

By Any Means Necessary:
*Towards a Comprehensive Definition of Coercion to Address
Forced Labour in Human Trafficking Legislation*

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Abstract

With the substantial rise in global migration in recent years, human trafficking and forced labour are becoming increasingly important international and domestic legal issues. A decade since the inception of the *Palermo Protocol*, States continue to grapple with the legal definitions associated with human trafficking. This is particularly evident with respect to the concept of coercion, and its prevalence in the realm of forced labour. This thesis explores the meaning of coercion as it applies to human trafficking, and particularly to forced labour, in an effort to address the complexity of this concept from both an international perspective, and specifically in its application to Canadian law against human trafficking. This thesis posits that coercion is non-physical in nature and is employed through threats and penalties which target particular vulnerabilities of victims. This thesis develops a legal conceptual framework to define coercion which can inform domestic and international law in improving the criminal justice response to human trafficking and applies this framework to the current Canadian *Criminal Code* offence against human trafficking to demonstrate existing gaps, and to propose legislative reform which can improve the investigation and prosecution rates of forced labour cases in Canada.

Résumé

La traite des êtres humains et le travail forcé présentent des enjeux juridiques nationaux et internationaux de plus en plus importants. Une décennie après la mise en œuvre du *Protocole de Palerme*, les Etats continuent à débattre des définitions juridiques associées à la traite humaine. Cela est particulièrement évident concernant le concept de contrainte, et sa prévalence dans le domaine du travail forcé. Ce mémoire explore la signification de la contrainte telle qu'elle s'applique à la traite des êtres humains, et plus particulièrement au travail forcé, afin d'adresser cette question complexe par une double perspective internationale et canadienne, en la confrontant à la loi domestique contre la traite des êtres humains. Ce mémoire postule que la contrainte est de nature non-physique et qu'elle est utilisée efficacement par des menaces et sanctions qui ciblent les vulnérabilités particulières des victimes. Ce mémoire développe un cadre juridique pour définir le concept de contrainte, afin d'informer les lois nationales et internationales dans un but d'améliorer la réponse pénale à la traite des êtres humains. Ce cadre juridique est ensuite opposé à la lettre de l'infraction portant sur la traite des êtres humains, telle que présentement comprise dans le *Code criminel du Canada*, afin de démontrer les lacunes existantes, et de proposer des réformes législatives qui pourront améliorer le taux de réussite des enquêtes et des poursuites portant sur le travail forcé au Canada.

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Introduction

The Elmvale 11: Legal Forced Labour in Canada

The Elmvale 11 – as they came to be known – thought they were on their way to Canada to work building two icebreakers for the Canadian Arctic. The men had been recruited under valid Canadian Labour Market Opinion papers – legal work permits. They were promised \$23 an hour plus overtime, food and lodging. To pay their way to Canada, many of the men sold belongings and gave as much as \$12,000 to labour recruiters in the Philippines to cover fees and transportation costs.

When the group arrived at Toronto’s Pearson International Airport, they were met by a woman claiming to be a representative of the recruiting agency. Their passports were confiscated. The men were brought to a house in Scarborough. Telephones were removed from the house, and the men were warned not to contact their families. Eight men were crammed into a basement, sleeping four to a bed. After a week of living in squalid conditions and uncertain about their future in Canada, the men were informed that the icebreaker project had been cancelled; they would now be transported to their new “job site”, an abandoned farmhouse outside of Elmvale, Ontario, in the isolated countryside.

The conditions of their new “home” were deplorable: one worker reported “outside, the grass was five feet tall. Inside there was mud on the floor everywhere.” The used mattresses, sheets and towels were filthy; there was no food in the fridge. The men were sent to work at plants and factories, digging ditches, and picking up garbage on the boss’s estate. Affidavits prepared by the workers document long work shifts and no days off: one man worked a 17-day stretch; another reported working a 24-hour stint cleaning a “beer cage” at a beverage factory. Threatened with deportation and desperate for the wages promised, the men did any menial job thrown at them. When a worker inquired about pay with the new boss, he replied, “don’t you guys know that I spent \$4,000 to get you?” The men were never paid their promised wages.

Six weeks into the ordeal, one man escaped from his work detail in Hamilton and managed to contact the Filipino consulate. The remaining men were rescued days later. “This was nothing short of slavery” said Frank Luna, the labour attaché with the Filipino consulate, “this was a chain gang without the chains”. Yet, the RCMP never laid charges in this case. RCMP Constable Julie Meeks, who conducted the initial investigation, cites the wording of the Criminal Code definition of “exploitation” as preventing charges in this case. “The way exploitation is phrased in the criminal code, they have to fear for their safety or their lives ... they just didn’t have that fear”.¹

This case precisely fits the definition of human trafficking in the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*². The men were deceived about their job situation, their wages, and their living and working conditions. They were isolated and their movements were restricted. Their passports were confiscated and they were threatened with deportation when they complained about working conditions. They were led to believe they owed a debt to their employer. These are classic examples of coercion and control methods used by human traffickers in labour exploitation scenarios. Yet, under Canadian law, this is insufficient to prosecute under the crime of human trafficking. The gap in the *Criminal Code* provision against human trafficking illuminated by this case sparks an interesting debate requiring significant and urgent attention – what does coercion mean in the context of human trafficking for forced labour?

¹ Facts and quotes of this case taken from: Dale Brazao, “Exploited Workers’ Canada’s ‘Slave Trade’,” *The Toronto Star* (30 August 2008) online: The Toronto Star <<http://www.thestar.com>>; see also, Benjamin Perrin, *Invisible Chains: Canada’s Underground World of Human Trafficking* (Toronto: Penguin Group Canada, 2010) at 175-6 [Perrin].

² *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, GA Res. 55/25, UNODC, 2000 [Palermo Protocol].

Human Trafficking as a National and International Concern

The United Nations estimates that 2.5 million people are victims of human trafficking at any one time; 18% of those are estimated to be trafficked for forced labour.³ Labour migration has been on the rise as a global phenomenon in the last decade; for example, Canada now intakes over 150,000 temporary migrant workers per year⁴ – workers brought to Canada through the LMO process like the Elmvale 11. Labour trafficking can often be characterized as “3D work”: dirty, dangerous and difficult,⁵ and is typically found in sectors dominated by migrant work and troubled by persistent labour shortages, such as: agriculture, construction, cleaning, nursing, domestic work, and hospitality.⁶ These industries typically provide jobs of low pay and low skill level, and require a large number of flexible, seasonal workers.⁷ Yet, despite the growing phenomenon of labour migration and increasing recognition of labour trafficking as a significant portion of overall human trafficking, research and activity to combat this form of trafficking and its related issues continue to move slowly.

Despite cases like the Elmvale 11, Canada, like most Global North countries, does not appear to recognize labour trafficking as a significant domestic issue. While scholarly literature has identified not only the existence of forced labour in Global North countries, but the industries in which this commonly occurs, on-the-ground efforts to combat this form of human trafficking appear to remain a low priority amongst relevant actors. Although there are many complex facets involved in effectively combating this crime, a lack of accurate meaning and interpretation of

³ “Human Trafficking FAQs” online: United Nations Office on Drugs and Crime <www.unodc.org>.

⁴ “Working Temporarily in Canada” online: Citizenship and Immigration Canada <www.cic.gc.ca>.

⁵ International Labour Conference, *Towards a Fair Deal for Migrant Workers in the Global Economy* (Report IV), ILO, 92nd sess. (2004), at 11.

⁶ *Ibid*

⁷ Dowling et al., *Trafficking for the purposes of labour exploitation: a literature review*, online: Home Office Research Development Statistics <<http://www.homeoffice.gov.uk/rds>> at 7.

legal texts, coupled with a lack of understanding of the unique methods used in labour trafficking likely play a significant part in victims and cases remaining unrecognized and under-prosecuted. This is aptly demonstrated by the above case study of the Elmvale 11, where no charges were laid because of the definition of human trafficking – or its interpretation – in the Canadian *Criminal Code*.

The crime of human trafficking can be broken down into three components: the *act*, the *means*, and the *purpose* of exploitation. The component requiring the greatest interpretation, and therefore likely being the most difficult obstacle to proper identification and prosecution, is the *means*. Within the enumerated *means*, the concept of coercion is particularly ambiguous and controversial, but is the most apt to apply to labour trafficking scenarios. The objectives of this thesis are to explore and define coercion in a way which can capture the primary trends of labour trafficking in Global North countries; to evaluate the existing law in Canada in relation to the findings; and, to identify best practices from which to propose reform to Canada's current laws.

This thesis will focus on international non-sexual labour trafficking. The distinction between sexual and non-sexual labour trafficking is important not only because of the breadth of existing research on the former, but because the author anticipates that some coercive tactics are unique, or attach unique importance, to victims in non-sexual labour trafficking scenarios. In addition, while the concept of victimization in sex trafficking is more readily apparent because of the violation of bodily integrity, the impact of non-physical coercive tactics more prevalent in labour trafficking is not as obvious or easily accepted without explanation and analysis. This thesis will focus on international, as opposed to domestic trafficking, and on trafficking to Global North

nations, because of the unique issues and circumstances presented in these contexts. International trafficking, particularly in the context of labour exploitation, is heavily founded on and overlaps with issues of economic plight and migration. More importantly, the environments and industries which employ labour trafficking victims in Global North countries may be unique from other nations, as these industries are often built and regulated under a significant legal structure intended to protect labour and employment rights; yet the demand for cheap, exploitable labour in these industries continue to erode the basic legal protections intended to apply to all individuals working in these countries. Finally, as mentioned earlier, Global North nations have yet to recognize labour trafficking as a significant concern within their territories despite a growing body of evidence to the contrary.

A Brief History of the Palermo Protocol

The *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*⁸ (hereafter the *Palermo Protocol*) was created as a supplement to the *UN Convention Against Transnational Organized Crime*⁹, and was entered into force in 2003. The *Convention* was created primarily as a tool of international criminal law which would increase international cooperation and prosecution of organized crime syndicates. The *Palermo Protocol* is unique from other international treaties in that it not only sets out obligations with respect to criminal law measures, but also calls on States to develop and implement concrete measures to prevent human trafficking and protect victims of human trafficking. In this way, the *Palermo Protocol* sets out a comprehensive framework for combating human trafficking. The implementation of the *Palermo Protocol* has, in practice, placed significant emphasis on the additional non-criminal

⁸ *Palermo Protocol*, *supra* note 2.

⁹ *United Nations Convention Against Transnational Organized Crime*, 15 November 2000, 40 ILM 335 (Hein).

measures of prevention and protection, and thus, the *Protocol* has evolved to serve a dual purpose: an instrument of criminal law, and of human rights protection. Since coming into force in 2003, 143 countries have become parties to the *Palermo Protocol*.¹⁰

Important Elements of Human Trafficking: Act, Means, and Purpose

Human trafficking is defined internationally by the *Palermo Protocol*, which states:

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;¹¹

To summarize, the crime of human trafficking involves three aspects:

- (1) an *act* (recruitment, transportation, transfer, harbouring, or receipt);
- (2) a *means* (threat, use of force, coercion, abduction, fraud, deception, abuse of power, abuse of position of vulnerability, or giving or receiving of payments or benefits); and,
- (3) a *purpose* (sexual exploitation, forced labour, slavery or slave-like practices, servitude, or organ removal).

Trafficking in persons can be international or domestic. It may or may not involve movement across borders or at all. In the international context, trafficking can occur from developing to developed countries, or between developing or developed countries themselves. In short, there is

¹⁰ “Signatories to the United Nations Convention against Transnational Crime and its Protocols” online: United Nations Office on Drugs and Crime <www.unodc.org>.

¹¹ *Palermo Protocol*, *supra* note 2, art 3(a).

no specific “pattern” of human trafficking; it is an opportunistic and flexible crime that adapts to new trends either to escape capture or to capitalize on more profitable trades.

A common myth regarding human trafficking is that it requires the movement of persons. As can be seen by the above definition, while movement is one act that may occur within the context of trafficking, it is not required. Any other of the listed acts will constitute trafficking where a listed means is employed. This is important to the effectiveness of the definition as a victim may be moved legally or consensually, and find him or herself in a trafficking situation only upon or after arrival to a destination, such as was seen with the case of the Elmvale 11 set out at the beginning of this introduction.

Another important feature of the human trafficking definition is that consent of the victim is irrelevant where one of the listed means are used, or where the victim is a child.¹² Where a listed means is used, a victim cannot be said to have freely consented as the truth of their situation was unknown to them at the time of this choice.

...[O]nce the elements of the crime of trafficking, including the use of one of the identified means (coercion, deception, etc.), are proven, any defence or allegation that the victim “consented” is irrelevant. ... While being aware of the nature of the work, the person may have been misled as to the conditions of work, which have turned out to be exploitative or coercive.

This provision restates existing international legal norms. It is logically and legally impossible to “consent” when one of the means listed in the definition is used. Genuine consent is only possible and legally recognized when all the relevant facts are known and a person exercises free will.¹³

¹² *Palermo Protocol*, *supra* note 2, art 3(b),(c).

¹³ *Model Law against Trafficking in Persons* (Vienna: United Nations, 2009) at 34 [*Model Law*].

This is also important when, as described in the above quote, the movement of a person or entry into the work situation was consensual, but the conditions of work are exploitative and the person is unable to freely change or leave their situation, as was the case for the Elmvale 11.

Labour Trafficking: A Spectrum of Exploitative Practices

This research aims to explore the unique facets of non-sexual labour trafficking.¹⁴ To better understand the specific scope of this research, “labour trafficking” must be given a clear definition. The *Palermo Protocol* cites several exploitative situations that would fall under the umbrella term of labour trafficking, including: forced labour, slavery or slave-like practices, and servitude. In addition, debt bondage is generally accepted as a form of labour trafficking. While these terms are not defined in the *Palermo Protocol* itself, references are made to other international treaties under which these terms have been defined. However, when adopting definitions from treaties created in other contexts, the definitions must be interpreted in a manner consistent with the purpose of the treaty importing the terms.

Forced labour is defined as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.¹⁵ This definition is extremely broad and has the ability to apply to many, or most, labour trafficking situations, as it encompasses “any work or service” performed “under the menace of any penalty”. It is important to note that “penalty” is construed broadly so as to include “a loss of

¹⁴ Although definitions of human trafficking in national legislation, or in scholarly debate, may not distinguish between trafficking for sexual exploitation and trafficking for labour exploitation (as sexual services are sometimes seen as and included within labour and services generally), this research wishes only to address the issue of non-sexual labour trafficking as several underlying policy and legal issues are necessarily unique to this form of trafficking; the distinction for the purposes of this research is not related to any position on the issue of sexual services as “work”.

¹⁵ *Convention concerning Forced or Compulsory Labour*, 1 May 1932, 39 UNTS 55, art 2 [*Forced Labour Convention*].

rights or privileges”, not just penal sanctions.¹⁶ While “menace of penalty” does imply that a threat is, at minimum, necessary, the subject or type of threat applicable to this definition is very broad and can include, for example, a threat against immigration status, non-payment of wages or other moneys, or restriction over movement of the worker.¹⁷ Finally, the forced labour definition adopted from the *Convention concerning Forced or Compulsory Labour* requires that the worker did not offer him or herself voluntarily for the work or services exacted. This issue of voluntariness should be interpreted in light of the consent provision under the *Palermo Protocol*, so that when one of the listed *means* is employed, the issue of consent or voluntariness is moot.

For the purposes of this research, it is not necessary to define “slavery or slave-like practices” or “servitude” as these can both be seen as falling under the broad general definition of forced labour above, although more severe in the nature of the relationship and impact on the victim.

Debt bondage is predicated on a situation of exchange whereby one party provides a loan to another who, in return, provides labour or services to repay the debt. When, however, the value of the work is not applied towards the liquidation of the debt, or inflated fees and interest are added to the debt so that the labourer is unable to reasonably pay off the debt, the situation becomes one of debt bondage.¹⁸ While the psychological underpinnings of this, and other, methods of trafficking are complex, this impact can be drawn back to the issue of consent. Because a menace of penalty, or coercion, is being used against the worker, they cannot be said to give true and free consent to their situation, even though it may *appear* that the individual is

¹⁶ ILO, *Human Trafficking and Forced Labour Exploitation, Guidance for Legislation and Law Enforcers*, (Geneva: International Labour Organization, 2005) at 20 [*ILO Guide*].

¹⁷ *Ibid.*

¹⁸ *UN Supplementary Convention on the Abolition of Slavery, Slave Trade and Institutions and Practices Similar to Slavery*, ESC 608(XXI), OHCHR, 1956, art 1(a).

choosing to remain in this situation. The absence of overt physical control does not vitiate the criminality of the trafficker's conduct.

Based on the above definitions, which have many overlapping features, a broad definition of labour trafficking has two primary and constant components: the provision of labour or services, and the use of unlawful means to obtain the labour or services. Unlawful means can be sufficiently limited in scope to the listed means under the *Palermo Protocol* and any additional means which would appropriately fall within the meaning of "menace of penalty" found under the *Convention concerning Forced or Compulsory Labour*.

Not all labour exploitation rises to the level of trafficking in persons for forced labour. While in practice it may be difficult to distinguish labour trafficking from lesser forms of labour exploitation, the tactics used to gain the labour or services of an individual can assist in identifying whether a situation rises to the level of trafficking. As we will see in Chapter 1, many of the tactics used in labour trafficking situations are threats and penalties inflicted on the victim with the direct purpose of gaining compliance by manipulating the victim's alternatives or perceived ability to leave the situation. However, the nuances and subtlety used in labour trafficking create difficulty in establishing when a situation has risen to this level.

Content Overview

This thesis is divided into two parts. Part 1 will focus on the concept and scope of coercion for the purposes of trafficking for forced labour. To understand what coercion is and what it should mean within the context of labour trafficking, it is best to first begin with what we know of

coercion in labour trafficking. Chapter 1 will set this context by examining the scope and intended meaning of coercion under the *Palermo Protocol*, focusing on related *means* of trafficking, as well as the acute connection between coercion and forced labour. Chapter 1 will then go on to outline and discuss the common coercive tactics which have been found to exist in labour trafficking scenarios, and explore why these tactics – which remain relatively absent of physical violence – are so effective against their victims. Chapter 2 will set out a conceptual framework for defining coercion within the legal context of human trafficking by drawing on philosophical theories of coercion, adapting previous theories to the specific issue of human trafficking, and setting out the critical legal elements of the conceptual framework.

Having set out a clear framework for defining coercion in the context of labour trafficking, Part 2 will turn to an analysis of the existing Canadian law criminalizing human trafficking, applying the conceptual framework to illuminate current gaps and identify best practices to address these gaps. Chapter 3 will examine Canada's *Criminal Code* definition of human trafficking, with a particular focus on whether, and to what extent, this definition encompasses the defining features of coercion as set out in Part 1. This chapter will establish serious shortcomings with respect to the *Criminal Code* definition based primarily on the restriction of *means* and consent to only those scenarios involving a "fear for safety", which may account, in part, for the lack of investigation and prosecution of labour trafficking cases in Canada to date. Chapter 4 will examine alternative approaches to address the gaps currently existing in the *Criminal Code*, looking to domestic, comparative, and international law. This chapter will focus on analysing and proposing alternatives that can both better address the *means* of trafficking and the issue of consent. This chapter will conclude by setting out three alternative definitions to improve the law

in Canada. While Canada's legal shortcomings are the focus of the research, these findings exemplify a more general trend that likely exists in many countries throughout the world; therefore, a summary of recommendations can be used in future application to create a more comprehensive framework for combating labour trafficking worldwide, as well as to improve the status of the law in Canada.

Part 1: Defining the Critical Elements of Coercion for the Purposes of Human Trafficking Legislation

As reflected in the introduction to this thesis, coercion remains a significantly problematic term in defining and combating human trafficking in national legislation. This is particularly so where trafficking for forced labour is concerned. A decade since the inception of the *Palermo Protocol*, there is a need for States to step back and revisit the issue of definitions. While many countries now have criminal legislation specifically dealing with human trafficking, the consistency and clarity of definitions between States and in relation to the *Palermo Protocol* is relatively low. The need for harmonization and clarity in definitions and legal provisions is becoming increasingly evident as actors at many levels in the field begin to realize the limitations currently existing as a result of lack of harmonization: law enforcement training and operations are less effective and accurate; international and inter-departmental cooperation suffers; in general, fewer cases are investigated, fewer victims identified, and fewer perpetrators brought to justice. A broad concept of "coercion" is a key element in effective human trafficking legislation.¹⁹ This Part seeks to explore a meaning of coercion which accurately reflects the common control tactics often used in labour trafficking. The overarching aim of this analysis is to provide a definition of

¹⁹ United States Department of State, *2010 Trafficking in Persons Report*, online: United States Department of State <www.state.gov> [2010 TIP Report].

coercion which can be used to increase harmonization and clarity in the implementation and interpretation of domestic human trafficking laws.

Chapter 1 will set the necessary context from which to build a theoretical framework to define coercion for the purpose of trafficking for forced labour by examining the root legal instrument, the *Palermo Protocol*, as well as the on-the-ground knowledge about trafficking for forced labour and the control mechanisms at play in these scenarios. This chapter begins by examining the intended meaning and scope of coercion in the *Palermo Protocol*, derived from a contextual reading of the legislation, doctrinal analysis of the definition of human trafficking, and an examination of the background and drafting documents to the *Protocol*. This first section will illuminate three important factors in building a conceptual framework for coercion: coercion as a form of non-physical force; coercion and its relationship to abuse of power and abuse of a position of vulnerability; and, the strong link between coercion and forced labour. The following section will discuss the underlying conditions and root causes for victims of labour trafficking, and the common indicators and control mechanisms used in forced labour scenarios. This information will provide a deeper understanding of the context in which labour trafficking occurs, and how coercion is successfully used to induce victims of forced labour. Finally, this section will provide case studies and draw out trends which can be later used to evaluate the conceptual framework developed in Chapter 2.

Chapter 2 will develop a conceptual legal framework for defining coercion which can guide the development of domestic laws aimed at combating human trafficking. This chapter will begin by drawing on philosophical theories that have developed a formula for coercion, and will build

upon these theories to adapt to the specific circumstances of human trafficking, and to the specific requirements of legal drafting. This chapter will focus on two primary sets of conditions necessary to develop a legal framework for coercion: coercive mechanisms; and, the nullification of consent. The first section will examine the conditions necessary to identify conduct as coercive. This section will focus primarily on establishing coercive speech, although the primary conclusions will apply equally to coercive acts. Two primary conditions necessary to prove the existence of a coercive mechanism will be set out: the creation of an additional negative consequence for the victim; and, the authority of the trafficker to carry out the consequence. This section will also discuss in more depth the distinction between exploitation and coercion, and the necessary confines or restrictions in defining what constitutes a coercive mechanism for the purposes of criminal law. The next section will explore the issue of consent and agency, and will develop a standard to determine when consent is nullified by the use of a coercive mechanism. This section will import key findings in relation to victim vulnerabilities and underlying contexts discussed in Chapter 1 to both gain a deeper understanding of issues surrounding consent, and to ensure such findings are reflected in the development a legal test to evaluate consent. This section will conclude by proposing a two-prong test for determining the baseline for consent in situations of human trafficking involving coercive mechanisms. This chapter will conclude by piecing together the components of the previous sections to put forth a complete conceptual framework, or legal definition, of coercion for the purposes of trafficking for forced labour. This complete framework will be tested against the primary findings from Chapter 1 to determine the appropriateness of its scope and applicability in capturing trafficking for forced labour.

Chapter 1: Establishing the Underlying Context of Coercion in Trafficking for Forced Labour

To build a conceptual framework for coercion as it should be understood in relation to human trafficking, it is necessary to examine the underpinnings of coercion, both in terms of how it operates in forced labour scenarios, and its intended meaning and scope as a legal term. This chapter seeks to set out this underlying context of coercion to inform the development of a conceptual framework which can accurately reflect an understanding of coercion as both a legal concept and as it appears in documented cases of labour trafficking. This chapter begins by examining the meaning and scope of coercion as found in the *Palermo Protocol*. The analysis under the *Protocol* focuses primarily on the surrounding text of *means* present in the definition of human trafficking, as well as background documents which provide for additional interpretation and guidance in discerning the intended scope and application of coercion as an individual *means*. This chapter then goes on to explore how coercion operates and appears in documented cases of forced labour in order to better engage with the critical elements and underlying root factors that make coercion an effective *means* of exploitation. This section uses case studies to illustrate various aspects of forced labour indicators, and how these indicators work in concert, and target root vulnerabilities, to achieve control through coercion without the use of physical violence. The key findings drawn out from this chapter will enable a conceptual framework of coercion to better capture the reality of coercion in forced labour situations.

I. Examining the Intended Scope and Meaning of Coercion under the International Legal Definition of Human Trafficking

To begin to achieve a better understanding of the meaning of coercion for the purposes of human trafficking, it is best to begin with the international legal definition adopted in the *Palermo Protocol*. As set out in the introductory chapter, the *Protocol* establishes a three-part definition of human trafficking:

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, **by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits** to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs[.]²⁰ [emphasis added]

The definition contains three elements: an *act*, a *means*, and a *purpose*. Translating these three parts to conform to the components of general criminal law, the *act* constitutes the *actus reus* of a crime. Some scholars have also grouped the *means* within the *actus reus* component²¹; however, the *means* should more appropriately be thought of as the *mens rea* of the crime as the proof of *means* establishes the intent of the offender to exploit and traffic an individual. Finally, the *purpose* element establishes additional necessary conditions that must be fulfilled, namely the target, or outcome, of the exploitation.

This analysis will focus on the *means* component of the definition, as this is the group within which coercion is contained, and is also arguably the most critical element in establishing a case of human trafficking, given that it is the *means* which establishes intent, and therefore, is the true

²⁰ *Palermo Protocol*, *supra* note 2, art 3(a).

²¹ See Anne T Gallagher, *The International Law of Human Trafficking* (New York: Cambridge University Press, 2010) at 31 [Gallagher].

determinant of the crime. The *purpose* element should be understood as the outcome or target of the exploitative *means* used to induce the victim, rather than as the primary determinant of the crime. While the target, or *purpose*, of exploitation may be any work or service, it is the *means* employed to induce an individual to carry out that work or service which distinguishes human trafficking from other forms of labour exploitation, and from consensual arrangements. This distinction, and its importance, will become clearer in the next chapter, when examining a conceptual framework for defining coercion.

Direct, Indirect, and Complementary Means to Coercion

To begin with an analysis of coercion, it is necessary to examine the other *means* listed in the *Protocol* as this will shed light on the intended scope of “coercion” in relation to, or opposition to, other methods which may be used to exploit victims of human trafficking. The listed means under the *Protocol* include: threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits. To begin, these *means* can be broken down into two distinct categories: direct, and indirect means.²² Direct means are those which actively pressure the victim to submit to the exploitation; in other words, the victim is aware of the pressure being exerted on him or her. In contrast, indirect means aim to mislead or “trick” the victim into submission. Indirect means, therefore, are limited to fraud and deception. All other listed means can be considered direct means.

Examining the direct *means*, the meaning of some is self-evident, even absent an express definition, such as: the use of force, threats of force, and abduction. Other *means* have been have

²² See Gallagher, *supra* note 21 at 31-2.

been specifically defined in the *Protocol*, including abuse of power and abuse of a position of vulnerability. Abuse of a position of vulnerability is defined in the *travaux préparatoires* as: “any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved”.²³ However, despite concerns that coercion would be difficult to establish and define in practice²⁴, no elaboration or definition of this *means* was provided in the *Palermo Protocol* or its background texts. Therefore, to illuminate the intended meaning of coercion, it must be examined in relation to the other direct means it is listed with under the *Protocol*.

In the final text, coercion is grouped as a means with “threat or use of force”. This is consistent with the common definition of “coercion” found in, for example, the Oxford Dictionary: “the action or practice of persuading someone to do something by using force or threats”.²⁵ Therefore, one form of coercion contemplated by the drafters is the threat or use of force. However, it is also clear from the wording (threat or use of force **or other forms of coercion**) that coercion may take on methods or conduct outside of force. The explicit inclusion of “use of force” can be interpreted to address situations of physical force, looking at the plain meaning of this text. Similarly, the inclusion of “other forms of coercion” as a separate and distinct *means* connotes an intention by the drafts to encompass non-physical forms of force, such as psychological force or pressure. The idea of coercion as psychological in nature was expressed in the *travaux préparatoires*: “...it was suggested that the article should focus on the coercive (physical and **psychological**) nature of such trafficking ...”.²⁶ The definition provided by the Oxford

²³ *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols*, UN Doc A/55/383/Add.1 UN, 3 November 2000 [*Travaux Préparatoires*].

²⁴ *Travaux Préparatoires*, *supra* note 23 at 352, n4.

²⁵ *Compact Oxford English Dictionary*, s.v. “coerce”: online <www.askoxford.com>.

²⁶ *Travaux Préparatoires*, *supra* note 23 at 334 [emphasis added].

Dictionary, which described the objective of coercion as “persuading” an individual to comply, also connotes a psychological element. From this analysis, two important features of “coercion” can be drawn out: (a) coercion is an act of force or active pressure; and, (b) coercion includes non-physical forms of force and threats, particularly the use of psychological pressure.

The other direct *means* which may shed additional light on the scope of coercion are the abuse of power and abuse of a position of vulnerability. As mentioned earlier, abuse of a position of vulnerability is defined in the *travaux préparatoires* as: “any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved”.²⁷ Positions of vulnerability have been interpreted to include: mental or physical infirmity, age, pregnancy, and immigration status, among others.²⁸ Therefore, this *means* appears to target situations where a trafficker utilizes the position of vulnerability of the victim to pressure him or her into submitting to the trafficker’s demands. The *means* of abuse of power, though ultimately left undefined, appears to refer to situations where a trafficker leverages their position of authority over the victim in order to pressure him or her into submitting to the trafficker’s demands. These two *means* appear to highlight particularly fragile or unbalanced power dynamic situations and, as will be seen, should be considered as complementary means to coercion. The active *means* employed in these two scenarios is “abuse” which is a broad term capable of encompassing several methods of exerting pressure or force. If the term “abuse” is viewed as a spectrum, on the more egregious end, “abuse” could easily equate to coercion, such that, at this end of the spectrum, the abuse used to pressure an individual in a vulnerable situation rises to the level of coercion.

²⁷ *Travaux Préparatoires*, *supra* note 23.

²⁸ *Model Law*, *supra* note 13 at 9.

The link between coercion and “abuse” of certain situations also appears to have been contemplated during the drafting of the *Protocol* itself. The concepts of coercion and abuse of power or of a position of vulnerability were intertwined extensively in the drafting of the *Palermo Protocol*. For example, in the rolling text of the definition of trafficking in persons in the *travaux préparatoires*, coercion was first grouped with the “abuse of authority”.²⁹ In another proposal, coercion was grouped with “or through the abuse of the particular vulnerability of an alien due to that person’s illegal or precarious administrative status, or through the exercise of other forms of pressure or abuse of authority such that the person has no real or acceptable choice but to submit to such pressures or abuse of authority”.³⁰ Finally, a third proposal listed coercion within the other enumerated *means* as follows: “coercion or abuse of power for the purposes of slavery, forced labour ...”.³¹ Like earlier proposals, this draft did not separate coercion from the concept of abuse of power through the use of a comma, or by grouping it with other means such as force and threats.

What is clear from this analysis is that coercion was consistently considered alongside the concepts of abuse of power and abuse of position of vulnerability, which not only results in complementary terms in the final text, but also connotes an understanding of coercion well beyond the use or threat of physical force. Examining coercion in relation to the complementary *means* of abuse of power or of a position of vulnerability sheds light on the breadth of this *means* of trafficking, and adds depth to the second identified feature of coercion illuminated earlier: (b)

²⁹ *Travaux Préparatoires*, *supra* note 23 at 343; although “abuse of authority” was later redacted due to disputes over the meaning of “authority”. However, this concept links very closely to “abuse of power” and it is likely that “abuse of power” was developed as an alternative to the disputed category of “authority”.

³⁰ *Travaux Préparatoires*, *supra* note 23 at 354.

³¹ *Travaux Préparatoires*, *supra* note 23 at 357.

coercion includes non-physical forms of force and threats. In addition to having previously identified psychological coercion as one form of non-physical force, this analysis establishes that coercion can also include situations where pressure is created through leveraging the power imbalance of the relationship between the parties, or the fragility of the victim's personal circumstances.

The Connection between Coercion and Forced Labour

Specifically in relation to labour trafficking, the *Palermo Protocol* also demonstrates an acute understanding of the connection between this type of exploitation and coercion, and the concept of coercion seemed to be emphasized in its relation and importance to forced labour. Coercion is clearly linked in the background texts to the concept of forced labour. For example, several attempted definitions of forced labour explicitly included the means of coercion: “forced labour shall mean all work or service extracted from any person under the threat [or][,] use of force [or coercion] ...”³²; “forced labour shall mean labour or services obtained through force or the threat of force, or the use of coercion ...”³³ These proposed definitions of forced labour clearly sought to elaborate on the definition found in the *ILO Convention Concerning Forced or Compulsory Labour*, which defines forced labour as: “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”³⁴, by explicitly linking the concept of coercion to this form of trafficking.

The concept of a “menace of penalty”, the *means* element in the *ILO Convention*, can be considered as a complementary *means* to coercion, albeit outside the parameters of the *Palermo*

³² *Travaux Préparatoires*, *supra* note 23 at 340.

³³ *Travaux Préparatoires*, *supra* note 23 at 342.

³⁴ *Forced Labour Convention*, *supra* note 15, art 2.

Protocol. The idea of “penalty” was further elaborated on in specific reference to trafficking in persons under the *Model Law against Trafficking in Persons*, which stated that a “penalty” can include threats of denunciation to police or immigration authorities, confiscation of identity papers, economic penalties linked to debts, and non-payment or loss of wages.³⁵ This further supports the position that the scope of coercion under the *Palermo Protocol* includes elements of non-physical force, and specifically the non-physical elements identified above. In addition to the two forms of non-physical force discussed earlier, this analysis provides a more detailed elaboration of non-physical forms of coercion. Bringing the analysis of this section altogether, the intended scope of coercion under the *Protocol* can be said to encompass: (a) psychological pressure; (b) abuse of power in serious circumstances; (c) abuse of a position of vulnerability in serious circumstances; (d) economic penalties; and, (e) abuse in relation to immigration status. Overlaying these particular forms of coercion is the notion that the power imbalance between parties, and the fragility of the victim’s circumstances, enables particular acts of coercion to be effective.

II. Understanding Human Trafficking through the Underlying Circumstances of the Victim and Indicators of Forced Labour

Indicators of forced labour and human trafficking aim to illuminate the prevalent control tactics and targets of pressure used to do induce victims into complying with the demands of the trafficker. A common theme recurring in studies and scholarship examining indicators of trafficking for forced labour is the relatively rare use of physical violence or abuse to control the

³⁵ *Model Law*, *supra* note 13 at 16.

victim.³⁶ Traffickers of all forms are using increasingly subtle means of exploitation in their methods.³⁷ The *means* of control, or exploitation, target the unique vulnerabilities of the victims, and leverage these vulnerabilities to induce the victim into compliance. An in-depth analysis of the prevalent control tactics used in forced labour scenarios will draw out both critical elements of the coercive relationship, as well as provide for a deeper understanding of the complex issues at play in such scenarios. This will serve to inform a conceptual framework for coercion that can accurately reflect these realities.

This section will begin by discussing the underlying pressures and context for labour migration, as this will facilitate a deeper understanding of the power and impact of identified coercive tactics. This section will then examine the indicators – or control methods – used in trafficking for forced labour situations. Indicators of labour trafficking are the on-the-ground control tactics used to gain compliance from victims. The presence of a single indicator may or may not establish a case of human trafficking, depending on all the surrounding circumstances and facts of a given case; however, as the following section will establish, these indicators are often found to exist in concert, and the accumulation of these tactics can result in situations of effective control and forced labour. Indicators of forced labour can be grouped into three main categories: economic penalties and threats; threats and abuses against immigration status; and, physical and social isolation.

³⁶ See Jill E.B. Coster van Voorhout, “Human trafficking for labour exploitation: Interpreting the crime”, 2 *Utrecht Law Review* 44 (2007) at 50; see also ILO, *The Cost of Coercion* (Geneva: International Labour Organization, 2009) at 13.

³⁷ 2010 *TIP Report*, *supra* note 19.

Understanding the Underlying Context in Which Forced Labour Occurs

Before the indicators – or control methods – used in trafficking for forced labour are examined, it is necessary to gain an appreciation and understanding for the specific context in which this crime often occurs. The underlying causes of migration - the “pull” and “push” factors - must be examined to illuminate the particular vulnerabilities associated with this group of victims, which tend to be the focal point or target of the control tactics used in trafficking for forced labour scenarios.

The “pull” factors which cause foreign nationals to migrate to Global North countries are a key problematic feature of the underlying context in which trafficking for forced labour can flourish.³⁸ The demand for cheap and exploitable labour has created the need for a migrant economy in many Global North countries. “3D” jobs: dirty, dangerous and difficult, are filled by migrants who come to these countries with the promise of good wages and a chance for a better life. The reality for many migrants who arrive in these countries is vastly different from the expectations set out. Industries that primarily employ migrants are characterized by low wages, poor working conditions, and precarious immigration schemes.³⁹ Migrant workers may find that the wages promised are not offered or not sufficient to pay down their debt and contribute to household finances in their origin country. Poor working and living conditions can add to feelings of social seclusion, exacerbating the vulnerabilities of these migrants.

³⁸ See generally, Elizabeth M Wheaton et al, “Economics of Human Trafficking” (2010) 48:4 International Migration 115; Janie Chuang, “Beyond a Snapshot: Preventing Human Trafficking in the Global Economy” (2006) 13 Ind J Global Legal Stud 137; Kevin Bales et al, “Hidden Slaves: Forced Labour in the United States” (2005) 23 Berkeley Intl L 47 at 48-9; Kathleen Kim, “Psychological Coercion in the Context of Modern-Day Involuntary Labor: Revisiting *United States v Kozminski* and Understanding Human Trafficking” (2006-2007) 38 Tol L Rev 941 [Kim 2006].

³⁹ *Ibid.*

For migrants who saw their travel abroad as a hopeful opportunity, this reality compounds the vulnerabilities arising out of the root causes for migration in the origin country. For most victims of trafficking for forced labour, the root cause for migration arises out of poor socio-economic conditions in their origin country.⁴⁰ “Trafficked persons originate where the conditions are ripe for exploitation: where there is structural and social pressure on the victims to migrate; where there are few educational or employment opportunities; where there is an unstable family structure (perhaps also due in part to economic, political, or social structure); and where gender, racial, or caste stigma or marginalization exist”.⁴¹ The opportunity to migrate not only creates the possibility of improving an individual’s socio-economic status, but also the possibility of escaping the inherent vulnerabilities existing in their origin country.

The existence of debt, whether to the employer, or a third party in the origin country, can create a particularly acute situation of vulnerability for migrant workers. Many migrant workers will take on significant debt to finance their travel.⁴² Employees who owe a debt to the employer, or a third party, may believe that they have no alternative but to submit to the work conditions, even if they are not physically constrained to the worksite or by other means. This perceived lack of freedom may be further exacerbated where the employee does not have legal immigration or administrative status in the country. Viewing this underlying context as a complete picture, the pre-existing vulnerability of this group of migrants is self-evident. Indicators and targets of

⁴⁰ See generally *Kim 2006*, *supra* note 38.

⁴¹ Dina Francesca Haynes, “(Not) Found Chained to a Bed in Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act” (2006-2007) 21 *Geo. Immigr. L.J.* 337 at 342.

⁴² The extent of this issue has recently been documented in relation to temporary foreign workers in Canada. See House of Commons, Standing Committee on Citizenship and Immigration, “Temporary Foreign Workers and Non-Status Workers” (May 2009) (Chair: David Tilson, MP) at 30.

control methods aim to further exacerbate these underlying conditions and capitalize on the fragile position many migrant workers find themselves in.

Economic Penalties as an Indicator of Forced Labour

Economic penalties, or threats thereof, can take on many forms in the context of forced labour situations. Economic penalties or threats may arise through: threat of or actual non-payment of wages; excessive wage deductions; inflated living expenses; and, imposition of debt for recruitment and other fees associated with employment.⁴³ In some circumstances, the use of economic penalties through the forms of imposing debts and inflated living expenses can create a situation of debt bondage: debts incurred during the trafficking process, such as for transportation, documents, food and lodging, and are constantly accumulating so that the victim's indebtedness never decreases.⁴⁴ "Through debt bondage ... they are forced to work to pay off the money owed."⁴⁵ This effectively bonds the worker to the trafficker for an indeterminate period of time.

Trafficked Men in Portugal

A group of Eastern European men, most between 20 and 50 years old, with various professional backgrounds, paid between \$450 and \$1,500 USD for a "package deal" from a travel agent in their home country to finance transportation, documents and other fees for a promised job in

⁴³ "Operational Indicators of Trafficking in Human Beings", online: International Labour Organization <www.ilo.org> [*Operational Indicators*].

⁴⁴ OSCE, "Understanding the Problem: Why does Trafficking Flourish in the Agricultural Sector?" in OSCE, "A Summary of Challenges on Addressing Human Trafficking for Labour Exploitation in the Agricultural Sector in the OSCE Region" (Background paper for the Alliance against Trafficking in Persons Conference, Vienna, 27-28 April 2009) at 34.

⁴⁵ Don LaJoie, "Exploited Farm Workers Win Reprieve" *The Windsor Star* (21 June 2011) online: The Windsor Star <www.windsorstar.com>. [*Windsor Star*].

Portugal. Upon arrival, they “experienced reduced wage payments or wage deductions combined with blackmailing and extortion”. The men also “had to pay additional fees for invented services, such as obtaining a tax identification number”. Authorities became alerted and were able to dismantle most of these networks. “The most common form of coercion was non-payment or late payment of wages”. Two cases of debt bondage were identified.⁴⁶

Thai Victims in Ontario

Lured by the promise of good work in Canada, individuals from Thailand were recruited through the legal work permit process set up by the Canadian government. “They believed they were participating in a program that was set up and monitored by the Canadian government and would offer them basic protections.” Instead, these workers were exploited for their labour. One victim reported working up to 10 hours a day for six days a week at \$8 per hour, but, most of her wages were “clawed back to pay for lodging”. Another victim reported working for free for her first month, and having her wages deducted for room and board, “even pillows and sheets”. ““I couldn’t talk because I had a debt to pay”, she said. “You couldn’t say anything or (you would) get sent home. Just shut your mouth and do what you’re told.”” Luckily for these individuals, Citizenship and Immigration Canada found them to fit the definition of victims of human trafficking. Despite the fact that law enforcement has not pursued criminal charges, these victims will be able to stay in Canada to pursue civil action against their traffickers.⁴⁷

These case studies illustrate the various forms of economic penalties that can exist, and the tactics employers or traffickers may use to control victims and maintain the trafficking operation.

⁴⁶ All facts and quotes of this case taken from Beate Andrees and Patrick Belser, eds., *Forced Labour: Coercion and Exploitation in the Private Economy* (Geneva: International Labour Office, 2009) at 100 [Andrees & Belser].

⁴⁷ All facts and quotes of this case taken from *Windsor Star*, *supra* note 45.

The use of economic penalties and threats of a financial nature to gain victim compliance appears to be quite common. One study conducted in the Commonwealth of Independent States found that 12% of interviewed migrants “could not leave their employment as they had to work off a debt”⁴⁸, 24% were not paid for their work, and ten of the interviewees reported encountering situations of debt bondage in their work.⁴⁹ Economic indicators were also seen in the Elmvale 11 case, discussed in the introductory chapter. In that case, the employer imposed a debt for recruitment costs (\$4,000) on the workers and did not pay the workers the wages owed.

Financial targets of control tactics exploit two underlying facets of a victim’s condition: the cause for migration being, in part, economically motivated (both from the perspective of pull and push factors), and the existence of pre-existing debt associated with the labour migration. These tactics aim to further weaken the fragile state of a victim’s financial situation or create additional financial dependency on the trafficker.

Threats against Administrative Status as an Indicator of Forced Labour

The use of threats or abuse in relation to a victim’s immigration status is also a common indicator of forced labour. The abuse of administrative or legal status is often employed through threats of deportation⁵⁰; however, the context and content of these threats may range from overt speech acts to subtle conduct depending on the circumstances surrounding the migration and knowledge of each party. Traffickers may confiscate a victim’s travel or identity documents as a way to maintain control. For victims of labour trafficking, whose primary motivation for migration was economic and job-related, the fear of losing work and immigration status attaches

⁴⁸ *Andrees and Belser, supra* note 46 at 100.

⁴⁹ *Andrees and Belser, supra* note 46 at 100.

⁵⁰ See *Operational Indicators, supra* note 43.

unique and significant importance to victims of labour trafficking. Because of this, and the knowledge that traffickers often have of these underlying contexts, implicit threats against immigration status may suppress any complaint or non-compliance demonstrated by victims.

Smuggled Migrants Turned Trafficking Victims in the US

Peruvian migrants were smuggled into the US by two individuals who charged \$6,000 to \$13,000 per person as a smuggling fee. On arrival, the migrants' passports were confiscated and they were threatened with denunciation to the authorities. The smugglers compelled the migrants to work for them and others. The case was detected and the defendants pleaded guilty.⁵¹

Domestic Servant in Vancouver

A woman was brought into Canada from Hong Kong by a Vancouver couple in 2008 on a visitor's visa. On arrival, the couple confiscated the woman's documents and subjected her to domestic slavery. "The woman was forced into domestic services and was working 24 hours a day, allegedly seven days a week" for two years. "Police allege ... she was wary of complaining to authorities because she was in the country illegally" and because the couple had her passport, she could not leave. Police were alerted, and the woman was rescued. The couple now face various charges under the *Immigration and Refugee Protection Act*.⁵²

These case studies illustrate the unique vulnerability of trafficking victims who do not have legal immigration status, and the ease with which traffickers can control this group of victims without

⁵¹ All facts and quotes of this case taken from Katy Thompson, "A Summary of Challenges Facing Legal Responses to Human Trafficking for Labour Exploitation in the OSCE Region" (Background paper for the Alliance against Trafficking in Persons High-Level Conference, Vienna, Hofburg, Neuer Saal, 16–17 November 2006) at 11.

⁵² All facts and quotes of this case taken from Neal Hall and Evan Duggan, "East Vancouver couple accused of domestic slavery" *The Vancouver Sun* (9 June 2011), online: The Vancouver Sun <www.vancouversun.com>.

the use or threat of violence, particularly where the victim is perceived to be culpable in a criminal act, such as smuggling. Where a victim's identity documents are confiscated, this can result in a perceived lack of freedom of movement, as the victim may fear deportation if found without documentation may therefore remain psychologically confined to their living or work premises. In addition to the threat of deportation, and potential criminal association, control tactics which target the immigration status of a victim also implicitly act as an economic pressure, because the primary reason for migration was economically motivated, and therefore deportation from the destination country equates to a complete loss of anticipated finances.

Isolation as a Contributory Factor of Effective Control in Forced Labour Situations

The use of physical and social isolation is also a common indicator of trafficking for forced labour.⁵³ These control tactics not only physically control the movement of the victims, but aim to exacerbate the pre-existing vulnerabilities of these workers and target their psychological well-being. In the destination country, labour trafficking victims may be isolated either geographically or socially, or both. Physical isolation refers largely to acts of restriction and monitoring rather than an image of victims physically locked up in a room or chained to a wall, as this has been documented to occur relatively infrequently.⁵⁴ Rather, the tactics used to create isolation are aimed at creating a psychological belief within the victim that they do not have freedom of movement, as was seen in the previous section on the abuse of administrative or legal status.

⁵³ See *Operational Indicators*, *supra* note 43.

⁵⁴ See *Andrees and Besler*, *supra* note 46 at 102.

Many industries in which victims of forced labour work are physically isolated from the outside world, located in rural areas or industrial complexes far from residential neighbourhoods and communities, or secluded in the privacy of an employer's home. In addition, victims may either work and live on a single property, or be transported between the work and living locations designated by the employer. This results in physical isolation as the workers are restricted in their movements, and their places of work and accommodation are controlled by the employer. In addition to physical control of movement, victims may be subjected to unsanitary and overcrowded living and work spaces.⁵⁵ Tactics of social isolation, such as restricting communication with the public, or to family, are also a common indicator of forced labour situations.⁵⁶

Polish Labourers in the UK

A group of Polish migrants were recruited for work in the UK. They were promised the minimum wage of £4.50 an hour, and good accommodation at £25 per week. The contracts they signed were not translated. On arrival to England, the group was transported to a house in the middle of the night; they spoke no English and did not know what was happening. "...[W]ith no money and no knowledge of the language, not even the full name of the boss of the company, they felt helpless" The house they were taken to had no furniture, "just heaps of rubbish, piles of syringes, soiled mattresses on the floor and a terrible smell." The rent increased to £40 each per week, despite the squalid conditions, which was deducted from their paycheques in violation of the law. The group was transported to and from a food packaging warehouse where they worked by a minivan. They were threatened with eviction and loss of wages if they reported their

⁵⁵ See *Operational Indicators*, *supra* note 43.

⁵⁶ *Ibid.*

conditions. “They said they felt intimidated”. The group managed to escape with the involvement of a union.⁵⁷

African Victim in West Vancouver

A woman from Africa was brought to Canada on the promise of a work visa and job in a local hair salon. Instead, the victim was forced to work in “demeaning and slave-like conditions” in the trafficker’s home. The victim was forced to work “18 hours a day, seven days a week” doing “[t]hings like hand-washing underwear ..., hand-washing cars”. The victim was not given adequate food and was sometimes even forced to eat scraps from leftover meals. She had no money and no identity documents. She could only sleep when all the other people in the home were asleep. Only one year after her arrival did the victim learn that these conditions were not acceptable in Canada. “She had so little idea, you would be shocked. She was very depressed, she was very upset, she thought she was stuck, she thought there would be no way out of this situation.” The victim was rescued by police and is now under their protection. The trafficker is charged under the *Immigration and Refugee Protection Act*.⁵⁸

These case studies illustrate the common control tactics used by traffickers which aim to restrict and monitor the movement of victims. In addition, improper housing conditions and other restrictive “rules” often present in these scenarios, while a cost-savings for the employer, also serve to contribute to a psychological state of isolation for the victims. These tactics were also seen in the case of the Elmvale 11, who were geographically isolated in a rural area of Ontario,

⁵⁷ All facts and quotes of this case taken from Klára Skrivánková, “Trafficking for Forced Labour: UK Country Report”, online: Anti-Slavery International <www.antislavery.org>.

⁵⁸ All facts and quote of this case taken from Andrea Woo, “West Vancouver woman charged with human trafficking” *The Vancouver Sun* (17 May 2011) online: The Vancouver Sun <www.vancouversun.com>.

and lived and worked on the same property in “squalid” conditions, or in some circumstances were transported by the employer to another worksite.

These types of exclusionary and isolating control tactics target the psychological well-being of the victims, who are often in a vulnerable state at the outset of their migration experience, and who may have pre-existing vulnerabilities arising from social exclusion or other experiences in their origin country. Therefore, tactics that seek to exclude migrant workers, both physically and socially, in the destination country build on these pre-existing conditions, exacerbating the psychological harm associated with the migrant’s experience both in their origin country and in the destination country. In addition, given the pressures associated with the labour migration experience, such as to provide for family back home or pay off a debt incurred, all of the discussed tactics target the psychological well-being of the victim in addition to financial or legal consequences.

Conclusions on Forced Labour Indicators and Implications for a Definition of Coercion

What is apparent from the analysis of common coercive tactics in labour trafficking is that these tactics are employed in concert to exert pressure on the victims’ particular vulnerabilities, which often arise out of their socio-economic situation. The targets of economic and social vulnerability in labour trafficking situations are particularly effective because of the “push” factors that compel individuals to seek work abroad, and are exacerbated by the conditions commonly present in the industries in which these individuals work, as well as their legal or administrative status. The accumulation of these control tactics, and the particular vulnerabilities they target,

have a significant impact on the victim's ability to consent to, or leave, the situation they find themselves in.

[T]he trafficked worker, legally disenfranchised and culturally alienated, is far more vulnerable to exploitation. Workers may receive compensation. They may even be free to run errands or move throughout their neighbourhood. However, they may not have the freedom to leave their work situation through a mix of the employer's threatening conduct with the workers' own economic or social circumstances.⁵⁹

These control tactics, given their intended outcome and impact on the victims, should be properly viewed as coercion for the purposes of trafficking in persons legislation and offences.

These indicators also match well with the analysis of coercion under the *Palermo Protocol*, which found that coercion should be understood to refer to situations of non-physical force. Specifically, these indicators match with the identified forms of non-physical coercion found in the *Protocol* analysis: (a) psychological pressure; (b) abuse of power in serious circumstances; (c) abuse of a position of vulnerability in serious circumstances; (d) economic penalties; and, (e) abuse in relation to immigration status. Further, the underlying context for migration and power dynamic of the trafficker-victim relationship which overlay the findings from the *Protocol* were also aptly demonstrated in the case studies and through the analysis and explanation of the forced labour realities in this section.

Drawing out the primary findings from this chapter, the following can be illuminated in creating a definition, or conceptual formula, for coercion: (a) coercion involves active pressure exerted by one party on another to gain compliance with demands or conditions set out; (b) coercion is non-physical; (c) coercion tactics use implicit and explicit threats to target the psychological,

⁵⁹ Kathleen Kim, "The Coercion of Trafficked Workers" (2011) 96 Iowa L. Rev. 409 at 461 [Kim 2011].

financial, and immigration status of the victim; (d) these tactics and targets are often used in concert; and, (e) coercion tactics aim to create an environment where the victim feels that he or she has no meaningful alternatives but to submit to the work or conditions set out.

Chapter 2: Defining a Conceptual Framework of Coercion and its Critical Legal Elements

The meaning of coercion has received significant attention in recent years with the introduction of human trafficking legislation. As “the laws addressing human trafficking continue to struggle with delineating the dimension of coercion”⁶⁰, legal theorists and other academics have taken up the pursuit of analytical engagement with this term. Defining coercion has been quite problematic for scholars because of many underlying issues. Despite the difficulties and ambiguities inherent in a legal approach to defining coercion, a basic framework of coercion can be developed by drawing on theories constructed in other academic fields, most notably, philosophy. This chapter will set out a basic framework of coercion, adopted from legal-philosophical theories, and discuss each section of the framework in relation to criminal law, and specifically, in relation to human trafficking. The objective of this analysis is to develop a basic conceptual framework of coercion and its boundaries, which can then be used to inform international and domestic laws.

There are five basic elements of a framework for coercion which can be used as a baseline to further develop the theory within a legal context. These elements include: (1) the presence of two actors, a coercer and a coerced; (2) a coercive mechanism which (3) operates to manipulate the

⁶⁰ *Kim 2011, supra* note 59 at 414.

coercee's alternatives and is (4) targeted to a specific act; and, (5) a standard of credibility.⁶¹ However, these elements serve as only a starting point for a conceptual framework of coercion that can apply in legal contexts and specifically in cases of human trafficking. Both explanation and analysis of several key factors arising out of these elements is necessary to fully address the complex myriad of issues that underlie the task of defining coercion in relation to human trafficking offences.

I. Determining the Existence of a Coercive Mechanism and its Critical Elements

Modern coercion theory has seen significant debate around what can constitute a coercive mechanism. At the crux, this debate has often focused on whether coercion requires the existence of a threat, or whether an offer can also be coercive.⁶² Both threats and offers may aim to induce another party to make a particular choice or cause a particular action, however, the underlying distinction that may be made is that a threat undermines this choice process, while an offer does not. For example, where an employer offers an undocumented worker only \$3 per hour knowing that this worker does not have legal immigration status, and therefore has limited options, but tells the worker he can "take it or leave it", this is simply an offer which seeks to take advantage or, or exploit, the particularities of the situation. However, where an employer tells an undocumented worker that he must do certain work for \$3 per hour, or else the employer will have him deported, this constitutes a coercive threat. There are three important features present in this threat example: (1) the coercer (employer) threatens to impose an additional negative

⁶¹ Kim 2011, *supra* note 59 at 425-6, summarizing the primary conditions set out in Robert Nozick, *Coercion*, in Peter Laslett et al, eds, *Philosophy, Politics and Society 101* (4th series, 1972). While there are many competing modern theories of coercion, this basic formula provides an apt starting point from which further examination, specific to a legal context, can be undertaken.

⁶² See, for example, Alan Wertheimer, *Coercion* (New Jersey: Princeton University Press, 1987) at 204 [Wertheimer].

consequence on the coercee (undocumented worker) if he refuses to comply with the coercer's demands; (2) the coercer is in a position to carry out the threat; and, (3) the threat therefore undermines the choice process of the coercee. These three features distinguish what is a coercive mechanism from what is not.

The Imposition of an Additional Negative Consequence

A coercive threat must create an additional negative consequence for the coercee beyond simply refusing the terms or demands of the coercer. While this factor has been referred to as the requirement that a coercive threat make the coercee “worse off relative to some baseline”⁶³, this characterization is somewhat vague and requires moral evaluation. Therefore, reframing this criterion as the imposition of an additional negative consequence more accurately captures the importance of this factor when considering coercion for the purposes of forced labour. For example, the worker who refuses to work for \$3 per hour simply loses out on the possibility of those wages. However, the worker who refuses the work when deportation is threatened not only loses out on the wages but will experience the additional negative consequence of deportation from the country. Similarly, in the case studies from the previous chapter, there are many examples of coercive mechanisms which created an additional negative consequence, such as the Polish workers in the UK who were threatened with eviction if they complained about working conditions.

This “additional negative consequence” requirement can also be seen as a two-prong test: (1) the threat is action inducing, in that its aim is to get the coercee to do something, and (2) the threat is

⁶³ Wertheimer, *supra* note 62 at 204.

situation altering, in that the statement has the effect of changing the coercee's situation.⁶⁴ While an offer is only action-inducing, a threat must be both action-inducing and situation-altering; it is the "situation-altering" prong that constitutes the existence of an additional negative consequence, because the additional negative consequence seeks to alter or manipulate the coercee's situation should he or she refuse to comply with the coercer's demands. Looking again at the situation of the Polish workers in the UK, the threat of eviction was not only action-inducing, in that the workers were compelled to accept sub-standard working conditions, but it was situation-altering, because if the workers did not comply with their trafficker's demands, they would not just lose their work, but would be evicted from their place of residence, altering their physical situation, as well as, potentially, their legal status and psychological state.

The importance of an "additional negative consequence" is the underlying intent of this tactic to manipulate the coercee's alternatives. It is the engagement, by the coercer, in speech or conduct with the intent to manipulate the coercee's alternatives that constitutes the coercion. What we have seen in Chapter 1 illustrates that this speech or conduct most often takes the form of creating some "additional negative consequence" in order to manipulate the coercee's alternatives such that the coercee is in a position where his or her ability to choose one alternative from a set of alternatives is unreasonably restricted. This emphasis on the underlying intent or purpose in creating an additional negative consequence should, therefore, take prominence in evaluating a potential situation of forced labour, rather than the target, or object, of the additional negative consequence itself. The underlying situation of manipulating the process of choice will be further examined in the next section.

⁶⁴ *Wertheimer, supra* note 62 at 96.

Real or Perceived Authority of the Coercer

For a coercive threat to be valid in the legal context, the coercer must be in a position to carry out the negative consequences threatened, or the coercee must reasonably believe that the coercer is in a position to carry out the threat. Although this does not mean that the coercer must be able to directly carry out the threat, he or she must be in, or perceived to be in, a position of authority such that he or she has effective control over the threatened consequences and, therefore, over the outcome of the coercee's situation. For example, the coercer-employer who imposes a debt on a coercee-employee, or who threatens the coercee-employee with deportation, can be seen to be in a position to carry out both those threats. In relation to the debt scenario, the coercer is in a direct position to carry out the additional negative consequence as the coercer essentially has complete financial control in the relationship. In the latter scenario involving deportation, the coercer is in an indirect position to carry out the threat, as he or she will not personally deport the coercee-employee, but is in a position to contact the relevant authorities and advise them on the coercee-employee's status. This latter example is very similar to the Peruvian migrant case study examined in Chapter 1. These victims were voluntarily smuggled into the US before being coerced into forced labour. As the trafficker knew of the victims' illegal status in the country, it is reasonable that these victims believed their trafficker would be in a position of authority to have them deported or removed from the country if they did not comply with the demands.

There is also a question of whether the coercer must not be entitled to carry out the threatened consequence for coercion to exist.⁶⁵ If this is a valid criterion, the coercer must both be in a position to carry out the threat, and the threat must be "wrongful".⁶⁶ However, there are several

⁶⁵ See *Wertheimer, supra* note 62 at 101.

⁶⁶ *Wertheimer, supra* note 62 at 102.

problems with incorporating this second criterion into the requirements of coercion for the purposes of trafficking for forced labour. First, the importation of a moral standard risks further confusion in successfully implementing and interpreting domestic laws. The historical development of many areas of law have grappled with balancing what is moral with what is legal, and have typically suffered greatly in their effectiveness during these periods of uncertainty. However, more importantly, the divergence between legal entitlement and moral justification is wide with respect to certain coercive mechanisms prevalent in this crime. While the threat of economic penalty can be somewhat easily seen as both legally prohibitive and morally unjustified, threats against immigration status do not align well to both of these standards. Although using a threat against immigration status to compel an individual into submission is morally reprehensible, a coercer would have a legal entitlement to report an individual to immigration authorities if that individual did not have appropriate legal status in the country. Therefore, from both a pragmatic and normative perspective, the question of moral justification or legal entitlement should be intentionally absent in defining coercion for the purposes of trafficking for forced labour. Where a situation is found to constitute forced labour and coercion is found to exist, the conduct of the coercer should be considered both innately immoral and legally prohibitive based on legal standards set out in relevant legislation, even where the conduct could be considered legally acceptable in another context. The focus of the inquiry should remain on the intent of the coercer rather than the target or object of the threatened consequence.

To conclude, threats constitute a coercive mechanism, while offers do not. A threat can be identified when two primary factors exist in a given situation: the creation of an additional

negative consequence, and the authority (real or reasonably perceived) to carry out the additional negative consequence. The outcome of these two factors must be to undermine the choice process of the coercee. This analysis has focused largely on speech acts, as coercive conduct will largely come about as the result of, or in combination with, a threatened consequence. For example, where a coercer withholds identity documents, he or she is implicitly threatening the coercee with denunciation to or deportation by immigration authorities. This was seen in the case of the domestic servant in Vancouver; the family in whose home she worked held her identity and travel documents, and knew that she had overstayed her visa. This action constituted a coercive mechanism by which the victim felt she was unable to leave the family's home or employment for fear of denunciation and deportation. Similarly, where a coercer withholds wages, he or she is carrying out a threat of economic penalty against the coercee. Therefore, where a coercive mechanism is identified which constitutes conduct or action on the part of the coercer, this will fit within the framework identified above as the conduct creates an additional negative consequence and therefore undermines the choice process of the coercee. As the conduct or action has occurred, the second requirement of the coercer being in a position to carry out the consequence is inherently fulfilled. Given these conclusions, there are two important outstanding issues to resolve surrounding the concept of coercion at this time: the conflation of coercion and exploitation, and the question of whether external circumstances can constitute coercion.

The Misguided Association between Exploitation and Coercion in Human Trafficking Debate

The association between exploitation and human trafficking, and the point at which exploitation rises to the level of human trafficking, is a controversial and politicized issue. When *means* such

as coercion are identified in a situation, there is additional question as to what level of “seriousness” is required to constitute a situation of human trafficking versus a situation of a lesser exploitative form.⁶⁷ Although “there is a general agreement that not all undesirable practices involving the exploitation of individuals could or should be identified as trafficking ... beyond this, the lines remain blurred.”⁶⁸

As discussed in the previous sections, non-coercive mechanisms such as offers can be exploitative of the vulnerabilities and circumstances of a weaker party in the transaction. A proposed employment arrangement may take unfair advantage of the worker’s lack of knowledge around legal protections such as minimum wage or work-safety conditions, or capitalize on the probability that the worker’s options are limited. However, this in itself does not constitute coercion as defined for criminal law purposes. The concept of an offer inherently contains within it the notion of agency or consent. As seen earlier, an offer is a “take it or leave it” situation; the worker is able to freely engage in the process of choice, regardless of internal or external constraints. The employer has not sought to undermine this process of choice, or manipulate the availability of alternatives for the worker, despite capitalizing on known constraints or vulnerabilities of the worker’s situation. This is not to say that the conduct of the employer is not reprehensible and does not violate other laws such as labour and employment law standards. However, from a criminal law perspective, it does not constitute coercion. Constructing coercion as a broad concept risks undermining the integrity of the law as well as its effectiveness in implementation.⁶⁹

⁶⁷ See Gallagher, *supra* note 21 at 49.

⁶⁸ *Ibid.*

⁶⁹ Further, if the situation were to later become coercive such that the worker was not free to leave or change his or her situation, this would then fall within the concept of human trafficking. The legal developments around human

Some theorists have posited that coercion can arise from external pressures⁷⁰ such as the very fact that the individual comes from a developing country with widespread poverty, or lacks legal status in the destination country. This concept of coercion would see the personal circumstances of an individual as inherently coercive in contributing to their current conditions of work. Within a criminal law framework, any concept of coercion must involve individual actors, as set out at the beginning of this chapter. Therefore, this theory cannot meet even the first, most basic criteria, of coercion within a criminal law context. This concept argues that an individual's background or personal circumstances are by their very nature coercive. While this argument may carry weight from a social theory perspective, it cannot alone constitute coercion within a strict legal sense. However, as we will see later in this chapter, there is a place for these considerations in determining the existence of coercive situations of trafficking for forced labour, and these circumstances should not be ignored in evaluating the situation as a whole.

Most recently, the development of a legal framework for coercion in human trafficking labelled as “situational coercion”⁷¹ has sought to address and place greater emphasis on the power dynamic and external pressure issues often surrounding labour trafficking scenarios. This construction of “coercion” attempts to “evaluate all the circumstances surrounding the alleged trafficking scenario, paying special attention to the power inequalities and the workers’

trafficking have begun to recognize and understand the notion that a situation may transition to one of trafficking and the issue of whether an individual initially consented to their situation is irrelevant if at a later time they no longer felt free to leave or change their situation. Additionally, excluding such practices from the realm of criminal law would not prohibit legal action under relevant labour and employment laws, which are equipped to deal with many exploitative practices that do not rise to the level of human trafficking. Rather than expand human trafficking laws to compensate for a lack of proactive enforcement of labour and employment laws in relation to these issues, improvement and reform in the area of labour and employment law should be sought to address exploitative work practices that do not constitute human trafficking.

⁷⁰ Kim 2011, *supra* note 59 at n95.

⁷¹ *Ibid.*

individual characteristics that may render them vulnerable to exploitation”.⁷² This framework focuses on a greater extent whether, and to what degree, the coercer took advantage of the worker’s vulnerabilities and the power imbalance of the relationship in order to exploit the worker.⁷³ Although the framework requires an individual actor – coercer – to intentionally engage in speech or conduct (unlike the external pressures theory above), it does to some extent reach beyond the confines of coercion as described earlier by placing the underlying exploitative nature and power dynamic of the relationship within the primary set of criteria for determining the existence of coercive conduct.⁷⁴ The theory attempts to broaden coercion so as to “recognize the coerciveness of an individual’s deliberate exploitation of another’s vulnerability”⁷⁵, however, this characterization, too, risks conflating exploitation and coercion. Although the underlying exploitative nature and power dynamic of the relationship is an inherently important factor in examining coercion, it is more appropriate to consider as contextual and underlying factors in proving the primary elements of the offence in the context of criminal law.

II. Evaluating Consent and the Impact of Coercive Mechanisms on the Victim

For a situation to constitute trafficking for forced labour, and for coercion to exist, there must be a lack of consent on the part of the victim. However, this does not mean that the victim must refuse the conditions explicitly; rather, it requires that consent be vitiated by reason of the *means* used to induce the victim into compliance. This can be best defined as undermining the *process* of choice. An individual will always have the *existence* of a set of choices, and legal developments in relation to consent and agency have therefore tended to centre on the ability to

⁷² Kim 2011, *supra* note 59 at 457.

⁷³ *Ibid* at 461.

⁷⁴ *Ibid* at 472.

⁷⁵ *Ibid* at 469-70.

engage freely with the *process* of choice rather than determining the availability of choice. In other words, the distinction can be viewed as non-volition, on the one hand, and *constrained volition*, on the other hand⁷⁶. Most legal situations involving coercion centre on setting a standard at which consent can be vitiated by reason of constrained volition⁷⁷. Because a set of choices will always exist, the focus in determining agency or consent must be on establishing a standard, or baseline, at which it can be said that the victim's compliance to do an act was reasonable due to the presence of some external threat or pressure.⁷⁸ This standard is often described in terms of the availability of meaningful or reasonable alternatives⁷⁹.

Manipulating the Process of Choice

A coercive mechanism – or a threat – must operate to undermine the choice process of the coercee. The coercive mechanism threatens additional negative consequences on the coercee, targeted at the coercee's particular vulnerabilities or weaknesses, in order to manipulate the coercee's process of choice in determining whether to accept or refuse the conditions or demands set out. Looking back at the case of the Thai victims in Ontario, as one woman described, “[y]ou couldn't say anything or (you would) get sent home. Just shut your mouth and do what you're told.”⁸⁰ The choice these victims were left with, from their perspective, was to accept any and all demands of their employer, or be deported back to Thailand. Given the discussion and findings of Chapter 1, it is reasonable to assume that the employer in this case used the threat of

⁷⁶ Wertheimer, *supra* note 62 at 172.

⁷⁷ *Ibid.*

⁷⁸ “External” threat or pressure is not meant to relate to notions discussed in the previous section such as economic hardship; the “external” threat or pressure must be actively imposed on the victim by another individual. In this way, it is only meant that the threat or pressure is external to the victim.

⁷⁹ Wertheimer, *supra* note 62 at 172.

⁸⁰ *Windsor Star*, *supra* note 45.

deportation as a coercive mechanism to manipulate the victims' process of choice knowing the impact such a threat would have.

What is key to this characterization of consent, as we can see from the Thai case above, is not the *existence* of choice, but the ability to freely engage in the *process* of choice. To better understand this distinction, let us return to the examples provided at the outset of this section. The employer who offers the worker \$3 per hour or no work does not undermine the worker's choice process because the employer does not create additional consequences for the worker if he or she makes a particular choice (refusing to work). Therefore, while the employer may exploit the pre-existing circumstances of the worker, he or she does not actively interfere with the worker's ability to engage in the choice process. However, in the second scenario, where the employer threatens to have the worker deported unless he or she completes the work for \$3 per hour, the employer actively interferes with the worker's ability to freely engage in the *process* of choosing because the employer creates an additional negative consequence for a particular choice (refusing to work), obstructing the coerced's ability to independently assess the situation and freely choose amongst alternatives. Although the worker is still left with multiple choices (the *existence* of choice), the *process* of choice has been undermined because of the employer's active interference through the use of a threat. As a result of this, the worker cannot be said to freely consent to his or her conditions.

Analyzing Consent through the Lens of "Reasonable Alternatives"

Translating the concept of constrained volition, or manipulation of the process of choice, into a legal test for determining consent is a complicated task and has proven to be problematic where

direct non-physical *means*, such as coercion, are employed. For example, a baseline for consent is particularly difficult to ascertain where “the workers enjoy some amount of freedom”⁸¹ or have some interaction within the public sphere, which was seen in some case studies from Chapter 1, such as the African victim in West Vancouver. Although the victim in that case had some freedom of movement and interaction with the public, she remained in her situation because she did not understand that such conditions were both culturally unacceptable and in violation of the law in Canada. Because of the unique vulnerabilities and underlying context of trafficking situations involving foreign national victims, any standard for consent must account for the subjective perceptions and circumstances of this group of victims, as such factors carry heavy weight in informing an individual’s choice process, as can be seen from the case of the African victim. This has been referred to in law as contextualization, a standard which “considers the reasonableness of the [victim’s] beliefs in light of [his or] her individual circumstances”⁸², which can include “both the victim’s particular vulnerabilities as well as the specific facts surrounding the case”.⁸³ Therefore, in determining the baseline for consent in situations of trafficking for forced labour, the focus must be on two primary criteria: first, the existence of meaningful alternatives to the victim; and, second, the use of contextualization to evaluate the existence of meaningful alternatives.

The focus on meaningful alternatives acknowledges that the victim must have more than mere existence of any alternative to their situation. This has been formulated as the “no reasonable alternative” test, and can serve as an apt starting point for developing a legal test for coercion to apply in trafficking scenarios. This test essentially requires that the victim had “no reasonable

⁸¹ *Kim 2011, supra* note 59 at 460.

⁸² *Kim 2011, supra* note 59 at 458.

⁸³ *Ibid.*

alternative” but to submit to the demands of the coercer. However, this does not assist in determining what a reasonable alternative is. This test, as formulated, risks focusing too much on the *type* of threat, when the focus should be rather on the *impact* of the threat, taking account of the victim’s unique vulnerabilities and underlying circumstances. Therefore, we should rather view this test as asking the question: “was it reasonable for the victim, given their personal circumstances and the facts of the situation, to feel that they had no alternative but to submit to the demands of the offender?” This test, rather than becoming preoccupied with defining a “reasonable alternative” refocuses the question towards the subjective perceptions of the victim and the objective reasonableness of those perceptions given the victim’s background and the circumstances of the situation. The importance of this shift is apparent when looking back to the case study of the African servant in West Vancouver. Due to the personal background and knowledge of the victim, she believed did not have an alternative but to submit to her trafficker’s demands, despite the fact that she enjoyed some amount of physical freedom outside the trafficker’s residence. Ignoring this important feature of this victim’s story could enable her trafficker to go unpunished, as the underlying context and dynamics of the situation would not be considered, and therefore the situation could not be understood accurately.

Building further on determining the “reasonableness” of perceiving no meaningful alternative, the “climate of fear”⁸⁴ test can be engaged as assisting particularly in cases of non-physical force such as coercion. This test looks at “the totality of the circumstances to determine the level of subjective fear or psychological pressure the victims experienced”.⁸⁵ This test focuses primarily on the subjective impact of the situation on the victim when examining the overall situation to

⁸⁴ *Kim 2011, supra* note 59 at 432.

⁸⁵ *Ibid* at 432-433.

determine reasonableness. In this way, greater emphasis is placed on the contextual factors affecting the victim's choice process. Another layer can be added to this determination of reasonableness by incorporating the contextualization standard such that the end product is that of a "qualified reasonable person" which attempts to judge reasonableness from the perspective of a person with a similar background and in similar circumstances of the victim. Viewing the issue of consent from this lens, it becomes apparent why, for example, the African victim in West Vancouver was in fact considered a victim of human trafficking, despite the physical freedom she enjoyed or apparent lack of objection to her situation.

Bringing together all these elements, a baseline for consent can be developed which captures all of: the subjective impact of the coercive mechanism on the victim; the underlying circumstances and background of the victim; and, the external pressures or situational factors present in the scenario. By bridging this test together with the framework for determining a coercive mechanism, we can see a legal formula for coercion develop.

III. Outlining a Concept of Coercion for Laws against Human Trafficking

Consolidating the analysis and conclusions reached in this chapter, a specific legal framework for defining coercion in human trafficking legislation can now be put forth. First, there must be a minimum of two individual actors: a coercer, and a coercee. Second, the offender must engage in conduct which: (a) creates an additional negative consequence for the victim if he or she refuses to comply with the offender's demands, and (b) which the offender is in a position to, or is perceived by the victim to be in a position to, carry out. Third, the coercive mechanism, or conduct, must operate to manipulate the *process* of choice of the victim, such that the victim

reasonably believes that he or she has no meaningful alternative but to comply with the offender's demands. Fourth, in determining the subjective impact and reasonableness of the victim's belief, particular regard must be had to: (a) the totality of the circumstances and facts of the situation in creating a "climate of fear"; and, (b) the particular circumstances and background of the victim that affect and inform the psychological impact and beliefs regarding the nature of the situation and availability of meaningful alternatives.

In addition, in contemplating a legal test for adoption in domestic laws, it may be pragmatic to make explicit the notion that coercion includes non-physical forms of force, and to list the applicable targets of coercion, such as psychological, financial, and administrative status. This is because it is unlikely that a "no reasonable alternative" test as worded similarly to the above section would meet some of the specific constraints imposed by criminal law drafting standards. Rather, as we will see in the following chapters, a "no reasonable alternative" test may outline the target or type of coercive mechanisms which will create a lack of reasonable alternatives, and then incorporate a "qualified reasonable person" test to judge the impact of these mechanisms and evaluate the issue of consent. Despite the shift in wording or focus to the target or type of coercive mechanisms, these tests continue to rely heavily on the issue of consent and on a finding of "no reasonable alternatives", and therefore, the "no reasonable alternative" framework does serve as an underlying foundation for the development of domestic laws against human trafficking.

Evaluating this framework against the indicators of trafficking for forced labour, the indicators of economic penalties and threats against administrative status fit well within this concept of

coercion. First, both of these indicators involve conduct or speech that threatens or imposes additional negative consequences on the victim; and, given the power imbalance and underlying context of the relationship between trafficker and victim, the trafficker would be perceived to be in a position of authority to carry out the consequences. Therefore, the first set of conditions necessary to establish the existence of a coercive mechanism is easily fulfilled. The second set of conditions necessary to establish a lack of consent on the part of the victim may be fulfilled in particular cases and enables the underlying push and pull factors, unique vulnerabilities, and other control tactics discussed in Chapter 1 to be considered in the overall assessment of the situation. Therefore, this framework sufficiently applies to these two groups of indicators. However, this framework does not as easily capture isolation indicators discussed in Chapter 1. Where isolation tactics can be viewed as conduct or speech that imposes or threatens an additional consequence on the victim, such as physical confinement to a particular property, this may fall within the first set of conditions as the victim will be explicitly prohibited from free movement. However, where isolation tactics are more subtle, such as controlling movement through designated living and work spaces and transportation between the two, or where some social isolation tactics come into play, the set of conditions required for coercion to exist may not be fulfilled. However, isolation tactics tend to, as was seen in Chapter 1, serve as secondary or supplementary control mechanisms aimed at exacerbating the psychological condition of the victim and are most often accompanied by explicit coercive mechanisms such as economic penalties and threats against administrative status, such as was the case with the Polish workers in the UK. Where this is the case, these tactics can be considered as conditions contributing to a “climate of fear”, subsumed under an examination of consent. Given the necessary constraints of

developing a legal definition of coercion for the purposes of human trafficking, this restricted scope of applicability to isolation tactics is appropriate.

This framework of coercion most importantly captures the intent of the drafters of the *Palermo Protocol* by accounting for the non-physical nature of coercion, and capturing the complementary *means* of abuse of power and abuse of position of vulnerability in the standard of reasonableness and “climate of fear” test. As discussed in Chapter 1, the *Protocol* clearly set out to capture forms of non-physical coercion such as psychological coercion, which can be seen to be exacted through the use of the coercive mechanisms discussed in Chapter 1 and in this chapter. Further, the analysis of the *Protocol* established a close link between the concept of coercion and the concepts of abuse of power and abuse of a position of vulnerability, such as precarious administrative status. This is captured both in the required elements of coercive mechanisms (the first set of conditions) and may also be evaluated in the second set of conditions relating to the surrounding circumstances of the case and the underlying vulnerabilities of the victim. Further, with particular respect to forced labour, this definition of coercion, and particularly the coercive mechanism conditions, comport well with the ILO definition of forced labour requiring work to be performed under the “menace of any penalty”, which has been explicitly defined as including a loss of privileges as well as more severe threats or punishment. This term is quite analogous to the concept of “an additional negative consequence” as the latter concept can include both the loss of [positive] privileges as well as the imposition of [negative] punishments. Because the developed definition or test for “coercion” focuses on the conduct and intent of the offender and its impact on the victim, rather than the target of the threat, it is not unduly restricted in a way which undermines the intent of the *Protocol*. Therefore, this

framework sufficiently meets the minimum standards, as well as the spirit and intent, of the international legal definition. However, even where domestic laws incorporate specific targets of coercive mechanisms, as discussed earlier, these laws can meet the requirements of the framework and the *Protocol* provided that the listed targets are sufficiently broad and explicitly include the application of non-physical *means*.

To summarize the above evaluation of the framework against forced labour indicators and the international legal definition, this framework comports to the primary conclusion drawn out in Chapter 1: (a) coercion involves active pressure by one party on another to gain compliance with demands or conditions set out; (b) coercion is non-physical; (c) coercion tactics use implicit and explicit threats targeted to specific vulnerabilities of the victim; (d) coercion tactics are often used in concert; and, (e) coercion tactics are used to create an environment where the victim feels that he or she has no meaningful alternatives but to submit to the demands of the coercer. Having confirmed the scope of the framework as appropriate in this regard, this conceptual framework can be considered as an appropriate foundation from which to build and evaluate domestic laws in relation to human trafficking, and with particular regard to the inclusion of forced labour.

Part 2: Dissecting and Rebuilding the Canadian Criminal Offence of Human Trafficking to Account for Coercion and Forced Labour

Canada's experience with human trafficking legislation, and efforts to combat the crime, have been on-going for nearly a decade, although serious momentum on the issue has only been seen within the last five years. The first legislation aimed at combating human trafficking in Canada

was introduced in 2002 under the *Immigration and Refugee Protection Act*⁸⁶, and in 2005, the offence of human trafficking was added to the Canadian *Criminal Code*⁸⁷. Intelligence gathering over particularly the past five years has revealed many important trends and data that establish the existence of human trafficking, and forced labour, in Canada. Suspected cases of international forced labour are a growing concern for RCMP. “For example, between 2005 and 2008, the RCMP’s Immigration and Passport Branch (Northwest Region) received twenty-eight complaints of alleged human trafficking in Alberta, Saskatchewan, and Manitoba, many linked to forced labour practices.”⁸⁸ As concerns foreign nationals and victims of forced labour, statistics from a Citizenship and Immigration Canada database found an increasing number – one in four – of potential foreign trafficking victims to be men, likely victims of forced labour.⁸⁹ Between May 2006 and November 2008, CIC issued 46 Temporary Residence Permits to victims of forced labour⁹⁰, confirming the existence of international trafficking for forced labour in Canada.

Despite these documented cases, no charges for forced labour or cases involving international victims have been successfully prosecuted. Of the seven convicted human traffickers in Canada to date⁹¹, all involved the sexual exploitation of Canadian nationals. Of approximately 30 individuals in Canada charged with human trafficking between 2007 and 2009, only 6% of cases involved forced labour.⁹² Three known cases of international labour trafficking are currently making their way through the justice system: two charged under the *Immigration and Refugee*

⁸⁶ *Immigration and Refugee Protection Act*, CS 2001, c 27, ss.118-121.

⁸⁷ *Criminal Code*, RSC 1985, cC-46, ss.279.01-279.04 [*Criminal Code*].

⁸⁸ *Perrin*, *supra* note 1 at 171-2.

⁸⁹ *Ibid* at 33.

⁹⁰ *Ibid* at 144.

⁹¹ See “Human Trafficking Quick Facts” online: Royal Canadian Mounted Police <www.rcmp-grc.gc.ca>.

⁹² *Perrin*, *supra* note 1 at 121-2.

Protection Act, which were discussed as case studies in Chapter 1, and one charged under the *Criminal Code*. The case currently being tried under the *Criminal Code* – known as the Hamilton 19 – represents a very extreme situation of human trafficking, including the use of physical violence and ties to organized crimes.⁹³ Based on what was seen in Chapter 1, this can therefore be considered as falling within a small minority of overall labour trafficking situations, and thus does not detract from the larger concerns that Canada’s laws are ill-equipped to deal with trafficking for forced labour. Two cases from British Columbia, discussed in Chapter have recently been charged under the *Immigration and Refugee Protection Act* offence of human trafficking. Both of these cases involve the domestic servitude of foreign nationals, and both appear to primarily involve the use of non-physical *means* of exploitation. In deciding to charge under *IRPA*, authorities likely considered the limited potential for success under the *Criminal Code* due to the narrow wording of the offence, as will be discussed in Chapter 3. However, given that these two cases fall within the international definition of human trafficking, they should be capable of prosecution under domestic criminal law in Canada, as was a mandatory requirement for States signing on to the *Palermo Protocol*. The fact that these cases cannot fit within the criminal law framework in Canada, and that others, such as the Elmvale 11 and the Thai workers in Ontario, are not prosecuted at all, signals a significant issue with Canada’s legal framework to combat human trafficking.

This Part will examine the current wording of the Canadian *Criminal Code* offence against human trafficking and seek to address the gaps identified in the current text. Chapter 3 will begin by setting out the *Criminal Code* offence of human trafficking and identifying its primary

⁹³ Douglas Quan, “19 Hungarians found in alleged Ontario human traffic ring,” *The Montreal Gazette* (9 October 2010) online: The Montreal Gazette <<http://www.montrealgazette.com>>.

components. These components will then be examined in relation to the *Palermo Protocol* and the conceptual framework for coercion. After identifying and analyzing the primary gaps in Canada's current criminal law against trafficking, Chapter 4 will propose alternative texts and standards that can fill the current gaps and provide for a more complete definition of human trafficking that is capable of including coercion as a *means* of trafficking, and therefore better addressing forced labour situations. This chapter will look to other *Criminal Code* offences as well as international and comparative national law to draw on a variety of texts and options for revision of Canada's current laws. This chapter will conclude by setting out two alternative approaches for alternative definitions to Canada's current law on human trafficking, which can serve as starting points for reform on this issue in Canada.

Chapter 3: The Problematic Nature of the Canadian *Criminal Code* Offence of Human Trafficking

Despite the existence of many other issues in prosecuting cases of international human trafficking, the limited scope of the *Criminal Code* is a significant and foundational problem in addressing the crime of trafficking for forced labour. Having ratified the *Palermo Protocol*, Canada committed to criminalizing all forms of human trafficking, and meeting the minimum requirements of the *Palermo Protocol* in doing so. However, as this chapter will establish, the Canadian *Criminal Code* offence does not meet these requirements, and unduly narrows the scope of the offence such that many cases of human trafficking will be insufficient to meet the stringent standards set out in this offence, even where such cases would fit within the parameters of the *Palermo Protocol*.

This chapter will set out and analyse the *Criminal Code* offence of human trafficking in order to identify the gaps currently existing in this legislation that prevent effective prosecution of trafficking for forced labour. Particularly, this chapter will focus on how the *Criminal Code* meets or falls short of the standards set out in the *Palermo Protocol* and the framework for coercion developed in Part 1. A majority of the analysis will focus on the “fear for safety” standard developed under the *Criminal Code*, a significant gap in the effective implementation of criminal law against human trafficking in Canada, and a “loophole” which has enabled “traffickers in Canada ... to escape human trafficking charges.”⁹⁴

I. The Restrictive “Fear for Safety” Standard and its [Un]Intended Consequences

The criminal offence of human trafficking is set out in sections 279.01-279.04 of the Canadian *Criminal Code*⁹⁵. Section 279.01 sets out the offence of trafficking in persons:

279.01 (1) Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence and liable

...

Section 279.04 defines “exploitation” as:

279.04 For the purposes of sections 279.01 to 279.03, a person exploits another person if they

(a) cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service; or

⁹⁴ *Perrin, supra* note 1 at 137.

⁹⁵ Sections 279.011, 279.02, and 279.03 deal with issues of child trafficking and the related offences of receiving a material benefit, and withholding documents; *Criminal Code, supra* note 87.

(b) cause them, by means of deception or the use or threat of force or of any other form of coercion, to have an organ or tissue removed.

Therefore, for an individual to be successfully convicted of human trafficking in Canada, they must have committed one of the *acts* listed under s.279.01, and must have done so for the *purpose* of exploitation as defined under s.279.04. At first glance, this may appear to be a broader definition than the *Palermo Protocol* because there is no defined *means* set out in the *Criminal Code* offence. The list of enumerated *acts* is broader than that set out in the *Protocol* because it includes “control, direction or influence over the movements of a person” as well as all the enumerated *acts* set out in the *Protocol*. In addition, rather than providing an explicit list of exploitative purposes, the *Criminal Code* allows for “any labour or services” to constitute a *purpose* of exploitation, thereby shifting the focus of evaluation in a potential situation of human trafficking to the *acts* and *means* employed, rather than the end outcome or target of exploitation. However, despite these broadened categories, the definition of exploitation in s.279.04 includes an implicit *means* of trafficking by including a “fear for safety” requirement, which is in fact far more limited in scope than the *means* enumerated under the *Protocol*, and therefore severely limits the application of this offence to cases of human trafficking.

The Interpretation of “Safety” and its Relationship to the Presence of Physical Violence

The “fear for safety” requirement set out in the definition of exploitation under the Canadian *Criminal Code* requires, for a charge of human trafficking to be laid, that the accused engage in conduct which “in all the circumstances, could reasonably be expected to cause the [victim] to believe that their safety or the safety of a person known to them would be threatened if they

failed to provide, or offer to provide, the labour or service”.⁹⁶ This requirement has been incorporated into the definition of exploitation in a way that creates an implicit *means* standard. The conduct of the accused will only be considered to cause the victim to submit to the exploitation where the victim fears for his or her safety or for the safety of someone known to them. Therefore, the *means* required is not limited to a *type* of conduct, but is limited in respect of the *target* of the conduct: safety. “This is unfortunately too narrow because it fails to criminalize other means by which trafficking is routinely committed.”⁹⁷

The use of the word “safety” creates a strong connotation that only *means* involving physical force or threats thereof will be considered sufficient to constitute human trafficking under the *Criminal Code* offence. The chosen use of the word “safety” relates to the physical or bodily integrity of an individual, rather than psychological well-being or financial security. Therefore, only conduct which threatens physical or bodily integrity would be sufficient to meet this “fear for safety” standard. While with trafficking for sexual exploitation, any act to induce the victim to perform services may be seen as a threat to their bodily integrity, this link is not as readily apparent in labour trafficking scenarios. While it has been suggested that “safety” could encompass a meaning broader than that of physical harm or danger, and that this was perhaps even the intention of the legislature with regards to this offence⁹⁸, the evidence available thus far indicates that “safety” is being interpreted in relation only to physical or bodily integrity.

⁹⁶ *Criminal Code*, *supra* note 87, s279.04.

⁹⁷ *Perrin*, *supra* note 1 at 137.

⁹⁸ See, for example, Library of Parliament, Legislative Summary LS-508E, “Bill C-49: An Act to Amend the Criminal Code (Trafficking in Persons)” (12 January 2006).

This interpretation of the standard is supported by evidence from the legislature, law enforcement, and judicial authorities. The parliamentary committee reviewing the legislation prior to enactment made little comment or debate on the “fear for safety” requirement; however, one statement recorded on this issue supported the connection between “safety” and physical harm: “[b]asically, they fear for their **life or physical harm** to themselves, or, in the trafficking situation, threats against family members back home.”⁹⁹ In addition, as was seen with respect to the Elmvale 11 case in the introduction to this thesis, the RCMP has also interpreted the “fear for safety” requirement in a narrow manner. The RCMP in that case declined to press charges of human trafficking because the group did not “fear for their safety”; given that the group was subjected to many control mechanisms, including confiscation of documents, isolation, and threats of economic penalties, the only clear reason for this decision can be that there was no explicit physical abuse or threats thereof, and that the RCMP required the presence of one of these two mechanisms in order to meet the “fear for safety” requirement under the *Criminal Code*. Finally, in a criminal case involving the trafficking and sexual exploitation of two minors, the accused escaped charges of human trafficking in relation to one of the victims because she did not “fear for her safety”, despite the fact that the trafficker used psychological manipulation and preyed on her vulnerabilities in order to gain her compliance to the exploitation.¹⁰⁰ The decision in this case “demonstrates how a single trafficker may choose vastly different strategies to retain control over his victims: deception and psychological manipulation versus direct threats and physical assaults”¹⁰¹ and how the current *Criminal Code* provision is inadequate to deal with these more complex, and subtle, methods of control.

⁹⁹ *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 38th Parl, 1st Sess, No 25 (24 November 2005) at 25:57 (Carole Morency) [*emphasis added*].

¹⁰⁰ See *Perrin*, *supra* note 1 at 124, discussing *R. v. Nakpangi*, 2008 CarswellOnt 9334 (WL Can) (Ont Ct J).

¹⁰¹ *Perrin*, *supra* note 1 at 125.

Based on this evidence, it can be established that a strict interpretation based on the relation between “safety” and the threat of physical violence has surfaced as the prevalent construction of this standard under the *Criminal Code*. Therefore, any non-physical *means* of inducing the victim to perform labour or services will not be captured by the *Criminal Code* offence of human trafficking, including not only coercion, but also deception, fraud, abuse of power, and abuse of a position of vulnerability. The exclusion of coercion is particularly problematic because of it is often considered amongst the more severe *means* of human trafficking. In addition, as was discussed in Chapter 1, coercion has the ability as an enumerated *means* to encompass serious forms of abuse of power and abuse of a position of vulnerability. Therefore, the exclusion of this *means* in the wording of the *Criminal Code* has the effect of excluding all direct forms of non-physical control. Given that particularly in labour trafficking scenarios it has been documented that physical means of control are relatively rare, as discussed in Chapter 1, the effect of this restricted standard is to potentially exclude a significant majority of labour trafficking cases.

The Negative Impact of the “Fear for Safety” Requirement on Trafficking-Related Offences

The *Criminal Code* provisions addressing human trafficking contain, in addition to the main offence, two trafficking-related offences: withholding or destroying documents, and obtaining a material benefit.¹⁰² The separation of these offences from the main trafficking offence indicates an awareness and desire to address these specific issues as compounding, or exacerbating, conditions of human trafficking. However, because both of these related offences require a connection to the main trafficking offence under s.279.01, they are indirectly impacted by the “fear for safety” limitations discussed in the previous section. Therefore, these offences have the

¹⁰² *Criminal Code*, *supra* note 87, s279.02, s279.03.

same limited impact as the main trafficking offence because they can only be pursued where the main trafficking offence can also be pursued, and therefore, only where the victim in question fears for his or her safety.

There is particular concern with respect to the effectiveness of s.279.03, which prohibits the confiscation of documents, given that, as was seen in Chapter 1, the withholding or destruction of travel or identity documents is a particularly strong control mechanism against international victims. The consequence of the stringent “fear for safety” requirement under the main offence therefore renders ineffective a provision which ought to offer an additional route of redress against traffickers. In addition, s.279.02, if independent from the main offence, could be an effective tool of prosecution for “aiders and abettors” of human trafficking operations; those who may not have been the primary actor involved in the exploitation, but who nonetheless facilitated or benefited from the crime. The “fear for safety” requirement therefore debilitates the entire scheme of offences created to combat human trafficking in Canada, and cannot be ignored or understated in its significant impact on the success of investigations and prosecutions.

II. The Failure of the *Criminal Code* Offence to Capture the Critical Elements of Coercion

Having set out the scope and interpretation of the *Criminal Code* definition for trafficking in persons, this definition must be evaluated against the findings from Part 1 to illuminate the gaps currently existing in the Canadian legislation, and therefore to identify the key components that must be present in proposed alternatives. As was mentioned earlier in this chapter, the *act* and *purpose* elements of the *Criminal Code* not only meet, but exceed, the requirements of the *Palermo Protocol*, and allow for a deeper focus on the *means* element of the crime, which is

perhaps the most important in properly defining what constitute human trafficking, and in separating this crime from other exploitative practices. However, despite these improvements, because the “fear for safety” requirement essentially limits the applicable *means* to physical violence or threats thereof, the *Criminal Code* offence has, overall, been severely curtailed in impact. A comparative analysis between the *Criminal Code* text and the conceptual framework of coercion developed in Chapter 2 will deepen our understanding of how this offence is insufficient to capture human trafficking situations and what specific components must be addressed in improving the legislation.

The Constriction of Coercive Mechanisms to Physical Force

Looking back at the framework for coercion, the developed definition can be broken down into two primary components: first, the existence and definition of a coercive mechanism, and second the impact on the victim, or baseline for vitiating consent. The coercive mechanism component required two factors to be present in a situation: (a) the creation of an additional consequence; and, (b) the real or perceived authority of the coercer by the coerced to carry out the consequence. Examining the wording of the *Criminal Code* text, the offence does require the creation of an additional negative consequence as the offender must engage in conduct which causes the victim to fear for his or her safety. However, the scope of applicable conduct is too narrow as it has been established to be limited to threats or use of physical force or violence, and therefore does not enable a coercive mechanism to target other non-physical negative consequences, such as the threat of deportation or economic penalties, which have been shown to be the prevalent mechanisms used in situations of coercion.

The *Criminal Code* also contains an implicit requirement that the offender must be in a position of authority, or the victim must perceive the offender to be in a position of authority, to carry out the threat, as the definition of exploitation focuses on conduct that could reasonably cause the victim to believe that their safety was threatened.¹⁰³ The way this standard is phrased, a greater emphasis is placed on the victim's perception of the situation, which, when considering this particular requirement of the coercion framework, may be preferential as it is a low standard of proof required. However, despite the ability of the provision to apparently meet this second requirement, it also suffers from undue restriction due to the "fear for safety" requirement. The *Criminal Code* therefore is overly restrictive with respect to meeting the first-prong or set of conditions of the conceptual framework as to defining coercive mechanisms.

An Incomplete Standard of Consent

The existence of a coercive mechanism must also operate to manipulate the coercee's alternatives. Therefore, a lack of consent to the situation must complement the proof of a coercive mechanism. The framework for coercion establishes several necessary components to effectively establishing a lack of consent: (a) the victim must reasonably believe that he or she had no meaningful alternative but to comply with the offender's demands, having particular regard to, (b) the totality of the circumstances in creating a climate of fear and, (c) the particular circumstances and background of the victim. With respect to the first criterion, the *Criminal Code* establishes that the victim must believe he or she had no alternative but sets the 'baseline' for determining whether a meaningful alternative exists at the level of a fear for physical safety. This baseline is far too stringent and cannot account for the complex inner-workings of the coercive relationship as was examined in Part 1. This baseline cannot account for psychological

¹⁰³ *Criminal Code*, *supra* note 87, s 279.04.

manipulation, let alone economic coercion or threats against administrative status. Therefore, rather than judge the victim impact based on the existence of “meaningful alternatives”, the *Criminal Code* will only apply when the victim’s choice is manipulated to the extent that he or she fears physical violence or even death in refusing the trafficker’s demands. Further, the “fear for safety” standard fails to recognize the key component of manipulation in effective coercion, which is purposefully defined for the purposes of human trafficking as non-physical in nature. Therefore, the *Criminal Code* definition fails to fulfil the criterion of establishing manipulation of the victim’s alternatives such that the victim is left without *meaningful* alternatives. With respect to the second and third components of the framework, the *Criminal Code* does include the words “in all the circumstances” which suggests that the facts of the case, and possibly the victim’s background, should be considered in the assessment. However, given the extreme weight of these factors as discussed in Part 1, these two components of the framework should receive more prominence in a criminal legal text setting out the definition of human trafficking and elements of the offence. Further, as the *Criminal Code* is not explicit in requiring consideration of the victim’s individual background and pre-existing circumstances, it is likely that these may be overlooked in evaluating the overall situation to determine whether human trafficking exists.

Having briefly analysed the primary components of the coercion framework against the current *Criminal Code* text, the following can be determined: the *Criminal Code* seeks to set out a baseline for consent, and to require consideration of the underlying circumstances of the case; however, the baseline for consent is set at too high a standard which does not account for any non-physical targets of a coercive mechanism, and therefore does not account for coercion as a

means, let alone the less severe *means* of abuse of power and a position of vulnerability. Further, the requirement to consider underlying circumstances is not given the prominence necessary to convey the weight and importance of these factors in determining whether coercion (or other *means*) exists in a situation of exploitation to prove the elements of human trafficking. Therefore, alternative approaches for reform to the *Criminal Code* text must: (a) expand the allowable *targets* of the coercive mechanism beyond physical safety to account for the prevalent, non-physical coercive mechanisms used in labour trafficking; (b) refocus the baseline for consent to include the concept of meaningful alternatives; and, (c) attribute more weight to the consideration of underlying facts and pre-existing vulnerabilities or circumstances affecting the victim's perceptions of the situation in the baseline for consent.

Chapter 4: Exploring Alternatives to the “Fear for Safety” Standard

The inclusion of the “fear for safety” requirement in the Canadian *Criminal Code* offence against human trafficking was clearly an attempt to set a baseline to determine what situations will constitute human trafficking versus what may fall below this on a spectrum of exploitative practices. However, as can be seen from the evidence in Chapter 3, the interpretation of this standard as requiring physical violence or threats thereof is too stringent, and is certain to exclude a large majority of severe trafficking cases, as well as potentially excluding a significant proportion of cases involving less severe, or more subtle, *means* such as deception and abuse of power or a position of vulnerability.

This chapter seeks to examine ways in which Canada's current *Criminal Code* definition of “exploitation” and offence against human trafficking can be revised in order to better meet the

requirements of the *Palermo Protocol* and capture the primary *means* used particularly in forced labour situations by incorporating elements of the conceptual framework for coercion developed in Chapter 2. To that end, this chapter will examine other *Criminal Code* provisions, as well as the *travaux préparatoires* to the *Palermo Protocol*, and the United States' *William Wilberforce Act* as examples and texts that can be drawn on to improve the Canadian text. The *Criminal Code* provisions primarily assist in developing a deeper understanding of how to incorporate coercive mechanisms in an offence as well as establishing the capacity of criminal law to recognize non-physical *means*. The *Palermo Protocol* and United States legislation provide varied examples of alternative baselines for consent that could serve as substitutes to the current “fear for safety” requirement under Canada’s *Criminal Code*. This chapter concludes by piecing together these analyses to propose two alternative approaches for reform, highlighting the advantages and disadvantages of each in meeting the *Palermo Protocol* requirements, sufficiently capturing the components of the conceptual framework for coercion, and conforming to legal and criminal law drafting principals.

I. The Recognition of Coercive Mechanisms in Other *Criminal Code* Offences

Legal principals necessitate clear standards for defining the components of criminal acts. The existence of coercive mechanisms in other *Criminal Code* offences, as well as other *means* within the provisions on trafficking, establish the recognition that non-physical *means* can be criminalized and used to induce a victim’s compliance in a particular situation, which assists in both arguing for revision of the “fear for safety” standard and providing a starting point from which to consider alternative texts. This section will examine the related definition of “exploitation” for organ trafficking under s.279.04, as well as the offences of extortion and

intimidation under the *Criminal Code*. These offences provide examples of the existence and format of coercive mechanisms within criminal law that can be later drawn on in developing proposals for reform to Canada's current *Criminal Code* offence.

S.279.04 itself contains an alternative definition of exploitation where organ trafficking is concerned. S.279.04(b) defines exploitation as: “[causing the victim], **by means of deception or the use or threat of force or of any other form of coercion**, to have an organ or tissue removed.” This subsection clearly indicates an awareness on the part of the drafters of the many *means* available to traffickers and imports directly some wording from the *Palermo Protocol*. Further, it clearly conveys an understanding that coercion, while a severe *means* like force, is somehow different from physical force or threats thereof, as was discussed in Chapter 1 with respect to the same group of enumerated *means* under the *Protocol*. Although it is not clear why this form of trafficking provides for a broader, albeit more vague, set of *means*, it importantly establishes within the specific set of trafficking provisions the ability to recognize non-physical *means* of exploitation.

The criminal offences of extortion and intimidation may offer more pragmatic alternatives to the current *Criminal Code* definition of exploitation, and “fear for safety” standard. Each of these offences involves the use of non-physical coercion or control to induce a victim into compliance with the offender's demands.

Extortion as a Coercive Mechanism in the Criminal Code

Extortion is defined under the *Criminal Code* as: “Everyone ... who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done.”¹⁰⁴ There are three key elements to this offence:

- (1) the use of threats, accusations, menaces, or violence,
- (2) to induce a person to do something or cause something to be done;
- (3) without reasonable justification or excuse.

These three components of the definition of extortion match closely with identified components of coercion as discussed in Chapter 2. First, when discussing coercive mechanisms, it was determined that conduct could include speech and acts. Where speech was concerned, the coercive mechanism must take the form of a threat. This comports well with the first key element of extortion which requires the presence of a threat, accusation or menace – all speech acts aimed at inducing the victim’s compliance as set out in the second condition of extortion. The defined concept of coercion in Chapter 2 also recognized the underlying premise that the coercive mechanism must operate to induce a coercee’s compliance by manipulating their alternatives. Finally, the third key component of extortion requires that the accused not be justified in their conduct; this, too, is an underlying premise inherent in any criminal concept of coercion, although intentionally left outside the parameters of the conceptual framework due to the identified problems associated with justification in this context, as set out in Chapter 2.

¹⁰⁴ *Criminal Code*, *supra* note 87, s346.

The definition of extortion under the *Criminal Code* does not limit the target or outcome of the conduct – extortion can be used to compel a victim to do “anything”; therefore, the focus of this offence remains on the conduct of the accused and mechanism by which the victim is induced to comply with the accused’s demands, rather than judging the *purpose* of the transaction. This focus is also already present in the *Criminal Code* offence against trafficking in persons, and is a positive departure from the *Palermo Protocol* as discussed earlier in this chapter. However, the *Criminal Code* limits the target or outcome of the conduct to that of physical safety, which was determined to be a major gap in its ability to encompass the wide array of *means* used by traffickers to control their victims, and specifically in its ability to capture coercion as defined in Part 1. Therefore, the definition of extortion provides not only an alternative which broadens the target or outcome of the offender’s conduct, but establishes that such a narrow view as that imposed under s.279.04 is not required to adequately meet legal drafting principals in Canada.

Intimidation as a Coercive Mechanism in the Criminal Code

The offence of intimidation under the Canadian *Criminal Code* set outs very similar basic elements to that of the definition of extortion, but goes into much further detail in defining the specific criminal conduct – or *means* – of the offence. Section 423 of the *Criminal Code* sets out the offence of intimidation:

423. (1) Every one ... who, wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he or she has a lawful right to do, or to do anything that he or she has a lawful right to abstain from doing,

(a) uses violence or threats of violence to that person or his or her spouse or common-law partner or children, or injures his or her property;

(b) intimidates or attempts to intimidate that person or a relative of that person by threats that, in Canada or elsewhere, violence or other injury will be done to

or punishment inflicted on him or her or a relative of his or hers, or that the property of any of them will be damaged;

(c) persistently follows that person;

(d) hides any tools, clothes or other property owned or used by that person, or deprives him or her of them or hinders him or her in the use of them;

...

(f) besets or watches the place where that person resides, works, carries on business or happens to be;¹⁰⁵

Like the definition of extortion, the offence of intimidation rests on three primary components: (1) the use of certain defined tactics or mechanisms, (2) to cause a person to do or not to do something, (3) without reasonable justification or excuse. Looking first at the second element, the offence of intimidation expands beyond the simple wording of causing a person to do something to include the requirement that the person have a legal right to do or not to do that which the offender is compelling them to not do or do. Although this wording is more limited than that under the definition of extortion, it is sufficiently broad to apply to human trafficking scenarios, as labour and other laws provide individuals legal rights which are violated in the context of human trafficking and forced labour situations. However, while the requirement of a legal right may be important to the definition of intimidation, it is not so to the required elements of human trafficking, and therefore, this component is not a necessary addition to any proposals for reform to s.279.04. As was mentioned with extortion, the third element is an inherent requirement of criminal laws targeting specific conduct or speech used to compel another person to do (or not do) something, and therefore, is also not at issue.

¹⁰⁵ *Criminal Code*, *supra* note 87, s423. Subsections considered inapplicable to this analysis were excluded from copy above to achieve greater clarity and flow.

It is the first element of the offence of intimidation which warrants close consideration in this analysis, as the wording of this offence delineates in detail the specific types, or targets, of conduct that will give rise to a situation of intimidation. Whereas the definition of extortion lists broad categories of conduct, “threats, accusations, menaces, or violence”, the offence of intimidation delineates specific acts and speech that apply to the offence. These acts and speech make up the *means* element of the offence, and can be broken down into the following general categories: violence, threats of violence, threats of injury, threats of punishment, threats of property damage, actual property damage, hiding or depriving the victim of his or her personal property, and following or constantly watching/supervising the person. While some of these listed *means* pertain to physical violence or threats thereof, others pertain to some of the primary control tactics or coercive mechanisms outlined in Part 1, specifically: confiscation of property; threats of “punishment” (which is specifically separated from injury and physical violence, connoting an intention that this would apply to non-physical penalties); and, supervision or following the movements of a person.

Evaluating the Positive and Negative Components of Other Criminal Code Offences as Alternatives to Canada’s Definition of Human Trafficking

The *Criminal Code* offences of extortion and intimidation offer alternative approaches the identification and inclusion of specific types of coercive mechanisms to the current “fear for safety” requirement under s.279.04. These other *Criminal Code* offences establish many important findings, primarily that the *Criminal Code* recognizes non-physical mechanisms of coercion in other existing offences. Establishing the capacity of the *Criminal Code* to include non-physical mechanisms of control and coercion provides a foundation to argue for reform to

the “fear for safety requirement”. Having established this, it is best to consider which examined offence provides the best format to adopt in considering alternative approaches to Canada’s current *Criminal Code* offence against human trafficking.

Both the offences of extortion and intimidation specifically delineate the types of conduct required of the offender to give rise to the offence. However, the offence of extortion groups the type of conduct into broad categories: “threats, accusations, menaces, or violence”, while the offence of intimidation lists specific types and targets of coercive mechanisms applicable in proving the elements of the crime. Therefore, the choice of format is essentially between a broad versus detailed listing of applicable conduct. In addition, there is a choice of format in terms of listing the targets of conduct, as is done in the offence of intimidation. Although the concept of broad categories is tempting, as there is less risk of excluding applicable conduct, the use of broad categories also risks narrow interpretation in implementation of the law. Whereas a detailed list of applicable conduct and targets of such conduct must be comprehensive to fully address the complexities of human trafficking, such an approach leaves less room for error in interpretation and implementation, which has been found to be the primary problem associated with Canada’s current *Criminal Code* offence. Further, given that the primary types and targets of conduct have been identified with respect to labour trafficking in Chapter 1, a comprehensive list is possible in proposing alternatives for reform. Therefore, the offence of intimidation will serve as the model for proposals later in this chapter.

II. Alternative Baselines for Consent in International and Comparative Law

The *Palermo Protocol* and national laws in other countries can also provide useful guidance in examining alternative baselines for consent for the *Criminal Code* offence against human trafficking. As we saw in Chapter 1, the *travaux préparatoires* to the *Palermo Protocol* contain several proposed texts that attempt to set a baseline for consent, and can be useful to examine in relation to reform in Canada. Further, the United States legislation criminalizing human trafficking, and specifically forced labour, may serve as a particularly useful example as the justice system is quite similar to Canada, the text itself is quite similar to the current wording of the *Criminal Code*, and the US legislation has gone through extensive revision over the past decade in an effort to better encapsulate forms of non-physical coercion.

Alternative Wording for the “No Reasonable Alternative” Framework under the Palermo Protocol

As was discussed in Chapter 1, the *travaux préparatoires* to the *Palermo Protocol* proposed many potential definitions for some of the listed *means* under the definition of human trafficking which employed wording similar to the “no reasonable alternative” framework outlined in Chapter 2. Despite the fact that these proposals were not included in the final text, they may serve as useful alternatives to Canada’s current *Criminal Code* wording. Three proposed definitions in the *travaux préparatoires* are particularly useful to examine. Two were made in relation to the *means* of an abuse of position of vulnerability; and a third outlined a definition specific to forced labour. Given the complementary nature of these terms as discussed in Chapter 1, it is appropriate to examine these baselines as they would apply to the framework developed in Chapter 2.

The first proposed definition explained an “abuse of position of vulnerability” as: “any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved”.¹⁰⁶ This definition is very similar to the “no reasonable alternative” test developed in Chapter 2 and overcomes one of the identified problems of the “no reasonable alternative” test by delineating in more detail what constitutes “reasonable”. “Real and acceptable alternative” establishes that there must be both the existence of alternatives, and that those must be viewed as acceptable. However, this definition does not go on to state how acceptability should be judged, and by whom. Yet, if this change in wording is coupled with a “qualified reasonable person” test as suggested in Chapter 2, this would provide a more concrete baseline for consent. However, a lack of any definition as to what would constitute a coercive mechanism or conduct on the part of the trafficker is problematic insofar as this text could be considered a complete alternative. Rather, some enumeration of conduct would have to complement this new baseline for consent. The other *Criminal Code* offences analysed in the previous section may provide a complementary alternative to address the issue of enumerated conduct that, pieced together with this baseline for consent, may meet the drafting standards required of criminal law in Canada while also maintaining sufficient breadth to appropriately capture coercion as a non-physical *means*.

A second proposed definition of “abuse of position of vulnerability” also provides alternative text similar to the “no reasonable alternative” framework. This proposal defined the baseline for consent as: “such that the person has no real or acceptable choice but to submit to such pressures

¹⁰⁶ *Travaux Préparatoires*, *supra* note 23.

or abuse of authority”.¹⁰⁷ This proposal is again very similar to the conceptual framework for coercion developed in Chapter 2, and also very similar to the first alternative proposal above. The primary distinction between this and the immediately preceding proposed definition is the target of the victim’s submission. While the former definition required submission to “the abuse involved”, this definition would expand this to include both “pressures” and “abuse of authority”. Given the controversial status of “pressures” as constituting coercion and the weight that should be attributed to the power dynamic of the employer-worker relationship, both discussed in Chapter 2, this definition may not be a pragmatic option for reform in Canada, as it may eliminate one issue but create another.

Finally, a third proposed definition specific to forced labour was made, which focuses the ‘test’ for consent on whether the victim has the “freedom to change his or her condition”:

Maintenance of the victim in such conditions in order to demand, under the threat of some penalty, the performance of forced and compulsory labour to which the victim has not voluntarily consented or in order to force the person, in accordance with custom or by agreement, for payment or free of charge, to provide certain services **without the freedom to change his or her condition.**¹⁰⁸ [*emphasis added*]

Unlike the previous proposals, this definition is complete in that it specifies the conduct required of the offender which, like the *Criminal Code* wording, is very broad (“maintenance in conditions”; “threat of some penalty”; or, “force”), as well as setting a baseline for consent that recognizes the perceived impact on the victim (“without the freedom to change his or her condition”). This proposed definition is somewhat broader than the standard developed under the coercion framework in Chapter 2 as it focuses not on the existence of alternatives, but on the

¹⁰⁷ *Travaux Préparatoires*, supra note 23 at 355.

¹⁰⁸ *Travaux Préparatoires*, supra note 23 at 350.

impact of the immediate situation on the victim. In this way, this proposed definition overcomes some of the challenges with respect to “alternatives” discussed in Chapter 2. While this definition does implicitly capture the fact that a coercer manipulates the alternatives of a coercee, and that this alters the course of action of the coercee, it maintains a focus on the impact of the coercee in the current situation and an evaluation of this immediate situation, rather than emphasizing the question of existing alternatives and evaluating those alternatives. This may be, from a normative perspective, a more appropriate focal point when considering the issue of consent as it operates in situations of human trafficking.

Despite the positive aspects of this text, this definition suffers from ambiguity in several ways. First, the conduct required of the offender is vague and interspersed throughout the definition such that it may be unclear how each type of conduct applies to the baseline for consent at the end of the definition. This, however, would be less of a concern if the baseline for consent was a clear standard, such as is the case in the current *Criminal Code* definition. Therefore, for this proposed definition to serve as a realistic alternative to the current *Criminal Code* definition, it may be necessary either to provide additional detail in relation to the requisite conduct, or coercive mechanisms, of the offender, or to enhance the baseline for consent such that more clarity is provided on the “freedom to change his or her condition” standard. Finally, despite the fact that this definition implicitly includes consideration of the surrounding facts of the case and underlying circumstances of the victim in the baseline for consent, it may be beneficial to explicitly address these components in order to ensure appropriate weight is attributed to them.

The United States’ “Serious Harm” Standard as a Broader Alternative to the “Fear for Safety” Requirement

As discussed briefly in Chapter 2, rather than adopting a similar wording or structure to the “no reasonable alternative” framework, domestic laws will sometimes blend the two prongs of the coercion framework such that the target or existence of a coercive mechanism also sets a baseline for when and how consent will be vitiated by the victim. As was seen in Chapter 3, Canada’s current *Criminal Code* definition of exploitation adopts this approach, but is far too restrictive in its application. The United States legislation on trafficking in persons under the *Trafficking Victims Protection Act of 2000*¹⁰⁹ [TVPA] may offer a readily accessible alternative as it employs a similar structure but broadens the categories, or targets, of coercive mechanisms that give rise to a situation of coercion and human trafficking.

The TVPA defines “coercion” as:

- (A) threats of serious harm to or physical restraint against any person;
- (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
- (C) the abuse or threatened abuse of the legal process.¹¹⁰

This definition clearly incorporates the idea that coercion can include elements beyond physical force, as demonstrated by the inclusion of “serious harm *or* physical restraint” in subsections (A) and (B), as well as the inclusion of subsection (C), which could relate to, for example, threats against immigration status. However, the original *Act* of 2000 did not define “serious harm”, leaving the concept of psychological and economic coercion open to debate.

¹⁰⁹ *Trafficking Victims Protection Act of 2000*, 22 USC 7101.

¹¹⁰ *Ibid*, s103.

In 2008, the United States enacted the *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*¹¹¹ which supplements the *TVPA*, in part, by expressly defining “serious harm” as:

“(2) The term ‘serious harm’ means any harm, whether physical or nonphysical, **including psychological, financial, or reputational harm**, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm. [*emphasis added*]¹¹²

This definition not only incorporates the most common forms of coercion as identified in Chapter 1, but is structured quite similarly to Canada’s current *Criminal Code* wording. However, rather than use the term “fear for safety”, the United States definition rests on the idea of “serious harm” which it explicitly states as including non-physical forms of harm. This definition also expressly includes a consideration of the surrounding facts of the case and underlying circumstances, or background, of the victim. Finally, where as the *Criminal Code* requires the victim to perform a service or labour out of active fear for their safety, the United States standard requires only that the victim perform the labour or service to *avoid incurring* the harm. This small change in wording actually marks a significant difference in the weight attributable to the existence of “alternatives” for the victim in the situation. Because the *Criminal Code* links submission to the active fear for safety, it implicitly places a greater weight on the *existence* of alternatives; however, the United States definition, rather than evaluate the reasonableness of the alternatives, focuses on an evaluation of the *process* of choice and manipulation of alternatives because of certain threatened consequences, or harm. Finally, the text of the United States incorporates the contextualization, or “qualified reasonable person”

¹¹¹ US, Bill HR 7311, *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*, 110th Cong, 2008 (enacted).

¹¹² *William Wilberforce Act*, *supra* note 111, title 2, subtitle C, sec 1589, s (c)(3).

standard by expressly considering the underlying facts of the case as well as background and circumstance of the victim. This enables the *process* of choice and availability of meaningful alternatives to be examined more appropriately, having particular regard to and recognition of, the unique vulnerabilities at play in human trafficking situations.

This definition illustrates the way in which the “no reasonable alternative” test can be incorporated in domestic law to allow for both sufficient clarity of requisite conduct and an appropriate baseline for consent. Although it does not import the wording of the “no reasonable alternative” test like the proposals evaluated under the *Palermo Protocol*, it uses the underlying tenets of this test, and of the general coercion framework, to inform and guide the legal text. Therefore, this standard is able to capture the critical legal elements identified under the conceptual framework for coercion developed in Chapter 2, while also overcoming some of the potential barriers discussed in relation to the other proposed alternatives.

III. Proposing a New Definition of Exploitation in the *Criminal Code*

This chapter has sought to address the problematic wording of Canada’s current *Criminal Code* offence against human trafficking by examining alternatives to the identified gaps in the *Criminal Code* definition of exploitation addressed in Chapter 3. The most pressing identified issue with respect to the current offence, and its ability to capture all forms of human trafficking, particularly forced labour, is the “fear for safety” standard. This standard implicitly requires a *means* of trafficking and limits the *means* to only those involving the use of threat of physical violence or force. As we have seen, this is not the predominant form of control used to induce victims of forced labour, and has even been suggested to be a relatively rare occurrence. Most

troubling is the fact that this standard excludes forms of non-physical coercion, which has been considered amongst severe methods of trafficking.

This chapter has examined other *Criminal Code* offences, as well as international and comparative national laws addressing human trafficking, to identify options and alternatives that can improve and further align the current Canadian *Criminal Code* definition of human trafficking with both the *Palermo Protocol* and conceptual framework of coercion developed in Part 1 of this thesis. Bringing these alternatives together, and using the *Protocol* requirements and conceptual framework as a guide, a complete proposal for reform to Canada's current law can now be seen which sufficiently meets both the requirements of the *Palermo Protocol* and the framework for coercion.

Any domestic human trafficking legislation must meet the minimum requirements set out in the *Palermo Protocol*: an *act*, a *means*, and a *purpose* of human trafficking as set out in the introductory chapter. In addition, domestic offences must incorporate the concept that the consent of the victim is irrelevant where one of the listed *means* is employed. The conceptual framework for coercion developed in Chapter 2 sets out two primary components necessary for an effective legal definition of coercive: the existence of a coercive mechanism, and a baseline for vitiating the consent of the victim. Looking at the proposed alternatives discussed in this chapter, the alternatives can be broken down to fit within each of these two requirements. The other *Criminal Code* offences examined illustrate ways in which the current human trafficking offence can elaborate, or expand, upon the types of coercive mechanisms attributable to a scenario of human trafficking. International and other comparative laws against human

trafficking provide examples of more appropriate baselines for consent to be utilized in the Canadian *Criminal Code* text. Proposals for reform can be broken down into two primary approaches: definitions which include separate express provisions with respect to coercive mechanisms and a baseline for consent; and, definitions which combine the two elements of coercive mechanisms and consent into a single standard for determining whether human trafficking has occurred.

This section will provide alternative definitions of “exploitation” based on the two identified approaches above. Proposals put forth under the first approach will combine the text and format of the *Criminal Code* offence of intimidation with baselines for consent identified under the *Palermo Protocol* to develop a comprehensive, two-prong definition of exploitation that expressly addresses both coercive mechanisms and consent issues. Following this, a proposal based on the United States definition of “serious harm” will be made under the second approach of an integrated definition. This proposed alternative will capture the primary elements of coercion identified in Part 1 while also maintaining a textual format similar to Canada’s current *Criminal Code* offence, which could make it a more attractive option for reform.

Proposals for Reform as a Two-Prong Definition: Separating Coercive Mechanisms from the Baseline for Consent

One option for reform, as stated above, is to utilize the *Criminal Code* offence of intimidation in conjunction with alternative baselines for consent considered in the *Palermo Protocol* to develop a two-prong test or definition of exploitation. The primary advantage to this method is that, by separately listing the applicable types and targets of offensive conduct, the *Criminal Code* will

be able to not only capture coercion as a *means* of human trafficking, but could be easily expanded to include other *means* that may currently fall outside the scope of s.279.04, such as deception and fraud. The primary disadvantages with this method are that the resulting definition will continue to restrict the offence to enumerated conduct, and that the baseline for consent may result in interpretive problems in implementation of the law.

Drawing on the findings of this chapter, the following are examples of two-prong tests that could serve as alternatives to the current definition of exploitation under s.279.04:

(1) A person exploits another person if they cause them to provide, or offer to provide, labour or services by engaging in the conduct prohibited under subsection (2) that, in all the circumstances, could reasonably be expected to cause a person of similar circumstances and background to believe that they have no real or acceptable alternative but to provide, or offer to provide, the labour or services.

(2) The prohibited conduct referred to in subsection (1) includes:

- (a) using violence or physical force, or threats thereof against the individual or a person known to them;
- (b) threatening or imposing an economic penalty against the individual;
- (c) threatening to denounce the individual to immigration authorities;
- (d) confiscating the individual's identity or travel documents;
- (e) physically confining the individual to a particular property, and/or unduly constricting the free movement of the individual; or,
- (f) intimidating or threatening the individual that the individual, or a person known to them, in Canada or elsewhere, will have punishment inflicted on him or her, or that the property of any of them will be damaged.

As an alternative to subsection (1), the following baseline for consent could also be used in conjunction with the set of coercive means outlined in the above subsection (2):

(1) A person exploits another person if they cause them to provide, or offer to provide, labour or a services by engaging in the conduct prohibited under subsection (2) that, in all the circumstances, could reasonably be expected to cause a person of similar circumstances and background to believe that they do not have the freedom to change their condition.

As was mentioned above, these two proposals set out separate subsections to deal with each of the requirements of a coercive mechanism, and a baseline for consent. The advantage of setting out a list of offensive conduct, or coercive mechanisms, is that, as mentioned earlier, this can enable Parliament to adequately capture any and all methods used to induce a victim into human trafficking, and can expand beyond coercion to include *means* such as deception and fraud. However, the disadvantages of listing applicable offensive conduct include the possibility of an overly narrow list as well as difficulty in establishing when some conduct fits within the enumerated list, for example, determining what may constitute an “economic penalty”. Further, because the baselines for consent do not expressly link to any targets of a coercive mechanism, this component will also require additional interpretation on a case-by-case basis, and may therefore hinder the implementation and use of the law more than is already seen in Canada. However, given the similarity of the enumerated list of offensive conduct to other *Criminal Code* offences, there is equal potential for increased use of the law with this proposal as prosecutors and judges may feel more familiar with the format taken with this approach.

Proposals for Reform as an Integrated Definition: Coercive Mechanisms and Consent Combined

The United States legal text, much like Canada’s current *Criminal Code* wording, combines the elements of coercive mechanisms and a baseline for consent into one standard or definition for coercion in human trafficking. The primary advantage of this approach is the fact that such a method establishes a link between the coercive mechanism and the baseline for determining consent, such that less interpretation may be required on the part of criminal justice actors involved in a given case of suspected human trafficking. However, the primary disadvantages of

such an approach are similar to what has been seen already in Canada: the potential for a narrow interpretation of the law, and hesitation to use a law with inherent ambiguities. While the previous proposals set out with much more clarity the conduct associated with the offence, this approach focuses more on the impact on the victim and baseline for consent, which could prove to be a difficult obstacle for prosecutors and judges involved in a criminal case. In addition, over-emphasizing the victim impact component of the crime risks shifting the burden of proof to the victim rather than maintaining a focus on the offender. Finally, unlike the previous approach for reform, this approach will be much more restricted in its ability to capture indirect *means* of trafficking such as fraud and deception, and will generally be more difficult and time-consuming to revise and expand, given the format of the integrated text.

Despite the above potential disadvantages to this approach, given the similarity of the United States' text to Canada's current wording under s.279.04, this may be the most readily-accessible alternative for reform to Canada's current *Criminal Code* definition, as the text of the United States can be directly substituted for the current wording of s.279.04, such that the end result could appear like this:

279.04 (a) A person exploits another person if they cause them to provide, or offer to provide, labour or a service by engaging in conduct that, under all the surrounding circumstances, could cause a reasonable person of the same background and in the same circumstances to perform or continue to perform the labour or service to avoid incurring a serious harm, meaning any harm, whether physical or non-physical, and including psychological, financial, or reputational harm, or by abuse or threatened abuse of a legal process.

This definition leaves open the possibility that any conduct could constitute a coercive mechanism, and focuses on the target of the coercive mechanism and victim impact in determining the coerciveness of the situation. Further, this definition specifically delineates the

primary targets of coercion identified in Chapter 1: psychological, financial, and legal status. Certain key words from the Canadian definition are retained to enable a broad reach of this definition, including the word “cause” a person to perform, instead of the United States language of “compel” a person to perform a labour or service. This hybrid text is a significant improvement over Canada’s current human trafficking offence; however, it does still contain certain ambiguities that could result in a narrow interpretation, such as the standard at which harm is considered “serious”.

Each of the above proposals contain advantageous, and potentially disadvantageous, features; however, all of the above proposals represent marked improvement over the current wording of the Canadian *Criminal Code* offence of human trafficking. While the first set of proposals focuses primarily on the conduct associated with the offence, the latter proposal focuses on the target and impact of conduct on the victim. All sets of proposals identified in this Chapter conform to the basic requirements of the *Palermo Protocol* and the identified critical legal elements of the conceptual framework developed in Chapter 2. While the first approach for reform may be, from both a normative and long-term perspective, be the most appropriate option to address the gaps currently existing in the *Criminal Code*, ultimately, the proposal based on the United States definition will be more readily accessible and easily implemented from a pragmatic perspective, and may therefore be the more appropriate recommendation for immediate reform and improvement to the law in Canada.

Conclusion

This thesis began with a shocking story of forced labour in Canada’s own backyard. 11 individuals from the Philippines were deceptively recruited to Canada for work, they were

physically confined upon arrival, had their documents withheld, were transported to a rural and isolated location for work, made to work long hours doing degrading work with little or no pay, and had debts imposed upon them by their employer. They believed their employer was so much in control of their lives that the only way out was to escape and get help. Yet, according to Canada's criminal laws, they were not victims of human trafficking. If Canada had a different definition of human trafficking, would these men have been considered victims? Would their trafficker and the other individuals who facilitated their slavery been punished?

Although forced labour is gaining recognition as a widespread form of human trafficking, efforts to combat this crime have not yet seen serious momentum. This may be due, in large part, to the fact that, like in Canada, countries around the world do not have laws sufficient to address the complex and subtle nature of forced labour situations. Particularly, the concept of coercion as a non-physical *means* of inducing victims into trafficking has been a significant obstacle for legislators and policymakers to overcome. The complexity of this concept has prevented laws from adequately addressing this severe *means* of trafficking, despite its dominance in the realm of forced labour.

This thesis has set out to explore a definition of coercion for the purposes of human trafficking, and in specific relation to forced labour, in an effort to both address legislative gaps in Canada, and more broadly, to provide a framework for legislators around the world to effectively combat human trafficking in all its forms. An examination of the *Palermo Protocol* and forced labour indicators developed by international actors, demonstrated through several case studies, led to the conclusion that coercion was a primarily non-physical *means* of inducing victims into human

trafficking, which most often involved threats and conduct targeted to specific vulnerabilities of victims, such as their economic, social and administrative status. Based on these findings, the development of a conceptual framework for coercion identified and explained the critical legal elements necessary to effectively capture this *means* within criminal law offences of human trafficking. Two primary components necessary for an appropriate legal definition of coercion were outlined: a coercive mechanism, and a baseline for consent. Coercive mechanisms have been defined as conduct which imposes an additional negative consequence on the victim in order to manipulate their process of choice. An examination of when consent can be said to be vitiated by this conduct highlighted the necessity of examining the underlying context of the situation, including the victim's particular vulnerabilities and background, and emphasized the need for focus on *constrained volition* and the loss of "meaningful alternatives".

Applying these findings to the Canadian context, the current *Criminal Code* offence against human trafficking was severely lacking in its application to the majority of forced labour situations, as it is incapable of encompassing coercion as a *means* of trafficking, due primarily to the restrictive "fear for safety" standard and its connection with physical violence. Several proposals and approaches for reform were identified that can significantly improve the state of the law in Canada, which conform to both international standards and the critical legal elements identified in the conceptual framework for coercion developed in this thesis. These sample definitions can also be used more broadly as a foundation for the development of anti-human trafficking laws on a global scale.

If the *Criminal Code* adopted a new definition of human trafficking, such as one of the proposals set out in this thesis, it is much more likely that the Elmvale 11, along with many other potential victims of forced labour in Canada, would be considered victims of human trafficking and criminal charges could be pursued against the offenders involved. These men, like many other potential individuals in Canada, were without the power to change their situation. They felt forced to comply with their trafficker's demands, who manipulated their alternatives by use of threats and penalties targeted at the known vulnerabilities of these victims. That a country such as Canada, which prides itself on its history of freedom and inclusiveness, could consider that these men were not victims of crime is unacceptable and appalling. While the wording of the *Criminal Code* is but one of many changes that must occur in Canada to better combat human trafficking, it is a critical step in improving the response to human trafficking within our borders. If at the outset victims are not recognized as such, a crime or a problem is not recognized as one, no further action can exist to effectively address the myriad issues that exist in situations of human trafficking.

To better address human trafficking, particularly from a prosecutorial perspective, legislative reform, such as that proposed in this thesis, is a necessary first step. However, building on this first step, prosecutorial and judicial guidelines that aid in the interpretation of legislation should also be developed. Citizenship and Immigration Canada has developed a set of victim identification guidelines specific to its mandate, and the number of visas issued to victims of human trafficking to date establishes the effectiveness of these guidelines. Similar guidelines should be adopted in conjunction with new legislation to assist all actors involved in trafficking situations to better identify potential victims at the outset of investigations. This, too, will assist

in uncovering the key details that can establish a situation of human trafficking, and particularly forced labour, which operates within the legal economy in Canada and may often be hidden in plain sight.

Despite the long history of slavery and laws to combat it around the world, human trafficking as a modern legal concept is still young, and much more work is to be done to effectively address and combat this crime. The evolution and ‘sophistication’ of traffickers is a noted phenomenon; where legal loopholes exist, traffickers will find and exploit them to the best of their abilities. Therefore, without adequate laws to combat this crime in all its forms, human trafficking will continue to flourish around the world.

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