

¹⁴⁸ ILO Constitution 1919, art 24.

¹⁴⁹ US State Department, (n. 58), 391.

¹⁵⁰ ILO Governing Body (n 146) [54], [60-62].

¹⁵¹ *Ibid.*, [26-30], [38].

¹⁵² *Ibid.*, [41-6].

¹⁵³ ILO Governing Body, 322nd session, Institutional Section, agenda item 8, Appendix 1, at www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_459148.pdf accessed 7 January 2022.

compared to do, and to cooperate with the ILO's Office in Doha to comply with the ILO Fundamental Labour Standards.¹⁵⁴

Prior to the launch of a comprehensive 3-year ILO first phase of technical cooperation programme in Qatar, the ILO closed the complaint.¹⁵⁵ Changes in effect from January 2020, including the abolition of exit permits and the requirement to obtain a 'no objection certificate' from the sponsor before changing employers, have been hailed by the ILO as marking 'the end of kafala'.¹⁵⁶ Two legislative amendments were mainly put forward Labour Act No. 14 of 2004 was amended by the Decree Law No. 18 of 2020, which allows the workers to change employers during the probation period after giving one month notice in advance.¹⁵⁷ Act No. 21 of 2015 Regulating the Entry, Exit, and Residence of Expatriates was amended by the Decree Law No. 19 of 2020, allowing expatriate workers to change the employer.¹⁵⁸ The second phase of the ILO technical cooperation programmes runs from 2021-2023 – which contributed to the National vision 2030 for Sustainable Development – and to ensure compliance with ratified international labour Conventions and gradually achieving fundamental principles and rights at work in Qatar.¹⁵⁹

Rather than rely on ineffective criminal legislation the government introduced changes designed to ensure that workers would not enter the country on the basis of bogus contracts drawn up by recruiters.¹⁶⁰ Qatar visa centres have been established in six sending countries for potential workers which eliminates the risk of contract substitution and the workers can electronically sign their employment contracts.¹⁶¹ The Secretary General of the ITUC calls these labour reforms 'path breaking'.¹⁶² These legal reforms did not bring an immediate end to the exploitative practices of some employers,¹⁶³ nor did they avert the disastrous consequences for many migrant workers of the Covid-19 pandemic, which has affected Qatar very severely.¹⁶⁴ Before this tragic setback, however, the ILO had been instrumental in achieving significant legal reforms, with the potential to lead the way in the region and promote similar legal changes in countries such as the UAE, Saudi Arabia, Oman and Bahrain.

¹⁵⁴ ILO, *Monitoring Compliance with International Standards* (Geneva: ILO, 2019), 54-7.

¹⁵⁵ *Ibid.*, 54.

¹⁵⁶ D Conn, 'Qatar to Abolish "Kafala" Labour next January ahead of 2022 World Cup' *Guardian* 16 Oct 2019.

¹⁵⁷ ILO Observation of the Committee of Experts on the Application of Forced Labour Convention, 1930 (No. 29) – Qatar, 109th ILC session (adopted 2020).

¹⁵⁸ ILO Observation of the Committee of Experts on the Application of Forced Labour Convention, 1930 (No. 29) – Qatar, 109th ILC session (adopted 2020).

¹⁵⁹ ILO Project Office for the State of Qatar, <www.ilo.org/beirut/projects/qatar-office/lang--en/index.htm> accessed 4 January 2022.

¹⁶⁰ ILO Governing Body, 331st session, Institutional Section, agenda item 13, Appendix 1, paras 44, 49.

¹⁶¹ ILO Observation of the Committee of Experts on the Application of Forced Labour Convention, 1930 (No. 29) – Qatar, 109th ILC session (adopted 2020).

¹⁶² A Donini, 'Social Suffering and Structural Violence: Nepali Workers in Qatar' (2019) 11 *Revue Internationale de Politique de Développement* 11, 196.

¹⁶³ See Amnesty International, *All Work, No Pay: The Struggle of Qatar's Migrant Workers for Justice* (index MDE 22/0793/2019, available from amnesty.org); Human Rights Watch 'Qatar Wage Protection System Falls Short' www.hrw.org/news/2020/02/15/qatar-wage-protection-system-falls-short accessed 7 January 2022.

¹⁶⁴ See the series of articles available at <https://www.theguardian.com/world/qatar> (Accessed 9 May 2020); also Amnesty International, 'Qatar: migrant workers illegally expelled during COVID-19 pandemic', 15 April 2020, www.amnesty.org/en/latest/news/2020/04/qatar-migrant-workers-illegally-expelled-during-covid19-pandemic/ accessed 7 January 2022.

5 Conclusion

The two varieties of transnational law considered in this article – TCL and TLL – have certain features in common. They involve international institutions in setting standards to which domestic legal systems are expected to conform. Formal mechanisms for adjudicating on the conformity of national law to international standards are either absent or (as in the case of the ICJ’s labour law jurisdiction and the ECtHR’s role under ECHR art. 4) very rarely used. This ‘adjudication gap’ is filled by various kinds of expert assessment and ‘benchmarking’ which provide ostensibly objective measures of how far states are meeting their obligations. Rather than relying predominantly on sanctions, these mechanisms aim to encourage states and other actors (corporations, trades unions etc.) to develop policies of their own to meet international standards. They allow international institutions – and the US State Department – to ‘govern at a distance’ by a combination of monitoring and advice.

There are, however, important differences between the two systems. One is that within the ILO, expert assessments are subject to political supervision within the tripartite framework, giving workers’ representatives as well as employers a voice in the formulation and interpretation of standards. Another is that the transnational labour regime can use a variety of legal tools, including for example collective bargaining and international trade agreements, while TCL depends solely upon criminal law (although actors associated with it, notably GRETA, have attempted to implement wider strategies against labour exploitation).

Criminal law undoubtedly has a part to play in any strategy to combat forced labour, for two main reasons. First, some forced labour involves inherently illegal forms of work, such as drug cultivation or dealing, theft or fraud. Particularly in the UK, forced criminality is a major focus of anti-trafficking law. In the last quarter of 2019, when for the first time statistics on referrals to the National Referral Mechanism distinguished between forced criminality and labour trafficking, it emerged that some 56% of referrals of children and 25% of referrals of adults involved a suspicion of criminal exploitation, either alone or in combination with one or more other forms of exploitation.¹⁶⁵ Obviously such cases are unlikely to be dealt with by labour inspectors.

The second reason is that the most serious cases of human trafficking involve very serious violence, intimidation and/or deception. A system of justice that routinely criminalised lesser forms of force and fraud but did not criminalise these acts would be failing to treat them with the seriousness they deserve. It might be objected that this does not explain why we need separate offences of human trafficking, slavery, servitude and forced labour.¹⁶⁶ However, such offences probably do serve a valuable function in drawing the attention of police and prosecutors to forms of grave psychological coercion that might otherwise remain hidden, for example in domestic servitude cases.¹⁶⁷ In this respect TCL reinforces the duty of states to undertake effective investigations of breaches of fundamental human rights.

¹⁶⁵ Calculated from National Referral Mechanism Statistics UK Quarter 4 2019, <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876491/national-referral-mechanism-statistics-uk-quarter-4-2019-october-to-december-tables.ods>, Table 3. accessed 9 January 2022.

¹⁶⁶ Mattravers, (n 64).

¹⁶⁷ *CN v UK* (2013) 56 EHRR 24.

While recognising that prosecution and penal power have a part to play in combatting human trafficking,¹⁶⁸ we have argued that transnational criminal law should be ‘decentred’¹⁶⁹ in favour of an approach more focussed on international labour standards and the underlying causes of extreme labour exploitation. Given the increase of vulnerabilities in a transborder labour market setting, transnational social dialogue and a shift towards a labour rights approach may be capable of pursuing an international commitment to fundamental labour rights while also providing national regulatory frames for labour protection.

To view transnational law and policy against severe labour exploitation from a criminal law perspective gives criminal law a centrality it does not deserve. The securitarian paradigm’ of human trafficking has promoted false image of human trafficking and illegal migration in order to ‘draw attention away from the dependence of big capital on the cheap and malleable workers that populate the unregulated and unprotected labour market’.¹⁷⁰ Although TLL’s commitments to tripartism and compromise do not make it a vehicle for radical social change, it at least keeps the bigger picture in sight and affords the hope of modest progress towards social justice.

¹⁶⁸ Gless, ‘Bird’s-eye view and worm’s-eye view’, (n. 1), 128.

¹⁶⁹ Fouladvand, ‘Decentering the Prosecution-oriented approach’, (n. 4), 129.

¹⁷⁰ Kempadoo, ‘From Moral Panic to Global Justice’, (n. 83), xiv.

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