

**Dominika Borg Jansson**

# **Modern Slavery**

*A Comparative Study  
of the Definition of  
Trafficking in Persons*

**International Studies in Human Rights**

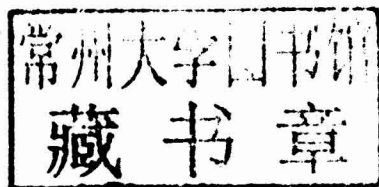
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*By*

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# Contents

## List of Abbreviations   x

<b>1</b>	<b>Introduction</b>	<b>1</b>
	Introduction	1
	Purpose and Research Questions	3
	Harmonization of Criminal Law within the Context of Human Trafficking	5
	Approaches to the Study and Conceptualization of Human Trafficking	11
	Outline	16
<b>2</b>	<b>Theory and Methodology</b>	<b>18</b>
	Introduction	18
	Reasons for Choosing the Case Studies	18
	Methodological Difficulties	23
	Legal Transplants	25
	<i>Introduction</i>	25
	<i>Legal Transplants in Context</i>	30
	Importance of Language	36
<b>3</b>	<b>Human Trafficking as a Social Practice</b>	<b>42</b>
	Introduction	42
	Trafficking: An Overview	42
	Trafficking in Human Beings after the Demise of Communism	43
	Push and Pull Factors	44
	Trafficking from Various Perspectives	50
	<i>Trafficking from a Migration Perspective</i>	50
	<i>Trafficking from a Gender Perspective</i>	51
	<i>Trafficking as a Result of Poverty, Development, and Education</i>	53
	<i>Trafficking as a Security Issue</i>	54
	<i>Trafficking as a Health Issue</i>	55
	<i>Trafficking as a Human Rights Issue</i>	56
<b>4</b>	<b>The Role of the Palermo Documents</b>	<b>61</b>
	UN Trafficking Documents: Overview	61
	Anti-Trafficking Efforts of the UN – A Historical Background	63
	Palermo Convention on Organized Crime	68
	Palermo Protocol – The Negotiation Process	73

<i>Introduction</i>	73
<i>The Palermo Protocol – General Rules</i>	77
<i>Article 3 of the Palermo Protocol – The Definition of Trafficking</i>	80
<i>Situation of Child Victims</i>	91
<i>Internal Trafficking</i>	92
Summary	92
5 Sweden	96
Introduction	96
Present Provision on Trafficking	98
<i>Introduction</i>	98
<i>Improper Means</i>	100
Trade Measures	122
Purpose	127
General Intent	129
<i>Introduction</i>	129
<i>Different Forms of Intent</i>	131
Participation	132
<i>Introduction</i>	132
<i>Object of Participation</i>	134
<i>Act of Participation</i>	134
<i>Intent of the Accomplice(s)</i>	135
<i>Possibility of Relabeling an Accomplice as a Principal Perpetrator</i>	136
Previous Provisions	137
<i>Placing a Person in a Distressful Situation</i>	137
<i>Provision from 2002</i>	139
<i>Provision from 2004</i>	141
Other Relevant Provisions	145
<i>Introduction</i>	145
<i>Kidnapping</i>	146
<i>Unlawful Deprivation of Liberty</i>	147
<i>Procuring and Gross Procuring</i>	148
<i>Prohibition of the Purchase of Sexual Services</i>	150
<i>Sexual Crimes</i>	152
Swedish Legislation through the Prism of Legal Transplants	159
<i>Accessibility in the Swedish Context</i>	159
<i>Reception and Perception of the Original Source in Sweden</i>	165
Sweden – Summary	179
<i>Introduction</i>	179
<i>Legal Issues</i>	179
<i>Non-Legal Issues</i>	185

**6 Poland 188**

Introduction 188

Present Provisions on Trafficking in Human Beings 189

*Introduction* 189*Trafficking in Human Beings – Article 189 (a)* 189*Definition of Trafficking in Human Beings – Article 115, Section 22* 191

General Intent 206

*Introduction* 206*Dolus Directus* 206*Dolus Eventualis (zamiar wynikowy)* 207

Criminal Participation 208

*Introduction* 208*Intent of the Accomplices* 211

Previous Provisions 212

*Trafficking Provision from 1969* 212*Trafficking Provision from 1997* 212

Other Relevant Provisions 215

*Slavery* 215*Illegal Adoptions* 216*Making a Person Engage in Prostitution* 218*Procuring* 219*Obligation to Notify Authorities in the Case of Knowledge of  
Certain Crimes* 221*Sexual Crimes* 222

Polish Legislation through the Prism of Legal Transplants 225

*Introduction* 225*Accessibility in the Polish Context* 226*Reception and Perception of the Original Source in Poland* 230

Poland – Summary 236

*Introduction* 236*Legal Issues* 236*Non-Legal Issues* 239**7 Russia 241**

Introduction 241

Present Provisions on Trafficking in Human Beings 242

*Introduction* 242

General Intent and the Specific Purpose of Exploitation 256

*Introduction* 256*Direct Intent and Indirect Intent* 259*Negligence and Thoughtlessness* 260

Participation	262
<i>Criminal Participation – Introduction and General Structure</i>	262
<i>Types of Accomplices</i>	263
<i>Responsibility of the Accomplices</i>	265
Previous Provisions	266
<i>Introduction</i>	266
<i>Kidnapping</i>	267
<i>Unlawful Deprivation of Liberty</i>	270
<i>Procuring</i>	272
Other Relevant Provisions	276
<i>Introduction</i>	276
<i>Illegal Adoptions</i>	276
<i>Forced Removal of Human Organs or Tissues for Transplantation</i>	277
<i>Sexual Crimes</i>	279
Russian Legislation through the Prism of Legal Transplants	291
<i>Introduction</i>	291
<i>Accessibility in the Russian Context</i>	292
<i>Reception and Perception of the Original Source in Russia</i>	298
Russia – Summary	303
<i>Legal Issues</i>	303
Non-Legal Issues	304
<b>8 Conclusions and Comments de Lege Ferenda</b>	<b>306</b>
<i>Introduction</i>	306
Central Findings Concerning the Original Source	308
<i>Introduction</i>	308
<i>Legal Issues</i>	308
<i>Other Important Questions of Both Legal and Non-Legal Nature</i>	310
Central Findings: Sweden	310
<i>Introduction</i>	310
<i>Legal Issues</i>	311
Trafficking in a Legal Context	315
Non-Legal Issues	315
Central Findings: Poland	318
<i>Introduction</i>	318
<i>Legal Issues</i>	318
Non-Legal Issues	322
Central Findings: Russia	324
<i>Introduction</i>	324
<i>Legal Issues</i>	325

Non-Legal Issues	328
Conclusions and Suggestions	332
<i>Introduction</i>	332
<i>Legal Issues</i>	333
Re-conceptualization of the Trafficking Offence	339
Possible Avenues for Future Research	343
 References	 347
Index	366



# Abbreviations

CATW	Coalition against Trafficking in Persons
CBSS	Council of the Baltic Sea States
CEDAW	Committee on the Elimination of Discrimination against Women
CIS	Commonwealth of Independent States
CoE	Council of Europe
Ds	Departementsserien
ECtHR	European Court of Human Rights
ECHR	European Convention for Human Rights and Freedoms
EU	European Union
EWL	European Women's Lobby
GAATW	Global Alliance against Trafficking in Women
IAF	International Abolitionist Federation
IHRLG	International Human Rights Law Group
ILO	International Labour Organization
IOM	International Organization for Migration
KCIK	Krajowe Centrum Interwencyjno-Konsultacyjne dla Ofiar Handlu Ludźmi
KKPK	Komisja Kodyfikacyjna Prawa Karnego
MSWiA	Ministerstwo Spraw Wewnętrznych i Administracji
NCK	Nationellt Kunskapscentrum för kvinnor
NJA	Nytt juridiskt arkiv
NMT	Nationellt Metodstödsteam mot Prostitution och Människohandel
OSCE	Organization for Security and Cooperation in Europe
Prop	Proposition
RH	Rättsfall från hovrätterna
Roks	Riksorganisationen för kvinnojourer och tjejjourer i Sverige
SKR	Sveriges Kvinno- och Tjejjourers Riksförbund
SOU	Statens offentliga utredningar
TFEU	Treaty on the Functioning of the European Union
TIP	us State Department Trafficking in Persons Report
UN	United Nations
UNDP	United Nations Development Programme
UNESCO	United Nations Education, Scientific and Cultural Organization
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
UNOHCHR	United Nations Office of the High Commissioner for Human Rights
VCLT	Vienna Convention on the Law of Treaties

# Introduction

## Introduction

Trafficking in human beings is one of the most serious offences of our time. It has been described as one of the main forms of organized crime.<sup>1</sup> The international community even defines the phenomenon as a modern form of slavery.<sup>2</sup> The European Court of Human Rights (ECtHR) has also confirmed that trafficking in human beings cannot be considered consistent with international human rights law or with a democratic society.<sup>3</sup> The International Labour Organization (ILO) estimates the overall number of people in forced labour to be 21 million.<sup>4</sup> Yet, worldwide there are only a few thousand convictions of traffickers every year.

It is not surprising, then, that states and the international community alike view trafficking as one of the most serious and acute problems of our time. Although the practice has been addressed in international law and numerous states have criminalized it,<sup>5</sup> the problem not only persists but also seems to be growing.<sup>6</sup> This book argues that an important part of the reason for this development is inherent in the wording of the relevant trafficking legislation.

- 1 "Communication from the Commission to the Council and the European Parliament – The Hague Programme: Ten Priorities for the Next Five Years. The Partnership for European Renewal in the Field of Freedom, Security and Justice", [Com (2005)184 final – Official Journal C 236 of 24.9.2005] and "Trafficking in Human Beings", Interpol Fact Sheet, <http://www.interpol.int/Crime-areas/Trafficking-in-human-beings/Trafficking-in-human-beings>, (accessed 2014-05-12). See also "Human Trafficking: Organized Crime and the Multibillion Dollar Sale of People", UNODC, 19 July 2012, <http://www.unodc.org/unodc/en/frontpage/2012/July/human-trafficking-organized-crime-and-the-multibillion-dollar-sale-of-people.html>, (accessed 19 May 2014).
- 2 "Global Report on Trafficking in Persons", UNODC and Global Initiative to Fight Human Trafficking (UN.GIFT), February 2009, [http://www.unodc.org/documents/Global\\_Report\\_on\\_TIP.pdf](http://www.unodc.org/documents/Global_Report_on_TIP.pdf), (accessed 19 May 2014).
- 3 Case of *Siliadin v. France*, (Application no. 73316/01), Judgment Strasbourg, 26 July 2005, and Case of *Rantsev v. Cyprus and Russia*, (Application no. 25965/04), Judgment Strasbourg, 7 January 2010, final 10 May 2010.
- 4 "ILO Global Estimate of Forced Labor. Results and Methodology", ILO, 2012, p. 13, [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_182004.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_182004.pdf), (accessed 19 May 2014).
- 5 It should, however, be noted that criminal law alone will not solve the trafficking problem.
- 6 "Global Report on Trafficking in Persons", 2009.

According to international expert organizations such as the United Nations Office on Drugs and Crime (UNODC), traffickers profit from inadequate national criminal legislation as well as from a lack of international cooperation.<sup>7</sup> In this context, harmonization of national laws has been presented as a first step toward solving or dealing with the trafficking problem. Consequently, the aim of the most important international document on trafficking in human beings, the Palermo Protocol,<sup>8</sup> is to create an internationally binding definition of trafficking by harmonizing the relevant laws of the state signatories to the protocol.<sup>9</sup> Comments from the United Nations (UN), as well as from many other international organizations, indicate that the Palermo Protocol is perceived as a powerful instrument and one which will serve as a model for national legislations. In consequence, subsequent international law has largely drawn on the protocol's definition of human trafficking.<sup>10</sup>

The international definition of trafficking contained in Article 3 of the Palermo Protocol constitutes the core of this research,<sup>11</sup> which consists of two main parts. The first deals with the original source, i.e., the international definition of trafficking itself. The second part addresses the process of implementation of this definition in three different state parties to the Palermo Protocol. These analyses generate findings that can be divided into two categories. Both categories concern challenges to the implementation of the original source and the interpretation of the transplant. Firstly, there are certain problems that are experienced by all three countries. As I will illustrate, these are attributable to the wording of the international definition of trafficking. Secondly, there are challenges that are country-specific. These concern primarily how trafficking is conceptualized on the national level. Building on the findings mentioned above, recommendations are made on how the international

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7 Ibid.

8 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the 2000 United Nations Convention against Transnational Organized Crime.

9 Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the 2000 United Nations Convention on Transnational Organized Crime, Part 2, p. 267, hereafter the Legislative Guide.

10 See the definition of human trafficking in the EU 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. See also the Council of Europe Convention on Action against Trafficking in Human Beings that entered into force in 2008.

11 For the wording of Article 3 and an analysis thereof, see Chapter 4.

definition of trafficking might be improved. The suggestions range from simple to more far-reaching reforms, concluding with a proposal on how a trafficking provision might be framed.

When states struggle with anti-trafficking efforts, international advice often comes in the form of encouragement to adjust national laws to the international definition of trafficking and to increase the penalties for the crime. However, as will be shown, national laws that have implemented the international definition of trafficking in human beings do not always work as intended. Also, the fact that penalties for trafficking often already are quite high, although the crime persists, is often overlooked. Such advice tends to neglect the fact that laws on the books do not always equal law in practice. By contrast, this study acknowledges the law in practice by attaching importance to the specific context in which the international definition of trafficking is implemented. It takes into account variables such as perception, legal tradition, and language as well as the practical consequences that the implementation of the international definition of trafficking has had on individual countries.

This book argues that there is arguably no adequate international definition of trafficking. The present definition is reproduced in both international law and national legislation, making an already troublesome situation even worse. Despite the importance of the topic, it has not been extensively researched. The present book conducts a critical legal analysis of the wording of the international definition of trafficking and puts those findings in context by discussing the implications that this definition has had on national laws, a novel approach in the study of trafficking.

### Purpose and Research Questions

Although trafficking does not always involve an element of border-crossing and many countries also suffer from so-called internal trafficking, the crime often involves at least two and sometimes several states. The fact that the Palermo Protocol requires states to criminalize all forms of trafficking in human beings while international cooperation and victim support are optional objectives indicates that *prevention by harmonizing laws* is considered one of the main tools in the fight against human trafficking. The question of counter-ing trafficking by means of the harmonization of national criminal laws is therefore essential. However, although trafficking laws are harmonized, there are very few trafficking convictions.

The main research question is why, despite international anti-trafficking efforts, there are so few trafficking convictions worldwide. The purpose is

to evaluate the international definition of trafficking by means of which national laws in this area are harmonized. A secondary purpose is to discuss what actually happens when states agree to create and implement a common definition of a crime. The distinction between first and secondary purpose is artificial as both purposes are linked to one another. However, this division is useful for the overall structure of the study. The underlying argument is that although a country's definition of a crime may be a verbatim transcript of the original legal source, a successful legal harmonization has not necessarily taken place.

This study examines two main areas, both covered by the umbrella concept of legal harmonization. Firstly, it concerns itself with the international definition of trafficking as set out in Article 3 of the Palermo Protocol. The definition is scrutinized from both legal and social perspectives. First, a critical legal analysis of the wording is conducted. Then, the wording is evaluated against the social practice of human trafficking and its realities. The question is whether the current international definition of human trafficking is satisfactory in terms of legal effectiveness and its sensitivity to the phenomenon itself.

Secondly, this work addresses the development that takes place on the national level after an international treaty has been implemented. It addresses the following question: Can we talk about the trafficking definition of the Palermo Protocol in terms of universality if we are not familiar with the results of its implementation in individual countries? I will attempt to answer this question by conducting country-specific analyses of the relevant laws of three state parties (Sweden, Poland, and Russia) to the Palermo Protocol.

In addition, the study contributes to the debate on international harmonization of law and legal transplants by discussing the shortcomings of national implementation and the problems that might arise when attempting to mend international dilemmas with unified criminal legislation. It indicates that the difficulties are not only internal in nature but also that certain problems can be attributed to the original source, i.e., there exist both country-specific and general problems with regard to international legal harmonization. The findings are also cause for reflection concerning what might be considered achievable or realistic where possible results of international harmonization are concerned.

To a certain extent, the findings of this work can be applied to other areas of criminal law where international harmonization takes place. However, the crime of trafficking in human beings is especially illustrative when discussing the importance of the roles that perception and language play in the field of legal harmonization. The potential success of legal harmonization is highly dependent upon attitudes and perceptions such as certain presuppositions or prejudices concerning the crime and its victims.

National laws are harmonized on different levels and through various mechanisms. The next section will position this work in its relevant field by describing the process of international legal harmonization.

### Harmonization of Criminal Law within the Context of Human Trafficking

Contemporary criminal law does not fall under the exclusive competence of states.<sup>12</sup> Some experts argue that individual states no longer can handle recent developments such as globalization and organized crime on their own.<sup>13</sup> As a result of this development, national criminal laws have been subjected to several harmonizing measures. The EU member states, e.g., have been affected by this development on an EU level and on an international level. The world order no longer consists of states with uniformly sovereign legislation. Scholars increasingly speak of constitutional pluralism.<sup>14</sup> In some cases, international legislation prevails over national norms, while in others it is still unclear how rules, decisions, and outcomes stemming from international legal acts are to be interpreted in relation to each other and to national legislation, especially if they are mutually contradictory.<sup>15</sup>

Under the premise that criminals might take advantage of differences between states' criminal laws or favour countries that have lower penalties for organized crime, harmonization of criminal laws and increased penalties for organized crime have been advocated by the international community. Along with prevention and victim protection, prosecution is considered to be one of the main tools in the fight against human trafficking. It is achieved by ensuring

12 F.M. Tadic, "How Harmonious Can Harmonization Be? A Theoretical Approach Towards Harmonization of (Criminal) Law" in A. Klip, H. van der Wilt (eds.), *Harmonization and Harmonizing Measures in Criminal Law*, Proceedings of the Colloquium, Amsterdam, Royal Netherlands Academy of Arts and Sciences, December 2001, pp. 1–2.

13 J. Vogel, "Why is the Harmonization of Penal Law Necessary? A Comment" in *Harmonization and Harmonizing Measures in Criminal Law*, pp. 55–56.

14 See, e.g., N. Walker, "The Idea of Constitutional Pluralism", *Modern Law Review*, vol. 65, no. 3, 2002, p. 317.

15 Within the field of criminal law, this has become especially evident with regard to international sanctions related to terrorism. These are ordered on the UN level, reinforced at the EU level, and then 'executed' on the national level. See T. Andersson, I. Cameron, K. Nordback, "EU Blacklisting: The Renaissance of Imperial Power, but on a Global Scale", *European Business Law Review*, vol. 14, no. 2, 2003 and I. Cameron, "European Union Anti-Terrorist Blacklisting", *Human Rights Law Review*, vol. 3, no. 2, 2003.

that states have adequate legal frameworks and appropriate criminal definitions of trafficking in human beings.<sup>16</sup> The Palermo Protocol is seen as a step in this direction as it is built around the concept of the three P's: prosecution, prevention, and protection.

In addition to extended victim assistance, the EU Directive on trafficking replacing the Council Framework Decision 2002/629/JHA introduces tougher penalties for trafficking.<sup>17</sup> Compared to the Palermo Protocol, the directive has a more extensive area of application. It not only deals with criminalization but also with victim protection. It also refers to another directive<sup>18</sup> concerning residence permits for those victims of trafficking and irregular migration who choose to cooperate with authorities.<sup>19</sup> The trafficking directive also refers to the Palermo Protocol as an important step "in the process of enhancing international cooperation against trafficking in human beings".<sup>20</sup> Moreover, the directive's definition of trafficking is a verbatim transposition of the Palermo Protocol's definition, perhaps the only exception being that forcing someone to commit criminal activities is explicitly set out in the directive as a form of exploitation.

Furthermore, the EU is required to build on the practice in this field stemming from relevant international acts, notably the United Nations Convention against Transnational Organized Crime (Palermo Convention) to which the European Community is bound by virtue of Council Decision 204/579/EC [3].<sup>21</sup> Also, the EU and its member states are required to follow the principles of human rights of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Article 4 of the ECHR explicitly and without

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16 See Opinion No. 7/2010 of the Group of Experts on Trafficking in Human Beings of the European Commission, "Proposal for a European Strategy and Priority Actions on Combating and Preventing Trafficking in Human Beings (ТНВ) and Protecting the Rights of Trafficked and Exploited Persons", p. 3.

17 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.

18 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration and who cooperate with the competent authorities.

19 Paragraph 7 of Directive 2011/36/EU.

20 Ibid, Paragraph 9.

21 See Paragraph 6 of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organized crime and also paragraph 9 of Directive 2011/36/EU that makes direct reference to the Palermo Protocol.

exception prohibits slavery. The Council of Europe (CoE) defines trafficking in human beings in its own 2005 Convention on Action against Trafficking in Human Beings. Nevertheless, Article 4 of the document is almost a literal translation of Article 3 of the Palermo Protocol. As the legislations of the majority of the EU member states build on the aforementioned experience because they are signatories to those international acts and must follow them by virtue of their membership in the EU,<sup>22</sup> Article 3 of the Palermo Protocol is the essential provision in discussing the international definition of trafficking.

The three countries studied in this work are bound by international law on trafficking on different levels and to varying degrees. Poland and Sweden have both ratified the Palermo Protocol and the ECHR (the international level). They are members of the EU which in turn has its own directive on trafficking in addition to being bound by the ECHR (the EU level). Russia is only bound by international law by having ratified the Palermo Protocol and the ECHR. This distinction adds another factor to the analyses of the three countries.

Trafficking in human beings is a crime that affects several areas of state responsibility including security, migration, health, social security, development, education, labour, gender equality, and human rights. In consequence, international documents usually advocate a holistic approach when anti-trafficking measures are concerned. The question is whether the definition of trafficking in the Palermo Protocol corresponds to this approach. Even more importantly, the question is if the definition is consistent with the developments that the trafficking phenomenon has undergone.

Two important developments within this area are that traffickers allegedly have become less violent in their contacts with potential victims and that women traffickers have become more common.<sup>23</sup> Traffickers abuse people's vulnerability, e.g., political instability and/or economic distress. In such circumstances, violence as an additional means of coercing someone into exploitation is often not necessary. The question is, however, if this constitutes a real change or a change in perceptions brought on by our increasing knowledge of the crime.

22 See, e.g., Paragraph 2 of the Opinion No. 6/2010 of the Group of Experts on Trafficking in Human Beings of the European Commission "On the Decision of the European Court of Human Rights in the case of *Rantsev v. Cyprus and Russia*", 22 June 2010.

23 "Knowledge Product. Trafficking in Human Beings in the European Union", o8 oc Networks in South-East European Sphere Oz Analysis and Knowledge, Europol Public Information, the Hague, 1 September 2011, p. 11. See also "Människohandel för sexuella ändamål", Lägesrapport 13, RPS Rapport 2012, pp. 14–15.



While the trafficking of women and children for sexual exploitation is still one of the more predominant forms of trafficking,<sup>24</sup> the phenomenon is constantly expanding and adapting to new circumstances. The traffickers of today tend to operate on a lesser scale than they did a decade ago. Largely gone are the big cells in which a broad and in principle dispensable base was ruled hierarchically by a small number of key actors.<sup>25</sup>

Nowadays, flexibility seems to be the *modus operandi*. A person can be brought to a country as a migrant worker. Indebted to the trafficker, the person is then forced to work off his debt for little or no compensation, often under poor working conditions. The same person can then be used in order to commit welfare benefit fraud, a new form of trafficking that seems to be on the increase.<sup>26</sup> Others might be forced to beg and to commit petty theft.

To get the current international definition of trafficking in line with the development referred to above would be a step in the right direction. However, it is important to note that a legal amendment alone will not solve the trafficking problem. Simply put, there are arguably certain disadvantages to a view on international cooperation that focuses *exclusively* on criminal law measures. By paying too much attention to unified criminal legislation, actual international cooperation might become an issue of secondary importance. This is already evident in the Palermo Protocol, according to which the implementation of criminal provisions is obligatory while international cooperation is only an optional measure. This implies that anti-trafficking efforts are mostly focused on the law on the books as opposed to law in practice. If efforts are predominantly focused on the harmonization of criminal laws, the evaluation of these laws might be neglected by the international community, especially as there are few mechanisms of control.

The former Polish trafficking law will serve as an example. The law in question was drafted in order to meet international requirements. However, the Ministry of Interior noted that in many cases the courts had decided to impose

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24 "Global Report on Trafficking in Persons", 2009.

25 Presentation by Gert Bogers, Seconded National Expert in the European Commission in DG Home Affairs in the Unit Fight against Organized Crime, specifically working in the area of trafficking in human beings since July 2010 during the Third Annual International Symposium on Preventing Human Trafficking, held on 24 November 2011 in Brussels.

26 According to a report from Europol, welfare benefit fraud is likely to expand even further. This is primarily due to the relatively large profits that it generates where a single trafficking group can get 125,000 Euro per month and the low levels of perceived risk of detection. See "Knowledge Product. Trafficking in Human beings in the European Union", 2011, p. 14.