

**Office of the United Nations High Commissioner for Human Rights**



# **Abolishing Slavery and its Contemporary Forms**

*David Weissbrodt and Anti-Slavery International\**



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\* Michael Dottridge, Director

## NOTE

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## INTRODUCTION

1. At its twenty-third session in 1998 the Working Group on Contemporary Forms of Slavery “asked David Weissbrodt and Anti-Slavery International ... to prepare a comprehensive review of existing treaty and customary law covering all the traditional and contemporary slavery-related practices and relevant monitoring mechanisms”.<sup>1</sup> At its twenty-fourth session in 1999 the Working Group received a working paper containing a consolidation and review of the conventions on slavery and an executive summary of that paper (E/CN.4/Sub.2/AC.2/1999/6). The working paper provided an update of the two previous studies by members of the Sub-Commission on the Promotion and Protection of Human Rights on the subject of slavery, the study by Mohamed Awad in 1966<sup>2</sup> and the update by Benjamin Whitaker in 1984.<sup>3</sup> The Working Group expressed its appreciation of the review of the conventions on slavery and the related executive summary; it also recommended to the Sub-Commission that it invite the authors of the review of international standards to update it and submit it to the Sub-Commission for consideration and eventual transmission to the Commission.

2. At its fifty-first session the Sub-Commission adopted resolution 1999/17 of 26 August 1999 in which it expressed its appreciation to David Weissbrodt and Anti-Slavery International for their consolidation and review of the conventions on slavery and for the executive summary. In that resolution the Sub-Commission also invited “the authors of the review of international standards to update the review and submit it to the Sub-Commission for its consideration and eventual transmission to the Commission”.

3. At its seventy-sixth meeting, on 24 April 2001, the Commission on Human Rights recommended to the Economic and Social Council that “the updated report submitted to the Sub-Commission on the Promotion and Protection of Human Rights as documents E/CN.4/Sub.2/2000/3 and Add.1 be compiled into a single report, printed in all official languages and given the widest possible distribution”. This document responds to that invitation, provides a further update on the Awad and Whitaker studies, and summarizes the core international law against slavery: its origins and the progress of the international campaign to abolish the slave trade and slavery, the legal instruments and institutions that have been established to combat slavery (including the United Nations Working Group on Contemporary Forms of Slavery), the evolving definition of slavery, contemporary forms of slavery, and other related practices. It then focuses briefly on serfdom, forced labour, debt bondage, migrant workers, trafficking in persons, prostitution, forced marriage, the sale of wives and other issues, before discussing international monitoring mechanisms. The review ends with tentative conclusions and recommendations.

4. On 24 July 2001 the Economic and Social Council decided, by resolution 2001/282, to accept the recommendation of the Commission on Human Rights.

*No one shall be held in slavery or servitude;  
slavery and the slave trade shall be prohibited  
in all their forms.*<sup>4</sup>

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<sup>1</sup> Report of the Working Group on Contemporary Forms of Slavery on its twenty-third session, United Nations document E/CN.4/Sub.2/1998/14, para. 22.

<sup>2</sup> Mohamed Awad, *Report on Slavery*, United Nations document E/4168/Rev.1, United Nations sales publication No. E.67.XIV.2 (1966); see also note 21, *infra*.

<sup>3</sup> Benjamin Whitaker, *Slavery: report updating the Report on Slavery submitted to the Sub-Commission in 1966*, United Nations document E/CN.4/Sub.2/1982/20/Rev.1, United Nations sales publication No. E.84.XIV.1 (1984).

<sup>4</sup> Universal Declaration of Human Rights, (1948), art. 4.



# I. CORE INTERNATIONAL LAW AGAINST SLAVERY

## A. Background

5. Although slavery has existed since ancient times,<sup>5</sup> the 1815 Declaration Relative to the Universal Abolition of the Slave Trade<sup>6</sup> (the “1815 Declaration”) was the first international instrument to condemn it. The abolitionist movement began as an effort to stop the Atlantic slave trade and to free slaves in the colonies of European countries and in the United States. A large number of agreements dating from the early nineteenth century, both multilateral and bilateral, contain provisions prohibiting such practices in times of war and peace. It has been estimated that between 1815 and 1957 some 300 international agreements were implemented to suppress slavery. None has been totally effective.

6. The predecessor of the United Nations, the League of Nations, was very active in its work to eliminate slavery, and as a result international attention focused on the elimination of slavery and slavery-related practices following the First World War.<sup>7</sup> After the Second World War the United Nations continued working towards the elimination of slavery, and as a result it is now a well-established principle of international law that the “prohibition against slavery and slavery-related practices have achieved the level of customary international law and have attained ‘*jus cogens*’ status.”<sup>8</sup>

7. The International Court of Justice has identified protection from slavery as one of two examples of “obligations *erga omnes* arising out of human rights law,”<sup>9</sup> or obligations owed by a State to the international community as a whole. The practice of slavery has thus been universally accepted as a crime against humanity,<sup>10</sup> and the right to be free from enslavement is considered so fundamental “that all nations have standing to bring offending states before the Court of Justice.”<sup>11</sup> Slavery, slave-related practices, and forced labour constitute:

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<sup>5</sup> It was held to be part of the *jus gentium* under Roman law. Alan Watson, “A Slave’s Marriage: Dowry or Deposit”, *Journal of Legal History*, vol. 12, 1991, p. 132; see also W.W. Buckland, *The Roman Law of Slavery*, 1908; C.W.W. Greenidge, *Slavery*, 1958, pp. 15-18; Roger Sawyer, *Slavery in the Twentieth Century*, 1986, pp. 1-8; see also Kevin Bales and Peter T. Robbins, “No One Shall be Held in Slavery or Servitude: A Critical Analysis of International Slavery Agreements”, *Human Rights Review*, vol. 2, 2001, p. 18.

<sup>6</sup> Declaration Relative to the Universal Abolition of the Slave Trade, 8 February 1815, *Consolidated Treaty Series*, vol. 63, No. 473.

<sup>7</sup> M. Burton, *The Assembly of the League of Nations*, 1941, p. 253. According to article 22 of the League of Nations Covenant, “the Mandatory must be responsible for the administration of the territory under conditions which will guarantee... the prohibition of abuses such as the slave trade.”

<sup>8</sup> M. Cherif Bassiouni, “Enslavement as an International Crime”, *New York University Journal of International Law and Politics*, vol. 23, 1991, p. 445; *Yearbook of the International Law Commission* 1963, vol. II, United Nations sales publication No. 63.V.2, pp. 198-199 (“[B]y way of illustration, some of the most obvious and best settled rules of *jus cogens* . . . included trade in slaves.”); Human Rights Committee, General Comment No. 24, United Nations document HRI/GEN/1/Rev.5, para. 8; see also A. Yasmine Rassam, “Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law”, *Virginia Journal of International Law*, vol. 39, 1999, p. 303.

<sup>9</sup> *Barcelona Traction, Light and Power Co, Ltd. (Belgium v. Spain)*, Judgment of 5 February 1971, *I.C.J. Reports*, 1970, p. 32.

<sup>10</sup> The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in September 2001 noted in its final declaration: “We further acknowledge that slavery and the slave trade are a crime against humanity and should always have been so, especially the trans-Atlantic slave trade.”

<sup>11</sup> Renee Colette Redman, “The League of Nations and the Right to be Free from Enslavement: the First Human Right to be Recognized as Customary International Law”, *Chicago-Kent Law Review*, vol. 70, 1994, pp. 759, 780.

- (a) A “war-crime” when committed by a belligerent against the nationals of another belligerent;
- (b) A “crime against humanity” when committed by public officials against any person irrespective of circumstances and diversity of nationality;
- (c) A common international crime when committed by public officials or private persons against any person.<sup>12</sup>

## **B. Definition of Slavery: the Slavery Convention of 1926 and the Supplementary Convention of 1956**

8. The definition of slavery has caused controversy since the beginning of the abolition process, yet is of paramount importance for the international community in working towards its effective eradication. Definitions have caused controversy for two reasons: first, there are differences of opinion about which practices should be categorized as slavery and thus designated for elimination; second, definitions have often been accompanied by obligations on States to carry out particular remedial measures. There has invariably been disagreement about the most appropriate strategies to eradicate any form of slavery.

9. For the United Nations or any other international body to carry out a mandate concerned with slavery effectively, it is necessary to develop an international consensus on what practices are included within the concept of slavery. If the term is interpreted in such a manner as to include all social injustices or human rights violations that may occur, it becomes so broad as to be meaningless. This over-broad approach would in turn lead to a dilution of work against slavery and reduce its effectiveness in achieving the objective of eliminating the phenomenon. Slavery as defined in the international instruments must, therefore, be reviewed in an effort to identify the practices included within its scope.

10. A definition of slavery first appeared in an international agreement in the League of Nations Slavery Convention of 25 September 1926.<sup>13</sup> It defined slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised” (art. 1(1)). It further defined the slave trade as “all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves” (art. 1(2)). The Convention also distinguished forced labour, stipulating that “forced labour may only be exacted for public purposes” and requiring States parties “to prevent compulsory or forced labour from developing into conditions analogous to slavery” (art. 5).

11. Before the Slavery Convention various forms of slavery had been identified in a list prepared by the Temporary Slavery Commission in 1924 and subsequently approved by the Council of the League of Nations. In addition to enslavement, slave raiding, the slave trade and slave dealing, the list included:

- “1. (c) Slavery or serfdom (domestic or predial);
- 2. Practices restrictive of the liberty of the person, or tending to acquire control of the person in conditions analogous to slavery, as for example:
  - (a) Acquisition of girls by purchase disguised as payment of dowry, it being understood that this does not refer to normal marriage customs;

<sup>12</sup> Bassiouni, *supra* note 8, p. 448.

<sup>13</sup> Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 (hereinafter Slavery Convention 1926), *League of Nations Treaty Series*, vol. 60, p. 253; entered into force on 9 March 1927.

- (b) Adoption of children, of either sex, with a view to their virtual enslavement, or the ultimate disposal of their persons;
- (c) All forms of pledging or reducing to servitude of persons for debt or other reason....  
[and]

4. System of compulsory labour, public or private, paid or unpaid.”<sup>14</sup>

12. By referring to “any or all of the powers of ownership” in its definition of slavery, and setting forth as its stated purpose the “abolition of slavery in all its forms” the Slavery Convention covered not only domestic slavery but also the other forms of slavery listed in the Report of the Temporary Slavery Commission.<sup>15</sup>

13. Although the Slavery Convention outlawed slavery and associated practices, it not only failed to establish procedures for reviewing the incidence of slavery in States parties, but also neglected to create an international body which could evaluate and pursue allegations of violations. Despite these drawbacks, the League of Nations was able, through publicity and pressure on Governments, to encourage the implementation of legislation abolishing slavery in countries such as Burma (1928) and Nepal (1926).<sup>16</sup> In 1931 the League established committees of experts to consider information about slavery, but the work of the second of these bodies, the Advisory Committee of Experts on Slavery, was ended by the outbreak of the Second World War.

14. The period before the Second World War also saw the adoption of a series of international conventions concerning the traffic of women for prostitution. These abuses were not mentioned in the Slavery Convention or addressed by the various committees of experts on slavery, although the first of the international conventions on traffic in women<sup>17</sup> referred in its title to the “white slave trade”.<sup>18</sup>

15. In 1949 the United Nations Economic and Social Council (ECOSOC) appointed an Ad Hoc Committee of Experts on Slavery which found that there was “not sufficient reason for discarding or amending the definition contained in Article 1 of the Slavery Convention 1926”.<sup>19</sup> The Committee did point out, however, that the definition in the Slavery Convention did not cover the full range of practices related to slavery and that there were other equally repugnant forms of servitude that should be prohibited. The Committee therefore recommended that a supplementary convention be drafted to cover practices analogous to slavery – many of which had been identified by the League of Nations when preparing the earlier Convention.

16. The Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956 (the “Supplementary Convention”)<sup>20</sup> “went further and

<sup>14</sup> Report of the Temporary Slavery Commission to the Council of the League of Nations (A.17.1924.VI.B), 1924, quoted in “The suppression of slavery” (Memorandum submitted by the Secretary-General to the Ad Hoc Committee on Slavery), United Nations document ST/SPA/4 (1951), para. 22.

<sup>15</sup> *Ibid.*, para. 80. The report to the Sixth Committee of the League of Nations Assembly in 1926 also clarified, in relation to article 2(b) of the final text of the Slavery Convention, that the words “notably in the case of domestic slavery and similar conditions” were being omitted on the grounds that “such conditions come within the definition of slavery contained in the first article and that no further prohibition of them in express terms was necessary. This provision applies not only to domestic slavery but to all those conditions mentioned by the Temporary Slavery Commission ... i.e. debt slavery, the enslaving of persons disguised as adoption of children and the acquisition of girls by purchase disguised as payment of dowry.”

<sup>16</sup> V. Nanda and C. Bassiouni, “Slavery and the Slave Trade: Steps Toward Eradication”, *Santa Clara Lawyer*, vol. 12, 1971, pp. 424, 430.

<sup>17</sup> International Agreement for the Suppression of the White Slave Trade of 1904, *League of Nations Treaty Series*, vol. 1, p. 83; entered into force on 18 July 1905.

<sup>18</sup> For details of conventions dealing with traffic in persons and exploitation of prostitution, see sections on Trafficking and Prostitution, *infra*.

<sup>19</sup> Report of the Ad Hoc Committee of Experts on Slavery, United Nations document E/AC.33/13 (1951), para. 11.

<sup>20</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956 (the Supplementary Convention), *United Nations Treaty Series*, vol. 226, p. 3; entered into force on 30 April 1957.

covered more ground than the 1926 Convention".<sup>21</sup> It obliged States parties to abolish, in addition to slavery, the following institutions and practices, identified collectively as "servile status":<sup>22</sup>

- (a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;
- (b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;
- (c) Any institution or practice whereby:
  - (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any person or group; or
  - (ii) The husband of a woman, his family, or his clan has the right to transfer her to another person for value received or otherwise; or
  - (iii) A woman on the death of her husband is liable to be inherited by another person;
- (d) Any institution or practice whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

17. The inclusion of practices such as serfdom was somewhat confusing as they were covered by the Slavery Convention. Article 1 of the Supplementary Convention therefore clarified that States parties should seek "the complete abolition or abandonment" of the various institutions and practices that were identified "where they still exist and whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention".

18. Although appeals have been made subsequently for a redefinition of slavery in the context of today's world, the combined definition set forth in the Convention of 1926 and the Supplementary Convention of 1956 has remained unchanged. The United Nations has made various restatements of the definition,<sup>23</sup> but in the international legal context it has not been altered substantially since 1926.

<sup>21</sup> Mohamed Awad, Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, "Question of slavery and the slave trade in all their practices and manifestations, including the slavery-like practices of apartheid and colonialism", United Nations document E/CN.4/Sub.2/322 (1971), para. 12.

<sup>22</sup> The term "servitude" is not used in the Supplementary Convention, which refers instead to "institutions and practices similar to slavery" and "persons of servile status". During the drafting stage, however, the term appeared in the proposed title for the new instrument: (Draft) Supplementary Convention on Slavery and Servitude, United Nations document E/AC.43/L.1 (1955).

<sup>23</sup> See, for example, United Nations document E/CN.4/Sub.2/1982/20 (1982) (paragraph 9 of which defines "slavery" as "any form of dealing with human beings leading to the forced exploitation of their labour."); Rome Statute of the International Criminal Court (A/CONF.183/9) (1998) (article 7(2)(c) of which defines "enslavement" as "the exercise of any or all of the powers attaching to the right of ownership over a person . . . includ[ing] the exercise of such power in the course of trafficking in persons, in particular women and children". This definition is essentially the same as the original definition adopted by the League of Nations over 60 years ago, adding only a specific reference to trafficking.)

### C. Main Characteristics of Slavery

19. Ownership is the common theme existing in all the conventions concerning the abolition of slavery and slavery-like practices. The wording of the Slavery Convention is ambiguous as to whether this concept of control must be absolute in nature in order to be considered a prohibited activity. Arguably, the use of the phrase “any or all of the powers attaching to the right of ownership” (art. 2) was intended to give a more expansive and comprehensive definition of slavery that would include not just the forms of slavery involved in the African slave trade but also practices of a similar nature and effect.

20. Traditional slavery was referred to as “chattel slavery” on the grounds that the owners of such slaves were able to treat them as if they were possessions, like livestock or furniture, and to sell or transfer them to others. Such practices are extremely rare nowadays and the criterion of ownership may obscure some of the other characteristics of slavery associated with the complete control to which a victim of slavery is subjected by another human being, as implied by the Slavery Convention’s actual wording, “any or all of the powers attaching to the right of ownership”.

21. In the modern context, the circumstances of the enslaved person are crucial to identifying what practices constitute slavery, including: (i) the degree of restriction of the individual’s inherent right to freedom of movement; (ii) the degree of control of the individual’s personal belongings; and (iii) the existence of informed consent and a full understanding of the nature of the relationship between the parties.

22. It will become apparent that these elements of control and ownership, often accompanied by the threat of violence, are central to identifying the existence of slavery. The migrant worker whose passport has been confiscated by his or her employer, the child sold into prostitution or the “comfort woman” forced into sexual slavery – all have the element of choice and control of their lives taken from them, either by circumstance or through direct action, and passed to a third party, either an individual or a State.<sup>24</sup>

### D. Other Instruments Prohibiting Slavery

23. The prohibitions set out in the Slavery Convention and the Supplementary Convention were given significant legal support by the International Bill of Human Rights.<sup>25</sup> The Universal Declaration of Human Rights states that “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms” (art. 4).<sup>26</sup> The International Covenant on Economic, Social and Cultural Rights recognizes the right to work “which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts” (art. 6(1)). In articles 5, 7, and 8 the Covenant further sets certain conditions and rights that must be upheld

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<sup>24</sup> The question of whether economic imperatives constitute a form of “force” is often debated, particularly in relation to traffic in women and exploitation of prostitution. For a discussion of this debate see the section on Forced Prostitution, *infra*.

<sup>25</sup> The International Bill of Human Rights consists of the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Optional Protocol to the International Covenant on Civil and Political Rights; and the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.

<sup>26</sup> Neither the Universal Declaration nor subsequent instruments offer a precise definition of “servitude”. During discussions in the Third Committee of the United Nations General Assembly about the draft Universal Declaration, Professor Cassin (France) observed that “by the use of the word ‘servitude’ it was intended to cover certain forms of slavery, such as that imposed on prisoners of war by the Nazis, and the traffic in women and children”, Ad Hoc Committee on Slavery, Development of article 4 of the Universal Declaration of Human Rights, United Nations document E/AC.33/5. On the difference between “slavery” and “servitude” in the European Convention on Human Rights, one commentary observes: “The status or condition of servitude does not involve ownership and differs from slavery on that count”, D.J. Harris, M. O’Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, 1995, p. 91. See also *infra* note 111 on the definition of servitude in the Trafficking Protocol.

and protected by the States parties such as fair wages and equal remuneration for work of equal value and the right to form and join trade unions.

24. The International Covenant on Civil and Political Rights<sup>27</sup> contains a prohibition against slavery and servitude in article 8 similar to that contained in the Universal Declaration. The importance accorded by the Covenant to the slavery provision is emphasized by its status as a non-derogable right under article 4(2). Article 8 also contains a provision which prohibits the use of forced or compulsory labour subject to certain limited exceptions.

25. Article 7(2)(c) of the Rome Statute of the International Criminal Court characterizes “enslavement” as a crime against humanity falling within the jurisdiction of the Court. The most recent reference to slavery in an international instrument is in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol), supplementing the United Nations Convention against Transnational Organized Crime,<sup>28</sup> which criminalizes trafficking in persons “for the purpose of exploitation” including, “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”.

## E. Violations of Other Fundamental Rights Associated with Slavery

26. The process of enslavement and, in many cases, the treatment of victims of slavery, servile status and forced labour are often accompanied by other violations of human rights. For example, the classic process of enslavement, involving either abduction or recruitment through false promises or duplicity, involves a violation of the individual’s right to liberty and security of person, as guaranteed by article 9 of the International Covenant on Civil and Political Rights, as well as, in many cases, a violation of the right of a person deprived of his/her liberty to be treated with humanity and of the right not to be subjected to cruel, inhuman or degrading treatment.<sup>29</sup> Historical images of slavery, again based on the Atlantic slave trade and treatment of African slaves in the Americas, focus primarily on the ill-treatment of slaves, particularly branding or mutilation of individuals to facilitate their identification. The Supplementary Convention of 1956 explicitly prohibits “the act of mutilating, branding or otherwise marking a slave or a person of servile status in order to indicate his status, or as a punishment, or for any other reason” (art. 5). Additional forms of ill-treatment, including beatings and other corporal punishment, are a violation of the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.<sup>30</sup>

27. Victims of slavery, servile status and forced labour are, almost by definition, deprived of their right under article 12 of the International Covenant on Civil and Political Rights to liberty of movement and freedom to choose their residence. Almost invariably, they are deprived of or prevented from exercising their right of access to the courts and to a fair trial<sup>31</sup> by their owners, controllers, employers or the authorities themselves.

<sup>27</sup> Adopted by General Assembly resolution 2200 A (XXI) of 16 December 1966, *United Nations Treaty Series*, vol. 999, p. 171; entered into force on 23 March 1976.

<sup>28</sup> Adopted by General Assembly resolution 55/25 of 15 November 2000, *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 49 (A/45/49)*, vol. I.; has not yet entered into force.

<sup>29</sup> Rights guaranteed respectively by article 10 and article 7 of the International Covenant on Civil and Political Rights. On a number of occasions, victims of slavery have “disappeared” while being trafficked or held in slavery. The enforced or involuntary disappearance of victims of slavery has been facilitated by the secrecy in which victims of slavery are often kept: being prevented from communicating with others, sometimes because of their isolation, for example on large agricultural estates, and sometimes because of their virtual imprisonment. See, for example, “Recommendation on the question of disappearances linked to contemporary forms of slavery”, in Report of the Working Group of Contemporary Forms of Slavery on its seventeenth session, United Nations document E/CN.4/Sub.2/1992/34 (1992), p. 27.

<sup>30</sup> See, for example, the International Covenant on Civil and Political Rights, art. 7, *supra* note 27.

<sup>31</sup> *Ibid.*, arts. 14 and 16.

28. The list of aggravating circumstances, of abuses of fundamental rights which accompany slavery and related abuses, is almost endless. In the harshest cases it includes depriving individuals of their identity (by giving them a new name, often one associated with a different religion or ethnic identity), obliging them to speak a new language, and forcing them to change their religion or subjecting them to coercion in violation of article 18 of the International Covenant on Civil and Political Rights.<sup>32</sup> Some extreme cases also involve preventing individuals from exercising their right to marry and to establish a family,<sup>33</sup> notably when the victims are women who are forced to act as the mistresses or concubines of the men who control them, or are forced to remain in prostitution. Virtually all cases involve violations of the victims' freedom of expression, their right to receive and impart information, their right of peaceful assembly and their freedom of association.

29. In some societies slaves have been prevented from owning or inheriting property. One of the legacies of slavery still affecting people categorized as "slaves" in one country where slavery has been formally abolished on several occasions is that, on the death of former slaves, the families of their former owners still intervene to take possession of their property – sometimes with the authority of the courts – thus preventing the heirs of former slaves from inheriting.<sup>34</sup> Such practices violate article 17 of the Universal Declaration as well as article 26 of the International Covenant on Civil and Political Rights. Former slaves, their descendants or others regarded socially as having slave status are subjected to a wide range of discriminatory practices in many societies.

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<sup>32</sup> Ibid., art. 18(2): "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or beliefs of his choice."

<sup>33</sup> Ibid., art. 23.

<sup>34</sup> Report of the Working Group on Contemporary Forms of Slavery on its eighteenth session, United Nations document E/CN.4/Sub.2/1993/30 (1993), para. 43.



## I. FORMS OF SLAVERY

30. In this section the review will summarize briefly the various forms of slavery and slavery-like practices.

### A. Serfdom

31. Serfdom has been categorized as a form of slavery since the first discussions preceding the adoption of the Slavery Convention of 1926. In its final report to the League of Nations, the Temporary Slavery Commission regarded serfdom as the equivalent of “predial slavery”, that is to say the use of slaves on farms or plantations for agricultural production.<sup>35</sup> The requirement contained in the Slavery Convention of 1926, “to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms,” consequently applies to serfdom as well as slavery.

32. The Temporary Slavery Commission also noted in a 1924 report that many people were found in “agricultural debt bondage” which combined elements of both debt bondage and serfdom.<sup>36</sup> That conclusion was confirmed by later investigations by the International Labour Organization (ILO) into the status and conditions of indigenous labour in Latin America during the 1940s.<sup>37</sup> Both serfdom and debt bondage are sometimes referred to by the term “peonage”, particularly in the Latin American context.<sup>38</sup>

33. The Supplementary Convention of 1956 categorizes serfdom as a form of “servile status”, and defines it as “the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status” (art. 1(b)). Land tenure systems viewed in all their aspects – legal, economic, social and political – can in certain circumstances be seen as oppressive power relationships arising from ownership or use of land and disposition of its products to create forms of servitude and bondage.<sup>39</sup>

34. Records of discussions that occurred both in the United Nations and in the ILO before the adoption of the Supplementary Convention in 1956 indicate that the term “serfdom” was intended to apply to a range of practices reported in Latin American countries and more generally referred to as “peonage”.<sup>40</sup> Those practices, which had developed in a context of conquest, subjugation of indigenous peoples, and seizure of their lands, involved a landowner granting a piece of land to an individual “serf” or “peon” in return for specific services, including (1) providing the landowner with a proportion of the crop at harvest (“share cropping”), (2) working for the landowner or (3) doing other work, for example domestic chores for the landowner’s household. In each case, it is not the provision of labour in return for access to land that is in itself considered a form of servitude, but the inability of the person of serf status to leave that status. The term “serfdom” and

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<sup>35</sup> Temporary Slavery Commission Report to the Council, League of Nations document A.19.1925.VI (1925), para. 97. Slaves involved in growing and harvesting sugar cane in the West Indies in the eighteenth century were classified as “*praediala*” or predial slaves. See Seymour Drescher and Stanley L Engerman, eds., “Caribbean Agriculture”, in *A Historical Guide to World Slavery*, (1998), p. 113.

<sup>36</sup> *Ibid.*

<sup>37</sup> Report for the Committee of Experts on Indigenous Labour, ILO document (1951), p. 135.

<sup>38</sup> See section on Debt Bondage, *infra*.

<sup>39</sup> See report of the Working Group on Slavery on its fifth session, United Nations document E/CN.4/Sub.2/434 (1979), paras. 10-16.

<sup>40</sup> C. W. W. Greenidge, *Slavery at the United Nations* (1954), p. 8.

its prohibition in the Supplementary Convention appear applicable to a range of practices that still occur today but are rarely recognized or described in the countries concerned as “serfdom”, as the term is linked by many to the political and economic order of medieval Europe.<sup>41</sup>

35. In some cases the status of “serf” is hereditary, affecting entire families on a permanent basis, while in others it is linked to and reinforced by debt bondage; in the latter case those affected are obliged to continue working for their landowner on account of debts they supposedly owe as well as on account of their tenant status.

## B. Forced Labour

36. The use of forced labour has been condemned by the international community as a practice similar to but distinct from slavery. The League of Nations and the United Nations have made a distinction between slavery and forced or compulsory labour and the International Labour Organization was given principal responsibility for the abolition of the latter.

### 1. International Labour Organization

37. The ILO has adopted some 183 conventions in the international labour code ranging from maternity protection issues to protection of the most vulnerable and poverty-stricken labourers. The ILO has four fundamental principles that it aims to achieve, namely: the elimination of forced labour; freedom of association, including the right to form or join a trade union; the effective abolition of child labour; and the ending of discrimination in employment.<sup>42</sup>

### 2. Forced labour conventions

38. The Forced Labour Convention, 1930 (No. 29) provides for the abolition of forced labour.<sup>43</sup> It defines forced or compulsory labour in article 2(1) as meaning “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”. While this definition distinguishes forced labour from slavery in that it does not include a concept of ownership, it is clear that the practice imposes a similar degree of restriction on the individual’s freedom – often through violent means, making forced labour similar to slavery in its effect on the individual.

39. ILO Convention No. 29 obliges States parties to “suppress the use of forced or compulsory labour *within the shortest possible time*”.<sup>44</sup> The lack of an absolute prohibition, along with the existence of such an ambiguous timeline for eradicating forced labour, may be explained by the fact that it was still routine for colonial authorities to rely on forced labour for public works. The ILO has recently noted, however, that a country may no longer rely on this timeline to justify inadequate national protections against forced labour.<sup>45</sup>

40. In a joint report issued in 1955, the United Nations Secretary-General and the Director-General of the ILO concluded that, despite the prohibitions of ILO Convention No. 29, forced labour

<sup>41</sup> Junius P. Rodriguez, ed., “Serfdom in Medieval Europe”, in *The Historical Encyclopedia of World Slavery* (1977), vol. 2, p. 575.

<sup>42</sup> See the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted on 18 June 1998 by the International Labour Conference at its eight-sixth session, ILO document CIT/1998/PR20A.

<sup>43</sup> The ILO Forced Labour Convention, 1930, is the most widely ratified ILO convention with 158 States parties.

<sup>44</sup> ILO Forced Labour Convention, 1930 (No. 29), art. 1, para. 1, *United Nations Treaty Series*, vol. 39, p. 55; entered into force on 1 May 1932 (emphasis added).

<sup>45</sup> Report of the Committee of Experts (1998), p. 100. The Commission of Inquiry on the observance of the Forced Labour Convention No. 29 in Myanmar agreed with this view having regard to the status of the abolition of forced or compulsory labour in general international law as a peremptory norm from which no derogations can be made. Forced Labour in Myanmar Report (1998), p. 72.

was not being eradicated, and “new systems of forced labour for economic purposes or as a means of political coercion . . . raise[d] new problems and call[ed] for action at the international level.”<sup>46</sup> The 1956 Supplementary Convention provides for the abolition of practices which could “lead to forms of forced labour”<sup>47</sup>; it was believed, however, that the international protections against forced labour were inadequate and that it was necessary to adopt another convention to strengthen the prohibition against compulsory labour.

41. Finding that the use of forced labour as a means of political coercion violated articles 2, 9, 10, 11 and 19 of the Universal Declaration of Human Rights, the ILO created the Abolition of Forced Labour Convention, 1957 (No. 105).<sup>48</sup> Convention No. 105 provides for the immediate and complete eradication of forced labour in specific circumstances. Article 1 imposes an obligation on the States parties to suppress the use of forced labour for political purposes, for purposes of economic development, as a means of labour discipline or punishment for strike action, and as a means of discrimination.

42. ILO Convention No. 29 and ILO Convention No. 105 (collectively referred to as the “ILO forced labour conventions”) apply to work or service exacted by governments or public authorities as well as to forced labour exacted by private bodies and individuals, including slavery, bonded labour and certain forms of child labour.<sup>49</sup> The ILO forced labour conventions are essentially the only international instruments that set out a definition of forced labour, although its prohibition is endorsed by many treaties, both international and regional.

43. It should be noted, however, that not all forms of forced labour are prohibited under the ILO forced labour conventions or under other international agreements addressing the subject. The Slavery Convention of 1926 allowed forced labour, but specified that it may only be exacted for public purposes, that it should be regulated by the competent central authorities of the territory concerned, and that “as long as forced or compulsory labour exists . . . [it] shall invariably be of an exceptional character, shall always receive adequate remuneration, and shall not involve the removal of the labourers from their usual place of residence.”<sup>50</sup> Article 2 (2) of ILO Convention No. 29 sets out certain specific exemptions which otherwise would have fallen under the definition of forced or compulsory labour. The ILO forced labor conventions do not prohibit prison labour but they do place restrictions on its use.<sup>51</sup> Convention No. 29 exempts from its provisions “any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country” and excludes “any work or service exacted in virtue of compulsory military service laws for work of a purely military character”.<sup>52</sup> The right of a Government to exact forced labour in times of emergency is also exempted from the forced labour conventions. Examples of such circumstances include “war or . . . a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic”.<sup>53</sup> ILO Convention No. 29 also exempts minor communal ser-

<sup>46</sup> United Nations document E/2815 (1955).

<sup>47</sup> General Conference of the ILO, Report IV(2), fortieth session, (1957), p. 4.

<sup>48</sup> Abolition of Forced Labour Convention, 1957 (No. 105), *United Nations Treaty Series*, vol. 320, p. 291; entered into force on 17 January 1959.

<sup>49</sup> Report of the ILO Governing Body, ILO document GB 265/2 (1996), para. 32.

<sup>50</sup> Slavery Convention 1926, *supra* note 13, arts. 5(1), 5(2) and 5(3).

<sup>51</sup> Only convicted criminals may be forced to work. Detainees awaiting trial may not be forced to work, nor may those imprisoned for political offences or as a result of labour disputes. See ILO Forced Labour Convention (No. 105), *supra* note 48, arts. 1 (a) and (d).

<sup>52</sup> ILO Convention No. 182 prohibits “forced or compulsory recruitment of children [under 18] for use in armed conflict”, Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Worst Forms of Child Labour Convention) (No. 182), art. 3(a), *International Legal Materials*, vol. 38, p.1207; entered into force on 19 November 2000. The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, adopted by General Assembly resolution 54/263 of 25 May 2000, similarly stipulates that “States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.” The ILO Committee of Experts has expressed concern about onerous restrictions on the ability of military personnel to terminate their contracts, particularly if they have specialized training. See International Labour Conference, sixty-fifth session (1979), Report III (Part 4B), General Survey of the Reports Relating to the Forced Labour Convention (No. 29), and the Abolition of Forced Labour Convention (No. 105).

vices “being performed by the members of the community in the direct interest of the said community”.<sup>54</sup>

### 3. *Other relevant human rights instruments*

44. The ILO forced labour conventions are essentially the only international instruments that set out a definition of forced labour, although its prohibition is endorsed by many treaties, both international and regional. The International Bill of Human Rights contains various provisions relevant to forced labour. Article 4 of the Universal Declaration does not specifically refer to forced labour but it is clear from discussions at the time it was drafted that forced labour was regarded as a form of servitude.<sup>55</sup> The International Covenant on Civil and Political Rights provides in article 8(3)(a) that “[n]o one shall be required to perform forced or compulsory labour”, subject to certain specified exceptions concerning prisoners, military service, emergencies and normal civil obligations.

45. In addition to the two International Covenants on Human Rights, the General Assembly adopted the International Convention on the Suppression and Punishment of the Crime of Apartheid in 1973, outlawing a number of inhuman acts committed for the purpose of establishing and maintaining domination by one racial group over any other, including exploitation of the labour of the members of a racial group or groups by subjecting them to forced labour.

46. Regional agreements have subsequently come into force which contain similar provisions to the two International Covenants, such as the European Convention for the Protection of Human Rights (art. 4(2)), the American Convention on Human Rights (art. 6) and the African Charter on Human and Peoples’ Rights (art. 5). The European Commission on Human Rights has identified two factors that must be present when considering forced or compulsory labour, “firstly, that the work is performed against the complainant’s will and secondly, that the work entails unavoidable hardship to the complainant”.<sup>56</sup>

47. The Trafficking Protocol, which has not yet come into effect, criminalizes transnational trafficking in persons for the purpose of exploitation of forced labour or services.<sup>57</sup>

48. Other categories of practices similar to slavery that have over the years been incorporated in the forced labour concept by the ILO include debt bondage and child labour. These categories are considered under separate headings below.

## C. Debt Bondage

49. Debt bondage (often termed “bonded labour”, which refers to exactly the same practices) is defined in the Supplementary Convention as the “status or condition arising from a pledge by a debtor of his personal services or those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined” (art. 1(a)). The

<sup>53</sup> ILO Convention No. 29, *supra* note 44, art. 2(2)(d). Emergency situations include war, calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic, that threaten a country’s existence, but the extent and length of service should be strictly limited to that which is absolutely necessary. See 1979 General Survey on the Abolition of Forced Labour, *supra* note 52, paras. 36-37.

<sup>54</sup> Such service (1) must be minor in nature, (2) must benefit the community directly, and (3) may be required only after the community has been consulted. 1979 General Survey on the Abolition of Forced Labour, *supra*, note 52, para. 37.

<sup>55</sup> United Nations document E/CN.4/SR.53 (1948).

<sup>56</sup> *X v. Federal Republic of Germany*, Application No. 4653/70, European Commission on Human Rights, *Decisions and Reports*, vol. 46, 1974, p. 22.

<sup>57</sup> Trafficking Protocol, *supra* note 28, art. 5.

Supplementary Convention characterizes debt bondage as a “servile status” (art. 7(b)) and obliges the States parties to implement national provisions to abolish it.

50. Although the ILO did not include debt bondage in the definition of forced labour in Convention No. 29, there appears to be a consensus that the two practices overlap. The preamble to Convention No. 105 refers specifically to the Supplementary Convention, noting that it provides for the complete abolition of “debt bondage and serfdom”. “Forced labour” is a broad term and the ILO has confirmed that there is a very wide range of practices that affect the freedom of workers which lead to varying degrees of compulsion in their work. The ILO has over time included debt bondage within the ambit of ILO Convention No. 29.

51. Debt bondage or bonded labour still exists today, affecting millions of adults and children in their own countries and migrant workers throughout the world. For some 10 years, the ILO Committee of Experts and more recently the Conference Committee on the Application of Standards have denounced the practice of debt bondage, in particular relating to children.<sup>58</sup> The ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999 (No. 182) specifically includes debt bondage among the “worst forms” prohibited by article 3(a)<sup>59</sup> and calls for its suppression. The ILO has observed that bondage of children generally occurs through a hereditary debt, an occasional debt or an advance on salary.<sup>60</sup>

52. Although there is no absolute international prohibition on the payment of wages in consideration other than legal tender, the ILO has adopted restrictions to protect workers from abuse. The Convention concerning Basic Aims and Standards of Social Policy, 1962 (No. 117) is particularly concerned with reducing forms of wage payment that foster indebtedness<sup>61</sup> and requires States parties to take “all practicable measures” to prevent debt bondage. Part IV of that Convention states that “wages shall normally be paid in legal tender only”. The Convention stipulates that wages must be paid regularly “at such intervals as will lessen the likelihood of indebtedness among the wage earners”.<sup>62</sup> It also places responsibility on a “competent authority” to ensure that when food, housing, clothing or other essential supplies and services are being used to pay the worker, their cash value is fairly assessed.<sup>63</sup> The Convention places the responsibility on States parties to establish mechanisms to monitor and control payments of wages that are made through non-cash transactions, and is intended to ensure that employers do not abuse their dominant position by charging inflated prices for goods provided in lieu of wages. Advances on wages must also be regulated by the competent authority, which should set a limit on the amounts advanced and render any advance exceeding the capped sum “legally irrecoverable”.

53. Extremely low wages are a cause of forced labour and debt bondage.<sup>64</sup> The ILO has therefore encouraged national authorities to set minimum wages to prevent the payment of extremely low

<sup>58</sup> ILO Governing Body Report, *supra* note 49, para. 32.

<sup>59</sup> Worst Forms of Child Labour Convention, *supra* note 52, art. 3(a). For further discussion of the ILO and child labour, see the section on the ILO and Child Labour, *infra*.

<sup>60</sup> International Labour Office, *Practical Action to Eliminate Child Labour* (1997); see also J. Hilowitz, *Labelling Child Labour Products* (1997).

<sup>61</sup> Convention concerning Basic Aims and Standards of Social Policy, 1962 (No. 117); entered into force on 23 April 1964. Convention No. 117 has been ratified by only 32 States.

<sup>62</sup> See also ILO Protection of Wages Convention, 1949 (No. 95); entered into force on 24 September 1952, International Labour Office, *International Labour Conventions and Recommendations 1919-1991* (1992), vol. 1, p. 482 (additionally prohibiting methods of payment that deprive workers of the genuine possibility of terminating their employment. Note that Convention No. 95 has been ratified by 95 States); Recommendation No. 85, International Labour Office, *International Labour Conventions and Recommendations 1919-1991* (1992), vol. 1, p. 487 (indicating either twice a month or monthly as the acceptable periodicity of wage payments).

<sup>63</sup> *Ibid.*, art. 9 (also requiring that deductions from wages be fair and authorized by national legislation, and specifically prohibiting “any deduction from wages with a view to ensuring a direct or indirect payment for the purpose of obtaining or retaining employment”).

<sup>64</sup> See, for example, *Bandhua Mukti Morcha v. Union of India & Others*, *Supreme Court Reports* (1984), vol. 2, p. 67, and Supreme Court of India decision 13 August 1991 on Contempt of Court Petition in conjunction with Writ Petition (Civil) No. 2135 of 1982, *Bandhua Mukti Morcha v. Union of India & Others* (deciding that any workers who were paid less than the minimum wage were bonded labourers).

wages that are insufficient to maintain the workers and their families.<sup>65</sup> The objective of the Convention concerning Minimum Wage Fixing, with Special Reference to Developing Countries, 1970 (No. 131),<sup>66</sup> and its accompanying Recommendation No. 135, is to give wage-earners the necessary social protection in terms of minimum permissible levels of wages.<sup>67</sup>

54. In view of the prevalence of bonded labour among the landless in rural areas, Governments may in some instances be required to reform the existing land tenure systems in order to prevent debt bondage and thereby comply with their obligations under the Supplementary Convention. In addition to passing legislation to abolish debt bondage, to extinguish debts that have been incurred and to take preventive action, rehabilitation is a crucial element that Governments must undertake to fulfil their obligations under ILO Conventions Nos. 95 and 117. They must ensure that once bonded workers are freed they will not be drawn back into bonded status by promptly assuming another loan. India and Pakistan<sup>68</sup> have legislation requiring the respective Governments to make payments to individuals identified as bonded labourers, seeking to prevent the process of bonded labour from starting again.

#### D. Migrant Workers

55. While all the existing instruments concerning slavery, servile status and forced labour apply to aliens and migrant workers as well as others, certain techniques of exploitation akin to slavery affect migrant workers in particular. These practices include employers confiscating workers' passports and, particularly in the case of domestic workers, keeping them effectively in captivity. They require special remedial action.<sup>69</sup> Migrant workers are subjected to a wide range of abuse and discrimination, most of which do not constitute slavery, servitude or forced labour. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families was adopted by the United Nations in 1990 in an attempt to counter these practices, but it has not yet entered into force. The ILO has also adopted a series of conventions to address the employment of migrant workers.<sup>70</sup>

56. Women migrant workers are particularly vulnerable to slavery-like exploitation and forced labour.<sup>71</sup> International instruments dealing with traffic in persons across international frontiers also address some of the problems experienced by migrants. Debt bondage, which affects many migrant workers, is explicitly addressed by the Supplementary Convention of 1956.<sup>72</sup>

<sup>65</sup> ILO Convention No. 117, *supra* note 61, art. 10.

<sup>66</sup> Convention concerning Minimum Wage Fixing, with Special Reference to Developing Countries, 1970 (No. 131); entered into force on 29 April 1972. Convention No. 131 has been ratified by only 43 States.

<sup>67</sup> Several previous conventions had a similar objective. ILO Convention No. 26 and Recommendation No. 30 (applicable to trades) and Convention No. 99 and Recommendation No. 89 (applicable to agriculture), which stipulated that the minimum wage should not be fixed at a lower rate than one which would ensure the subsistence of the worker and his or her family.

<sup>68</sup> In India the Bonded Labour System (Abolition) Act, 1976 (amended 1985), and in Pakistan the Bonded Labour System (Abolition) Act, 1992.

<sup>69</sup> The range of abuses was described in detail by the Sub-Commission's Special Rapporteur on exploitation of labour through illicit and clandestine trafficking, Halima Embarek Warzazi, appointed in 1973. Her final report was issued as a United Nations publication in 1986 (Sales No. E.86.XIV.1).

<sup>70</sup> ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), *United Nations Treaty Series*, vol. 1120, p. 323; entered into force on 9 December 1978, International Labour Office, *International Labour Conventions and Recommendations 1919-1991*(1992), vol. 2, p. 1091. The provisions of the ILO conventions are mentioned in the section on Trafficking, *infra*.

<sup>71</sup> M. Wijers and Lin Lap-Chew, *Trafficking in Women, Forced Labour and Slavery-like Practices in Marriage, Domestic Labour and Prostitution*, Global Alliance Against Trafficking in Women (1997); see also Secretariat of the Budapest Group at the International Centre for Migration Policy Development, *The Relationship Between Organized Crime and Trafficking in Aliens* (1999).

<sup>72</sup> See section on Debt Bondage, *supra*.

57. Migrants seeking to enter a new country without authorization are particularly vulnerable to exploitation. It is increasingly common for a person, after receiving the assistance of a smuggler or similar third party in illegally entering a new country, to be forced into an exploitative relationship that may include debt bondage, prostitution or other forms of slavery or slavery-like practices.<sup>73</sup> The Migrant Smuggling Protocol<sup>74</sup> covers “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident” and requires States parties to criminalize the smuggling of migrants and other related offences. The protection offered by the Migrant Smuggling Protocol is limited in two ways: first, it is only applicable in cases of international smuggling involving an organized crime group, and second, victims are afforded very few protections or remedies. The Migrant Smuggling Protocol does include, however, a number of provisions that seek to protect the rights of smuggled migrants, including safeguards found in international humanitarian law, human rights law and refugee law, as well as to prevent the worst forms of exploitation that often accompany the migrant smuggling process.<sup>75</sup>

58. Employers of migrant workers acquire a significant degree of control over their employees by offering to look after their wages. This practice is usually justified by the employer on the grounds that it will ensure earnings are not lost, or that they are invested to give the employee some extra benefit. Because of the migrant worker’s vulnerable position, s/he is often unable to refuse an employer’s offer or is unaware that it would be prudent to do so. Once the employer has accumulated the equivalent of several months wages, the employee is at a grave disadvantage, and if s/he wishes to depart must consequently put up with a significant level of abuse in an effort to retrieve his/her earnings. Such abuse sometimes involves physical assault and rape. The withholding of wages contravenes ILO Convention No. 95 concerning the Protection of Wages, 1949,<sup>76</sup> which requires wages to be paid regularly by employers and prohibits methods of payment that deprive workers of the genuine possibility of terminating their employment. Although international standards on slavery do not specify that withholding wages or failing to pay an employee is a form of slavery, the practice is clearly a violation of basic human rights, notably the guarantee in the International Covenant on Economic, Social and Cultural Rights of “remuneration which provides all workers, as a minimum, with . . . (i) fair wages and equal remuneration for work of equal value without distinction of any kind,”<sup>77</sup> and may contribute to forced labour or other exploitative employment conditions.

59. The Working Group on Contemporary Forms of Slavery observed at its April 1995 session that “foreign migrant workers are frequently subject to discriminatory rules and regulations which undermine human dignity”.<sup>78</sup> At its June 1996 session the Working Group heard evidence that the confiscation of passports by employers was a significant way of imposing control on migrant workers and urged States “to take necessary measures to sanction employers for the confiscation of passports belonging to migrant workers, in particular, migrant domestic workers”.<sup>79</sup> In a report to the 2000 session of the Commission on Human Rights, the High Commissioner for Human Rights stated: “Governments should enforce the call of the Working Group on Contemporary Forms of

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<sup>73</sup> For a further related discussion see the section on Debt Bondage, *supra*, and on Trafficking and Prostitution, *infra*.

<sup>74</sup> Protocol Against the Smuggling of Migrants by Land, Sea, and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (Migrant Smuggling Protocol); adopted by General Assembly resolution 55/25 on 15 November 2000, *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 49 (A/45/49)*, vol. I; not yet entered into force.

<sup>75</sup> Migrant Smuggling Protocol, *supra* note 74, arts. 4.4, 5, 9.1, 16.1, 16.2, 16.3, 16.4, 19.1.

<sup>76</sup> ILO Convention No. 95, *supra* note 62.

<sup>77</sup> International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, art. 7(a), *United Nations Treaty Series*, vol. 993, p. 3, entered into force on 3 January 1976.

<sup>78</sup> Report of the Working Group on Contemporary Forms of Slavery on its twentieth session, recommendation 8, United Nations document E/CN.4/Sub.2/1995/28 (1995).

<sup>79</sup> Report of the Working Group on Contemporary Forms of Slavery on its twenty-first session, recommendation 9, United Nations document E/CN.4/Sub.2/1996/24 (1996).

Slavery upon employers not to take possession of workers' passports or other key documents. . . . A vital form of preventive action for all migrants appears to be to ensure that they are not left alone or isolated, i.e. that some freedom of association is respected and that consulates closely monitor their migrant nationals."<sup>80</sup> The Migrant Smuggling Protocol encourages States to implement information campaigns designed to discourage illegal migration.<sup>81</sup>

## E. Trafficking

60. Prior to the adoption of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol) in November 2000,<sup>82</sup> the main international convention concerned with trafficking in persons dealt uniquely with traffic for the purposes of prostitution. Accordingly, the issues of traffic or trafficking in persons and prostitution were routinely addressed together. Since instruments define traffic or trafficking to cover the movement of people for purposes other than prostitution or sexual exploitation, however, this report deals separately with the issues of traffic in persons and prostitution. They are closely linked, however, so the two sections should be read together.

61. The Trafficking Protocol, supplementing the United Nations Convention against Transnational Organized Crime, provides the first clear definition of trafficking in international law. Before the adoption of the Trafficking Protocol there was no precise and globally recognized definition of "trafficking in persons". The drafting process represented the first opportunity in decades to address the relationship between trafficking and prostitution. Consequently, several aspects of the definition proved extremely controversial. The result of these negotiations was a definition that departed from the approach taken in the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (the Suppression of Traffic Convention),<sup>83</sup> the Convention that had previously formed the principal legal basis of international protection against the traffic in persons.<sup>84</sup>

62. The trafficking of persons today can be viewed as the modern equivalent of the slave trade of the nineteenth century.<sup>85</sup> The Covenant of the League of Nations adopted on 28 April 1919 not only called on Member States to ensure fair and humane conditions of employment for all but also to work towards the suppression of traffic in women and children, in particular for the purpose of sexual exploitation. Prior to the existence of the League of Nations, certain efforts had been made by the international community to prohibit the slave trade.

63. In the latter part of the nineteenth century, the Brussels Act of 1890 contained measures to control and prevent the slave trade. It provided for a Slavery Bureau to oversee this process, and the known sea routes preferred by slave traders were subjected to naval patrolling. Article XVIII of the Brussels Act stated that a "strict supervision shall be organized by the local authorities at the ports and in the countries adjacent to the coast, with the view of preventing the sale and shipment of slaves". Today, it is increasingly difficult to monitor and control trafficking in persons given the

<sup>80</sup> United Nations document E/CN.4/2000/12 (2000), para. 68.

<sup>81</sup> Migrant Smuggling Protocol, *supra* note 74, art. 15.1.

<sup>82</sup> Trafficking Protocol, *supra* note 28.

<sup>83</sup> Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (Suppression of Traffic Convention), *United Nations Treaty Series*, vol. 96, p. 271; entered into force on 25 July 1951.

<sup>84</sup> The terms "traffic" and "trafficking" refer to the same phenomenon in English. Confusion sometimes arises when these terms are translated into other languages using several different terms to denote different degrees of seriousness or enslavement, while in English the single term "traffic" is employed. The Suppression of Traffic Convention refers in its English-language title to "the traffic in persons", in French to "la traite des êtres humains" and in Spanish to "la trata de personas". The terms "traite" and "trata" are the same as those used to refer to the word *trade* in the phrase "slave trade", as in the title of the Supplementary Convention, and appear to carry a stronger connotation of treating human beings as commodities than the term "traffic" conveys in English.

<sup>85</sup> See Kevin Tessier, "The New Slave Trade: The International Crisis of Immigrant Smuggling", *Indiana Journal of Global Legal Studies*, vol. 13 (1995-1996), p. 261.

dramatic increase in global migration. Trafficking is evidently a “low-risk, high-return” prospect for the trafficker and it is often difficult for the authorities to identify perpetrators who use various disguises for their activities. Monitoring and prevention are made even more difficult by the covert nature of trafficking and the threats of violence associated with it – particularly when organized crime is involved.<sup>86</sup>

64. The “slave trade” was defined in the Slavery Convention as “all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general every act of trade or transport in slaves”.<sup>87</sup> The fact that individuals are still being acquired and transferred for whatever purpose today has led commentators to conclude that “this underground trade in human beings exacts such an enormous toll in human misery that it has been called a modern version of the slave trade.”<sup>88</sup> The definition of slave trade was endorsed by the Supplementary Convention with the addition of “by whatever means of conveyance”, thus including transportation by air.<sup>89</sup>

65. The international instruments dealing with trafficking implemented in the first part of the twentieth century focused on cases in which women and girls were moved across international frontiers both with and without their consent for the purpose of prostitution.<sup>90</sup> The trafficking of persons has therefore long been associated with prostitution in the treaties. In 1910, the International Convention for the Suppression of White Slave Traffic imposed an obligation on the parties to punish anyone who recruits a young woman, below the age of majority, into prostitution even with her consent. In 1933, article 1 of the International Convention for the Suppression of the Traffic of Women of Full Age established a duty to prohibit, prevent and punish the trafficking of women even when done with their consent. This 1933 Convention specifically relates to the international traffic in consenting women of full age, but only in situations where there is traffic from one country to another. A State could therefore conceivably tolerate on a national level what it condemns and seeks to prevent at an international level.

66. This trend towards criminalizing the activity of recruiting women in one country to work as prostitutes in another, whether it was done with or without the prior understanding and consent of the women concerned, continued after the Second World War with the adoption of the 1949 Suppression of Traffic Convention. This treaty consolidated the earlier instruments relating to the “white slave trade” and traffic in women and children, making it an offence to procure, entice, or lead away another person for the purpose of prostitution, even with the consent of that person.<sup>91</sup> Hence, the provisions of the Suppression of Traffic Convention make irrelevant the consent of the person to the trafficking activity. The States parties are, therefore, obliged to punish both voluntary and involuntary procurement into prostitution. This approach reflects the general intention of the Convention as stated in its Preamble: to establish prostitution as a practice that is “incompatible with the dignity and worth of the human person”. Recruitment need not be across international borders to qualify as “trafficking” under article 17 of the Suppression of Traffic Convention, although the parties are required, in connection with immigration and emigration, to check

<sup>86</sup> Lan Cao, “Illegal Traffic in Women: A Civil RICO [Racketeer Influenced and Corrupt Organization Act] Proposal”, *Yale Law Journal*, vol. 96 (1987), p. 1297.

<sup>87</sup> Slavery Convention 1926, *supra* note 13, art. 1(2).

<sup>88</sup> Kevin Tessier, *supra* note 85.

<sup>89</sup> U.O. Umozurike, “The African Slave Trade and the Attitude of International Law Towards It”, *Howard Law Journal*, vol. 16 (1971), p. 346..

<sup>90</sup> These instruments were the International Agreement for the Suppression of the White Slave Traffic of 18 May 1904, *supra* note 17, the International Convention for the Suppression of the White Slave Traffic of 4 May 1910, *United Nations Treaty Series*, vol. 98, p. 101, the International Convention for the Suppression of the Traffic in Women and Children of 30 September 1921, *League of Nations Treaty Series*, vol. 9, p. 415 (entered into force for each country on the date of its ratification or accession), and the International Convention for the Suppression of the Traffic of Women of Full Age of 11 October 1933, *infra* note 173. A further draft convention was prepared by the League of Nations in 1937 but was not adopted.

<sup>91</sup> Suppression of Traffic Convention, *supra* note 83, art. 1(1).

whether the trafficking involves prostitution. The Convention also places an obligation on States parties to take specific measures to protect immigrants and emigrants, the potential victims of trafficking, by providing them with relevant information to ensure that they do not fall victim to traffickers.

67. Article 1 of the Suppression of Traffic Convention requires the woman or man being trafficked to have been recruited “to gratify the passions of another” and “for purposes of prostitution”. Because the requirement concerning the intentional character of the offence may create practical difficulties in implementation, “additional instruments should be envisaged to mitigate in certain cases that requirement concerning the subjective aspect of the offence”.<sup>92</sup> As early as 1965 the International Criminal Police Organization (INTERPOL) recommended to the United Nations that the Suppression of Traffic Convention “be supplemented so as to cover cases of ‘disguised traffic’ (engaging persons for employment abroad that exposes them to prostitution)”.<sup>93</sup> The suggestion was not, however, followed.

68. The notion of trafficking in the Suppression of Traffic Convention was inextricably linked to prostitution, resulting in a narrow interpretation of trafficking. The reality today, however, is that people are trafficked not only for exploitation in the sex industry but also for many other reasons. The international community has recognized, on numerous occasions, that people are being smuggled across international borders in abusive as well as illegal circumstances for a variety of purposes in addition to prostitution.<sup>94</sup>

69. The Supplementary Convention adopted by the United Nations in 1956, just seven years after the Suppression of Traffic Convention, also contains provisions dealing with the slave trade and the transportation of slaves or persons of servile status from one country to another. Article 3 of the Supplementary Convention makes it a criminal offence to be involved in the slave trade and requires States parties to exchange relevant information in a coordinated effort to combat the slave trade.<sup>95</sup> In addition, article 6(1) of the Supplementary Convention views as a crime “the act of enslaving another person or of inducing another person” into slavery or servile status. There are various methods of procuring or enticing a person into slavery or servile status for the purposes of prostitution or other forms of exploitation. The primary methods include (i) abduction,<sup>96</sup> (ii) purchase,<sup>97</sup> or (iii) procurement with fraudulent inducements of jobs and a better life.<sup>98</sup>

70. There were various suggestions following the adoption of the Suppression of Traffic Convention in 1949 that the definition of “traffic in persons” should be extended to cover forms of recruit-

<sup>92</sup> Halima Embarek Warzazi, *supra* note 69, para. 89.

<sup>93</sup> Inquiry on the status of combating of the traffic in persons and of the exploitation of the prostitution of others: report of the Secretary-General, United Nations document E/CN.4/Sub.2/AC.2/1982/13 (1982), para. 139.

<sup>94</sup> See Economic and Social Council, Integration of the Human Rights of Women and the Gender Perspective: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women’s migration and violence against women, submitted in accordance with Commission on Human Rights resolution 1997/44, United Nations document E/CN.4/2000/68 (2000), para. 13 (stating that “Documentation and research shows that trafficking occurs for a myriad of exploitative purposes to which trafficked victims have not consented, including but not limited to forced and/or bonded labour, including within the sex trade, forced marriage and other slavery-like practices.”).

<sup>95</sup> See also Economic and Social Council resolution 1998/20 of 20 July 1998 entitled “Action to combat international trafficking in women and children” (stressing the importance of “sharing information, coordinating law enforcement activities . . . in order to locate and arrest those who organize trafficking in women and children, as well as those who exploit those trafficked”).

<sup>96</sup> See Kathleen Barry, *Female Sexual Slavery* (1984) (pointing out the difficulty of assessing the extent of abduction, as escape is often difficult and, consequently, the abduction goes unreported).

<sup>97</sup> See “A Painful Trade for North Koreans”, *International Herald Tribune*, 13-14 February 1999, p. 1 (discussing the phenomenon of selling children for food); Statement by the President of the General Assembly on International Day for the Abolition of Slavery, 2 December 1996 (GA/9190) (condemning as tragic cases where victims are sold with a family’s complicity, especially in situations where children marry).

<sup>98</sup> See Uli Schmetzer, “Slave Trade Survives, Prospers Across Asia”, *China Tribune*, 17 November 1991, p. C1 (noting that the target group for such procurement are persons who are young, poor and seeking financial security).

ment that are not directly linked to prostitution, and also the movement of men, women, or children across international frontiers for purposes other than prostitution, when they are being subjected to coercion or are being deceived about the nature of the situation that awaits them.<sup>99</sup> United Nations General Assembly resolution 49/166 of 23 December 1994 offered a de facto definition of trafficking in women and children. In that resolution, the Assembly condemned the “illicit and clandestine movement of persons across national and international borders, largely from developing countries and some countries with economies in transition, with the end goal of forcing women and girl children into sexually or economically oppressive and exploitative situations for the profit of recruiters, traffickers and crime syndicates, as well as other illegal activities related to trafficking, such as forced domestic labour, false marriages, clandestine employment and false adoption”.

71. In December 1998 the United Nations General Assembly established an Ad Hoc Committee with the aim of creating an international legal regime to fight transnational organized crime.<sup>100</sup> The resulting Convention against Transnational Organized Crime<sup>101</sup> is essentially an instrument of international cooperation, its purpose being to promote inter-State cooperation in order to combat such crime. It represents “the first serious attempt by the international community to invoke the weapon of international law in its battle against transnational organized crime”.<sup>102</sup> The Convention is supplemented by three protocols, the Protocol against the Smuggling of Migrants by Land, Sea and Air (Migrant Smuggling Protocol),<sup>103</sup> the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol) and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms.<sup>104</sup> The Migrant Smuggling Protocol and the Trafficking Protocol were both finalized at the eleventh session of the Ad Hoc Committee and adopted by the General Assembly on 15 November 2000.

72. It is necessary to set the Trafficking Protocol in the context of international crime prevention. The application of the Trafficking Protocol is limited to situations where trafficking is perpetrated by an organized criminal group across international borders.<sup>105</sup> This restriction contrasts with the terms of the Suppression of Traffic Convention, which, in a step representing a move away from the approach adopted in earlier international instruments, did not require an element of cross-border movement. In addition, the Convention against Transnational Organized Crime’s definition of an organized criminal group requires there to be three or more members.<sup>106</sup> While that further restriction reflects the intention of the Convention against Transnational Organized Crime to facilitate inter-State cooperation in the repression of organized crime, it is evidently irrelevant to an individual who has been trafficked and whose human rights have been abused whether one, two, three or more people were responsible.

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<sup>99</sup> The Traffic in Persons: Report of the Advisory Committee [to the Netherlands Minister on Foreign Affairs] on Human Rights and Foreign Policy (1992); see also Seminar on action against traffic in women and forced prostitution, Note by the Secretary-General, United Nations document E/CN.4/Sub.2/AC.2/1992/8 (1992) (proposing that the United Nations should consider “extending the scope of relevant international regulations to include all forms of trafficking in persons irrespective of the activity persons are trafficked for”); ILO Convention No. 143, *supra* note 70 (recognizing that trafficking occurs for purposes in addition to prostitution).

<sup>100</sup> General Assembly resolution 53/111 of 9 December 1998.

<sup>101</sup> United Nations Convention against Transnational Organized Crime, Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, adopted on 15 November 2000, not yet entered into force, United Nations document A/55/383.

<sup>102</sup> Anne Gallagher, Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: Preliminary Analysis, *Human Rights Quarterly* (November 2001), vol. 23, No. 4.

<sup>103</sup> Migrant Smuggling Protocol, *supra* note 74.

<sup>104</sup> Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/255 of 8 June 2001, not yet entered into force.

<sup>105</sup> Trafficking Protocol, *supra* note 28, art. 4.

<sup>106</sup> Convention against Transnational Organized Crime, *supra* note 101, art. 2(a).

73. The Trafficking Protocol defines “trafficking in persons” as having three elements, all of which must be present for the Convention to apply.<sup>107</sup>

1. An action, consisting of “recruitment, transportation, transfer, harbouring or receipt of persons”;
2. 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”;
3. For “the purpose of exploitation”.<sup>108</sup>

The second element of this definition creates an association between the Trafficking Protocol and earlier international instruments concerning slavery, as the means mentioned include “the threat or use of force or other forms of coercion”. The definition of abusive situations in the Trafficking Protocol goes beyond the means of control and coercion invoked in the slavery conventions to include deception and the abuse of power and vulnerability. Deception means that a person has been tricked into a vulnerable or abusive situation. For example, people are commonly deceived about the kind of work they will have to undertake or the conditions under which they will be living. Along with the use of force, coercion and deception, the Trafficking Protocol addresses the situation in which money is paid to a third person, for example the victim’s relatives, in order to gain control over the victim. Where an abuse of power or position of responsibility occurs, the *travaux préparatoires* state that such abuse must be understood to “refer to any situation in which the person involved had no real and acceptable alternative but to submit to the abuse involved”.<sup>109</sup> For example, if a woman has no choice but to submit to her husband’s, relatives’ or employers’ wishes – resulting in her recruitment or transfer into an exploitative situation – an abuse of power or position of responsibility occurs. The criteria in the second element of the definition only apply if the person trafficked is aged eighteen or over; when young persons under eighteen are involved, coercion or deception does not have to be shown.<sup>110</sup>

74. The Trafficking Protocol’s definition of exploitation includes, “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”.<sup>111</sup> Taken together with its second element (the means), this provision means the Trafficking Protocol considers the recruitment of adult women and men into prostitution to constitute trafficking if accompanied by the threat or use of force or other forms of coercion, deception, abuse of power or use of payments to

<sup>107</sup> When children are involved, however, the second element of coercion or deception does not have to be shown. See the section on Trafficking and Children below.

<sup>108</sup> Trafficking Protocol, *supra* note 28, art. 3.

<sup>109</sup> Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, United Nations document A/55/383/Add.1, para. 63.

<sup>110</sup> Trafficking Protocol, *supra* note 28, art. 3(4).

<sup>111</sup> The terms “slavery”, “forced labour”, “practices similar to slavery” or “servitude” are not defined in the Trafficking Protocol. Definitions of the first three terms are contained in other international legal instruments, as outlined above. Servitude, however, as opposed to “servile status”, is not defined in international law. It is worth noting that in an earlier draft of the Protocol, servitude was defined to mean “the status or condition of dependency of a person who is [unjustifiably] compelled by another person to render any service and who reasonably believes that he or she had no reasonable alternative but to perform the service”. (Revised Draft Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children, Ad Hoc Committee on the Elaboration of Convention against Transnational Organized Crime, ninth session, Vienna, 5-16 June 2000, United Nations document A/AC.254/4/Add.3/Rev.6.) This definition was dropped in the final version of the Protocol (as were definitions of the other terms). In addition, the United States Violence Protection Act of 2000 defines “involuntary servitude” to include:

“a condition of servitude induced by means of:

- A) Any scheme, plan or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or
- B) The abuse or threatened abuse of the legal system.”

acquire control over the women or men concerned, and if, once in prostitution, someone else is profiting from their earnings.<sup>112</sup>

75. It is expressly stated in the *travaux préparatoires* that “the Protocol addresses the exploitation of prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms ‘exploitation of the prostitution of others’ or ‘other forms of sexual exploitation’ are not defined in the [Trafficking] Protocol, which is therefore without prejudice to how States Parties address prostitution in their respective domestic laws.”<sup>113</sup> The phrase was left undefined following an inconclusive end to a year-long debate over the meaning of both these phrases. Although not explicitly defined, “exploitation of the prostitution of others” is the subject of the Suppression of Traffic Convention (and is addressed in the next chapter); “other forms of sexual exploitation” is not the subject of another international legal instrument.<sup>114</sup> This phrase may therefore refer to pornography and a range of other forms of abuse, such as forced marriage.

76. Hence, the Trafficking Protocol requires States to focus on non-consensual prostitution and other crimes involving force or coercion, and does not require them to treat all adult participation in prostitution as trafficking, even if others are receiving money as a result in ways considered to contravene the Suppression of Traffic Convention. The requirement to treat all adult participation in prostitution as trafficking has been cited as one reason why the Suppression of Traffic Convention has been ratified by fewer States than the other United Nations conventions against slavery.<sup>115</sup> Consequently, under the Trafficking Protocol, adults who have migrated to work voluntarily in the sex industry may not be regarded as having been trafficked. The Trafficking Protocol also addresses the issue of consent expressly, stating that the consent of a victim of trafficking to the intended exploitation shall be irrelevant where any type of coercion, deception or intimidation occurs.<sup>116</sup> Accordingly, the alleged consent of a victim of trafficking cannot be used as a defence by those persons accused of trafficking.

77. The Trafficking Protocol also recognizes that victims of trafficking may be exploited following their legal entry into a country.<sup>117</sup> Consequently, whether a person entered a country legally or illegally is irrelevant to their status as a trafficked person.

78. In order to achieve effective action to prevent and combat trafficking in persons, the Trafficking Protocol declares that it is necessary to implement a comprehensive approach that protects victims’ internationally recognized human rights.<sup>118</sup> Throughout the Trafficking Protocol, however, States’ conduct is mandatory concerning the law enforcement provisions, while the protec-

<sup>112</sup> As indicated above, however, when children are involved in prostitution the second element of coercion or deception does not have to be shown. See the section on Trafficking and Children below.

<sup>113</sup> *Travaux préparatoires*, *supra* note 109, para. 64.

<sup>114</sup> See Draft Regulation No. 2000/- on the Prohibition of Trafficking in Persons in Kosovo, October 2000, United Nations document UNMIK/REG/2000/- (suggesting a definition: “sexual exploitation means the participation by a person in prostitution, sexual servitude, or the production of pornographic materials as a result of being subjected to a threat, deception, coercion, abduction, force, abuse of authority, debt bondage or fraud. Even in the absence of any one of these factors, where the person participating in prostitution, sexual servitude or the production of pornographic materials is under the age of 18, sexual exploitation shall be deemed to exist.” The final draft of the Regulation dropped this definition of exploitation in favour of the Trafficking Protocol’s definition of trafficking (Regulation No. 2001/4 on the Prohibition of Trafficking in Persons in Kosovo, 12 January 2001, United Nations document UNMIK/REG/2001/4).

<sup>115</sup> As of September 2001, the Suppression of Traffic Convention had been ratified by 73 States, while the 1956 Supplementary Convention on the Abolition of Slavery had been ratified by 119 States (Working Group on Contemporary Forms of Slavery, Review of the Implementation and Follow-up to the Conventions on Slavery, Note by the Secretary-General, United Nations documents E/CN.4/Sub.2/AC.2/2001/2 and E/CN.4/Sub.2/AC.2/2001/3 (2000) (updated to September 2001). For example, the Federal Republic of Germany, while welcoming as a matter of principle the objectives established by the Suppression of Traffic Convention, has not ratified the Convention, objecting that “A direct penal campaign against prostitution would encourage it to go underground and continue illegally, and would eliminate existing means of control. The possible occurrence of far more dangerous accompanying phenomena could not be ruled out.” (Working Group on Slavery, seventh session, annex II, Reports by States which are not parties to the Convention on the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, United Nations document E/CN.4/Sub.2/AC.2/41 (1981)).

<sup>116</sup> Trafficking Protocol, *supra* note 28, art. 3(b).

<sup>117</sup> *Travaux préparatoires*, *supra* note 109, para. 79.

<sup>118</sup> Trafficking Protocol, *supra* note 28, Preamble.

tion and assistance provisions are discretionary. In practice, this difference is likely to result in weak protection of victims' human rights. For example, States parties are required to protect the privacy of victims "in appropriate cases" and "to the extent possible under international law"<sup>119</sup> and "shall consider" implementing measures to provide for the physical, psychological, and social recovery of victims,<sup>120</sup> while "endeavouring" to provide for the physical safety of victims.<sup>121</sup> This lack of specific obligation seems likely to undermine the Protocol's effectiveness as a law enforcement instrument since the identification and prosecution of traffickers is dependent on the cooperation of trafficked persons.<sup>122</sup> "States should be obliged to provide information to trafficking victims on the possibility of obtaining remedies, including compensation for trafficking and other criminal acts to which they have been subjected, and to render assistance to such victims, giving particular attention to the special needs of children to enable them to obtain the remedies to which they are entitled."<sup>123</sup>

79. The status of trafficking victims and the related issue of repatriation were both contested issues during the drafting of the Protocol<sup>124</sup> since both issues have a major influence on the degree of witness protection available for successful prosecutions once the Trafficking Protocol is implemented in national legislation. Receiving States parties are required to consider adopting legislative or other measures permitting the victims of trafficking to remain in their territories temporarily or permanently in "appropriate cases" with "appropriate consideration" being given to humanitarian and compassionate factors.<sup>125</sup> The State of origin of the trafficked person is obliged to facilitate and accept "the return of that person without undue or unreasonable delay", with "due regard for the safety of that person".<sup>126</sup> States of origin are also required to verify the nationality of a victim and issue the necessary travel documents in order to facilitate his or her return.<sup>127</sup> Similarly, the receiving State, when repatriating a trafficked person, is required to ensure that return is with due regard both to the person's safety and to the status of any legal proceedings relating to the fact that the person is a victim of trafficking.<sup>128</sup> As Gallagher highlights, however, while article 8(2) states that return of a trafficked person "shall preferably be voluntary", the *travaux préparatoires* effectively render this concession meaningless by indicating that these words are to be understood as not to be placing any obligation on the returning State party.<sup>129</sup> A note by the Secretary-General on "Smuggling and trafficking in persons and the protection of their human rights" states that, following the implementation of the Trafficking Protocol, "at a minimum, it would appear that the identification of an individual as a trafficked person should be sufficient to ensure that immediate expulsion which goes against the will of the victim does not occur and that necessary protection and assistance is provided."<sup>130</sup>

80. Chapter III of the Protocol, containing the law enforcement and border control provisions, is "clearly at the heart of the Protocol"; "the principal emphasis of the Protocol remains firmly on the interception of traffickers rather than the identification and protection of victims."<sup>131</sup> States are required to cooperate through information exchange; strengthen law enforcement, immigration

<sup>119</sup> Trafficking Protocol, *supra* note 28, art. 6(1).

<sup>120</sup> Trafficking Protocol, *supra* note 28, art. 6(3)(a). These measures include the provision of appropriate housing, counselling and information, particularly regarding legal rights, medical, psychological and material assistance, employment as well as educational and training opportunities.

<sup>121</sup> Trafficking Protocol, *supra* note 28, art. 6(5).

<sup>122</sup> Anne Gallagher, *supra* note 102.

<sup>123</sup> Smuggling and trafficking in persons and the protection of their human rights, Note by the Secretary-General, United Nations document E/CN.4/Sub.2/2001/26, para.11.

<sup>124</sup> Anne Gallagher, *supra* note 102.

<sup>125</sup> Trafficking Protocol, *supra* note 28, art. 7.

<sup>126</sup> Trafficking Protocol, *supra* note 28, art. 8(1).

<sup>127</sup> Trafficking Protocol, *supra* note 28, art. 8(3) and (4).

<sup>128</sup> Trafficking Protocol, *supra* note 28, art. 8(2).

<sup>129</sup> Anne Gallagher, *supra* note 102.

<sup>130</sup> Smuggling and trafficking in persons and the protection of their human rights, Note by the Secretary-General, *supra* note 123, para. 12.

<sup>131</sup> Anne Gallagher, *supra* note 102.

and other relevant officials' training in the prevention of trafficking, prosecution of traffickers and protection of victims; strengthen border controls; and adopt legislative and other appropriate measures such as sanctions to prevent commercial carriers transporting trafficked persons.<sup>132</sup> Following repeated United Nations requests for information exchange among States, article 10 of the Trafficking Protocol requires States' law enforcement, immigration and other relevant authorities to cooperate with each other by exchanging information. Concern that strengthened border controls would conflict with the principle of non-refoulement by limiting the right of individuals to seek asylum from persecution led to the implementation of a broad savings clause. Article 14 states that nothing in the Protocol "shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian and human rights law", with particular regard to the principle of non-refoulement as contained in the 1951 Convention on the Status of Refugees<sup>133</sup> and its 1967 Protocol.<sup>134</sup>

81. The law enforcement and border control provisions fail to address how victims of trafficking are to be identified. This failure proves to be a serious weakness when the relationship of the Trafficking Protocol to the Migrant Smuggling Protocol, which also supplements the Convention against Transnational Organized Crime, is taken into account.<sup>135</sup> The stated purpose of the Migrant Smuggling Protocol is to prevent and combat migrant smuggling and to promote cooperation among States to that end while protecting the rights of smuggled migrants.<sup>136</sup> The Trafficking Protocol, however, affords greater protection to the rights of victims of trafficking than the Migrant Smuggling Protocol allows to smuggled migrants. For example, States parties to the Migrant Smuggling Protocol are not required to consider the possibility of permitting victims to remain in their territories temporarily or permanently, nor are they required to take account of migrants' rights in the repatriation process. Furthermore, smuggled migrants are not granted similar entitlements to trafficking victims with respect to legal proceedings or remedies against smugglers, nor are they entitled to any of the special protections that States may choose to afford trafficked persons in relation to their personal safety and physical and psychological well-being. Altogether, this difference implies that States accept greater financial and administrative responsibilities when identifying trafficked persons. Accordingly, in some cases national authorities may prefer to identify victims of trafficking as irregular migrants who have been smuggled rather than trafficked. In addition, the definition of migrant smuggling – "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person"<sup>137</sup> – is sufficiently wide to apply to all irregular immigrants whose transport has been facilitated by others.<sup>138</sup> "The distinction that has been made between trafficked persons and smuggled migrants is a useful one. However, it is important to note that such a distinction is less clear on the ground, where there is considerable movement and overlapping between the two categories . . . Unfortunately there is little guidance in either instrument regarding how the identification process is to be undertaken and by whom."<sup>139</sup> This difference also results in a potential incentive for States to ratify the Smuggling Protocol and not the Trafficking Protocol. Additionally, neither Protocol recognizes the fact that it is becoming increasingly common for a person to begin their journey as a smuggled migrant, only to become trafficked when later forced or tricked into an exploitative situation.<sup>140</sup> Gallagher believes that the failure of States to address these issues is evidence of their unwillingness to relinquish any measure of control over the migrant identification process.

<sup>132</sup> Trafficking Protocol, *supra* note 28, art. 10(1) and (2), art. 11(1)(2)(3) and (4).

<sup>133</sup> Convention on the Status of Refugees, *United Nations Treaty Series*, vol. 189, p. 137; entered into force on 22 April 1954.

<sup>134</sup> Protocol on the Status of Refugees, *United Nations Treaty Series*, vol. 606, p. 267; entered into force on 4 October 1967.

<sup>135</sup> Anne Gallagher, *supra* note 102.

<sup>136</sup> Migrant Smuggling Protocol, *supra* note 74, art. 2.

<sup>137</sup> Migrant Smuggling Protocol, *supra* note 74, art. 3(a).

<sup>138</sup> Anne Gallagher, *supra* note 102.

<sup>139</sup> Smuggling and trafficking in persons and the protection of their human rights, Note by the Secretary General, *supra* note 123, para. 7.

<sup>140</sup> *Ibid.*, para. 13.

82. Moreover, the Trafficking Protocol contains no provision for a mechanism to monitor its implementation or to hold Governments to account for failing to implement it. The absence of a supervisory mechanism could prove significant, since a major criticism of the Suppression of Traffic Convention has been its lack of an effective reporting mechanism.<sup>141</sup> The Suppression of Traffic Convention merely requests that States parties annually communicate to the Secretary-General of the United Nations any laws, regulations and other measures adopted by them concerning the Convention. The Secretary-General is directed to publish periodically the information received and to send it to all United Nations Member States and non-member States.<sup>142</sup> There is no provision for the establishment of a monitoring body that could systematically study information supplied, request a particular State party for further information or scrutinize the application of the Suppression of Traffic Convention by a particular State party. "Compared with the reporting or monitoring systems of other human rights instruments, the reporting clause of the 1949 Convention appears vague and without effective influence on the implementation and enactment of the provisions."<sup>143</sup> The United Nations Working Group on Contemporary Forms of Slavery invites States to report on measures taken in conformity with the Suppression of Traffic Convention despite lacking an explicit mandate to do so. It is unclear whether the Working Group will seek to pursue a similar mandate for the Trafficking Protocol.

### 1. *Trafficking in women*

83. Adopting a similar approach to the resolutions of the annual Commission on Human Rights on the issue of trafficking in persons, which focus on women and children, the earliest drafts of the Trafficking Protocol limited its scope to trafficking in women and children. States, inter-governmental organizations and NGOs objected, however, that this approach was overly restrictive. Accordingly, the scope of the Trafficking Protocol was expanded to cover trafficking in all persons, with special attention being paid to women and children. While earlier treaties applied only to women and girls, the Suppression of Traffic Convention takes the same approach as the Trafficking Protocol, applying to men and women of all ages. Other treaties focus primarily on the problem of trafficking in women. The Convention on the Elimination of All Forms of Discrimination against Women, for example, includes in its article 6 the requirement that States parties suppress trafficking in women.<sup>144</sup> Various organizations have proposed definitions of "trafficking in women" in an effort to distinguish it from other forms of trafficking.<sup>145</sup> Trafficking has been established as a violation of women's rights. In the Vienna Declaration and Programme of Action, adopted at the end of the 1993 World Conference on Human Rights, it was agreed that "[g]ender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudices and international trafficking, are incompatible with the dignity and worth of the person and should be eliminated."<sup>146</sup> At its 1998 session, the Working Group on Contemporary Forms of Slavery adopted a recommendation declaring that "transborder trafficking of women and girls for sexual

<sup>141</sup> See United Nations document E/CN.4/Sub.2/1989/37 (1989); (the Secretary-General of the United Nations noted that the reporting clauses of the Suppression of Traffic Convention are without effective influence on implementation and therefore recommended the establishment of a reporting procedure).

<sup>142</sup> Suppression of Traffic Convention, *supra* note 83, art. 21.

<sup>143</sup> Liesbeth Zegveld, *Combat of Traffic in Persons within the U.N.*, Netherlands Institute of Human Rights, SIM Special No.17 (1995), p. 45.

<sup>144</sup> The Convention on the Elimination of All Forms of Discrimination against Women adopted by General Assembly resolution 34/180 of 18 December 1979; entered into force on 3 September 1981.

<sup>145</sup> Parliamentary Assembly Recommendation 1325 (1997) on traffic in women and forced prostitution in Council of Europe member states, Assembly debate on 23 April 1997 (13<sup>th</sup> Sitting) (defining "traffic in women" as "any legal or illegal transporting of women and/or trade in them, with or without their initial consent, for economic gain, with the purpose of subsequent forced prostitution, forced marriage or other form of forced sexual exploitation"); "Trafficking of Women to The European Union: Characteristics, Trends and Policy Issues", International Organization for Migration (1996) (defining trafficking in women as "any illicit transporting of migrant women and/or trade in them for economic personal gain," including facilitating their movement, legal or illegal, physically or sexually abusing them for the purpose of trafficking, selling or trading in them for the purpose of employment, marriage, prostitution or other forms of profit-making abuse).

exploitation is a contemporary form of slavery and constitutes a serious violation of human rights."<sup>147</sup> Reporting to the Commission on Human Rights at its fifty-sixth session in February 2000, the Special Rapporteur on violence against women highlighted in her report "the fact that trafficking in women is one component of a larger phenomenon of trafficking in persons, including both male and female adults and children. Nonetheless, she would like to highlight the women-specific character of many violations of human rights committed during the course of trafficking."<sup>148</sup>

## 2. Trafficking in children

84. According to article 3(c) of the Trafficking Protocol, the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered trafficking even without any evidence of force or coercion. As stated above, "exploitation" is defined in the Trafficking Protocol as "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".<sup>149</sup> While remaining undefined in international law, the term "other forms of sexual exploitation" can be understood to include the participation of persons under 18 in the production of pornography.<sup>150</sup> In addition, with regard to the definition of trafficking in article 3, the *travaux préparatoires* state that "where illegal adoption amounts to a practice similar to slavery as defined in article 1, paragraph (d), of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, it will also fall within the scope of the [Trafficking] Protocol."<sup>151</sup> Therefore, "any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour"<sup>152</sup> falls within the scope of the Trafficking Protocol.

85. Children who are recruited to work away from home but within the borders of their own country, in contravention of article 1(d) of the Supplementary Convention, are considered by many to have been "trafficked", notably when they are removed from their community of origin to another where they are more isolated and vulnerable to abuse, and where their labour is exploited for someone else's gain, whatever the nature of their income-generating activity.<sup>153</sup>

<sup>146</sup> Report of the World Conference on Human Rights, chapter III, section I, para. 18, United Nations document A/CONF.157/24 (Part 1) (1993); see also Declaration on the Elimination of Violence Against Women, adopted by General Assembly resolution 48/104 of 20 December 1993, art. 2 (including "trafficking in women" in its definition of violence against women); Radhika Coomaraswamy, Report of the Special Rapporteur on violence against women, its causes and consequences, United Nations document E/CN.4/1997/47 (1997) (discussing the causes of trafficking in women).

<sup>147</sup> Report of the Working Group on Contemporary Forms of Slavery on its twenty-third session, Recommendations 3 and 4, United Nations document E/CN.4/Sub.2/1998/14 (1998). The Working Group cited many instruments in its recommendations, including the slavery and forced labour conventions. The Commission on Human Rights also regards trafficking as a form of violence against women and a violation of their human rights that must accordingly be eliminated. See Commission on Human Rights resolution 1994/45, United Nations document E/CN.4/1994/132, p. 140.

<sup>148</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, *supra* note 94, para. 1.

<sup>149</sup> Trafficking Protocol, *supra* note 28, art. 3(a).

<sup>150</sup> See note 113. See also the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, adopted by General Assembly resolution 54/263 of 25 May 2000 (not yet entered into force), art. 2(c) (defining "child pornography" as "any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes").

<sup>151</sup> *Travaux préparatoires*, *supra* note 109, para. 66.

<sup>152</sup> Supplementary Convention, *supra* note 20, art. 1(d).

<sup>153</sup> In a statement by Anti-Slavery International to the twenty-sixth session of the Working Group on Contemporary Forms of Slavery in June 2001, "Trafic des enfants en Afrique de l'Ouest et du Centre: une réalité persistante", the organization invited members of the Working Group to comment on intra-country cases, saying: "Nous sollicitons le Groupe de travail également à examiner si le terme 'traite' doit également s'appliquer aux cas d'enfants transférés de leurs lieux d'origine (et leurs familles natales) à d'autres lieux dans le même pays, toujours aux fins d'exploitation économique abusive ou d'exploitation sexuelle." The Working Group did not, however, adopt a comment on this issue.

Formally, however, the Trafficking Protocol only applies to situations where children are trafficked across international borders.

86. With regard to assistance to and protection of victims of trafficking, the Trafficking Protocol requires each State party to take into account “the age, gender and special needs of victims of trafficking, and in particular the special needs of children, including appropriate housing, education and care” when applying the provisions of article 6.<sup>154</sup> As highlighted above, the Trafficking Protocol affords greater protection to the rights of victims of trafficking than the Migrant Smuggling Protocol affords to those of smuggled migrants. This difference is particularly apparent with regard to the protection of smuggled children’s rights, as the Migrant Smuggling Protocol only cursorily addresses their situation, merely stating that, in applying the provisions of article 16 on protection and assistance measures, “States Parties shall take into account the special needs of women and children”.<sup>155</sup>

87. The Convention on the Rights of the Child specifically prohibits “the abduction of, the sale of or traffic in children for any purpose or in any form”.<sup>156</sup> Hence, the prohibition of trafficking in children in the Convention (as in the Trafficking Protocol) is not limited to recruitment for prostitution, but includes a range of situations in which children are taken away from, or given away by, their families for a range of purposes, including, but not limited to, exploitation. Adoption is an example of a purpose which is not a form of exploitation.<sup>157</sup> Examples of exploitation include prostitution, pornography<sup>158</sup> and recruitment to work involving the removal of a child from home to be employed at an age or in circumstances that violate either national law or international standards on the minimum age for employment and on child servitude.<sup>159</sup> It is rather less clear when sending a child away from home for marriage is to be construed as “sexual exploitation” or “trafficking”, although some clear-cut cases are prohibited.<sup>160</sup> In every case, the children concerned are those under the age of 18, unless, under the law applicable to the child, majority is attained earlier.<sup>161</sup>

88. The Inter-American Convention on International Traffic in Minors, adopted by the Organization of American States (OAS) on 18 March 1994, defines the scope of cross-border traffic (or trafficking) in children in greater detail than any other instrument.<sup>162</sup> Article 2 specifies that:

“For the purpose of the present Convention:

- (a) ‘Minor’ means any human being below the age of eighteen.
- (b) ‘International traffic in minors’ means the abduction, removal or retention, or attempted abduction, removal or retention, of a minor for unlawful purposes or by unlawful means.
- (c) ‘Unlawful purpose’ includes, among others, prostitution, sexual exploitation, servitude or any other purpose unlawful in either the State of the minor’s habitual residence or the State Party where the minor is located.

<sup>154</sup> Trafficking Protocol, *supra* note 28, art. 6(4).

<sup>155</sup> Migrant Smuggling Protocol, *supra* note 74, art. 16(4).

<sup>156</sup> Convention on the Rights of the Child, adopted by General Assembly resolution 44/25 of 20 November 1989 (entered into force on 2 September 1990), art. 35.

<sup>157</sup> The main instrument adopted to prevent such trafficking is the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (entered into force on 1 May 1995), art. 32.1, which states: “No one shall derive improper financial or other gain from activity related to intercountry adoption.”

<sup>158</sup> Article 34 of the Convention on the Rights of the Child addresses the use of children in prostitution or other unlawful sexual practices and in pornographic performances and materials.

<sup>159</sup> Supplementary Convention, *supra* note 20, art. 1(d), and ILO Convention concerning Minimum Age for Admission to Employment (Minimum Age Convention), 1973 (No. 138), *United Nations Treaty Series*, vol. 1015, p. 297; entered into force on 19 June 1976.

<sup>160</sup> See section G, *infra*, on “Forced Marriage and the Sale of Wives”.

<sup>161</sup> Convention on the Rights of the Child, *supra* note 156, art. 1.

<sup>162</sup> Article 1 states that “The purpose of the present Convention, with a view to protection of the fundamental rights of minors and their best interests, is the prevention and punishment of the international traffic in minors as well as the regulation of its civil and penal aspects.”

- (d) 'Unlawful means' includes, among others, kidnapping, fraudulent or coerced consent, the giving or receipt of unlawful payments or benefits to achieve the consent of the parents, persons or institutions having care of the child, or any other means unlawful in either the State of the minor's habitual residence or the State Party where the minor is located."<sup>163</sup>

89. This regional instrument makes clear that recruitment in one country of a young person aged under 18 for legal employment in another country cannot be considered to be trafficking. The explicit reference, however, to "unlawful purpose" is helpful in clarifying that recruitment for any form of unlawful employment, such as work below the minimum age for employment, or work that is prohibited for those under 18, should be categorized as trafficking. Furthermore, the reference to "unlawful means" makes it clear that even if the intended employment is legal, recruitment involving transfer across a border is to be categorized as trafficking if it involves force, coerced consent, or consent acquired by an unlawful incentive. The Inter-American Convention does not explicitly refer to "deception" as an unlawful means, as the Trafficking Protocol does. Furthermore, it relies heavily on existing national legal standards, referring to a "purpose" or "means" unlawful in either of the States concerned rather than stating exactly what purposes and means are prohibited by international standards. The Inter-American Convention does, however, require States to designate a Central Authority to deal with the trafficking of children. These authorities must undertake to "assist each other promptly and expeditiously ... to conduct judicial and administrative proceedings, to take evidence, and to take any other procedural steps that may be necessary for fulfilling the objectives of this Convention" and establish "mechanisms for the exchange of information".<sup>164</sup>

90. When children are trafficked across international frontiers, States are required to ensure that the true age of the children is ascertained by independent and objective assessment, preferably with the cooperation of the non-governmental sector. If they are to be returned to the country of origin, their safety must be guaranteed by independent monitoring and follow-up. Pending their return to the country of origin, they may not be treated as illegal migrants by the receiving countries but should be dealt with humanely as special cases of humanitarian concern. Upon the children's return, the country of origin is to treat them with respect and in accordance with international human rights principles, supported by adequate family-based and community-based rehabilitation measures.<sup>165</sup> Evidently, the States concerned are also required to take actions that are in the "best interests of the child", under the terms of article 3 of the Convention on the Rights of the Child.

91. The ILO Worst Forms of Child Labour Convention, 1999 (No.182) declares that the trafficking of girls and boys under 18 years of age is a practice similar to slavery and, as such, a worst form of child labour, and recommends that it be made a criminal offence.<sup>166</sup> The Convention does not, however, spell out what it means by trafficking.

92. International conferences have recently focused attention on the eradication of trafficking in children.<sup>167</sup> The seriousness of the problem has also led the Commission on Human Rights to prepare an Optional Protocol to the Convention on the Rights of the Child dealing specifically with the sale of children, child prostitution and child pornography, adopted by the General Assembly in May 2000. The Optional Protocol states that "the elimination of the sale of children, child prostitution and child pornography will be facilitated by adopting a holistic approach, addressing the contributing factors," including trafficking in children. The Optional Protocol does not address trafficking in children explicitly. The provisions on the sale of children, however, can be used to

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<sup>163</sup> Inter-American Convention on International Traffic in Minors, adopted on 18 March 1994, quoted in United Nations document A/AC.254/CRP.2 (1998).

<sup>164</sup> *Ibid.*, arts. 4 and 8.

<sup>165</sup> Provisional report of the Special Rapporteur to the General Assembly on the sale of children, child prostitution and child pornography, para. 31, United Nations document A/49/478 (1994).

<sup>166</sup> Worst Forms of Child Labour Convention, *supra* note 52, art. 3(a), and Worst Forms of Child Labour Recommendation, No. 190 (1999), para. 12.

address such trafficking. The “sale of children” is defined as “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration”.<sup>168</sup> States are required to ensure that “offering, delivering or accepting, by whatever means, a child for the purpose of: (a) sexual exploitation of the child; (b) transfer of organs of the child for profit; (c) engagement of the child in forced labour;” and “offering, obtaining, procuring or providing a child for child prostitution” are made criminal offences whether they are “committed domestically or transnationally or on an individual or organized basis”.<sup>169</sup> The scope of the Optional Protocol is therefore wider than that of the Trafficking Protocol, since it covers the trafficking of children within domestic borders and by individuals. In terms of providing protection for children who have been trafficked or otherwise abused, the provisions of the Optional Protocol go significantly further than those of the Trafficking Protocol, since it recognizes “the vulnerability of child victims” and requires States parties to adopt “procedures to recognize their special needs, including their special needs as witnesses”<sup>170</sup> and to provide “in appropriate cases, for the safety of child victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation”.<sup>171</sup> However, these comprehensive protection provisions are applicable only if the child is participating in the criminal justice process as a witness.<sup>172</sup> For example, article 8(d) only requires appropriate support services to be provided to child victims “throughout the legal process”.

## F. Prostitution

93. Prostitution takes various forms and involves women, children and also men. As noted in the previous section, it is very closely related to trafficking. The Suppression of Traffic Convention requires States to punish “any person who, to gratify the passions of another . . . procures, entices or leads away, for purposes of prostitution, another person . . . [or] otherwise exploits the prostitution of another person” (art. 1 (1) and (2)). The prohibition refers both to cases in which the prostitute is subjected to some form of coercion and to acts carried out “with the consent of that person” (art. 1(2)).<sup>173</sup>

94. International instruments do not contain a definition of prostitution, though it is most commonly interpreted according to its ordinary meaning, that is “any sexual act offered for reward or profit”. The Suppression of Traffic Convention makes it clear that the reference to prostitution includes men practising prostitution, as well as women and children under the age of 18. The act

<sup>167</sup> See, for example, Programme of Action of the International Conference on Population and Development, chapter I, resolution I, annex, principle 11, United Nations document A/CONF.171/13 (1994) (stating that “all States . . . should give the highest possible priority to children” and that “[t]he child has the right to standards of living adequate for its well-being . . . and to be protected . . . from all forms of physical or mental violence . . . maltreatment or exploitation, including sale, trafficking, sexual abuse and trafficking in its organs”); Final Report of the World Congress against Commercial Exploitation of Children (1997) (considering the scope of the problem of child trafficking and measures that could be adopted to combat the problem); see also Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, United Nations document E/CN.4/1997/95 (1997) (following the World Congress, proposing that “consultation and information services . . . be established in countries of origin as a preventative measure for children likely to fall victim to trafficking”); General Assembly resolution 51/66 of 31 January 1997, Traffic in Women and Girls.

<sup>168</sup> Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, *supra* note 150, art. 2.

<sup>169</sup> *Ibid.*, art. 3. In addition, article 3(a)(ii) includes “Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption” as another act in the context of the sale of children that should be made criminal under the Optional Protocol.

<sup>170</sup> *Ibid.*, art. 8(1)(a).

<sup>171</sup> *Ibid.*, art. 8(1)(f).

<sup>172</sup> *Ibid.*, art. 8.

<sup>173</sup> See also International Convention for the Suppression of the Traffic of Women of Full Age, *League of Nations Treaty Series*, vol. 150, p. 431; entered into force on 24 August 1934, art. 1 (similarly banning traffic in women “even with [their] own consent”).

of prostitution itself committed by adults over 18 is not explicitly prohibited by international standards but the Suppression of Traffic Convention strongly discourages it.<sup>174</sup>

95. Some international instruments clearly consider the *exploitation* of prostitution – when money made through prostitution is passed on a systematic basis to anyone other than the prostitute herself – as inherently abusive and analogous to slavery.<sup>175</sup> “Exploitation of prostitution,” includes maintaining or knowingly financing a brothel,<sup>176</sup> that is to say a place in which one or more people are practising as prostitutes, or knowingly letting or renting “a building or other place . . . for the purpose of the prostitution of others.”<sup>177</sup>

### 1. *Forced prostitution*

96. The three international instruments concerning the traffic of women for prostitution adopted before 1933<sup>178</sup> address the various forms of coercion, threats and fraud that are used to force women or men into prostitution or to continue practising as prostitutes. For example, the International Convention for the Suppression of the White Slave Traffic 1910 requires the punishment of “any person who, to gratify the passions of others, has *by fraud or by the use of violence, threats, abuse of authority, or any other means of constraint*, hired, abducted or enticed a woman or a girl of full age for immoral purposes, even when the various acts which together constitute the offence were committed in different countries” (emphasis added).<sup>179</sup>

97. Forced prostitution occurs when a person is prostituted against his/her will, that is to say is compelled under duress or intimidation to engage in sexual acts in return for money or payment in kind, whether such payment is passed to others or received by the victim of forced prostitution him or herself.<sup>180</sup> Some commentators suggest that entering prostitution to earn money because of acute financial need should also be interpreted as “forced” prostitution.<sup>181</sup>

98. Forms of control over prostitutes include “(1) physical abuse; (2) physical control of prostitutes’ children, with threats to keep the children as hostages if prostitutes leave; (3) serious threats of physical harm, including murder; (4) keeping prostitutes in a continuous state of poverty and

<sup>174</sup> *Ibid.*, preamble (stating that “prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community . . .”).

<sup>175</sup> See, for example, the Convention on the Elimination of All Forms of Discrimination against Women, *supra* note 144, art. 6 (requiring States parties to suppress the “exploitation of prostitution of women”).

<sup>176</sup> Suppression of Traffic Convention, *supra* note 83, art. 2(1).

<sup>177</sup> *Ibid.*, art. 2(2). Note that article 6 of the Convention requires States parties to put an end to licensing or “special registration” of prostitutes.

<sup>178</sup> International Agreement for the Suppression of the White Slave Traffic of 1904; International Convention for the Suppression of the White Slave Traffic of 4 May 1910; and International Convention for the Suppression of the Traffic in Women and Children of 30 September 1921, *supra* note 40 (for all three conventions).

<sup>179</sup> Convention for the Suppression of the White Slave Traffic of 4 May 1910, *supra* note 90, art. 2.

<sup>180</sup> Michèle Hirsch, Plan of Action against Traffic in Women and Forced Prostitution, Council of Europe EG(96) 2 (1996) (proposing, as a definition of “forced prostitution”, the “act, for financial gain, of inducing a person by any form of constraint to supply sexual services to another person”); see also International Labour Organization, *The Sex Sector: The Economic and Social Basis of Prostitution in South East Asia*, Lin Lean Lim (ed.), 1998 (describing forced prostitution as “the ownership of women and children by pimps, brothel owners, and sometimes even customers for the purpose of financial gain, sexual gratification, and/or power and domination”).

<sup>181</sup> See, for example, report of the Special Rapporteur on the suppression of the traffic in persons and the exploitation of the prostitution of others, United Nations document E/1983/7, para. 23 (asserting that “even when prostitution seems to have been chosen freely, it is actually the result of coercion”, and quoting from the testimony given to the Congress of Nice on 8 September 1981 by three “collectives of women prostitutes”: “As prostitutes, we are all aware that all prostitution is forced prostitution. Whether we are forced to become prostitutes by lack of money or by housing or unemployment problems, or to escape from a family situation of rape or violence (which is often the case with very young prostitutes), or by a procurer, we would not lead the ‘life’ if we were in a position to leave it”); Kathleen Barry, *The Prostitution of Sexuality*, 1995 (arguing that there is no such thing as consensual prostitution and calling for the elimination of prostitution in all its forms); Centre on Speech, Equality and Harm, *Creating an International Framework for Legislation to Protect Women and Children from Commercial Sexual Exploitation*, University of Minnesota Law School Preliminary Report (1998) (arguing that only coerced prostitution should be controlled and prevented).

indebtedness; and (5) ensuring that they have no freedom to move outside unaccompanied".<sup>182</sup> It is this element of coercion and lack of free will that clearly makes forced prostitution a contemporary manifestation of slavery as defined in the general international instruments concerned with slavery, as well in as the Suppression of Traffic Convention.<sup>183</sup> Illegal immigrants are extremely vulnerable to this form of exploitation or forced labour. Traffickers, or their subsequent employers, often retain the victim's passport in order to blackmail her (or him) and subject her to forced prostitution, in many cases siphoning off the bulk of her (or his) earnings.

99. In 1993 the General Assembly adopted a resolution seeking to eradicate, among other forms of violence against women, "trafficking in women and forced prostitution".<sup>184</sup> There does not appear to be a substantial difference in meaning between "forced" and "enforced" in relation to prostitution. Under the provisions of the Fourth Geneva Convention of 1949, "[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."<sup>185</sup> Additional Protocol I prohibits "outrages of personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault".<sup>186</sup>

100. The Rome Statute of the International Criminal Court includes in its definition of crimes against humanity, committed as part of a widespread or systematic attack against any civilian population, "enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity".<sup>187</sup> In the Rome Statute provisions relating to armed conflict not of an international character indicate that "rape, sexual slavery, enforced prostitution, forced pregnancy . . . and any other form of sexual violence also constituting a serious violation of article 3 common to the Four Geneva Conventions"<sup>188</sup> are prohibited as war crimes. The rules of inter-

<sup>182</sup> Nancy Erbe, "Prostitutes, Victims of Men's Exploitation and Abuse", *Law and Inequality Journal*, vol. 2 (1984), pp. 609, 612-13 (1984); John F. Decker, *Prostitution: Regulation and Control* (1979), p. 230 (defining "pimp" as one who "draws another into prostitution and thereafter dictates the daily activities, supervises the manner of operation, . . . expropriates and spends virtually all earnings and otherwise commands influence over that person's life". Under such circumstances the control may become so complete that the pimp "will have little difficulty actually selling his 'possession' to another pimp"); see also *The Lively Commerce: Prostitution in the United States*, 1971, p. 117.

<sup>183</sup> See Neal Kumar Hatyal, "Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution", *Yale Law Journal*, vol. 103 (1993), pp. 791, 793 (pointing out that "forced prostitution like slavery implicates all of the core concerns of the Thirteenth Amendment – physical abuse, lack of free will, forced labor and social stratification"); report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, United Nations document E/CN.4/Sub.2/1982/20, p. 8 (considering forced prostitution a form of slavery).

<sup>184</sup> Declaration on the Elimination of Violence Against Women, *supra* note 146, art. 2.

<sup>185</sup> Geneva Convention Relative to the Protection of Civilian Persons In Time of War, 1949, *United Nations Treaty Series*, vol. 75, p. 287; entered into force on 21 October 1950. See also Gay J. McDougall, Systematic rape, sexual slavery and slavery-like practices during times of war, final report, United Nations document E/CN.4/Sub.2/1998/13, p. 105, para 60. "[T]he notion of rape as a violation of honour, rather than as an act of violence, obscures the violent nature of the crime and inappropriately shifts the focus toward the imputed shame of the victim and away from the intent of the perpetrator to violate, degrade and injure . . . The hazards involved in linking rape to gender-biased concepts of 'women's honour' include the risk of marginalizing the nature of the injury or inadvertently accepting the imputation of shame to the survivor, thereby reducing adequate legal redress and compensation and otherwise complicating all aspects of physical and psychological recovery. Survivors of sexual violence often face ostracism and discrimination from their families and communities, members of whom may consider the victims to be 'tarnished' or to have 'dishonoured' them in some way, which hinder steps toward reintegration."

<sup>186</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), art. 75(2)(b), *United Nations Treaty Series*, vol. 1125, p. 3; entered into force on 7 December 1978 (Additional Protocol I also affords, in art. 76(1), special protection and respect to women, "in particular against rape, forced prostitution and any other form of indecent assault"); see also Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, *United Nations Treaty Series*, vol. 1125, p. 609; entered into force on 7 December 1978 ("Additional Protocol II") (prohibiting "[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault [and] slavery and the slave trade in all their forms"); Report of the Fourth World Conference on Women (Beijing), United Nations document A/CONF.177/20 (1995), para. 144(b) (urging Governments to "respect fully the norms of international humanitarian law in armed conflicts and take all measures required for the protection of women and children in particular against rape, forced prostitution and any other form of indecent assault"); Tong Yu, "Reparation for Former Comfort Women of World War II", *Harvard International Law Journal*, vol. 36 (1995), p. 533; Gay McDougall, *supra* note 185.

<sup>187</sup> Rome Statute of the International Criminal Court, *supra* note 23, art. 7(1)(g).

<sup>188</sup> *Ibid.*, art. 8(2)(e)(vi).

national humanitarian law clearly establish forced prostitution as an international crime, even though such practices have been used as a means of modern warfare with apparent impunity.<sup>189</sup>

101. In recent years the international community has tended to focus its attention on the punishment of perpetrators of acts of violence against women. The Platform for Action adopted by the Fourth World Conference on Women in Beijing includes a call on Governments to take certain measures whose objectives include “providing better protection of the rights of women and girls and punishing the perpetrators, through both criminal and civil measures”.<sup>190</sup> The Commission on Human Rights has also encouraged the introduction of practical measures by States to implement international protection against prostitution.<sup>191</sup>

## 2. *Children and prostitution*

102. While there is continuing debate about whether adult prostitution should be tolerated in some circumstances, the Convention on the Rights of the Child clearly prohibits “all forms of sexual exploitation and sexual abuse”, including “(a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or other unlawful sexual practices; (c) the exploitative use of children in pornographic performances and materials”.<sup>192</sup>

103. The term “exploitative use of children in prostitution” in article 34(c) was interpreted by some to signify that adults could legitimately pay for sex with children above the age of sexual consent (for example aged 16 or 17), but in no circumstances was it permissible for anyone else to profit from the money earned. In June 1999, however, the ILO’s Worst Forms of Child Labour Convention confirmed that the “use of a child for prostitution” is classified as a “worst form of child labour” and that international standards make it unacceptable for anyone to “use” a child in prostitution, whether the child is under or over the age of consent.<sup>193</sup> The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography explicitly prohibits child prostitution, defining the term to mean “the use of a child in sexual activities for remuneration or any other form of consideration”.<sup>194</sup>

## 3. *Sexual slavery*

104. The concept of sexual slavery is closely related to that of forced prostitution but is a distinct form of sexual exploitation. There does not have to be any financial gain in sexual slavery; it is merely the imposition of absolute control or power of one person over another. It is the sexual exploitation of individuals through the use or threat of force, often occurring in times of armed conflict or belligerent occupation. Sexual slavery, occurring at any time, violates the fundamental guarantees of basic human rights in the International Bill of Human Rights.

<sup>189</sup> *Mass Rape: The War Against Women in Bosnia-Herzegovina* (Alexandra Stiglmayer (ed.), 1994; Beverly Allen, *Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina and Croatia* (1996). See also Prosecutor v. Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic, International Tribunal for the Former Yugoslavia, IT-96-23-T & IT-96-23/1-T, 22 February 2001, *infra* note 199.

<sup>190</sup> Report of the Fourth World Conference on Women (Beijing), *supra* note 186, chap. 1, res. 1, annex II, para. 130(b).

<sup>191</sup> In its resolution 1996/24, for example, it endorsed the conclusion reached at the Fourth World Conference on Women in Beijing and asked Governments to adopt the practical proposals aimed at eliminating prostitution as it violates basic human rights. At the same session in 1996, the Commission approved the Programme of Action for the Prevention of the Traffic in Persons and the Exploitation of the Prostitution of Others, United Nations document E/CN.4/Sub.2/1995/28/Add.1.

<sup>192</sup> Convention on the Rights of the Child, *supra* note 156, art. 34.

<sup>193</sup> Worst Forms of Child Labour Convention, *supra* note 52, art. 3(b); see also section on Child Labour and Child Servitude, *infra*.

<sup>194</sup> Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, *supra* note 150, art. 2(b); see also section on Trafficking and Children, *supra*.

105. This concept of sexual slavery has been recognized in national courts. For example, in *United States v. Sanga*<sup>195</sup> a man forced a woman to work as a domestic maid for over two years and forced her to have sex with him. The United States Court of Appeals for the 9th Circuit unanimously held that she was a “virtual slave” contrary to the provision of the Thirteenth Amendment to the United States Constitution, which prohibits slavery and involuntary servitude.

106. The use of sexual slavery in any form during times of armed conflict – rape camps, comfort stations or other forms of sexual abuse – constitutes a grave breach of international humanitarian law. Armed conflict, including occupation of territories, tends to result in increased sexual violence, in particular against women, which requires specific protective and punitive measures.

107. Common article 3 of the four Geneva Conventions prohibits all parties to a conflict from perpetrating “outrages upon personal dignity, in particular humiliating and degrading treatment”.<sup>196</sup> Common article 3 has over time been interpreted to include sexual slavery.<sup>197</sup> Article 147 of the Fourth Geneva Convention, which deals with “grave breaches”, includes “torture or inhuman treatment . . . wilfully causing great suffering or serious injury to body or health”.<sup>198</sup> Additional Protocols I and II contain prohibitions against any form of indecent assault, especially on women and children.

108. Abuse and systematic rape of women have long been used as a means of warfare; yet it is only in more recent international documents that references to “sexual slavery” emerge.<sup>199</sup> The Vienna Declaration and Programme of Action confirms that “All violations of this kind, including in particular murder, systematic rape, sexual slavery and forced pregnancy, require a particularly effective response.”<sup>200</sup>

#### 4. Sex tourism

109. The 1983 report of the Special Rapporteur on the suppression of the traffic in persons and the exploitation of the prostitution of others characterized “sex tourism” as a phenomenon similar to trafficking rather than just an exploitation of prostitution. “More conspicuous, and therefore easier to trace, is the other type of traffic which, instead of transporting the prostitute, temporarily transports the client. This is the channel of the package tours (‘sex tours’), in which the services of

<sup>195</sup> *United States v. Sanga*, 967 F.2d 1332 (9th Cir. 1992).

<sup>196</sup> Common article 3 of the Four Geneva Conventions of 1949, *United Nations Treaty Series*, vol. 75, pp. 31, 85, 135, 287.

<sup>197</sup> Linda Chavez, Systematic rape, sexual slavery and slavery-like practices during periods of armed conflict, United Nations document E/CN.4/Sub.2/1996/26, p. 4.

<sup>198</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 185, art. 147.

<sup>199</sup> Report of the Special Rapporteur on the situation of human rights in the territory of the former Yugoslavia, United Nations document E/CN.4/1996/63; Report of the Special Rapporteur on the situation of human rights in Rwanda, United Nations document E/CN.4/1996/68; see, for example, Gay J. McDougall, Systematic rape, sexual slavery and slavery-like practices during times of war, final report, United Nations document E/CN.4/Sub.2/1998/13 (pointing out that detaining women in “rape camps or comfort stations [and] forced temporary ‘marriages’ to soldiers are both in fact and law forms of slavery contrary to the international standards”); Rape and abuse of women in the areas of armed conflict in the former Yugoslavia: report of the Secretary-General, United Nations document A/51/557 (1996) (“strongly condemn[ing] the abhorrent practice of rape and abuse of women and children in the area of armed conflict in the former Yugoslavia and reaffirm[ing] that rape in the conduct of armed conflict constituted a war crime”). A report of the High Commissioner for Human Rights on systematic rape, sexual slavery and slavery-like practices during armed conflicts states that in the case of Prosecutor v. Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic (IT-96-23-T & IT-96-23/1-T, 22 Feb., 2001) the International Tribunal for the Former Yugoslavia (ICTY) acknowledged that rape and sexual enslavement are crimes against humanity. Although in this case the enslavement was for sexual purposes, the ICTY found the men guilty of enslavement without using the terms “sexual enslavement” or “sexual slavery”, meaning that enslavement for any purpose can constitute a crime against humanity. United Nations document E/CN.4/Sub.2/2001/29.

<sup>200</sup> Report of the World Conference on Human Rights, United Nations document A/CONF.157/24 (1993), part II, para. 38.

a prostitute are included in the price the tourist pays for his ticket. This specialized kind of tourism is grafted onto an existing prostitution market and develops it.”<sup>201</sup>

110. The Commission on Human Rights Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography, urges that “[s]pecial attention should be given to the problem of sex tourism. Legislative and other measures should be taken to prevent and combat sex tourism, both in the countries from which the customer comes and the countries to which they go. Marketing tourism through enticement of sex with children should be penalized on the same level as procurement.”<sup>202</sup>

111. The Preamble to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography affirms that the States parties are “Deeply concerned at the widespread and continuing practice of sex tourism, to which children are especially vulnerable, as it directly promotes the sale of children, child prostitution and child pornography”. Under article 4, a State “may take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 3, paragraph 1, in the following cases: (a) when the alleged offender is a national of that State or a person who has his habitual residence in its territory”. The Optional Protocol does not, however, contain any specific articles addressing sex tourism directly.

## G. Forced Marriage and the Sale of Wives

112. Although the most recent instruments dealing with sexual exploitation are applicable to men and women equally, within the context of marriage women are particularly vulnerable. The Temporary Slavery Commission in 1924 included in its list of practices analogous to slavery “[a]cquisition of girls by purchase disguised as payment of dowry, it being understood that this does not refer to normal marriage customs”.<sup>203</sup> The Supplementary Convention of 1956 identifies three types of institutions or practices akin to slavery to which women can be subjected in the context of marriage. The Supplementary Convention first prohibits any institution or practice whereby “a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family, or any other person or group”.<sup>204</sup> It is not the payment which is an abuse but its occurrence in a forced or non-consensual marriage. The second practice prohibited by the Supplementary Convention is the right, by a woman’s husband, his family, or his clan “to transfer her to another person for value received or otherwise”.<sup>205</sup> The third prohibited practice concerns the inheritance of a widow on her husband’s death by her husband’s brother or another member of her deceased husband’s family. This custom, known as “levirate”, involves automatic remarriage to a member of the deceased’s family.

113. Recognizing the close link between these three forms of servile status and the general practice of forced marriage, the Supplementary Convention requires States parties “to prescribe, where appropriate, suitable minimum ages of marriage, to encourage the use of facilities whereby the

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<sup>201</sup> Jean Fernand-Laurent, Report of the Special Rapporteur on the suppression of the traffic in persons and the exploitation of the prostitution of others, United Nations document E/1983/7, para. 39 (also stating that “such tourism is quite plainly the worst possible image of development which the industrialized countries could project”).

<sup>202</sup> Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography, United Nations document E/CN.4/Sub.2/1991/41, Commission on Human Rights resolution 1992/74, para. 47. In 1995 the Working Group on Contemporary Forms of Slavery recommended that “[g]overnments prohibit advertising or publicizing sex tourism and they not facilitate other commercial activities involving sexual exploitation”. Report of the Working Group on Contemporary Forms of Slavery on its twentieth session, *supra* note 78, Recommendation 3 on the Prevention of Traffic in Persons and the Exploitation of the Prostitution of Others.

<sup>203</sup> The suppression of slavery (memorandum submitted by the Secretary-General to the Ad Hoc Committee on Slavery), United Nations document ST/SPA/4 (1951), p. 31.

<sup>204</sup> Supplementary Convention, *supra* note 20, art. 1(c)(i).

<sup>205</sup> *Ibid.*, art. 1(c)(ii).

consent of both parties to a marriage may be freely expressed in the presence of a competent civil or religious authority, and to encourage the registration of marriages".<sup>206</sup>

114. The Universal Declaration provides that "[m]arriage shall be entered into only with the free and full consent of the intending spouse" (art. 16(2)). The 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages specifies that "[n]o marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and other witnesses".<sup>207</sup> Article 2 requires States parties to "take legislative action to specify a minimum age for marriage" but does not itself specify any minimum age. The Convention on the Elimination of All Forms of Discrimination against Women stipulates that "[t]he betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory."<sup>208</sup>

### 1. *Mail-order brides*

115. A relatively recent development concerning women available for marriage is the advertising of women for marriage outside their own countries in a variety of media (magazines, videos and the Internet), prompting the description "mail-order brides" and the concern that they may be trafficked. The Committee on the Elimination of Discrimination Against Women (CEDAW) has classified such marriages as a new form of sexual exploitation.<sup>209</sup>

116. While the marriage of women from one society, country or continent to men from another cannot by itself be categorized as a form of slavery or servitude, it seems clear that women who leave their families to marry a man in a foreign country that they have not previously visited are vulnerable to a wide range of forms of exploitation prohibited by existing international standards. The involvement of commercial agents in organizing marriages does not in itself appear to be unacceptable, but if the agent makes payments to the bride's parents or others, the arrangement would come close to infringing the prohibition on the sale of women for marriage in the Supplementary Convention.

117. Women advertised for marriage are becoming victims of a contemporary form of slavery or of trafficking. Advertisements may portray women as commodities rather than people – in much the same way as they are portrayed in various forms of pornography – and are therefore demeaning to women in general. Almost invariably women from developing countries advertise themselves to men in industrialized countries, creating a perception that women from developing countries have a secondary or servile status; this view is supplemented by a concern that certain men in industrialized countries deliberately seek out women from abroad who will behave in a more subservient way than women in their own culture. As new brides in countries where they do not have relatives or friends and where they may not immediately acquire a permanent right of residence, women may be exposed to abuse by their new husbands and either not know where to turn for help or fear deportation if they abandon their new husbands.<sup>210</sup>

118. Some marriages that involve a spouse moving from one country to another disguise either migrant smuggling or trafficking in persons and are often referred to as "paper marriages" (i.e. the

<sup>206</sup> *Ibid.*, art. 2.

<sup>207</sup> Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, General Assembly resolution 1763 A (XVII) of 7 November 1963, *United Nations Treaty Series*, vol. 521, p. 231, art. 1(1); entered into force on 9 December 1964.

<sup>208</sup> Convention on the Elimination of All Forms of Discrimination against Women, *supra* note 144, art. 16(2).

<sup>209</sup> General Recommendation No. 19, Committee on the Elimination of Violence Against Women (eleventh session, 1992), United Nations document A/47/38, para. 14.

<sup>210</sup> Markus Dreixler, *Der Mensch als Ware – Erscheinungsformen modernen Menschenhandels unter strafrechtlicher Sicht* (Peter Lang, 1998), p. 200.

marriage has taken place officially and exists “on paper” but the couple do not live together subsequently as husband and wife). When a woman in such a marriage is forced to earn money for her husband or another person through prostitution or in any other income-generating activity, she is a victim of trafficking in persons.

## H. Child Labour and Child Servitude

119. This section summarizes international standards on child labour before focusing on definitions of child slavery and servile status, which, for lack of any other term in general use, are referred to here as “child servitude”. The need to protect children from exploitative practices was formally acknowledged at the international level early in the twentieth century. The League of Nations included the protection of children within the ambit of its work on eliminating slavery and the slave trade. The League, in the Geneva Declaration of the Rights of the Child of 1924, stated that children must be protected against every form of exploitation.<sup>211</sup>

120. The Universal Declaration and the International Covenant on Civil and Political Rights contain provisions prohibiting slavery, servitude and forced labour in all their forms and acknowledge the special place of children in society. Article 24 of the International Covenant declares that every child has the “right to such measures of protection as are required by his status as a minor”. In addition to the general prohibitions on slavery and forced labour, which are applicable to children as well as adults, the Supplementary Convention of 1956 specifically defines a servile status that is restricted to children alone. The International Covenant on Economic, Social and Cultural Rights echoes the requirement of numerous ILO conventions that States should specify a minimum age below which “the paid employment of children should be prohibited and punishable by law”.<sup>212</sup>

121. Increased awareness in the 1980s and 1990s of the economic exploitation of millions of children around the world has pushed its consideration into the international arena and “to the forefront of a debate within governments, international organizations and the business sector”.<sup>213</sup> Limits on child labour have been introduced as it has been universally accepted that children, by virtue of their physical and mental immaturity, need special protection.

### 1. *The ILO and child labour*

122. Child labour has been a special concern of the ILO from its inception. The preamble to its Constitution commits the ILO to protecting children as one of the essential elements in the pursuit of social justice and universal peace. The abolition of child labour is therefore one of the four main objectives of the ILO. The Minimum Age (Industry) Convention, 1919 (No. 5) was adopted at the very first session of the International Labour Conference.

123. The ILO’s efforts to prevent child labour can be divided into three stages. During the first stage, lasting from 1919 to 1973, the ILO sought to influence regulations and practice with regard to child labour in member States principally through the adoption of international labour conventions and recommendations, especially on the minimum age of admission to employment.<sup>214</sup> Since 1979, and especially since 1983 when child labour was the theme of the Director-General’s

<sup>211</sup> See also Declaration of the Rights of the Child, General Assembly resolution 1386 (XIV) of 20 November 1959, principle 2.

<sup>212</sup> International Covenant on Economic, Social and Cultural Rights, *supra* note 77, art. 10(3).

<sup>213</sup> Jannelle M. Diller and David A. Levy, “Child Labour, Trade and Investment: Towards the Harmonisation of International Law”, *American Journal of International Law*, vol. 19 (1997), p. 663.

<sup>214</sup> The earlier standards, from 1919 to 1932, generally set the basic minimum age at 14 years and this age was later revised to 15. The ILO conventions targeting particularly hazardous sectors set higher age limits, for example 16 years for underground work (Convention No. 123 of 1965) and up to 18 for work involving exposure to radiation (Convention No. 115 of 1960) or dangerous chemicals (Convention No. 136 of 1971).

report to the International Labour Conference, the ILO has given more weight to public awareness campaigns and the dissemination of information on forms of child labour that must be abolished. The third stage started at the beginning of the 1990s with a very clear emphasis on direct technical assistance to Governments, including action-oriented research.

124. It has proven difficult, on a practical level, to distinguish between those practices that are permissible and those that constitute abusive forms of child labour. The ILO Minimum Age Convention, 1973 (No. 138) and its accompanying Recommendation No. 146 are the principal international instruments dedicated to eradicating child labour in general. They require ratifying States to implement national policies progressively to raise the minimum age for admission to the work force in order to ensure the fullest physical and mental development of young persons.

125. The Minimum Age Convention applies to all sectors of economic activity and covers children whether or not they are employed for wages.<sup>215</sup> It was introduced to prevent the exploitation of child labour by setting the minimum age for work at not less than the age of completion of compulsory schooling but not less than 15 years (14 years for countries in which the “economy and educational facilities are insufficiently developed”).<sup>216</sup> The Convention allows children to do “light work” between the ages of 13 and 15 (12 years in developing countries).<sup>217</sup> The minimum age for “hazardous work” likely to jeopardize the health, safety or morals of a child is set at 18 years.<sup>218</sup>

126. The Minimum Age Convention has received somewhat fewer ratifications than the other core ILO conventions. Governments have indicated their reluctance to ratify because of the technical nature of the Convention. Nonetheless, the Minimum Age Convention provides the only existing comprehensive set of guidelines relating to the appropriate age at which young children can enter the work force.

127. In view of the huge numbers of children employed in contravention of the Minimum Age Convention and in an apparent effort to give a clear signal about which forms of exploitation States should give priority to eliminating, the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Worst Forms of Child Labour Convention), 1999 (No. 182) was adopted by the International Labour Conference in June 1999 together with Recommendation No. 190 on the same subject. In article 3 it defines “the worst forms of child labour” as:

- “(a) All forms of slavery or practice similar to slavery, such as the sale or trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) The use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) The use, procuring or offering of a child for illicit activities, in particular for the production or trafficking of drugs as defined in the relevant international treaties;
- (d) Work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.”<sup>219</sup>

<sup>215</sup> International Programme on the Elimination of Child Labour (IPEC), ILO (1997), p. 3.

<sup>216</sup> Minimum Age Convention, *supra* note 159.

<sup>217</sup> *Ibid.*, arts. 7(1) and 7(4).

<sup>218</sup> *Ibid.*, art. 3(1).

<sup>219</sup> Worst Forms of Child Labour Convention, *supra* note 52, art. 3.

## 2. *The United Nations and child labour*

128. The Slavery Convention did not specifically refer to child slavery as a particular category in its definitions of slavery and the slave trade. It is clear that Governments' attitudes to child labour at that time were somewhat ambivalent, and possibly more tolerant, than they are today. That approach had changed by the time the Supplementary Convention was being drafted; a specific reference to the exploitation of young persons was included in addition to an explicit prohibition of debt bondage regarding both adults and children.<sup>220</sup>

129. The Supplementary Convention also prohibits "any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour".<sup>221</sup> That provision was implemented with the particular practice of "sham adoptions" in mind, but it does, in fact, cover a wider range of practices involving the exploitation of children.<sup>222</sup>

## 3. *Implementation strategies*

130. The Commission on Human Rights has adopted a Programme of Action for the Elimination of the Exploitation of Child Labour ("Programme of Action") which identifies the following three forms of child labour as international crimes that violate the international standards against slavery:

- The sale of children and similar practices (including fake adoption);
- Child pornography, trafficking in child pornography and international trafficking in children for immoral purposes;
- Underage maid-servants in a position of servitude.<sup>223</sup>

The Programme of Action calls for "energetic repressive action" to deal with such cases, and also calls on States to review their legislation "with a view to the absolute prohibition of employment of children" in the following seven sectors:

- (a) Employment before the normal age of completion of primary schooling in the country concerned;
- (b) Underage maid service;
- (c) Night work;
- (d) Work in dangerous or unhealthy conditions;

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<sup>220</sup> The Supplementary Convention also contains an implicit prohibition of the exploitation of the labour of young girls through early marriage. Hans Engen concluded in his report that a supplementary convention on slavery was necessary to cover "slavery-like practices not included in the Slavery Convention 1926", United Nations document E/2673 (1955).

<sup>221</sup> Supplementary Convention, *supra* note 20, art. 1(d).

<sup>222</sup> A "sham adoption" occurs when a family, generally in financial difficulty, gives or sells a child to a richer family, nominally to be adopted, but in reality to work in the rich family's household without enjoying either the same status or the same treatment as ordinary children in the household into which they are adopted. A similar practice, still widely reported, involves children being sent to the households of relatives or others who are expected by the child's parents to give special attention to their education but in reality exploit the child's labour. The largest group of children whose predicament falls into this category, currently numbering in the millions and primarily girls, are those employed as live-in domestics.

<sup>223</sup> Programme of Action for the Elimination of the Exploitation of Child Labour, Commission on Human Rights resolution 1993/79, United Nations document E/CN.4/1993/122, para. 14.

- (e) Activities linked with prostitution, pornography and other forms of sexual trade and exploitation;
- (f) Work concerned with trafficking in and production of illicit drugs;
- (g) Work involving degrading or cruel treatment.<sup>224</sup>

#### 4. *Convention on the Rights of the Child*

131. The United Nations Convention on the Rights of the Child contains one of the most explicit and comprehensive set of State obligations relating to the suppression of the worst forms of child labour. Article 32 of the Convention on the Rights of the Child recognizes the child's right to be protected from economic exploitation and from "performing any work that is likely to be hazardous or to interfere with the child's education or to be harmful to the child's health or physical, mental, spiritual, moral or social development".<sup>225</sup>

132. Articles 34, 35, and 36 of the Convention on the Rights of the Child focus on separate aspects of child exploitation. Article 34 obliges States parties to protect children from "all forms of sexual exploitation and sexual abuse by implementing relevant national, bilateral and multilateral measures". This article may be read in conjunction with the general provision in article 19 of the Convention which protects children from all forms of physical or mental violence.

133. Article 35 provides protection for children from the risk of abduction, sale or trafficking – both abroad and within a country. This provision is more inclusive, and hence more protective, than the Suppression of Traffic Convention as it does not link the trafficking of children to sexual exploitation.<sup>226</sup> Article 35 is also broader than article 34 which relates solely to child pornography and prostitution. Also relevant is article 11 of the Convention which requires States parties to "combat the illicit transfer and non-return of children abroad". Article 21 regulates the system of international adoptions and stipulates that it should not result in improper financial gain. Article 36 provides an even broader, albeit less specific, safeguard, requiring States parties to "protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare".

134. The Committee on the Rights of the Child, established under the Convention on the Rights of the Child to monitor States' compliance with its provisions, has made recommendations on how to achieve the elimination of child slavery. The Committee has focused on freedom for children from economic exploitation and discrimination, along with their rights to adequate family support and education.<sup>227</sup> It has identified compulsory education as an important factor in eliminating child labour and has coordinated its mandate with the work of the ILO and UNICEF's Programme for Children in Especially Difficult Circumstances.

135. The Committee supported the Commission on Human Rights during the preparation of two Optional Protocols to the Convention on the Rights of the Child, the first dealing with the sale of children, child prostitution and child pornography, and the second with the involvement of children in armed conflict. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict is intended to ensure that children are not forced to enlist and participate actively in any armed conflict.<sup>228</sup> In article 38 the Convention on the Rights of the Child stipulates that "in recruiting among those persons who have attained the age of 15

<sup>224</sup> *Ibid.*, para. 20.

<sup>225</sup> Convention on the Rights of the Child, *supra* note 156, art. 32.

<sup>226</sup> "A New Kind of Trafficking: Child Beggars in Asia", *World of Work*, International Labour Office, vol. 26 (1998) p. 17.

<sup>227</sup> Recommendations concerning economic exploitation of children, Report of the Committee on the Rights of the Child, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 41 (A/49/41)* (1994), para. 572(b).

years but who have not attained the age of 18 years, States Parties shall endeavour to give priority to those who are the oldest.”<sup>229</sup>

136. Article 3(a) of ILO Convention No. 182 bans “forced or compulsory recruitment of children for use in armed conflict”.<sup>230</sup> This provision appears to allow parties to hostilities to allow children aged 15, 16 and 17 to enter the armed forces on a voluntary basis, but to prohibit conscription if those under 18 are likely to be mobilized to fight.

137. Some States accept volunteers from 16 years upwards and resist increasing the minimum age of recruitment into the armed forces to 18. This view is reflected in the Rome Statute establishing the International Criminal Court where there are provisions making it a crime, in both international and internal armed conflicts, to conscript or enlist “children under the age of fifteen years into the national armed forces or [to use] them to participate actively in hostilities”.<sup>231</sup> The new Protocol to the Convention on the Rights of the Child improves the protection of children from recruitment to participate in armed conflict.<sup>232</sup>

## I. Other Issues

138. A number of other issues have been considered by the Working Group on Contemporary Forms of Slavery, including apartheid, colonialism, trafficking in human organs and incest. Although these practices generally constitute serious violations, some, including apartheid and colonialism, may not fall within the ambit of the international conventions abolishing slavery.

### 1. *Apartheid and colonialism*

139. By the time the Working Group on Slavery was established in 1974 the question of “slavery in all its forms” was already held to include “the slavery-like practices of apartheid and colonialism”. At the first session of the Working Group, in 1975, consideration was given to apartheid and colonialism, and it was noted that various other bodies existed within the United Nations dealing with similar subject matter, such as the Committee on Apartheid and the Working Group of Experts on South Africa. The Working Group on Slavery observed that “the lack of a comprehensive and detailed study on the relationship between apartheid, colonialism and slavery was deemed as rendering difficult the task of the Working Group of reviewing the slavery-like practices of apartheid and colonialism.”<sup>233</sup>

140. At subsequent sessions the Working Group reviewed information about apartheid and received information about situations of colonialism. In 1983, for example, the Working Group noted in its conclusions and recommendations that it “recognizes that apartheid is a slavery-like practice and a collective form of slavery” and suggested that it should be renamed as the “Working

<sup>228</sup> Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, General Assembly resolution No. 54/263 of 25 May 2000, annex I, not yet entered into force; see Report of the working group on a draft optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts on its sixth session, United Nations document E/CN.4/2000/74 (2000); C. Goodwin-Gill and I. Cohn, *Child Soldiers: The Role of Children in Armed Conflicts* (1994); see also C. Hamilton and T. Abu El Haj, “Armed Conflict and the Protection of Children in International Law”, *International Journal of Child Rights*, vol. 5 (1997), p. 1.

<sup>229</sup> Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, *supra* note 150. For further information see section on Trafficking in Children, *supra*.

<sup>230</sup> Worst Forms of Child Labour Convention, *supra* note 52, art. 3(a); see also Graça Machel, *The impact of armed conflict on children*, United Nations document A/51/306 (1996); *The Position of the ICRC on the Optional Protocol to the Convention on the Rights of the Child* (1997).

<sup>231</sup> Rome Final Act, arts. 8(2)(b)(xxvi) and 8(2)(e)(vii) (A/CONF.183/10) (1998).

<sup>232</sup> Report of the working group on a draft optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts on its sixth session, United Nations document E/CN.4/2000/74 (2000).

<sup>233</sup> Report of the Working Group on Slavery on its first session, United Nations document E/CN.4/Sub.2/AC.2/3 (1975), para. 16.

Group against Slavery, Apartheid, Gross Human Exploitations and Human Degradation".<sup>234</sup> That proposal was not eventually accepted.

141. The most recent recommendation by the Working Group on the issue of the "[s]lavery-like practices of apartheid and colonialism" was issued in 1992, when it referred to earlier recommendations to focus attention on the situation of vulnerable groups, particularly women and children, and decided to devote "attention to ways and means to assist victims of apartheid in order to mitigate its consequences".<sup>235</sup>

## **2. World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance; historic responsibility and reparations**

142. The longer individuals are kept in a situation of slavery, the more difficult it often becomes to reintegrate them into their original social environment. Consequently, there is a particular urgency to secure their release from their slavery status, while ensuring it is done in an ordered way that does not jeopardize their physical or mental well-being. Rehabilitation following the release of the victim is particularly important to ensure that the victim does not slip back into slavery. Often, when victims are released from slavery or servitude they are impoverished, have little or no education or vocational training outside their slave labour, may fear retaliation by the perpetrator, and may be shunned or stigmatized by their families and communities. In each of these circumstances, the victims may have little choice but to resume their slavery status as the only means to survive.

143. In recent years, the need to provide reparations to individual victims of human rights abuses has received increasing attention from the international community. In 1993, Theo van Boven, the Sub-Commission's Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, concluded that slavery and slavery-like practices are violations of human rights that give rise to a right of reparation for victims.<sup>236</sup> Van Boven's report culminated in the drafting of a set of basic principles and guidelines for reparations. According to these guidelines, States should provide reparations to victims of violations of human rights and humanitarian law,<sup>237</sup> including restitution,<sup>238</sup> compensation,<sup>239</sup> rehabilitation,<sup>240</sup> satisfaction and guarantees of non-repetition.<sup>241</sup>

144. A number of treaties and other international instruments provide for reparation to victims of human rights violations, albeit only in the specific context addressed by each instrument.<sup>242</sup> Additionally, the United Nations Sub-Commission on the Promotion and Protection of Human Rights has passed a number of resolutions calling on States to provide compensation and other forms of reparation to victims of human rights abuses.<sup>243</sup> The Sub-Commission addressed the topic of reparations in several resolutions adopted in preparation for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR), held in Durban, South Africa, in 2001.<sup>244</sup> On 6 August 2001 the Sub-Commission adopted a resolution:

<sup>234</sup> Report of the Working Group on Slavery on its ninth session, United Nations document E/CN.4/Sub.2/1983/27 (1982), recommendations 3 and 13.

<sup>235</sup> Report of the Working Group on Contemporary Forms of Slavery on its seventeenth session, United Nations document E/CN.4/Sub.2/1992/34, p. 26.

<sup>236</sup> United Nations document E/CN.4/Sub.2/1993/8, para. 137(1).

<sup>237</sup> United Nations document E/CN.4/Sub.2/1993/8, para.137.

<sup>238</sup> Restitution must restore the victim to the original situation before the violations of international human rights or humanitarian law occurred, United Nations document E/CN.4/2000/62, para. 22.

<sup>239</sup> Compensation must cover any economically assessable damages resulting from violations of international human rights and humanitarian law, United Nations document E/CN.4/2000/62, para. 23.

<sup>240</sup> Rehabilitation should include medical and psychological care, as well as legal and social services for the victim, United Nations document E/CN.4/2000/62, para. 24.

<sup>241</sup> Satisfaction and guarantees of non-repetition include actions that ensure closure to the victim as well as prevention of the recurrence of such violations, United Nations document E/CN.4/2000/62, para. 25.

“drawing the attention of the international community to the cases of massive and flagrant violation of human rights which should be considered as crimes against humanity and which have, to date, benefited from impunity, in spite of the tragic suffering which slavery, colonialism and wars of conquest have inflicted . . .”

and recognizing that “the historic responsibility of the relevant powers towards the peoples whom they colonize or reduce to slavery should be the subject of solemn and formal recognition and reparation.”<sup>245</sup>

145. On 15 August 2001, the Sub-Commission passed another resolution requesting that the WCAR focus on several items, including:

“The link between contemporary forms of slavery and racial and other discrimination based on descent;

The impact of massive and flagrant violations of human rights which constitute crimes against humanity and which took place during the period of slavery, colonialism and wars of conquest;

<sup>242</sup> See, for example, International Covenant on Civil and Political Rights, *supra* note 27, art. 2(3); International Covenant on Economic, Social and Cultural Rights, *supra* note 77; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly resolution 39/46 of 10 December 1984, annex, entered into force on 26 June 1987, arts. 14, 22; Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, *supra* note 83, arts. 16, 19, 20, 96; International Convention on the Elimination of All Forms of Racial Discrimination, *United Nations Treaty Series*, vol. 660, p. 195, entered into force on 4 January 1969, arts. 6, 11; Convention on the Elimination of All Forms of Discrimination against Women, *supra* note 144; Convention on the Rights of the Child, *supra* note 156, art. 39; United Nations Convention against Transnational Organized Crime, *supra* note 101, arts. 14(2), 25; Trafficking Protocol *supra* note 28, para. 78; Migrant Smuggling Protocol *supra* note 74, paras. 57, 59; Rome Statute of the International Criminal Court, *supra* note 23, art. 75; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, General Assembly resolution 45/158 of 18 December 1990, annex, art. 83; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, *supra* note 228, arts. 6, 7; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *supra* note 149, arts. 8, 9; Draft Declaration on the Rights of Indigenous Peoples (E/CN.4/Sub.2/1994/2/Add.1), arts. 7, 10, 27, 39, 72; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly resolution 40/34 of 29 November 1985, annex, paras. 4, 5, 7, 8-17, 19, 21; Declaration on the Protection of All Persons from Enforced Disappearances, General Assembly resolution 47/133 of 18 December 1992, arts. 5, 19; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly resolution 3452 (XXX) of 9 December 1975, annex, art. 11; American Convention on Human Rights, O.A.S. Treaty Series No. 36, *United Nations Treaty Series*, vol. 1144, p. 123, entered into force on 18 July 1978, OEA/Ser.L.V/II.82 doc.6 rev.1 (1992), p. 25, arts. 2, 10, 25, 63; African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3 rev. 5, *International Legal Materials*, vol. 21, p. 58 (1982), entered into force on 21 October 1986, arts. 1, 7; [European] Convention for the Protection of Human Rights and Fundamental Freedoms, *United Nations Treaty Series*, vol. 213, p. 222, entered into force on 3 September 1953, as amended by Protocols Nos. 3, 5, 8, 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990 and 1 November 1998 respectively, art. 13.

<sup>243</sup> See, for example, United Nations document E/CN.4/RES/1999/33, Right to restitution, compensation and rehabilitation for victims; United Nations document E/CN.4/RES/1999/40, Trafficking of women and girls; United Nations document E/CN.4/Sub.2/RES/1999/16, Systematic rape, sexual slavery, and slavery-like practices. See also similar language in United Nations document E/CN.4/2000/44, Traffic in women and girls.

<sup>244</sup> See, for example, United Nations document E/CN.4/Sub.2/RES/2000/3, para. 17.

<sup>245</sup> United Nations Sub-Commission on the Promotion and Protection of Human Rights resolution 2000/1, United Nations document E/CN.4/Sub.2/2001/L.1. The resolution further stated:

“Considering that the solemn and formal recognition of this historic responsibility towards the peoples concerned should include a concrete and material aspect such as rehabilitation of the dignity of the peoples affected, active cooperation in development not limited to existing measures of development assistance, debt cancellation, implementation of the “Tobin tax”, technology transfers for the benefit of the peoples concerned and progressive restoration of cultural objects accompanied by the means to ensure their effective protection, . . .

Considering that it is essential that the implementation of reparations should effectively benefit peoples, notably their most disadvantaged groups, with special attention being paid to the realization of their economic, social and cultural rights,

Convinced that such recognition and reparation will constitute the beginning of a process that will foster the institution of an indispensable dialogue between peoples whom history has put in conflict for the achievement of a world of understanding, tolerance and peace,

Requests all countries concerned to take initiatives which would assist, notably through debate on the basis of accurate information, in the raising of public awareness of the disastrous consequences of periods of slavery and colonialism.”

The current realities in the aftermath of slavery and colonialism, including the legal implications of the slave trade and the conditions of persons of African descent in all continents, including Europe; [and] . . .

Recognition, remedies, redress mechanisms and reparations for racial discrimination for victims and descendants of victims of racism, including for example affirmative action and compensation, accurate textbooks on historical events, memorials and truth commissions, as well as independent mechanisms for monitoring the effectiveness of remedies and redress mechanisms."<sup>246</sup>

146. While the Declaration acknowledges that the transatlantic slave trade and slavery were "appalling tragedies" in history and are a source of racism and related intolerance,<sup>247</sup> it states little in terms of express reparations for descendants of victims of slavery. The Declaration notes that "some States have taken the initiative to apologize and have paid reparation, where appropriate, for grave and massive violations committed,"<sup>248</sup> and it suggests that States find appropriate ways to restore the dignity of victims<sup>249</sup> and calls on States to take measures to halt and reverse the lasting consequences of such practices.<sup>250</sup> In addition, the Final Declaration urges States to ensure the right of victims to seek just and adequate reparation and satisfaction.<sup>251</sup>

In conclusion, the WCAR "acknowledge[d] that slavery and the slave trade, including the transatlantic slave trade, were appalling tragedies in the history of humanity not only because of their abhorrent barbarism but also in terms of their magnitude, organized nature and especially their negation of the essence of the victims, and further acknowledge that slavery and the slave trade are a crime against humanity and should always have been so, especially the transatlantic slave trade, and are among the major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, Asians and people of Asian descent and indigenous peoples were victims of these acts and continue to be victims of their consequences."

### 3. *Trafficking in human organs*

147. There are some references to trafficking in human organs in various reports prepared for submission to the Commission on Human Rights but no survey of this practice has been compiled concerning the world as a whole.<sup>252</sup> The World Health Assembly has adopted guidelines that establish international standards governing organ transplants and the possibility of commercial trafficking.<sup>253</sup> The guidelines prohibit trafficking in human organs for commercial gain.

148. In 1991 the Working Group on Contemporary Forms of Slavery expressed concern about information "alleging that children are victims of, or are even killed for, the removal of organs for the purpose of commercial transplants".<sup>254</sup> The Working Group later noted that "specific proof of incidents involving and of the extent of this phenomenon is difficult to obtain" and requested the

<sup>246</sup> United Nations document E/CN.4/Sub.2/Res. 2001/11, para. 12(i).

<sup>247</sup> Declaration, para. 13.

<sup>248</sup> Declaration, para. 100.

<sup>249</sup> Declaration, para. 101.

<sup>250</sup> Declaration, para. 102.

<sup>251</sup> Declaration, para. 160.

<sup>252</sup> V. Muntarhorn, Report on the sale of children, United Nations document E/CN.4/1991/51, paras. 23-25. The issue of organ trafficking was also mentioned by Ofelia Calcetas-Santos in her reports on the sale of children, child prostitution and child pornography submitted to the General Assembly, United Nations document A/50/456, para. 49, and to the Commission on Human Rights, United Nations document E/CN.4/1996/100, paras. 41-48.

<sup>253</sup> World Health Organization, Human Organ Transplantation, A Report on Developments under the Auspices of WHO (1987-1991) (1991), forty-fourth World Health Assembly, resolution WHA44.25.

<sup>254</sup> Report of the Working Group on Contemporary Forms of Slavery on its sixteenth session, United Nations document E/CN.4/Sub.2/1991/41, para. 138.

Secretary-General to invite United Nations agencies and others “to pursue their investigation” into allegations of this practice.<sup>255</sup>

149. In 1996 the Commission on Human Rights called on the Secretary-General to examine, in cooperation with relevant United Nations agencies, particularly WHO, and with INTERPOL “the reliability of allegations regarding the removal of organs and tissues of children and adults for commercial purposes”.<sup>256</sup> The Commission has urged States to strengthen existing laws or to adopt new laws to punish those who knowingly participate in the traffic of organs, in particular children’s organs.<sup>257</sup>

150. By including “the removal of organs” within its definition of exploitation, the Trafficking Protocol requires States to criminalize the removal of organs when carried out by means of the threat or use of force or other forms of coercion, abduction, deception or fraud. In addition, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography requires States to criminalize “offering, delivering or accepting, by whatever means, a child for the purpose of . . . (b) Transfer of organs of the child for profit”.

#### 4. *Incest*

151. Prior to 1993 incest had not been described as a form of slavery and did not explicitly fall under the existing definitions of slavery or child servitude set out in international law. In May 1993 the Working Group on Contemporary Forms of Slavery addressed the issue and expressed concern at the practice of incest and the sexual abuse of children inside the family, observing that this practice “is probably the most common, most widespread, most reprehensible, most disgraceful, socially unacceptable, morally repugnant and spiritually harmful betrayal of children within the whole array of contemporary forms of slavery”.<sup>258</sup>

152. The Commission on Human Rights Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography, adopted in 1992, observes that “incest and child abuse within the family . . . may lead to child prostitution”<sup>259</sup> and urges States to take legislative, administrative, social and educational measures to protect children against all forms of abuse while in the care of parents, family or others.

153. The Working Group on Contemporary Forms of Slavery has considered incest on its agenda as “another form of exploitation” but not necessarily as a contemporary form of slavery. Its draft recommendations adopted at the end of its twenty-sixth session in 2001 expressed concern over incest and other forms of child sexual abuse and exploitation, and the Working Group decided to continue the consideration of ways to combat sexual abuse inside the family.<sup>260</sup>

154. Incest is also a matter of concern to the Committee on the Rights of the Child, not as a form of slavery but rather as a form of harmful child abuse contrary to the terms of the Convention on the Rights of the Child. It is addressed under the criminal codes and social welfare legislation of

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<sup>255</sup> Report of the Working Group on Contemporary Forms of Slavery on its nineteenth session, United Nations document E/CN.4/Sub.2/1994/33, recommendation 2(b).

<sup>256</sup> Commission on Human Rights resolution 1996/6; Report of the Working Group on Contemporary Forms of Slavery on its twenty-first session, United Nations document E/CN.4/Sub.2/1996/24.

<sup>257</sup> Commission on Human Rights resolution 1996/61, *supra* note 256; Programme of Action on the Traffic in Persons and the Exploitation of the Prostitution of Others, United Nations document E/CN.4/Sub.2/1995/28/Add.1, art. 28.

<sup>258</sup> Report of the Working Group on Contemporary Forms of Slavery on its eighteenth session, United Nations document E/CN.4/Sub.2/1993/30, p. 40. The wording used came directly from the testimony presented at that session by a victim of incest.

<sup>259</sup> Commission on Human Rights resolution 1992/74, United Nations document E/CN.4/Sub.2/1991/41, para. 46.

<sup>260</sup> Report of the Working Group on Contemporary Forms of Slavery on its twenty-sixth session, United Nations document E/CN.4.Sub.2/2001/30. The wording used came directly from the testimony presented at that session by a victim of incest.

most, if not all, nations. Although incest and other forms of child abuse constitute serious violations of the Convention on the Rights of the Child, it is unlikely that incest falls within the ambit of the international conventions abolishing slavery.<sup>261</sup>

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<sup>261</sup> Although the relationship between slavery and incest has not been delineated in a formal manner, it has been implicitly considered in some national courts. Akhil Reed Amar and Daniel Widawsky, "Child Abuse as Slavery: A Thirteenth Amendment Response to *DeShaney*", *Harvard Law Review*, vol. 106 (1992), p. 1359 (discussing a claim that, in the United States, child abuse is covered by the Thirteenth Amendment to the Constitution which prohibits the existence of slavery or involuntary servitude, which argument was rejected by the United States courts. It would appear that incest is a form of child abuse and, accordingly, would not be covered by the Thirteenth Amendment).

### III. INTERNATIONAL MONITORING MECHANISMS

155. National authorities possess the primary obligation to protect the human rights of residents, including, of course, the obligation to prohibit slavery and slavery-like practices.<sup>262</sup> The efforts of national authorities are augmented, however, by international human rights norms and procedures for implementing and ensuring compliance with international human rights treaties. For example, the International Covenant on Civil and Political Rights prohibits “slavery and the slave-trade in all their forms” (art. 8) and establishes a Human Rights Committee to monitor compliance. That treaty and international law generally recognize that Governments are obligated “to respect and to ensure to all individuals within its territory and subject to its jurisdiction” the guaranteed rights and “to take the necessary steps, in accordance with its constitutional processes and with the provisions of the [treaty], to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the [treaty]” (art. 2). The primary responsibility of national authorities to protect human rights is underlined by the general rule of international law that all available domestic remedies must be exhausted before resorting to international settlement procedures.<sup>263</sup> There are therefore important links between national and international monitoring methods that cannot be overlooked, although the focus of this section is on international mechanisms.

156. International human rights law has evolved a number of mechanisms for ensuring implementation and monitoring. Since the adoption of the International Covenant on Civil and Political Rights in 1966, all major human rights treaties have provided for an expert body, such as the Human Rights Committee under the International Covenant on Civil and Political Rights, to oversee implementation of the relevant multilateral conventions by receiving and reviewing periodic reports from the Governments that have ratified them. Most of the treaty bodies issue conclusions and recommendations after reviewing each State party’s report. Treaty bodies also occasionally issue general comments or recommendations that authoritatively construe provisions of their treaties and summarize their experience in reviewing States parties’ reports. Further, four of the treaty bodies – the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, and the Committee against Torture – may receive communications from individuals complaining about violations of those treaties and issue adjudicative decisions interpreting and applying treaty provisions.<sup>264</sup>

157. Under the authority of the Charter of the United Nations rather than on the basis of a specific human rights treaty, the United Nations Commission on Human Rights has developed several additional mechanisms for human rights monitoring. One of the most visible measures that the Commission has taken with respect to a violating Government is to authorize a special rapporteur, a special representative or a working group to investigate and publish a report on the situation. The Commission has also established thematic special rapporteurs and working groups to deal with particular kinds of violations, for example the sale of children.<sup>265</sup>

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<sup>262</sup> International Covenant on Civil and Political Rights, *supra* note 27, art. 2. Individuals also have an obligation not to engage in slavery; see, for example, Rome Statute of the International Criminal Court, *supra* note 23, art. 7(c).

<sup>263</sup> See, for example, International Covenant on Civil and Political Rights, *supra* note 27, art. 41(c).

<sup>264</sup> A similar complaint mechanism is being developed for the Committee on Economic, Social and Cultural Rights. It should be noted that no individual communications are known to have related to contemporary forms of slavery.

158. In 1996 the General Assembly also authorized the post of Special Representative on the impact of armed conflict on children. Now called the Special Representative on Children and Armed Conflict, the mechanism works in cooperation with UNICEF and the Office of the High Commissioner for Human Rights (OHCHR). Since the early 1990s OHCHR has conducted an increasing number of field operations. In 2000, it had 27 human rights field presences around the world.<sup>266</sup>

159. In 1970 the Economic and Social Council adopted resolution 1503 (XLVIII) authorizing the Commission on Human Rights to receive and review communications alleging the existence of a consistent pattern of gross violations of human rights. In the 30 years since the procedure was established, the Commission has dealt with over 65 country situations.

160. The Sub-Commission on Prevention of Discrimination and Protection of Minorities (renamed the Sub-Commission on the Promotion and Protection of Human Rights in 1999) has, as authorized by the Economic and Social Council and the Commission on Human Rights, established intersessional working groups on contemporary forms of slavery (1975), indigenous populations (1982) and minorities (1995).

161. Most of the international mechanisms for implementation have been developed since the advent of the treaties that prohibit slavery and slavery-like practices. Those treaties therefore did not incorporate procedures which are now considered to be indispensable for monitoring compliance with States' human rights obligations.

## A. Slavery Conventions

162. Article 7 of the Slavery Convention provides that "the High Contracting Parties undertake to communicate to each other and to the Secretary-General . . . any laws and regulations which they may enact with a view to the application of the provisions of the present Convention".<sup>267</sup> There is also a similar obligation to notify the Secretary-General of any measures implemented in national law pursuant to the provisions of the Supplementary Convention (art. 8(2)). Compared with the reporting and monitoring mechanisms of other more recent human rights instruments, the reporting clauses of the Slavery Convention and the Supplementary Convention lack the requisite periodicity and specificity. Most importantly, the slavery treaties do not designate a treaty body to receive and comment on the reports. They have little effect on the fulfilment of States' obligations and contain no effective implementation mechanism for the provisions of the conventions aimed at abolishing slavery. The Sub-Commission has noted that this gap is "a clear defect in the arrangements made for the eradication of slavery and the slave trade and similar institutions and practices".<sup>268</sup>

163. Under the Slavery Convention and the Supplementary Convention, States parties agree but are not obliged to send information on measures implemented in accordance with the slavery conventions to the Secretary-General, who in turn communicates such information to the Economic and Social Council for discussion "with a view to making further recommendations for the abolition of slavery".<sup>269</sup> The Economic and Social Council has not pursued this role actively. Instead,

<sup>265</sup> In general, these thematic mechanisms have the capacity to receive information from individuals, to make direct appeals to Governments, to visit countries and ultimately to seek an end to specific violations. Their prompt action and capacity to act in regard to all countries – regardless of whether the country has ratified a specific treaty – make the thematic procedures one of the most effective human rights tools in the United Nations system – helping to save lives, to stop torture, to find disappeared people and otherwise to protect individuals. The rapporteurs submit comprehensive reports each year to the Commission.

<sup>266</sup> Office of the High Commissioner for Human Rights, United Nations Human Rights Field Presences, available at [www.unhchr.ch/html/menu2/5/field.htm](http://www.unhchr.ch/html/menu2/5/field.htm).

<sup>267</sup> In 1953, by resolution 794 (VIII) of 23 October 1954, the General Assembly approved the Protocol amending the Slavery Convention to bring it within the United Nations system.

<sup>268</sup> Awad, *supra* note 21, para. 163.

<sup>269</sup> Supplementary Convention, *supra* note 20, art. 8(3).

it established the Working Group on Slavery, which later became the Working Group on Contemporary Forms of Slavery under the aegis of the Sub-Commission, to review developments in the field of slavery based on all available information.

## B. ILO Mechanisms

164. The ILO has since its inception sought to establish a monitoring method that is acceptable to all States parties. The ILO process is widely regarded as one of the most effective systems of supervision, and many of the existing reporting procedures under other human rights treaties “owe much to the long experience of reporting under various conventions adopted by the ILO”.<sup>270</sup> The principal ILO system for the application of international labour standards is based on reports received from Governments and is exercised by the Committee of Experts on the Application of Conventions and Recommendations. Article 22 of the ILO Constitution requires all States to report periodically on the conventions to which they are a party.

165. This mechanism starts with the submission of reports by Governments. Originally, reports were to be submitted every year on all ratified conventions. That system has since been revised on a number of occasions in view of the increasing number of conventions and members of the ILO. Priority is now given, in terms of periodicity of reporting, to the more important conventions such as those dealing with fundamental human rights, on which detailed reports must be submitted every second year; reports on other conventions must be submitted every five years. The ILO Governing Body decided that reports were no longer necessary for certain conventions which they determined had lost their relevance over time.

166. The reports are carefully reviewed by the staff of the ILO, who prepare draft comments for the Committee of Experts, a body of distinguished individuals from different countries which meets once each year. The reports and the draft comments are then examined by the Committee of Experts, which makes juridical assessments in closed session. Although the Committee uses the reports submitted by Governments as a starting point, it also looks at other available official or reliable data, such as information gathered in the course of ILO direct contact missions, reports of United Nations bodies and other international agencies, as well as submissions from employers’ and workers’ organizations. These additional sources of information can be important in establishing whether the conventions are implemented in practice.

167. The Committee of Experts reports annually to the Conference Committee on the Application of Conventions and Recommendations, a tripartite committee of the International Labour Conference.<sup>271</sup> The Conference Committee meets at the annual International Labour Conference to discuss in open session some of the more pressing cases referred to it by the Committee of Experts. The Conference Committee issues a report, adopted by the Conference in plenary session, which is transmitted to the Governments concerned, making specific reference to points that should be addressed in the next report. Although the views of the Committee of Experts are not binding on States parties, they do carry a certain amount of authority and in most instances are accepted. They are a useful source of information on the meaning and application of obligations in the ILO conventions.<sup>272</sup>

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<sup>270</sup> Martin Scheinin, “International Mechanisms and Procedures for Implementation”, in *An Introduction to the International Protection of Human Rights*, Raija Hanski and Markku Suksi (eds.), 1997, p. 56; see also E. A. Landy, *The Effectiveness of International Supervision: Thirty Years of ILO Experience*, 1966.

<sup>271</sup> Both Committees derive their authority from decisions of the International Labour Conference and the ILO Governing Body. See N. Valticos and G. von Potobsky, *International Labour Law*, 1994, pp. 239-45.

<sup>272</sup> There is a mechanism under article 37 of the ILO Constitution which provides that any dispute relating to the interpretation of a provision of a convention can be referred to the International Court of Justice (ICJ). Although the ICJ is the only forum that has jurisdiction to give definitive interpretations, this procedure has been used on only one occasion, in 1932.

168. The second type of supervision exercised by the ILO involves an investigation into allegations that a State has failed to comply with its obligation under a convention it has ratified. It is a mechanism whereby the ILO can undertake an examination and find a general solution in situations arising from claims of non-compliance by a State party with a ratified treaty. Representations may be made under article 24 of the ILO Constitution by any employers' or workers' organization alleging that the State is in breach of its obligation; the procedure cannot be invoked by an individual claiming to be a victim of a violation of an ILO convention. The ILO Governing Body, if it determines that the representation is acceptable, appoints a tripartite committee.<sup>273</sup> The committee's report, which includes the Government's response to the allegations, is sent to the Governing Body for adoption. If the Government's reply is unacceptable, the Governing Body can decide to publish the presentation and reply by way of sanction. This extraordinary procedure has been pursued only once; all other cases have been referred back to the Committee of Experts under the usual supervisory system.

169. This second mechanism can also be invoked under article 26 of the ILO Constitution whereby one State can lodge a complaint that another State has failed to observe the provisions of a ratified treaty. That inter-State complaint mechanism has very rarely been invoked. The Governing Body can also initiate such a procedure and refer a complaint to a Commission of Inquiry.<sup>274</sup> The Commission prepares a report on issues of both fact and law, setting out recommendations on how to rectify the problem. The Government concerned must indicate within a three-month period whether it accepts the Commission's recommendations and, if not, whether it intends to refer the matter to the International Court of Justice. This possibility of appeal has never been used because in most cases the recommendations of the Commission of Inquiry have been accepted.<sup>275</sup> If a Government does not comply with the recommendation in the report, the Governing Body can, under article 33 of the ILO Constitution, recommend to the International Labour Conference adoption of "such action as it may deem wise and expedient to secure compliance therewith".<sup>276</sup>

170. The Commission of Inquiry appointed under article 26 of the ILO Constitution to examine the compliance of Myanmar with the forced labour conventions issued a report on its findings and recommendations in 1998. The report clearly sets out "an international labour standard that protects a fundamental human right – the right not to be reduced to a state of slavery or forced labour, whichever form this may take".<sup>277</sup> The Commission of Inquiry confirms that international law prohibits absolutely any recourse to forced or compulsory labour and that any person who "violates this peremptory norm is guilty of a crime".<sup>278</sup> A year after its report was published, the International Labour Conference adopted a resolution condemning the Government of Myanmar for persistent violations of Convention No. 29 and determining that Myanmar would receive no development funds from the ILO and was to be suspended from ILO meetings, except insofar as either was aimed at securing compliance with the recommendations on ending forced labour.

## 1. *The ILO Declaration on Fundamental Principles and Rights at Work*

171. At its 86th session in 1998 the International Labour Conference adopted the ILO Declaration on Fundamental Principles and Rights at Work and Follow-up.<sup>279</sup> The aim of the Declaration

<sup>273</sup> Standing Orders concerning the Procedure for the Examination of Representations under articles 24 and 25 of the Constitution of the ILO, *ILO Official Bulletin*, vol. 64, Series A, No. 1, 1981, p. 93.

<sup>274</sup> International Labour Office, *Impact of International Labour Conventions and Recommendations*, 1976, p. 68; see also Klaus Samson, "The Standard-Setting and Supervisory System of the ILO", in *An Introduction to the International Protection of Human Rights*, *supra* note 270, p. 170.

<sup>275</sup> *Ibid.*

<sup>276</sup> *Ibid.*

<sup>277</sup> Patrick Bolle, "Supervising Labour Standards and Human Rights: The Case of Forced Labour in Myanmar (Burma)", *International Labour Review*, vol. 137, 1998, p. 391.

<sup>278</sup> Report of the Commission of Inquiry Appointed under article 26 to Examine the Observance of Myanmar of the Forced Labour Convention, 1930 (No. 29), 1998, p. 66.

<sup>279</sup> ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, *supra* note 42.

was to establish a list of rules that would apply globally even if the relevant conventions had not yet been ratified by certain States.

172. Of particular importance for the monitoring and elimination of forced labour is the provision in the Declaration which imposes on

“all Members, even if they have not ratified the Conventions in question . . . an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realise . . . the principles concerning the fundamental rights which are the subject of those Conventions, namely:

- (a) Freedom of association and the effective recognition of the right to collective bargaining;
- (b) The elimination of forms of forced or compulsory labour;
- (c) The effective abolition of child labour;
- (d) The elimination of discrimination in respect of employment and occupation.”<sup>280</sup>

173. The follow-up to the Declaration provides for two new monitoring mechanisms to be implemented. The first process will involve the Governing Body in receiving information from Governments that have not ratified one or more of the fundamental conventions on any changes that may have taken place in their law and practice. The second procedure is the submission of global reports to the International Labour Conference. These reports will provide a dynamic global picture relating to each category of fundamental principles and rights noted during the preceding four-year period. It is expected that they will also serve as a basis for assessing the effectiveness of the assistance provided by the ILO and for determining priorities for technical assistance in the following period. It is anticipated that these new reporting mechanisms will strengthen the ILO’s capacity to promote and protect fundamental human rights, in particular through the elimination of forced labour.

### C. The Working Group on Contemporary Forms of Slavery

174. The mandate of the Working Group is to monitor the existence of “slavery and the slave trade in all their practices and manifestations”.<sup>281</sup> The Working Group operates with a large degree of flexibility and receives information from States and non-governmental organizations (NGOs) relating to slavery, servitude, forced labour and other slavery-like practices. Although the slavery conventions provide for States parties to submit reports to the United Nations, the Working Group has developed a practice of receiving information from any Governments that may wish to present it. Normally, at each session the Working Group receives information from NGOs and then promptly informs the relevant Governments that they have been mentioned and may wish to submit further information. Since the Governments are rarely given more than a couple of days’ notice, their responses are often spontaneous and they offer to submit further information when it can be obtained.

175. The Suppression of Traffic Convention also imposes an obligation on States parties to submit annual reports to the Secretary-General of the United Nations setting out information on “such laws and regulations as may be promulgated, relating to subjects of the present Convention, as well as all measures taken by them concerning the application of the convention” (art. 21). The reporting requirement is seen as an important mechanism to encourage State compliance with international norms, but the lack of any mechanism for review of reporting on slavery and trafficking is a clear limitation. The United Nations is aware of this lacuna and it has been suggested that States parties’ reports submitted under the Convention on the Elimination of All Forms of Discrim-

<sup>280</sup> *Ibid.*, para. 2.

<sup>281</sup> Economic and Social Council decision 16 (LVI) of 17 May 1974.

ination Against Women should include information on measures adopted to suppress trafficking<sup>282</sup> which is prohibited under article 6 of that Convention. Similarly, the lack of a specialized monitoring body was noted by the Secretary-General in his 1966 report on traffic in women and girls in which he suggested that "it may be opportune to consider the possibility of revising the treaty with a view to making it more effective in terms of both increasing the numbers of States parties and the creation of a regular reporting and monitoring mechanism" (A/51/309, para. 56).

176. At the end of each of its annual sessional reports, the Working Group submits a set of general recommendations for further action to its parent body, the United Nations Sub-Commission on the Promotion and Protection of Human Rights. The Sub-Commission usually supports these recommendations and submits any new proposals to the Commission on Human Rights for authorization and approval. This cumbersome procedure can take a long time and rarely mentions specific situations.<sup>283</sup> The draft Programme of Action for the Elimination of Child Labour proposed by the Working Group in 1992 in this manner was adopted by the Commission on Human Rights in its resolution 1993/79. The Working Group had considered the problem of trafficking of persons at its twentieth session in informal discussions on information received from different organizations such as the ILO and the Action for Children Campaign. After examining the problems raised by the menace of trafficking, the Working Group proposed the Programme of Action for the Prevention of Traffic in Persons and the Exploitation of the Prostitution of Others.<sup>284</sup> The programme contains suggestions for measures to be implemented by national authorities relating to law enforcement, rehabilitation, reintegration and education. This recommendation of the Working Group was adopted by the Commission, albeit with significant reservations, in its resolution 1996/61.

177. The Working Group has therefore emerged as an informal forum within which States and non-governmental organizations can discuss issues of slavery or related practices, but it has not developed effective procedures to follow up conclusions reached and recommendations adopted. The Working Group has interpreted its mandate in an expansive manner and has been creative in interpreting what constitutes slavery to cover a wide range of issues, for example problems concerning the rights of women, children and migrant workers. In order to be an effective forum for combating slavery, the Working Group must be careful not to become embroiled in the consideration of issues that are relatively tangential to slavery, as there are limits to the range of matters that can legitimately be brought under the existing definition of slavery in international law.

178. It should also be noted that no international body has been explicitly recognized as competent to receive and consider claims on the part of one State that another State is not fulfilling its obligations under the slavery conventions. That gap may not be too serious since inter-State complaint mechanisms in other human rights treaties have rarely been used. In addition, it should be noted that no international body has been explicitly recognized as competent to receive and consider communications from individuals who claim to be victims of slavery. Nonetheless, the Working Group has received information about such violations and has informally sought responses from the Governments concerned. More importantly, the lack of a mandatory reporting requirement and a review mechanism has hindered the efficacy of the Working Group in applying the provisions of the slavery conventions.

179. The only treaty mechanism that does exist under the present treaty-based regime is the jurisdiction given to the International Court of Justice to resolve any dispute that may arise concerning the interpretation or the application of the Slavery Convention (art. 8) or the Supplementary Convention (art. 10). In contrast, the more recent conventions such as the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against

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<sup>282</sup> Traffic in women and girls: Report of the Secretary-General, United Nations document A/51/309 (1996), para. 42.

<sup>283</sup> Kathryn Zoglin, "United Nations Action Against Slavery: A Critical Evaluation", *Human Rights Quarterly*, vol. 8, 1996, p. 329.

<sup>284</sup> United Nations document E/CN.4/Sub.2/1995/28/Add.1.

Women provide for the establishment of specific institutions to monitor the terms of those conventions. No such body exists in respect of slavery.

180. This clear defect in the existing regime under the slavery conventions has been discussed many times but no change has been effected, although numerous suggestions on how to improve the system have been made. The six treaty monitoring mechanisms are generally regarded as far more effective in their respective domains than the Working Group on Contemporary Forms of Slavery. Hence, one option would be for the Working Group to seek authorization from the Commission on Human Rights to be recognized as the treaty monitoring body for the slavery-related conventions. That option would have the advantage of encouraging the Working Group to structure its work and to rely on the procedural precedents of the treaty monitoring bodies.

181. It is difficult to assess whether the Working Group, given its current status, would be in a position to receive and review periodic reports from States. It receives “very limited substantive assistance in its work from the secretariat”<sup>285</sup> so that even if it wanted to carry out a systematic review of reports submitted under the Slavery Convention, the Supplementary Convention and the Suppression of Traffic Convention, it would not have sufficient resources to be effective.

182. States parties are already required to report on their implementation of the prohibition of slavery and forced labour under article 8 of the International Covenant on Civil and Political Rights, as well as on the right of everyone to gain a living by freely accepted work for which fair wages are provided under articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights. Although neither the Human Rights Committee nor the Committee on Economic, Social and Cultural Rights has emphasized contemporary forms of slavery in its review of States parties’ reports, it is uncertain whether Governments – already overburdened by their reporting responsibilities to the six existing treaty bodies – would be anxious to develop a comprehensive reporting process for the Working Group to monitor compliance with the slavery-related conventions.

183. Another option would be for the Working Group to build on its approach of the past few years by continuing to focus on particular issues such as domestic workers, trafficking in persons, debt bondage, etc. At its 1998 session the Working Group identified trafficking for prostitution as the principal focus of its 1999 session and debt bondage as the principal focus for its session in the year 2000. At its 1999 session the Working Group was requested to select a sample of three to five nations which would be expected to possess useful information about the theme to be discussed, so that the Governments could be informally invited to participate in the session the following year. Those Governments could have been invited to submit written reports. Hence, each session of the Working Group would be divided into two parts. During a more formal segment, it would receive information from Governments and non-governmental organizations about the theme of that year, for example trafficking in persons. The second part of the session would be informal and at least partially without observers. During the second informal part, the Working Group could (a) consider whether it could draw any conclusions from the information it had just heard about the theme of that year; (b) discuss what topic should be selected for the next and future years; and (c) hold consultations that would permit it to select a few countries to be invited to participate in the following year’s session of the Working Group.

184. If this approach were adopted, Governments, in general, would be far less burdened than in the case of a comprehensive reporting process affecting all States parties. Instead of a State reporting responsibility that would place a burden on all States, only a few Governments would be asked to participate actively in the Working Group’s session in a particular year. The Working Group would be expected to vary the countries invited to participate from year to year as the theme of the session would change every year or two. Also, Governments would generally be given much better information about the issues that might arise at a particular session than they

<sup>285</sup> Zoglin, *supra* note 283, p. 339.

receive at present. At its 1999 session, however, the Working Group refused to accept the option of focusing on particular countries, which would have substantially professionalized its activities, but it did identify a theme for its session for the year 2001.

185. The Working Group could also seek a mandate in order formally to receive, consider and gather information about communications from individuals who claim to be victims of slavery or from others working on their behalf, as well as to establish a mechanism to consider and act on such communications between sessions. The mandate to take up urgent cases would allow the Working Group to be more effective in preventing and challenging human rights abuses relating to slavery. The Working Group could also seek a mandate to visit countries in order to gather information about compliance with international norms relating to slavery or individual cases reported to the Working Group. After the issue was initially raised at the Working Group, a member of the Working Group undertook such a visit to Mauritania in his capacity as a Sub-Commission expert in the early 1980s. Nonetheless, in the late 1990s the Working Group declined an invitation from the Government of the Sudan to send a delegation to investigate slavery in the Sudan on the grounds that they had no mandate to do so.

186. A third option was suggested by the Bureau of the fifty-fourth session of the Commission on Human Rights in its report submitted pursuant to Commission decision 1998/112. Its proposal was to “terminate the mandate of the Sub-Commission’s Working Group on Contemporary Forms of Slavery and transfer those responsibilities which are not addressed by existing mechanisms to a new Special Rapporteur on contemporary forms of slavery” (E/CN.4/1999/104, para. 20). This proposal may have reflected the view of the Bureau of the Commission’s fifty-fourth session, and of at least some members of the Commission, that the Working Group on Contemporary Forms of Slavery has not been effective in achieving its objectives. The Bureau believed that a special rapporteur would afford a far less cumbersome, less expensive and more flexible way of focusing world attention on the issue of slavery. A special rapporteur would, however, be less effective than the Working Group could be in monitoring the implementation of the slavery-related conventions, particularly if the Working Group should be encouraged to improve its procedures, for example as suggested above.

187. The proposals of the Bureau of the Commission’s fifty-fourth session were referred by the Commission’s fifty-fifth session to the intersessional open-ended Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission to continue the comprehensive examination of the Bureau’s report and to report to the fifty-sixth session of the Commission in 2000. In her statement, made on behalf of the Commission at the conclusion of its fifty-fifth session, the Chairperson observed, with respect to the Sub-Commission, that, “[w]hile fully valuing the distinctive role and contribution of the Sub-Commission over its more than 50-year history, the Commission considers that it too is in need of thorough review” (E/1999/23-E/CN.4/1999/167, para. 552). The open-ended Working Group of the Commission considered but did not adopt the proposal for a Special Rapporteur on contemporary forms of slavery, but decided to recommend that the sessions of the Working Group on Contemporary Forms of Slavery be reduced from eight to five days. That recommendation, along with the others contained in the report of the Working Group (E/CN.4/2000/112), was adopted by the Commission at its fifty-sixth session (decision 2000/109 of 26 April 2000).

## IV. CONCLUSION AND RECOMMENDATION

188. The true effectiveness of a treaty can be assessed by the extent to which the States parties apply its provisions at the national level. The implementation of treaties generally refers to both the national measures adopted by States and international measures and procedures adopted to review or monitor those national actions. There is no such international mechanism for the monitoring and enforcement of States' obligations to abolish slavery and related practices. The right of all individuals to be free from slavery is a basic human right; yet this lack of an adequate implementation procedure does little to encourage States to establish safeguards against all contemporary forms of slavery. The mandate of the Working Group on Contemporary Forms of Slavery could be extended to incorporate such a function to provide for a systematic review procedure. Alternatively, the Working Group could improve its own procedures to focus on thematic issues relevant to the prevention of slavery. Another option would be for the Commission to revive its previous proposal that the Working Group be transformed into a special rapporteur of the Commission on Human Rights. Whatever mechanism the Commission and Sub-Commission might choose to improve the implementation of the many treaties against slavery, this updated review of the international law against slavery has been published in order to continue the work of the Sub-Commission's previous studies<sup>286</sup> and as a means to further understanding of the long-standing struggle to abolish slavery and its contemporary manifestations.

189. Despite a widely held belief to the contrary, slavery in its various forms remains prevalent as the world enters a new millennium. The concept of slavery has remained quite static during the close on two centuries in which Governments and non-governmental organizations have attempted to seek its abolition. Nonetheless, as this updated report has illustrated, a number of slavery-like practices have evolved. In the past decade there have been proposals for yet further expansion of contemporary forms of slavery which may dilute efforts to eradicate the historical forms. Such proposals should be carefully scrutinized.

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<sup>286</sup> See Awad, *supra* note 2; Whitaker, *supra* note 3.

