

The Prominent Role of National Judges in Interpreting the International Definition of Human Trafficking

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Abstract

Although there has been much discussion of the scope of the concept of human trafficking in international literature, the part played by national courts in interpreting definitions based on the international definition of human trafficking in the UN Trafficking Protocol has received little attention. When a judge interprets an offence, he or she clarifies or adds new meaning to it. The space for this is even greater when the underlying definition is broadly formulated, as in the case of the international definition of human trafficking. This article demonstrates that, although this international definition establishes the outer parameters within which conduct must be made a criminal offence, domestic courts still have room to flesh out the definition in national contexts. The role of national judges needs more consideration in today's discourse on the legal definition of human trafficking.

Keywords: human trafficking, definitions, exploitation, abuse of a position of vulnerability

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El papel destacado de las juezas y los jueces nacionales en la interpretación de la definición internacional de trata de personas.

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Resumen

Aunque se ha dicho mucho sobre el alcance del concepto de trata de personas a nivel internacional, no se ha prestado mucha atención al papel desempeñado por las cortes nacionales en la interpretación de las definiciones, basándose en la definición internacional de trata de personas del protocolo de la ONU contra la trata. Cuando una jueza o juez interpreta un delito, lo hace añadiendo un nuevo significado. El hueco para que esto ocurra es incluso mayor cuando la definición subyacente es formulada de forma generalizada, como es el caso de la definición internacional de la trata de personas. Este artículo demuestra que, aunque la definición internacional establece los parámetros externos dentro de los que una conducta debe ser considerada un crimen, las cortes nacionales tienen cierto margen para desarrollar la definición en los contextos nacionales. El papel de las juezas y jueces nacionales necesita ser tenido en cuenta en el discurso actual sobre la definición legal de la trata de personas.

Palabras clave: trata de personas, definiciones, explotación y abuso de una situación de vulnerabilidad.

Definitions and the Absence of the Perspective of the National Judge

Sixteen years after it was drafted, the international definition of human trafficking in the Trafficking Protocol¹ still causes controversy. Many authors and organisations have addressed the complex issues related to the scope of the

¹ UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, (Trafficking Protocol).

definition. For example, how can ‘abuse of a position of vulnerability’ be understood? And what sort of evidence is needed in order to prove the definition’s *mens rea* element, i.e. the purpose of exploitation?²

Without any pretence of providing even a remotely comprehensive overview of the available literature, it is possible to identify a number of streams in the current discourse about the concept of human trafficking. One stream seeks to find the similarities and nexuses between human trafficking and new and emerging phenomena that are not at present commonly associated with it. In this regard, a 2013 article by Tyldum is illustrative.³ In it she applies the definition of human trafficking to the (already existing) phenomenon of transnational marriages in Norway and comes to understand the latter as directly related to the former. Here, the definition is used in a functionalistic way; it serves as a framework to deepen the understanding of the characteristics of a (previously presumed to be) distinguishable concept and has, as such, the capacity to shed more conceptual light on other phenomena. A second stream in recent literature is characterised by the ongoing search for the parameters of the definition of human trafficking and, related to this, the most effective perspective on which to build policies. One of the main recent contributors in this respect is Chuang, who criticises the erosion of the definition’s apparent boundaries and pleads for more careful consideration of its scope.⁴ Subsequently, Chuang is, as is Shamir,⁵ advocating a labour perspective or paradigm on human trafficking, adding an approach that, among other measures, focusses on labour market regulation.

For all the attention that has been devoted to the potential scope of the definition of human trafficking in theory, far less has been written—or is otherwise known—about the role played by domestic courts in delineating the definition. Although States are under an obligation to criminalise the act of human trafficking as laid down in Article 3(a) of the Trafficking Protocol, the definition of human trafficking is sufficiently flexible to enable it to be fleshed out in the ‘local contexts’ of different countries.⁶ Hence, from the outset it was clear that national actors would play a pivotal role in searching for the definition’s exact radius of action. Naturally, the object of interpretation at these national levels is the national definition. However, bearing in mind the transnational background of this definition and the fact that most States have adopted language very similar to the international legal definition in formulating their understanding of trafficking, national interpretations can also be insightful and valuable in an international context. Especially where the national definition is closely aligned with the international counterpart it stems from, interpretations and case law by national courts can be of importance for and add meaning to international debates about elements of the definition.⁷ Of course, the weight of influence should not be overstated and can only be properly understood as *indirect*. A useful analogy might be the concept of ‘subsidiary means’ in the context of international (criminal) law. In Article 38, paragraph 1, under d of the Statute of the International Court of Justice it is stipulated that the Court shall apply *inter alia* (and subject to the provisions of Article 59) ‘judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law’.⁸ More recently, Van der Wilt described the domestic courts’ role *vis-à-vis* international criminal law as follows: ‘By applying the law, they [the domestic courts] refine, interpret and—therefore—change the law and they contribute to the further development of international (criminal) law.’⁹

To demonstrate the consequences of the space left open for judges, the focus in this article is on the way Dutch courts have interpreted the (national) human trafficking definition that was derived from the Trafficking Protocol. The article presents an analysis of how the Dutch courts have interpreted two main elements of the definition, the element of means, specifically: ‘abuse of a position of vulnerability’, and the element ‘purpose of exploitation’. This article also elaborates upon the term ‘transnational criminal law’ in order to improve our understanding of the

² UNODC recently published a series of issue papers addressing what states parties to the Protocol identified as ‘problematic’ aspects of the international legal definition of trafficking in persons. See: United Nations Office on Drugs and Crime, *Abuse of a Position of Vulnerability and Other “Means” within the Definition of Trafficking in Persons*, UNODC, Vienna, 2013; United Nations Office on Drugs and Crime, *The Role of Consent in the Trafficking in Persons Protocol*, UNODC, Vienna, 2014; United Nations Office on Drugs and Crime, *The Concept of ‘Exploitation’ in the Trafficking in Persons Protocol*, UNODC, Vienna, 2015.

³ G Tyldum, ‘Dependence and Human Trafficking in the Context of Transnational Marriage’, *International Migration*, vol. 51, 2013, pp. 103–115.

⁴ J Chuang, ‘Exploitation Creep and the Unmaking of Human Trafficking Law’, *American Journal of International Law*, vol. 108, 2014, pp. 609–649.

⁵ H Shamir, ‘A Labor Paradigm for Human Trafficking’, *UCLA Law Review*, vol. 60, 2012, pp. 76–136.

⁶ UNODC issue papers observe that ‘[the] potential breadth and narrowness of the definition has raised several issues to which States have taken quite different positions’. See, for instance: United Nations Office on Drugs and Crime, *The Concept of ‘Exploitation’ in the Trafficking in Persons Protocol*, UNODC, Vienna, 2015, p. 15.

⁷ Arato is of the opinion that ‘[...] national courts have a particular responsibility to supervise the proper interpretation of treaties because their judgments have a recursive relationship to the treaty being applied’. And: ‘[...] domestic interpretations can have a significant impact on the meaning of a treaty over time. They not only interpret and apply international treaties, but further contribute to their meaning and affect their growth.’ J Arato, ‘Deference to the Executive: The US debate in global perspective’ in H P Aust and G Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, diversity, convergence*, Oxford University Press, Oxford, 2016, p. 211.

⁸ Statute of the International Court of Justice, accessible online via http://www.icj-cij.org/documents/?p1=4&p2=2#CHAPTER_II, retrieved 10 February 2016.

⁹ Van der Wilt makes this remark in an article on the influence of domestic courts on international criminal law. H van der Wilt, ‘Domestic Courts’ Contribution to the Development of International Criminal Law: Some reflections’, *Israel Law Review*, vol. 42, 2013, p. 209.

relation between *international* definitions and *national* judges. Finally, the focus shifts to the actual application of the national definition by the Dutch courts.

The Role of Domestic Courts in Applying and Interpreting Transnational Crimes

Within international law, human trafficking is considered a transnational crime. This criminological term embraces ‘offences whose inception, prevention and/or direct or indirect efforts involved more than one country’.¹⁰ Expanding on this, Boister introduced the concept of ‘transnational criminal law’, or ‘the indirect suppression by international law *through domestic penal law* of criminal activities that have actual or potential transboundary effects’ [author’s italics].¹¹ Both concepts are directly related. Where the first elaborates on the (transnational) nature of the crimes, the latter is more concerned with the specific action prescribed and, subsequently, the actor who has the task to take action. Prominent in Boister’s definition of transnational criminal law is the dual responsibility for realising an effective approach of transnational crime, for both international *and* national actors. On the one hand, the outer parameters within which conduct must be made a criminal offence are established at the international level. National actors, on the other hand, have to take steps to actually criminalise the behaviour (States) and apply and interpret the definition in practice. Accordingly, when it comes to the ‘realisation of criminalisation’, there is a degree of interdependence observable between transnational and national law.

Human trafficking’s status as part of transnational criminal law is not the sole explanation for the domestic courts’ paramount role. No less important is the method by which the definition was established at the international level. A definition can be formulated in such a way as to leave little room for doubt about its scope or it can be worded in what could be described as open-ended terms. The latter increases the chance that actors within States, responsible for applying and interpreting the law, will play a major role in determining the scope of application of the definition. That is the case with human trafficking. The drafting history confirms that in order to accommodate many parties with divergent interests, aspects of the definition were deliberately left vague.¹²

Accordingly, the international definition of human trafficking leaves room for interpretation of its individual components.¹³ That is noteworthy in view of the high standards that should be met in terms of certainty and predictability in the law, particularly in criminal law.¹⁴ However, when little is known about a particular phenomenon at the time it is being criminalised and when there are strong priority reasons to secure consensus, it is perhaps preferable not to make the law too rigid, but to leave room for the courts to apply it in practice in specific cases. That was also the feeling in relation to human trafficking, especially with respect to forms of exploitation outside the sex industry, which many countries had not yet any experience addressing as a criminal phenomenon.

In sum, that human trafficking is part of transnational criminal law implies that states and domestic courts play a major role in the actual realisation of the human trafficking criminalisation. In this case, the open definition, presuming it is transposed without clarification into domestic law, can be considered problematic (in light of the principle of legal certainty), but can also be conceived as an invitation to domestic courts to flesh out its precise meaning in their respective local contexts. The next section reviews how the Dutch courts have approached that invitation.

The Human Trafficking Provision in the Dutch Criminal Code and its Interpretation by the Supreme Court

¹⁰ A.CONF.169/15/Add.1, 4 April 1995, https://www.unodc.org/documents/congress//Previous_Congresses/9th_Congress_199517_ACONF.169.15.ADD.1_Interim_Report_Strengthening_the_Rule_of_Law.pdf, retrieved 7 July 2015. For the history of this term, see: G Mueller, ‘Transnational Crime: Definitions and concepts’ in P Williams and D Vlassis, *Combating Transnational Crime: Concepts, activities and responses*, Frank Cass Publishers, London/Portland, 2001, p. 14.

¹¹ N Boister, ‘Transnational Criminal Law?’, *European Journal of International Law*, vol. 14, 2003, p. 955. See for a more thorough treatise of this subject by the same author: N Boister, *An Introduction to Transnational Criminal Law*, Oxford University Press, Oxford, 2012.

¹² For an overview of the key issues at stake during the drafting process of the Trafficking Protocol, see: A Gallagher, *The International Law of Human Trafficking*, Cambridge University Press, Cambridge, 2010, para 1.2.1. See also: Chuang, p. 610.

¹³ Every norm, however precisely formulated, in fact leaves some room for interpretation. Or, as the European Court of Human Rights succinctly expressed it in a landmark judgment: ‘However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances.’ ECtHR 22 November 1995, appl.no. 20190/92 (*C.N. v. UK*), para 34.

¹⁴ Regarding the meaning of the principle of legal certainty in criminal law, see: M Faure, M Goodwin and F Weber, ‘The Regulator’s Dilemma: Caught between the need for flexibility & the demands of foreseeability. Reassessing the *lex certa* principle’, *Albany Law Journal of Science & Technology*, vol. 24 (2), 2014, pp. 283–364.

In the Netherlands the main source of criminal law is the Dutch Criminal Code, but the scope of the human trafficking provision cannot properly be understood without taking into account decisions of the Supreme Court.¹⁵ Human trafficking for the purposes of sexual exploitation already was an offence under Dutch criminal law when the Trafficking Protocol was drafted. Human trafficking is a criminal offence under Article 273f of the Dutch Criminal Code (DCC). Legislators decided to take the Protocol definition almost verbatim, thereby widening the range of human trafficking to other forms of exploitation and ensuring alignment with international law. The offence stipulated in Article 273f paragraph 1, under 1, involves (1) an action (2) by certain means and with a specific intention (the criminal intent), (3) the purpose of exploitation. In a series of judgments, the Supreme Court has shed further light on how the individual components of this definition should be interpreted. This case law has concentrated on the interpretation of the means element, in particular ‘abuse of a position of vulnerability’, and the criminal intent element: ‘the purpose of exploitation’.

Abuse of a Position of Vulnerability (APOV) in the International Definition of Human Trafficking¹⁶

Abuse of a position of vulnerability (APOV) is one of the ‘means’ in the international definition of human trafficking and, apart from its inclusion in the Trafficking Protocol, it is not otherwise known to international law.¹⁷ According to the *travaux préparatoires* to the Protocol, the term is to be understood ‘as referring to any situation in which the person involved has no real or acceptable alternative but to submit to the abuse involved’.¹⁸ Essentially, this requires that in each individual case, it has to be established whether (1) there was a position of vulnerability, and, if so, (2) whether the suspect (intentionally) abused that position to secure the ‘act’ element of the offence. To prove this, therefore, it is necessary to consider the situation of both the victim and the suspect. Neither the Trafficking Protocol nor the various guidance material available elaborate on these requirements. An issue paper on this subject published by the UNODC in 2012, which included the results of a survey of law and practice in 12 countries, confirmed wide variation between States with regard to how this means is understood and applied. The main area of discussion concerned the question of what exactly constitutes a ‘position of vulnerability’ and the differences in the evidentiary requirements for establishing abuse of that vulnerability. Unquestionably, the term is very open-ended. Should a person’s precarious financial situation constitute a position of vulnerability, for example? Is a person’s status as an illegal immigrant in itself sufficient to presume the existence of a position of vulnerability? And what kind of intentional involvement is required to prove the defendant’s abuse of an established vulnerability? The issue paper provides important insight into these questions and includes a Guidance Note for Practitioners that sets out key issues for consideration.

Abuse of a Position of Vulnerability in the DCC and Case Law in the Netherlands

In Dutch case law, abuse of a position of vulnerability (APOV) plays a significant role. In a quantitative study into 83 Dutch cases conducted in 2012 by the Office of the Dutch Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, it appeared that in almost all cases APOV was included in the indictment. Moreover, in all cases of trafficking for labour exploitation that led to a conviction, APOV was established.¹⁹ APOV truly is—in the wording of the UNODC issue paper on this subject—‘[...] an inherent feature of most, if not all, trafficking cases’.²⁰

Not surprisingly, it did not take long for the Supreme Court to render its first decision on the interpretation of this means of trafficking. In 2009, the Court delivered a landmark judgment which set out the requirements that have to be met to prove the abuse element (the *Diamond City* case).²¹ Furthermore, the legislative history and Supreme Court judgments from before 2005, when the international definition was incorporated into the Dutch Criminal Code, are still relevant, since one of the means specified in the already existing Dutch definition of human trafficking is ‘abuse of the position of dominance arising from the factual relationships’. According to the Supreme Court, this concept

¹⁵ In this regard, the Dutch legal scholar Rozemond speaks about the ‘method of substantive criminal law’ by which he means that the exact scope of the substantive criminal law can only be found when the criminal provision in the Code and the Supreme Court’s judgments are taken together. K Rozemond, *De methode van het materiële strafrecht*, Ars Aequi Libri, Nijmegen, 2006 (in Dutch only).

¹⁶ This section draws on the relevant issue paper produced by the United Nations on this subject: United Nations Office on Drugs and Crime, *Abuse of a Position of Vulnerability and Other “Means” within the Definition of Trafficking in Persons*, UNODC, Vienna, 2013.

¹⁷ *Ibid.*, p. 17.

¹⁸ United Nations Office on Drugs and Crime, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, 2006, p. 347.

¹⁹ Dutch Rapporteur on Trafficking in Human Beings, *Trafficking in Human Beings. Case law in trafficking in human beings 2009–2012. An analysis*, BNRM, The Hague, 2013, para 4.4.3.

²⁰ United Nations Office on Drugs and Crime, *Abuse of a Position of Vulnerability and Other “Means” within the Definition of Trafficking in Persons*, UNODC, Vienna, 2013, p. 71.

²¹ *Diamond City* case. This decision is fully translated into English and available through the online UNODC Case Law Database. Retrieved 1 July 2015, https://www.unodc.org/res/cld/case-law/nld/2009/diamond_city_html/Diamond-English_version.pdf

overlaps with that of APOV.²² Many of the examples discussed by legislators in 1988, when the national definition of human trafficking was being debated in Parliament, would therefore also have been included under the term ‘abuse of a position of vulnerability’ today. Because the intention of the 1988 legislation was to provide extensive protection against every form of force or compulsion in the sex industry, legislators opted for a relatively broad approach: stipulating that the means ‘abuse of the position of dominance arising from the factual relationships’ is sufficiently proven ‘when the prostitute is in a situation or comes into a situation that is other than the circumstances accepted by an assertive prostitute in the Netherlands’.²³ Examples provided included indebtedness, drug addiction, not possessing documentation and lack of personal financial resources. In its 2009 judgment, the Supreme Court also ruled that a person’s illegal status places that person in a vulnerable position.²⁴

A vulnerable position alone however is not enough to prove abuse of a position of vulnerability. In the aforementioned judgment of 2009, the Supreme Court elaborated on the criteria that have to be met to establish such abuse. The judgment was rendered in a trafficking for labour exploitation case involving Chinese irregular immigrants who had, literally, begged the owner of a Chinese restaurant for work. Before looking at the criteria given by the Supreme Court, it is useful to focus at the facts. The Appeal Court in the underlying case established *inter alia* the following facts:

- The irregular Chinese immigrants involved as victim-witnesses had decided to come to the Netherlands of their own accord in order to earn money.
- They applied for work to the restaurant owner: a number also asked for meals and lodging and a number asked solely for meals and lodging. The last group then worked in exchange for meals and lodging, without receiving any further remuneration.
- None had any monetary debts or other obligations towards the restaurant owners. All were free to depart at any time they wished. A number of them had already worked in the Netherlands at one or more other locations.²⁵

The legal question that arose in this case was whether it could be said under these circumstances that the restaurant owner abused the position of vulnerability of the irregular migrants. In its consideration of the judgment of the Court of First Instance, the appeal court answered this question in the negative and considered that, in view of the facts mentioned above:

It is not possible to state that the accused and/or one or more others had taken the initiative or acted actively towards the aforementioned Chinese, for example by approaching them or persuading them to work in the restaurant. Rather, they responded to requests and, in a number of instances, pleas from the Chinese. In view of these circumstances it is not possible to find proved that the accused and/or one or more others purposefully abused a position of dominance arising from the factual relationships with or the weaker/vulnerable position of the Chinese in accommodating or harbouring them.²⁶

What the appeal court in this case did was interpret the means of APOV in such a way that it became an evidentiary requirement to determine whether an accused *purposefully* abused the vulnerable position, for instance by taking the initiative and playing an active role in the recruitment process of victims. The Supreme Court however did not follow the judgment. In contrast, it ruled that:

[...] adequate proof of ‘abuse’ has been submitted when it is established that the perpetrator must have been aware of the relevant factual circumstances of the person concerned from which the position of dominance arose or may be presumed to have arisen, in the sense that these circumstances gave cause to the perpetrator’s conditional intent. The same is applicable to situations in which the victim is in a vulnerable position as referred to in the provision. It should be noted that in addition to this requirement of intent another, more stringent, requirement of intent is applicable to the exploitation, namely the purpose of exploitation.

The judgment of the Supreme Court takes a different approach when establishing the evidentiary requirements to prove the abuse element in the context of APOV. Where the appeal court explicitly focusses on the degree of

²² Dutch Rapporteur on Trafficking in Human Beings, *Trafficking in Human Beings. Case law in trafficking in human beings 2009–2012. An Analysis*, BNRM, The Hague, 2013, para 4.4.5.

²³ *Ibid.*, p. 61. The authors purposely do not refer to the original documents, since these are only available in Dutch. The case law report of the Dutch Rapporteur however consists of an in-depth analysis of the history of the Dutch human trafficking legislation in English.

²⁴ *Diamond City*, para 2.6.2.

²⁵ *Diamond City*, para 2.2.2.

²⁶ *Ibid.*

initiative of the accused and his active role in the process of recruitment, the Supreme Court determined that a lower threshold was required. There is, according to the Court, already a presumption of abuse at such time as the offender is aware of the factual circumstances that create the vulnerable position. To put it another way: the conscious use of a position of vulnerability itself constitutes the abuse (one can call this the *use = abuse doctrine*). This decision confirms that the scope of this means is actually (in the specific circumstances of that case) and potentially (in relation to different circumstances) very wide. In this instance, the accusation being made against the suspect is that he acted, for example, by employing people in a vulnerable position, despite being aware of their vulnerability. To prove this, it does not have to be established that he also purposefully intended to abuse the position of those individuals in that situation.

This approach has been criticised, nationally and internationally.²⁷ Some authors are of the opinion that this interpretation contributes to an expansion of the definition, rendering it capable of including within its scope conduct that has little to do with the concept of trafficking. The UNODC issue paper on APOV states that '[...] the low standard set in some countries, whereby perpetrators are not required to have taken any initiative in order for the element to be proven, differentiates APOV from other means, all of which appear to require some level of action or initiative by on behalf of the alleged perpetrator'.²⁸ However, international law does not prevent States to use a broader interpretation of the definition. And although the term 'abuse' undeniably points in the direction of a perpetrator acting deliberately, the nature of the intent is not further elaborated upon in international law. Thus, the fact that the Dutch Supreme Court applies one of the lower forms of criminal intent—the conditional intent—fulfils the intent requisite. Finally, to establish human trafficking also requires proof of other elements. As shown below, the element 'purpose of exploitation' and its interpretation by the Supreme Court prevents the human trafficking definition from becoming overly inclusive.

The Mens Rea Element: Purpose of exploitation

In the definition of human trafficking, exploitation is primarily the purpose for which the actions are undertaken. To cite Gallagher, the purpose of exploitation constitutes the *mens rea* element of the international definition of human trafficking and therefore rests on intention: what was the suspect's intention while performing the acts and utilising the means?²⁹ It is beyond the scope of this article to discuss at length the relevance of intention in criminal law. In discussing 'purpose of exploitation', the main question is how to establish that a person specifically intended to exploit another person. To do that, it is necessary to (1) form a judgment of what constitutes exploitation and (2) formulate requirements regarding the degree to which the suspect's intentions can be ascertained. Suspects generally remain silent about their intentions, and in those cases, the court is compelled to establish intent on the basis of available evidence.

The Purpose of Exploitation in the Case Law of the Dutch Supreme Court

In the aforementioned judgment of 2009, the Supreme Court also ruled on how the 'purpose of exploitation' can be established. Before discussing its findings, it is important to note that 'purpose', as one of the forms of intent, already existed in Dutch criminal law. According to the standard formula adopted by the Supreme Court, a suspect can be said to have acted with a specific purpose if he must have realised that his actions would lead or have led to the other person being exploited and that, consequently, this was what the suspect wished.³⁰ The 'purpose' requirement therefore calls for more than *dolus eventualis*; the suspect must not simply have been aware of the possibility of a particular consequence, but must also have specifically desired that consequence: *dolus specialis*.³¹

To examine whether this requirement is met, the Court must have an idea of what constitutes exploitation, since only then can it address the question of whether the evidence that was furnished has shown to have been the suspect's purpose. Subsection 2 of the relevant Dutch law contains a non-exhaustive list of forms of exploitation, which follows more or less the wording of Article 3(a), second part, of the Trafficking Protocol.³² The logical course

²⁷ United Nations Office on Drugs and Crime, *Abuse of a Position of Vulnerability and Other "Means" within the Definition of Trafficking in Persons*, UNODC, Vienna, 2013, p. 81. See also the critical comment about this judgment by legal scholar Buruma. Dutch Supreme Court, 27 October 2009, ECLI:NL:HR:2009:BI7099, NJ 2010, 598 with comment by Y Buruma (in Dutch only).

²⁸ United Nations Office on Drugs and Crime, *Abuse of a Position of Vulnerability and Other "Means" within the Definition of Trafficking in Persons*, UNODC, Vienna, 2013, p. 81.

²⁹ Gallagher, p. 34.

³⁰ The standard evidential criterion for the purpose element is formulated in Dutch Supreme Court, 21 April 1998, ECLI:NL:HR:1998:ZD1031.

³¹ See for more on the modes of intention distinguished in criminal law: T Weigend, 'Subjective Elements of Criminal Liability' in M D Dubber and T Hörnle, *The Oxford Handbook of Criminal Law*, Oxford University Press, Oxford, 2014, chapter 22.

³² The list was recently supplemented with forced begging and exploitation in criminal activities with the implementation of the EU Human Trafficking Directive. Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in

to take in interpreting ‘exploitation’ would be to follow the various forms of exploitation listed in the law and the definitions of them that already exist at the international level or indeed in national law itself.³³ However, the Supreme Court took a different path and chose instead to formulate a number of factors that should apply in assessing every form of exploitation, regardless of the precise form of exploitation. Relevant factors in that context, the Supreme Court found, include the nature and duration of the work, the limitations it imposes on the individual concerned and the economic advantage accruing to the employer. Furthermore, the frame of reference for weighing these and other relevant factors should be the prevailing social standards in the Netherlands.³⁴ It is not necessary for all of the factors to apply. Ultimately, the various factors have to be weighed against each other; some will weigh more heavily than others in some cases, while different factors will weigh more heavily in others.³⁵ It is possible, for example, that in a particular situation the employer enjoys a major financial advantage but imposes relatively few limitations on the victim. This perspective can be particularly important in cases where victims do not self-identify as having been exploited. In other cases, it might not be the profit made that stands out, but rather the number of hours worked, the nature of the work or the limitations that the situation imposed on the employee. In the case of the Chinese immigrants, the Supreme Court qualified the decision by the Appeal Court that the purpose of exploitation could not be established as incomprehensible in view of the facts and the criteria mentioned above.³⁶

In a 2015 judgment the Supreme Court added another dimension to these criteria when it ruled that the outcome of this ‘weighing of perspectives’ can be different when the victim is a minor.³⁷ The Court’s meaning and the implications of this aspect of the judgement are both unclear, but it must be assumed that it calls on lower courts to include in their weighting the fact that the victim in the case is a minor.

The factors enunciated by the Supreme Court provide a clear framework that reflects the complexity of the element ‘purpose of exploitation’ and the variety of forms that exploitation can take and contexts in which it can occur. In practice, this framework serves as an important benchmark, which is decisive for establishing the parameters of the offence.

Conclusion

This article shows the discretion that domestic courts enjoy in clarifying the definition of human trafficking and thereby provides insight into the interaction between international and national law in cases involving transnational criminal law (as is the case in the field of human trafficking). This interaction is one of mutual dependence. On the one hand, national courts are bound to render judgment within the boundaries of the international parameters, in this case (the elements of) the international definition of human trafficking as integrated into national law. At the same time, we have seen that the use of open norms in that definition invariably requires domestic courts to engage in interpretation. In that context, relevant developments in the Netherlands have been the broad interpretation of APOV (and the enduring influence of national legislative history around this concept) and the decision to interpret ‘purpose of exploitation’ without making a distinction between the different forms of exploitation. The fact of such interpretation is not surprising. As the UNODC Studies confirmed, the international legal definition of trafficking is interpreted in significantly different ways and only assumes concrete form in the individual States.³⁸

The space left for domestic courts to give further meaning to the definition of human trafficking raises the question of how unavoidable differences in interpretations between different states should be understood. The answer depends on the perspective from which the interaction between international and national law is assessed. Some tend to opt for a more ‘sovereignist perspective’, arguing that criminal law is primarily the province of (democratically legitimated) national legislators.³⁹ On that basis, the room that is left to the courts to interpret the definition of human trafficking can be regarded as positive. In contrast, for adherents of a more uniform application

human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JBZ, 5 April 2011. The directive was published in the Official Journal of the EU, OJ 2011, L 101/1 on 5 April 2011.

³³ For instance, the existing definition of ‘forced or compulsory labour’ as laid down in the ILO Forced Labour Convention (ILO Convention of 28 June 1930 concerning Forced or Compulsory Labour). See for a recent analysis of other legal concepts surrounding the trafficking definition: N Siller, “‘Modern Slavery’ Does international law distinguish between slavery, enslavement and trafficking?”, *Journal of International Criminal Justice*, vol. 14, 2016, pp. 1–23.

³⁴ *Diamond City*, para 2.6.1.

³⁵ See also the advisory opinion of Advocate-General Knigge in the *Diamond City* case, https://www.unodc.org/res/cld/case-law/nld/2009/diamond_city_html/Diamond-_English_version.pdf, retrieved 7 July 2015 (available in English).

³⁶ *Diamond City*, para 2.6.2.

³⁷ Dutch Supreme Court 24 November 2015, ECLI:NL:HR:2015:3309 (not available in English). Repeated in Dutch Supreme Court, 5 April 2016, ECLI:NL:HR:2016:554.

³⁸ United Nations Office on Drugs and Crime, *Abuse of a Position of Vulnerability and Other “Means” within the Definition of Trafficking in Persons*, UNODC, Vienna, 2013; United Nations Office on Drugs and Crime, *The Role of Consent in the Trafficking in Persons Protocol*, UNODC, Vienna, 2014; United Nations Office on Drugs and Crime, *The Concept of ‘Exploitation’ in the Trafficking in Persons Protocol*, UNODC, Vienna, 2015.

³⁹ For more on this ‘tendency’, see: J Ouwkerk, ‘Criminal Justice beyond National Sovereignty’, *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 23, 2015, pp. 11–31.

of global definitions and norms, the discretion granted to domestic courts defeats the original purpose of developing a universal understanding of human trafficking, namely to harmonise national legal frameworks in order to facilitate more effective international cooperation.

Whatever viewpoint is taken, domestic courts will continue to play a major role in the application and interpretation of national definitions derived from the international human trafficking definition. To cite van der Wilt again, domestic courts are able to ‘refine, interpret and—therefore—change the law and they contribute to the further development of international (criminal) law’.⁴⁰ As noted previously, the international definition of human trafficking in the Trafficking Protocol still generates controversy, and many authors and organisations have addressed the complex issues that arise with regard to the scope of the definition. Remarkably, less attention has been paid to the application and interpretation of national definitions. Mindful of the prominent role of national judges, this is a subject that needs more attention. This new stream in the discourse on the legal definition of human trafficking is more than welcome.

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⁴⁰ H van der Wilt, ‘Domestic Courts’ Contribution to the Development of International Criminal Law: Some reflections’, *Israel Law Review*, vol. 42, 2013, p. 209.