2008

Using International Human Rights Law to Better Protect Victims of Trafficking: The Prohibitions on Slavery, Servitude, Forced Labour and Debt Bondage

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L.N. Sadat, M.P. Scarf, *The Theory and Practice of International Criminal Law: Essays in Honour of M. Cherif Bassiouni*, (Leiden: Martinus Nijhoff, 2008, pp 397-430).

USING INTERNATIONAL HUMAN RIGHTS LAW TO BETTER PROTECT VICTIMS OF HUMAN TRAFFICKING: THE PROHIBITIONS ON SLAVERY, SERVITUDE FORCED LABOR AND DEBT BONDAGE

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Introduction

The primary function of the international lawyer is to identify, as precisely and practically as possible, what States are required to do, or not to do, as a matter of international law. In all cases, this requires a degree of conceptual understanding of the nature of the problem which law seeks to address. In relation to trafficking, such a conceptual understanding has proven to be highly elusive. As recently as 2000, the term 'trafficking' was being used by government officials, intergovernmental organizations, NGOs and the media interchangeably with other phrases connected to unfortunate migration outcomes including illegal migration, forced migration and migrant smuggling. Until December of that same year, a plethora of definitions was being wheeled out for examination, each faithfully reflecting the interest and prejudices of its promoters. The resulting confusion was not improved by a discourse that was contradictory, highly moralistic, often factually incorrect and based upon extremely shaky empirical foundations.

Against this rather discouraging backdrop, the considerable progress which has been made in articulating the nature of the trafficking phenomenon is remarkable. While policy makers and their advisers still occasionally confuse trafficking with other forms of migration, and while research standards remain comparatively abysmal, there is a growing foundation of common understanding on what exactly is happening, where and to whom. Trafficking is now widely agreed to be a process of moving people, within and (especially) between countries for the express purpose of exploiting them. In the case of adults, this will necessarily involve some form of deception or coercion but just moving, selling or receiving a child with intent to exploit is now considered enough to constitute trafficking.[1] It is accepted that trafficking affects, to a greater or lesser degree, all regions and most countries of the world, the only constant factor being the disparity in wealth and opportunity between countries of origin and countries of destination. It is agreed that the profile of the victim and the end-purposes of trafficking are open-ended and ever-changing because both are ultimately determined on the basis of considerations of profit. Women, men and children are trafficked into every situation and industry in which money can be made through the exploitation of human beings. It is further agreed that the crime of trafficking suits the structure and functioning of organized criminal groups, although the extent of their involvement appears highly regional. There

[1] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime*, at Article 3(a) and 3(c), Annex II, U.N. Doc.A/55/383 (2000) [hereinafter Trafficking Protocol].

is a growing understanding of the gender aspects of trafficking—not just in terms of women and men being subject to very different forms of trafficking, but also in relation to the whole range of factors which underlie national and international responses.

Trafficking was a matter for international human rights law long before it became an issue of migration or of transnational organized crime.[2] However, human rights law, apart from two solid references, does not contain a comprehensive prohibition on trafficking.[3] The question of whether or not such a prohibition exists, or whether it can be inferred, or whether other prohibitions which *do* exist can be made to fit the trafficking phenomenon can only be answered (tentatively), with reference to a myriad of human rights instruments and standards. Despite these difficulties, a careful analysis of human rights law with this goal in mind is ultimately a productive exercise. This is because trafficking goes to the very heart of what human rights law is trying to prevent. From its earliest days to the present, human rights law has loudly proclaimed the fundamental immorality (and unlawfulness) of one person appropriating the legal personality, labor or humanity of another. Human rights law has battled the demons of discrimination on the basis of race and sex; it has demanded equal or at least key rights for aliens; it has decried and outlawed arbitrary detention, forced labor, debt bondage, forced marriage and the commercial sexual exploitation of children and women; it has championed freedom of movement and the right to leave and return to one's own country. While the task of separating out the important bits from a huge range of legal instruments is a daunting one, there can be no doubt that the spirit of the entire corpus of human rights law rejects, absolutely, the practices and results which are integral to the human trafficking process.

Despite this overwhelmingly positive assessment, international human rights law has not, on balance, been especially useful to victims of trafficking. Rarely are even the most clear-cut and uncontested provisions (e.g. those relating to slavery, debt bondage,

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[2] Between 1904 and 1933 four different international conventions dealing with the (white slave) traffic in women and girls were concluded. In 1949, these were mostly consolidated into one instrument: the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, July 25, 1951, 96 U.N.T.S. 271.

[3] The Women's Convention obliges States Parties to take all appropriate legislative and other measures to suppress all forms of traffic in women and exploitation of the prostitution of women, Convention on the Elimination of all Forms of Discrimination Against Women art. 6, Sept. 3, 1981, 1249 U.N.T.S. 13. The Convention on the Rights of the Child requires States Parties to: "take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form" (Article 35). Children are also to be protected from all forms of economic exploitation (Article 32), sexual exploitation and sexual abuse (Article 34). States Parties are therefore also required to take all appropriate national, bilateral and multilateral measures to prevent the inducement or coercion of a child to engage in any unlawful sexual activity; the exploitative use of children in prostitution or other unlawful sexual practices; the exploitative use of children in pornographic performances and materials (Article 34**)** and the illicit transfer and non-return of children abroad (Article 11). The Convention further requires States parties to "take all appropriate measures to promote physical and psychological recovery and social integration of a child victim of … any form of … exploitation … in an environment which fosters the health, self-respect and dignity of the child" (Article 39). Convention on the Rights of the Child, G.A. Res. 44/2, U.N. Doc. A/44/49 (November 20, 1989).

forced marriage and forced labor) advanced in relation to a situation of trafficking. When such connections are made, their purpose is often rhetorical and, even when presented by legal scholars, lacking in legal justification. While many examples could be cited, perhaps the most telling of these relates to the human rights treaty-bodies: the key enforcement mechanisms of the international human rights system. While the issue is raised with increasing frequency in the context of human rights treaty-body work, none of the relevant committees has managed to tie trafficking to a violation of a specific right in a specific treaty. Perhaps this is because trafficking is just too complicated. Perhaps it is because the norms themselves are devoid of sufficient content to support their application to real life. Perhaps the situation is aggravated by the fact that traffickers are generally bad people and bad organisations, not bad governments.

The primary purpose of this Chapter is to flesh out several of the strongest and clearest human rights norms that could be applied to trafficking by the international human rights system, international and regional tribunals and national criminal justice agencies. These norms include the prohibition on slavery and the slave trade; the prohibition on forced labor; and the prohibition on debt bondage. The exercise is necessarily a selective one and does not purport to reflect the full corpus of international human rights law relevant to trafficking.[4] The underlying rationale for this approach lies in the fact that even the most promising recent international legal developments do not appear to have made the process of prosecuting traffickers and protecting victims much easier. Perhaps it is time for us to go back to basics. Perhaps this is an opportune moment to take out of cold storage our oldest, strongest and most widely accepted laws to determine whether (and, if so, to what extent) they can be used against this especially persistent and virulent criminal phenomenon.

I. The Prohibition on Slavery and Servitude

The link between trafficking and traditional chattel slavery[5] is immediately obvious. Both practices involve the large-scale movement of individuals, generally across national borders for exploitative purposes. Both are primarily conducted by private entities for private profit. Both seek to secure control over individuals by minimizing personal autonomy. Neither system can be sustained without massive and systematic violations of human rights.

For present purposes, two aspects of slavery are particularly relevant. The first relates to the fact that slavery generally takes place outside the "public" realm. The prohibition on slavery and servitude has been called a "paradigmatic example" of a State's obligation to protect against non-State interference with human rights. The relevance of international human rights law to situations in which the State is not the immediate agent of harm is a key issue when it comes to identifying precise legal obligations and responsibilities of States in the context of trafficking. Second, and more specifically, is

[4] For example, prohibitions on discrimination and rights protecting certain groups such as non-citizens, migrant workers, women and children.

[5] "Chattel" slavery refers to the right of the "owner" to treat slaves as possessions especially in terms of their sale or transfer to others. Weissbrodt and Dottridge, *infra* note 21, ¶ 18.

the question of whether the prohibition on slavery can accommodate trafficking. In other words, is it possible to sustain an argument that trafficking is a form of slavery and that trafficking is therefore subject to the same strict legal prohibition as exists in respect of slavery and the slave-trade? These and related issues are considered in detail below.

A. International Instruments Relevant to Slavery and Servitude

In its "classic" form, slavery and the slave trade involved the open trading (buying, selling and transportation) of individuals, in massive numbers, for the purpose of exploiting their labour for profit. These practices have existed throughout history in different cultures and, until several centuries ago, were legal, commonplace aspects of society and commerce in many parts of Africa, the Americas, Asia and the Ottoman Empire.[6] Slavery was also not rejected by traditional religious doctrine. For example, the Hebrew Bible,[7] the New Testament[8] and the *Qur'an*[9] all accepted the institution of slavery and sought its regulation and humanization, rather than outright abolition.

Freedom from slavery was one of the first rights to be recognized under public international law with prohibitions on slavery and the trading in slaves being a central feature of more than seventy-five multilateral and bilateral conventions from the early nineteenth century onwards.[10] Professor Bassiouni's 1991 study of slavery as an

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[6] For a detailed account of slavery and the slave-trade during the eighteenth and nineteenth centuries see JAMES WALVIN, BLACK IVORY: A HISTORY OF BRITISH SLAVERY (1992).

[7] Freamon extracts the following passage from Leviticus which relates an instruction received by Moses from God on Mount Sinai: "Slaves, male and female, you may indeed possess, provided you bring them from among the neighbouring nations. You may also buy them from among aliens who reside with you and from their children who are born and reared in your land. Such slaves you may own as chattels, and leave to your sons as their hereditary property, making them perpetual slaves. But you should not lord it harshly over any of the Israelites, your kinsmen." Leviticus, 25:44-46, *cited in* Bernard K. Freamon, *Slavery, Freedom and the Doctrine of Consensus in Islamic Jurisprudence*, 11 HARV. HUM. RTS. J. 1, 31 (1998) [hereinafter Freamon].

[8] Freamon notes that there is no indication, in the New Testament, that abolition of slavery is seen as an immediate moral task. He cites the following extract from a letter of Paul to the Ephesians: "5. Slaves, obey your masters with the reverence, the awe and the sincerity you owe to Christ … 9. Masters, act in a similar way towards your slaves. Stop threatening them. Remember that you and they have a master in heaven who plays no favourites." *Id.citing* Ephesians, 6:5, 9.

[9] For a detailed examination of traditional Islamic law (specifically the *Qur'an* as the revealed text) as it related to the practice of slavery, see Freamon, *supra* note 7.

[10] For example, the Peace Treaties of Paris (1814 and 1815), the Declaration and Final Act of the Congress of Vienna (1815), the Declaration of Verona (1822), bilateral treaties between Great Britain and France (1831, 1833, and 1845), the Treaty of London (1841), the Treaty of Washington (1862), the General Act of the Berlin Congo Conference (1885) which affirmed that "trading in slaves is forbidden in conformity with the principles of international law," the General Act of the Brussels Conference (1890) and the Convention of St. Germain-en-Laye (1919). For a detailed examination of relevant international and state practice during the eighteenth and nineteenth century see J.H.W.VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 238-260 (1976).

international crime remains the clearest and most comprehensive annotation of these instruments including their individual and collective legal weight.[11]

While economic considerations clearly played a role, the driving force behind early efforts of States to abolish the official slave trade was essentially a moral imperative, derived from impulses which found their basis in religious and secular principles emerging during the European enlightenment[12] including "the idea of the natural rights of man."[13] International abolitionist sentiment was fuelled by the work of the British and Foreign Anti-Slavery Society—an organization which has been described as: "the first moral entrepreneur … to play a significant role in world politics generally and in the evolution of a global regime specifically."[14]

The mandate of the League of Nations expressly included suppression of the slave trade and the prohibition of forced labor.[15] The 1927 Convention on Slavery,[16] which was drafted under League auspices, is now widely recognized as the first modern international treaty for the protection of human rights.[17] The Convention defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised."[18]

Slave trade is defined as including:

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[11] M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT'L. L. & POL. 445 (1991). *See also*: Nina Lassen, *Slavery and Slavery-like Practices: United Nations Standards and Implementation*, 57 NORDIC J. INT'L LAW 197, 197-198 (1988) [hereinafter Lassen]. For a detailed examination of relevant international and state practice during the eighteenth and nineteenth century see VERZIJL, *supra* note 10, at 238-260.

[12] Ethan A. Nadelmann, *Global Prohibition Regimes: the Evolution of Norms in International Society*, 44 INT'L ORG 479, 493, 497 (1990).

[13] NORMAN HAMPSON, THE ENLIGHTENMENT 153 (1968), *cited in* Nadelmann, *id.* at 493. Note that the 1822 Declaration of Verona states that slave trading is contrary to principles of justice and humanity. Bassiouni, *supra* note 11.

[14] Nadelmann, *supra* note 12, at 495. For further commentary on the contribution of the British and Foreign Anti-Slavery Society see SUZANNE MIERS, BRITAIN AND THE ENDING OF THE SLAVE TRADE 31 (1975).

[15] Under Article 22 of the Covenant of the League of Nations: " . . . 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." Covenant of the League of Nations art. 22 (June 28, 1919).

[16] Convention on Slavery, March 9, 1927, 60 LNTS 253 (amended December 7, 1953) [hereinafter 1926 Slavery Convention].

[17] MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 146 (1993). *See also* H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 334-335 (1950). The Convention was drafted in response to a recommendation (subsequently endorsed by the General Assembly) of the temporary Slave Commission – a body established by the League in 1922 for the purpose of ascertaining the extent of slavery and making proposals for its eventual eradication.

[18] 1926 Slavery Convention, *supra* note 16, art. 1.

> [A]ll 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.[19]

States Parties are required to take all necessary steps to prevent and suppress the slave trade and to work towards the abolition of slavery in all its forms.[20] Importantly, the "forms" of slavery to be covered by the Convention were not specified beyond the definition as set out above. While the general view is that this early Convention was prompted by and linked to continuing manifestations of chattel slavery, some limited evidence does exist of an intention on the part of the drafters to widen the scope of practices falling within the prohibition.[21]

The Universal Declaration of Human Rights, adopted by the General Assembly in 1948, provides that "[n]o-one shall be held in slavery or servitude. Slavery and the slave-trade shall be prohibited in all their forms."[22] In 1949 work began within the United Nations on the elaboration of a new legal instrument—one in which would address itself to certain institutions and practices resembling slavery as well as aiming at the abolition of the

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[19] *Id.* art. I (2).

[20] *Id.* art. I (2). The League established a Standing Advisory Committee to oversee implementation of the Convention. The Convention itself continued to exist after the demise of the League by virtue of a protocol elaborated under U.N. auspices which entered into force in 1957. Supplementary Convention on the Elaboration of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, April 30, 1957, 266 U.N.T.S. 3 [hereinafter Supplementary Convention].

[21] In a study prepared for the Sub-Commission on Protection and Promotion of Human Rights (then the Sub-Commission on Prevention of Discrimination and Protection of Minorities), Weissbrodt and Dottridge argue that the references to "any or all of the powers of ownership" and to "abolition of slavery in all its forms" indicate that the Convention does in fact cover a broad range of practices. They point to a report of the Temporary Slavery Commission of the League of Nations indicating that references to domestic slavery and similar conditions were being omitted from the 1927 Convention 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," Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Contemporary Forms of Slavery, Working Paper: U.N. Doc. E/CN.4/Sub.2/2000/3 (May 26, 2000) (*prepared by* David Weissbrodt and Anti-Slavery International) [hereinafter Weissbrodt and Dottridge]. It should be noted however, that an observation of ECOSOC's Ad-hoc Committee of Experts on Slavery, also cited by Weissbrodt and Dottridge, that the definition of slavery contained in the 1927 Convention "did not cover the full range of practices related to slavery … many of which had been identified by the League of Nations when preparing the … Convention," appears to contradict their assertion relating to the inclusive nature of the 1927 definition. *Id.* ¶ 13.

[22] Universal Declaration of Human Rights art. 4. G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg. U.N. Doc.A/1810 (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights]. *See also* Nina Lassen, *Article 4*, *in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY 90 (Asbjorn Eide, Gudmunder Alfredsson et al. eds., 1992).

legal status of slavery.[23] The result was the Supplementary Convention on the Elaboration of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery[24] which entered into force in 1957. The central feature of this Convention is its extended application to the institutions and practices of debt bondage, serfdom, servile forms of marriage and exploitation of children which are all held to be *similar to slavery*. States Parties are required to abolish these institutions or practices: "whether or not [they] are covered by the definition of slavery" as set out in Article 1 of the 1926 Slavery Convention.[25] In addition to retaining this earlier definition of slavery and the slave trade, the Supplementary Convention adds a new concept: a person of "servile status" which is intended to differentiate a "slave" from a victim of one of the institutions or practices referred to as "slave-like."[26] States Parties are required: to bring about progressively, and as soon as possible, the complete abolition or abandonment of slave-like institutions and practices as well as to ensure their criminalization: " … where they still exist and *whether or not* they are covered by the [1926] Convention's] definition of slavery.[27] Article 4 of the Convention states that "[a]ny slave who takes refuge on board any vessel of a State party to this Convention shall *ipso facto* be free."[28]

The International Covenant on Civil and Political Rights reiterates the prohibition on slavery and the slave trade as set out in the Universal Declaration.[29] Both the Universal Declaration and the ICCPR further stipulate that no person shall be held in *servitude*[30]— a term which, while not defined by either instrument, is generally seen to be separate from[31] and broader than slavery, referring to "all conceivable forms of domination and

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[23] The decision to develop a new legal instrument was made following a recommendation of a special Committee on Slavery, set up by the General Assembly through its resolution 278 (III) of 13 May 1949. Report of the Ad-Hoc Committee on Slavery, 2d Sess., U.N. Doc. E/1988, at 25, 29. Recommendation B1, *cited in* Lassen, *supra* note 22.

[24] Supplementary Convention, *supra* note 20.

[25] *Id.* art. 1.

[26] *Id.* art. 7(b).

[27] *Id.* art. 1 (emphasis added).

[28] *Id.* art. 4. This provision (expanded to include "[a]ny slave taking refuge on board any ship, whatever its flag") was subsequently included in Convention II of the Geneva Conference of 1958 on the High Seas and in the United Nations Convention on the Law of the Sea. *See* Convention on the High Seas art. 13, Apr. 29, 1958, 450 U.N.T.S. 6465. *See also* United Nations Convention on the Law of the Sea art. 99, Dec. 10, 1982, 1833 U.N.T.S. 397.

[29] International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) art. 10, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

[30] Universal Declaration of Human Rights, *supra* note 22, art. 8(2).

[31] Drafters of the ICCPR decided to change the formulation of the Universal Declaration by separating 'slavery' and 'servitude' on the grounds that they were two different concepts and should therefore be dealt with in separate paragraphs. MARC. J. BOSSUYT, GUIDE TO THE *TRAVAUX PREPARATOIRES* OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 164 (1987).

degradation of human beings by human beings."[32] Another interpretation separates the two concepts according to relative severity: "Slavery indicates that the person concerned is wholly in the legal ownership of another person, while servitude concerns less far-reaching forms of restraint and refers, for instance, to the total of the labour conditions and/or the obligations to work or to render services from which the person in question cannot escape and which he cannot change."[33] The provisions of the ICCPR relating to both slavery and servitude are non-derogable, i.e.: they cannot be suspended by a State, even in times of emergency.[34] Slavery and the slave trade are prohibited under the African Charter[35] and the American Convention.[36] The European Convention prohibits both slavery and servitude.[37] The prohibition on slavery is expressly non-derogable in both the European Convention and the American Convention.[38] In addition, the intrinsic inalienability of personal freedom means that consent is irrelevant with regard to both

[32] NOWAK, *supra* note 17, at 148. Nowak cites the relevant *travaux preparatoires* of the ICCPR to support his argument that "servitude" covers slavery-like practices involving economic exploitation such as debt bondage, servile forms of marriage and all forms of trafficking in women and children. *See also* BOSSUYT, *supra* note 31, at 167. That interpretation can be justified (at least for debt bondage, servile forms of marriage and trafficking in children) by reference to the 1957 Convention which defines a person of "servile status" as being a victim of such practices. Servitude has not, however, been mentioned in any of the conventions dealing with trafficking until the Palermo protocol. *See* Trafficking Protocol, *supra* note 1. On the history of the term "servitude" with reference to Article 4 of the Universal Declaration see Lassen, *supra* note 8, at 210 and sources cited.

[33] P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 242 (1990) (discussing Article 4 of the European Convention on Human Rights). The European Commission on Human Rights has endorsed this interpretation by indicating that: "in addition to the obligation to provide another with certain services, the concept of servitude includes the obligation on the part of the 'serf' to live on another's property and the impossibility of changing his condition." Van Droogenbroeck v. Belgium, 44 Eur. Ct. H.R. (ser.B) at 30 (1980). See also the discussion below of the 2005 judgment of the European Court in Siladian v France. Note that in the United States, the crime of "involuntary servitude" has been specifically linked to "forced labor." *See* United States v. Bradley, 390 F.3d 145 (1st Cir. 2004).

[34] ICCPR, *supra* note 9, art. 4(2).

[35] African Charter on Human and People's Rights, art. 5 G.A. Res. 35/197, 35 U.N. GAOR Supp. No. 48, UN Doc. A/35/48 (June 27, 1981), [hereinafter African Charter] ("Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade torture, cruel, inhumane, or degrading treatment and punishment shall be prohibited.")

[36] American Convention on Human Rights art. 6, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. [hereinafter American Convention] ("No-one shall be subjected to slavery or to involuntary servitude which are prohibited in all their forms, as are the slave trade and trafficking in women.")

[37] European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 4, 1 November 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention] ("No-one shall be held in slavery or servitude.")

[38] *See id.* art. 15(2); *see also* American Convention, *supra* note 36, art. 27(2).

slavery and servitude. In other words, it is not possible for any individual to contract herself or himself into a situation of slavery or servitude.[39]

As detailed by Professor Bassiouni, the principle instruments of international humanitarian law also contain very explicit prohibitions on slavery and the slave trade during situations of armed conflict.[40] In the context of both humanitarian law and human rights law, slavery has been identified as an international crime when committed by private or public officials against any person; as a war crime when committed by a belligerent against the nationals of another belligerent; and as a crime against humanity when committed by a public official against any person.[41]

"Enslavement" is punishable as a crime against humanity under the Statute of the International Criminal Tribunal for the Former Yugoslavia,[42] the International Criminal Tribunal for Rwanda,[43] and the Special Court for Sierra Leone.[44] The establishment of the International Criminal Court has significantly supplemented the international legal framework for prosecuting international crimes in times of conflict and in times of peace—including those involving sexual violence.[45] The International Criminal Court has jurisdiction over genocide, war crimes, crimes against humanity and the crime of aggression.[46] The jurisdiction of the Court is limited to situations where national systems

[39] This issue came before the drafters of the both the 1956 Slavery Convention and the ICCPR in the context of proposals to add the qualification "involuntary" to servitude. The proposal was rejected, in both instances, on the grounds that "it should not be possible for any individual to contract himself into bondage." U.N. Doc. A/2929/33, *cited in* FRANCIS G. JACOBS & ROBIN C.A. WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 77-78 (2d ed. 1996) [hereinafter Jacobs & White, 1996]. The European Commission on Human Rights has confirmed that "[p]ersonal liberty is an inalienable right which a person cannot voluntarily abandon." Report of the Commission in the *Vagrancy Cases*, July 19, 1969, Series B, No. 10, 91, *confirmed by* the European Court of Human Rights *in* De Wilde, Ooms and Versypt v. Belgium, Series A, No. 12 June 18, 1971.

[40] For a full listing of (and detailed commentary on) the provisions of international humanitarian law relating to slavery, forced labor and similar practices, see Bassiouni, *supra* note 11, at 492-517.

[41] Nuremberg Charter art. 6(c), Charter of the Tokyo War Crimes Tribunal Article 5, *cited in* INTERNATIONAL COMMISSION OF JURISTS, COMFORT WOMEN – AN UNFINISHED ORDEAL 169 (1994). *See also* ¶¶ 23-67, Special Rapporteur, Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict, *Update to the Final Report* E/CN.4/Sub.2/2000/21 (submitted by Gay J. McDougall) [hereinafter McDougall Report].

[42] Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) art. 5, S.C. Res. 827, U.N. Doc. S/Res/827 (Nov. 3, 1993).

[43] Statute of the International Criminal Tribunal for Rwanda (ICTR) art. 3, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

[44] Agreement for and Statute of the Special Court for Sierra Leone art. 2 (Jan. 16, 2002) *available at* http://www.sc-sl.org/scsl-statute.html.

[45] For a useful consideration of the ICC's Statute within the context of sexual violence during armed conflict, see McDougall Report, *supra* note 41, ¶¶ 23-43.

[46] Rome Statute of the International Criminal Court, arts. 5(1)(b), 5(2), 6, U.N.Doc A/CONF. 183/9 (July 17, 1998) *available at* www.un.org/law/icc/statute/romefra.htm [hereinafter Rome Statute].

fail to investigate or prosecute, or where they are "unable" or "unwilling" to do so genuinely.[47] The Statute provides for individual criminal responsibility for persons who commit, attempt to commit, order, solicit, induce, aid, abet, assist or intentionally contribute to the commission of a crime within the Court's jurisdiction.[48] Enslavement is also listed as a constituent act of crimes against humanity. The Statute provides that "'[e]nslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children."[49]

B. What Is the Legal Status of the Prohibition on Slavery and the Slave Trade? Has Trafficking Been Assimilated to this Prohibition?

In view of its unequivocal, universal character, the prohibition on slavery is now recognized as a supreme rule of customary international law,[50] a legal obligation *erga omnes*,[51] and part of *jus cogens*—a fundamental norm of international law.[52] However,

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[47] *Id.* art. 17.

[48] *Id.* art. 25.

[49] *Id.* art. 7(2)(c). Note that "trafficking" is not defined in the Statute.

[50] That slavery and the slave trade, in their classic forms are forbidden by customary international law would appear to be beyond serious dispute. Traditional "chattel" slavery has totally disappeared as a legitimate system and State practice, as evidenced by the universal prohibition on slavery, is unequivocal. As Rassam notes, no State dares assert that it does not have an international legal obligation to prohibit slavery. A.Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade under Customary International Law*, 39 VA. J. INT'L L. 311 (1999).

[51] A legal obligation *erga omnes* is considered to be universal in character – giving every State a legal interest in its protection and a capacity to bring suit against another state in the International Court of Justice—irrespective of whether it has suffered direct harm. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1990), ¶ 902. The basis for this doctrine is a statement of the International Court of Justice in the Barcelona Traction case:

> [A]n essential should be drawn between the obligations of a State towards the international community as a whole and those arising vis a vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. … Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide [and] also from the principles and rules the basic human rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law … others are conferred by international instruments of a universal or quasi-universal character.

Barcelona Traction, Light & Power Co., Ltd. (Belgium v. Spain), 1970 I. C. J. 3, ¶¶ 33-34 (Second Phase).

[52] The concept of *jus cogens* is encapsulated in the definition of "peremptory norm of general international law" contained in Article 53 of the 1969 Vienna Convention on the law of Treaties: "… a norm accepted

as Bassiouni notes in his study of *jus cogens* and *obligations erga omnes* in the context of international criminal law, a solid legal basis for identifying both the relevant norms and the consequences of their violation, is yet to be secured.[53] Certainly, in relation to all three categories set out above, there has been a general failure to identify the substantive content of the norm relating to slavery. Does the prohibition, as set out in various legal texts, apply only to traditional "chattel" slavery or can it be interpreted more widely? Is there any evidence that the customary norm has evolved, over time, to encompass other institutions and practices such as debt bondage recognized in international instruments as "slavery-like practices" as well as additional ones such as trafficking? These are critical questions and one which commentators have, thus far, not provided adequate insight into. The following paragraphs seek to analyze the evidence, both historic and contemporary, with a view to determining whether trafficking and related exploitation can, as a matter of law, be rightfully assimilated to slavery—either through interpretation of relevant treaty provisions or through an analysis of the customary law making process.

In terms of interpreting the treaty-based prohibition on slavery, it is important to acknowledge the careful manner by which States have confined the concept of slavery. As noted above, States have meticulously separated the traditional concept of slavery (involving the permanent destruction of an individual's juridical personality)[54] from the range of practices identified as analogous or otherwise similar to slavery. The fact that trafficking was not even identified as an analogous or similar practice but was dealt with through a different set of instruments lends considerable weight to the argument that States never intended the prohibition to extend to this particular practice. An examination of relevant *travaux préparatoires* confirms this position. In relation to the ICCPR, for example, there are clear indications that the reference to the slave trade was

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and recognised by the international community as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties art. 50, May 22, 1969, I.L.C. Yearbook, ii. 247-249, 261, 266. In *Barcelona Traction*, the International Court of Justice indicated that the prohibition on slavery is a *jus cogens* norm and that such norms give rise to obligations *erga omnes*. *See* Barcelona Traction, *id.* at ¶¶ 33-34. *See also*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, ¶ 702 (1987). For a highly relevant discussion of the gendered nature of the doctrine of *jus cogens* see Hilary Charlesworth and Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63 (1993).

[53] M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligations Erga Omnes*, 59 LAW AND CONTEMP. PROB. 63 (1996).

[54] A 1953 report of the U.N. Secretary-General to the Economic and Social Council concluded that in the absence of any precise indication in the *travaux preparatoires* to the 1926 Slavery Convention (which delineates the still-accepted definition), it might reasonably be assumed that the drafters had in mind the power of master over slave recognized in Roman law (*dominica potestas*). The characteristics of this status include its permanence, the absolute nature of the power exercised, the products of labor of the individual becoming the property of the master without any compensation commensurate to the value of the labor; the transferability of ownership; and the fact that it is inherited by descendants of persons holding such status. Report of the Secretary-General on Slavery, the Slave Trade and Other Forms of Servitude, ¶ 36, 1, *cited in* Lassen, *supra* note 11, at 204-205. Drafters of the ICCPR also noted, in the context of discussions on Article 8 of that instrument, that the term 'slavery' implied the destruction of the juridical personality. BOSSUYT, *supra* note 31, at 167. On the concept generally as recognised in Roman law, see W. W. BUCKLAND, A MANUAL OF ROMAN PRIVATE LAW 37 (2d. ed. 1957).

not meant to encompass trafficking in women.[55] It is therefore difficult to argue, even through a comparison of the treatment of trafficked persons with the treatment of traditional slaves,[56] that the treaty-based concept of slavery includes trafficking and related exploitation.

If the prohibition on slavery as contained in relevant treaties cannot be interpreted as including trafficking, then it is necessary to turn to customary international law. It is clear that the relevant customary norm, at least in its original form, was restricted, in the manner set out above, to traditional chattel slavery. As there is not strong evidence that the prohibition extended to practices similar to slavery,[57] it is not useful, at this point, to pursue an argument that trafficking fell within the customary norm on the basis of its status as a slave-like practice. The question to be asked in the present context is therefore a straightforward one. What is the evidence, if any, that trafficking and related exploitation have been assimilated into the concept of slavery in relation to which an international legal prohibition has been confirmed to exist in customary international law? There is no one test for determining the existence of a customary international legal rule. However, it is widely accepted that evidence is required of state practice which itself is based on a sense of legal obligation (*opinio juris*). State practice can be extrapolated from a number of different sources including through policy statements and opinions of government officials, national legislation and judicial decisions and the work of

[55] During the drafting process, a suggestion was made to substitute "trade in human beings" for "slave trade" in order that this provision would cover traffic in women as well. The suggestion was rejected on the grounds that the clause should be only dealing with the slave trade as such, U.N. Doc. E/CN.4/SR.199, ¶ 101(F), ¶ 102(GB), ¶ 103(F), U.N. Doc. E/CN.4/SR.93, p. 3-4, *cited in* BOSSUYT, *supra* note 31, at 165.

[56] A number of commentators have attempted this comparison, arguing that the identifying features of classical slavery are in fact present in many cases of modern-day trafficking. Weissbrodt and Dottridge contend that, "The circumstances of the enslaved person are crucial to identifying what constitutes slavery." For them, the relevant markers include the degree of restricting of the right to movement; the degree of control exercised over the individual's belongings and the existence of informed consent and a full understanding of the nature of the relationship between the parties. Weissbrodt and Dottridge, *supra* note 21, ¶ 19. These markers are subsequently referred to as " … these elements of control and ownership,"—a somewhat misleading characterisation as the identified elements do not actually address ownership *of a person*, a critical aspect of chattel slavery. *Id.* ¶ 20. Subsequent discussion makes clear that for Weissbrodt and Dottridge, the removal of choice and control from an individual and its passing to a third party is in fact the central identifying element. *Id*. Others have looked outside international law for guidance on whether trafficking and related practices are, in fact, true forms of slavery. Freamon, for example, cites the three identifiers integral to the accepted sociological definition of slavery: "(1) the dishonour of the slave in the cultural and social sphere, (2) "natal alienation", or the cutting off of linguistic familial and cultural ties with one's ancestors; and (3) a situation where the slave condition is an alternative to death at the choice of the master." Freamon, *supra* note 7, at 6, *citing* ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH (1982), Freamon quotes from Patterson's conclusion that slavery is therefore: " … the permanent, violent domination of natally alienated and generally dishonoured persons" and not just a legal status but one "structured and defined by the relative power of the interacting persons." While the traditionally accepted legal and sociological identifiers of slavery may be applicable to *some* trafficking cases, *some of the time*, it is submitted that the general practice of trafficking, particularly its typically temporary character, does not fit comfortably within either of these paradigms.

[57] Bassiouni takes a different position on this point, arguing that "the prohibition against slavery *and slavery-related practices* have achieved the level of customary international law and have attained *jus cogens* status." Bassiouni, *supra* note 11, at 445 (emphasis added).

intergovernmental organizations such as the United Nations. It is more important for such practice to be "general and consistent" than for an extended duration[58] and, for the entire test to be satisfied, that it arises out of a sense of legal obligation, not merely through habit or convenience. In the present context therefore, it is necessary to examine the content of the prohibition on slavery presently recognised in customary international law. Does state practice, supported by the necessary level of *opinio juris*, confirm a revised, extended understanding of the concept of slavery to include practices such as trafficking?

The difficulties associated with identifying non-treaty-based human rights norms are well-known. Both state practice and *opinio juris* are rarely capable of objective measurement and partiality of the evaluator will almost inevitably affect his or her assessment. Added to this is the unfamiliarity of many commentators in this field with anything more than the most superficial aspects of the "test" for custom. As a result, current analyses provide little, if any clarity on the place of trafficking within the customary international law prohibition on slavery. Some writers have advanced (generally weak) anecdotal evidence in support of the contention that trafficking and forced prostitution are themselves forms of slavery and therefore prohibited under international law.[59] Others have reached this same conclusion without any analysis or supporting argument.[60] A

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[58] In the *North Sea Continental Shelf Case* the International Court of Justice held that State practice can be short in duration if it has been extensive and virtually uniform. North Sea Continental Shelf Case (F.R.G. v. Denmark), 1969 I. C. J. 3 (Feb. 20).

[59] Lassen, for example, points to resolutions 1981/40 and 1983/30 of the United Nations Economic and Social Council (which refer to "this form of slavery" and "the enslavement of women and children" in the context of trafficking and forced prostitution) as evidence of such practices being subject to the same legal effect as "classical" slavery. Lassen, *supra* note 11, at 210. More recently, Morrison has noted that a resolution of the 1998 session of the Working Group on Contemporary Forms of Slavery explicitly declares that: "trans-border trafficking of women and girls for sexual exploitation is a contemporary form of slavery and constitutes a serious violation of human rights," JOHN MORRISON, THE TRAFFICKING AND SMUGGLING OF REFUGEES: THE END GAME IN EUROPEAN ASYLUM POLICY 61 (2000). The authors of a report published by the Ludwig Boltzmann Institute for Human Rights (Vienna) also rely on the pronouncements of the Working Group to support their claim that: "Trafficking in women and children has been recognised as a form of slavery and the international anti-slavery treaties also cover trafficking." KATHARINA KNAUSS, ANGELIKA KARTUSCH & GABRIELE REITER, COMBAT OF TRAFFICKING IN WOMEN FOR THE PURPOSE OF FORCED PROSTITUTION 23 (2000) [hereinafter KNAUSS et al.].

[60] For example, Farrior refers to the definition of slavery contained in the 1926 Convention and comments that "[v]ictims of trafficking for prostitution would fit this definition." Stephanie Farrior, *The International Law on Trafficking in Women and Children for Prostitution: Making it Live up to its Potential*, 10 HARV. HUM. RTS. J. 213, 221 (1997). Bunch equates *forced prostitution* – the most commonly cited outcome of trafficking – with slavery: "[a]busing women physically … is sometimes accompanied by other forms of human rights abuse such as slavery (forced prostitution.) . . ." Charlotte Bunch, *Transforming Human Rights from a Feminist Perspective*, *in* WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 15 (Julie Peters & Andrea Wolper eds., 1995). Inglis refers to the European Convention's Article 4 prohibition on slavery, servitude and forced labor and, without further examination, states that: "[t]he practice of trafficking clearly fits within this prohibition." Shelley Case Inglis, *Expanding International and National Protections Against Trafficking for Forced Labour Using a Human Rights Framework*, 7 BUFF. HUM. RTS. L. REV. 55 n. 21 (2001). Malone, also without explanation, states that: "[t]he practice of trafficking clearly fits within [the European Convention Article 4] prohibition." Linda A. Malone, *Economic Hardship as Coercion Under the Protocol on International Trafficking in Persons by Organized Crime Elements*, 25 FORDHAM INT'L L. J. 54, 59 (2001). Corrigan asserts that "The United

number of leading authorities including both Professor Bassiouni and the High Commissioner for Human Rights, have argued that trafficking for forced labor and forced prostitution constitute a modern form of slavery.[61] As early as 1974, the U.N. Working Group on Contemporary forms of Slavery expressed the view that trafficking had been recognized as a form of slavery and that "the international anti-slavery treaties also cover trafficking."[62] The Special Rapporteur on Violence Against Women has adopted this position, stating that "[t]he conditions under which many trafficked women are forced to work … must be considered, without a doubt, to be within the realm of slavery and slavery-like practices."[63] Unfortuntely, few such pronouncements have been accompanied by a legal analysis of the claimed norms or by an examination of the consequences of equating trafficking with slavery.

How do these contentions stand up to the traditional methodology for determining customary international law? State practice is, at best, mixed and generally inconclusive. While most states have outlawed slavery, very few have used this prohibition in their efforts to combat trafficking and related practices such as forced prostitution. Conversely, the growing trend to enact national legislation on trafficking may be seen as a tacit acknowledgement, on the part of many States, that existing anti-slavery provisions are inadequate or inappropriate for application to trafficking. Certainly,

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Nations recognises trafficking as a form of slavery and condemns slavery as a violation of human rights". Whilst several of her citations support the second proposition, none provide direct support for her first assertion. Katrin Corrigan, *Putting the Brakes on the Global Trafficking of Women for the Sex Trade: An Analysis of Existing Regulatory Schemes to Stop the Flow of Traffic*, 25 FORDHAM INT'L L. J. 151, 154 (2001).

[61] Professor Bassiouni has referred to trafficking as "this cruel form of modern slavery." M. Cherif Basssiouni, *A Global Perspective on Trafficking, in* IN MODERN BONDAGE; SEX TRAFFICKING IN THE AMERICAS 97 (2002) [hereinafter Bassiouni, Global]. As High Commissioner for Human Rights, Mary Robinson referred to trafficking as " … a subterranean, criminal-dominated … form of modern slavery." Frances Williams, *Action Urged to Combat Traffic in Humans,* FINANCIAL TIMES, 23 July, 2002. She did not, however, make a direct link between trafficking and the prohibition on slavery in her carefully drafted RECOMMENDED PRINCIPLES AND GUIDELINES ON HUMAN RIGHTS AND HUMAN TRAFFICKING, submitted to the Economic and Social Council in 2002. (E/2002/68/Add.1 (2002). *See also* Council of Europe, Opinion of the Steering Committee for Equality Between Women and Men (CDEG) on Parliamentary Assembly Recommendation 1325 91997), *cited in* John Cerone, *State Accountability for the Acts of Non-State Actors: The Trafficking of Women for the Purposes of Sex IndustryWork* (unpublished paper, on file with the author)**.** Weissbrodt and Dottridge state: "The trafficking of persons today can be viewed as the modern day equivalent of the slave trade of the last [sic] century." Weissbrodt and Dottridge, *supra* note 21, at add. 1, ¶ 25. In a subsequent discussion on trafficking, they later conclude, somewhat confusingly, that "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." *Id.* ¶ 33.

[62] U.N. Working Group on Contemporary Forms of Slavery, Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub 2/AC.2/1991/1/Add 1 *in* Knauss et al., *supra* note 59, at 23.

[63] Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, U.N. Doc. E/CN.4/1997/47 (Feb. 12, 1997).

prohibitions on slavery in national legislation have rarely been used to prosecute trafficking cases.[64]

State practice, along with the necessary *opinio juris* can also be adduced from existing treaty law as well as the work of representative organs and organizations such as the United Nations. The following paragraphs provide an overview of relevant developments within the United Nation's main legal and political bodies including the human rights treaty bodies, the Commission on Human Rights and the General Assembly. More limited consideration is given to relatively lower profile, less representative and correspondingly less politically and legally relevant Working Group on Contemporary Forms of Slavery.[65] This overview is followed by a review of recent legal developments outside the traditional human rights field.

The Human Rights Committee has, on a number of occasions, linked trafficking with violations of Article 8 of the ICCPR. In relation to Macau, for example, the Committee expressed its concern at:

> Reports on the extent of trafficking in women in Macau and on the large numbers of women from different countries who are being brought into Macau for the purpose of prostitution. The Committee is extremely concerned at the inaction by the authorities in preventing and penalising exploitation of these women and that, in particular, immigration and police officials are not taking effective measures to protect these women and to impose sanctions on those who are exploiting women through prostitution *in violation of Article 8 of the Covenant*. . . . [66]

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[64] Italy provides one known exception. However, it is relevant to note that Italy has recently enacted specifically anti-trafficking legislation and will therefore presumably be no longer relying on the slavery provisions of its penal code. The United States has also occasionally used its slavery laws to prosecute trafficking-related offences. *See*, *e.g.,* United States v. Ingalls, 73 F.Supp.76 (S.D. Cal. 1947); United States v. Booker, 655 F.2d 562 (4th Cir. 1981). The United States has also recently enacted specific anti-trafficking legislation under which such crimes are now prosecuted. Australia incorporated anti-slavery provisions into its criminal code in the late 1990s, in part to respond to the growing number of Asian women forced into debt bondage in the Australian sex industry. The legislation was unsuccessful in terms of securing prosecutions and in the face of mounting public criticism, the government enacted a specialized anti-trafficking law in 2005.

[65] In attempting to ascertain evidence of *opinio juris* and State practice through the work of the various organs of the United Nations, it is important to recognize at the outset that not all such organs are of equal value as evidentiary source. The author distances herself from the tendency of many writers in this field, to accord primary weight to the deliberations and conclusions of the Working Group on Contemporary forms of Slavery, a sub-group of the Sub-Commission on protection and Promotion of Human Rights with little perceptible influence over the thinking or behavior of States on this issue. *E.g.* Rassam, *supra* note 49, at 340-342.

[66] Concluding Comments on Portugal (Macau), U.N. Doc. CCPR/C/79/Add.77 (1997), ¶ 13. The General Comment also included recommendations to the Government regarding prevention of trafficking, punishment on traffickers and protection for victims. *See also* Concluding Observations on Serbia and Montenegro, U.N. Doc. CCPR/CO/81/SEMO (2004), at para. 16; Concluding observations on Latvia, U.N. Doc. CCPR/CO/79/LVA (2003), ¶ 12.

The Committee does not indicate which part of Article 8 (slavery, servitude or forced labor) is relevant in this context. However, the following statement by the Committee in relation to Italy is more specific:

> It is noted with appreciation that the judiciary has begun to treat offences concerning trafficking in women and others for the purposes of prostitution as acts which can be assimilated to slavery and contrary to international and national law. These statements linking trafficking to slavery are additional to a number of other recent pronouncements of the Committee relating to obligations on state parties in relation to the criminalization of trafficking and protection of trafficked persons.[67]

An examination of the recent practice of the United Nation's relevant political organs reveals a tendency (more lately modified) to link trafficking with slavery. In their consideration of the issue of trafficking, both the General Assembly and the Commission on Human Rights have repeatedly encouraged ratification and implementation of the international slavery conventions.[68] In 1995 the General Assembly decided to focus the next International Day for the Abolition of Slavery (2 December 1996) on the problem of trafficking in human persons, especially women and children.[69] The Commission on Human Rights has identified trafficking in children, sale of children, child prostitution and child pornography as "modern forms of slavery."[70] The Commission also alluded to the slavery conventions and the prohibition on slavery and servitude in its consideration of "contemporary forms of slavery."[71] Member States of the United Nations, meeting in 1995 at the Fourth World Conference on Women, identified the elimination of trafficking as a strategic objective and, in this context, called on governments to "consider the

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[67] *See, e.g.,* Concluding observations on Greece, U.N. Doc. CCPR/CO/83/GRC (2005), ¶ 10; Concluding observations on Kenya, U.N. Doc. CCPR/CO/83/KEN (2005), ¶ 25; Concluding observations on Albania, U.N. Doc. CCPR/CO/82/ALB (2004), ¶ 15; Concluding observations on Finland, U.N. Doc. CCPR/CO/82/FIN, (2004), ¶ 3; Concluding observations on Lithuania, UNM Doc. CCPR/CO/80/LTU (2004), ¶ 14; Concluding Comments on Brazil U.N. Doc. CCPR/C/79/Add.66 (1996) (discussing the positive aspects to Article 8 protection), Concluding Comments on Dominican Republic, U.N. Doc. CCPR/C/79/Add.37 (1995).

[68] *See* G.A. Res. 49/166, 976, U.N. Doc. A/RES/49/166 (Dec. 23, 1994); G. A. Res. 50/167, ¶ 6, U.N. Doc. A/RES/50/167 (Dec. 22, 1995); G. A. Res. 51/66, ¶ 2(a), U.N. Doc. A/RES/51/66 (Dec. 12, 1996); G. A. Res. 52/98, ¶ 3(a), U.N. Doc. A/RES/52/98 (Dec. 12, 1997); U.N. Commission on Human Rights, Res. 1996/24, ¶ 2(a), U. N. Doc. E/CN.4/1996/24 (April 19, 1996); U.N. Commission on Human Rights, Res. 1997/19, ¶ 3(a), U.N. Doc. E/CN.4/1997/19 (Apr. 11, 1997); U.N. Commission on Human Rights, Res. 1998/30, U.N. Doc. E/CN.4/1998/30 (Apr.17, 1998). It is difficult to determine whether the elimination of this reference in resolutions after 1997 (Assembly) and 1998 (Commission) is significant.

[69] G. A. Res. 50/167, ¶ 12, U.N. Doc. A/RES/50/167 (December 22, 1995).

[70] Commission on Human Rights, *Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography*, Annex Res. 1992/74, U.N. Doc. E/CN.4/Sub.2/1991/41 (Mar. 5, 1992).

[71] Commission on Human Rights, Res. 1999/46, preamble (Apr. 27, 1999). In the same resolution, the Commission called upon States to consider ratifying, if they have not already done so, the pertinent international instruments relating to slavery, the slave trade and slavery-like practices.

ratification and enforcement of international conventions on trafficking in persons *and on slavery*."[72]

In this connection it is relevant to note the readiness of the Sub-Commission on Promotion and Protection of Human Rights (and, to a lesser extent, its parent body, the Commission on Human Rights) to characterize trafficking as a slavery-like practice and as a contemporary form of slavery. The Sub-Commission's Working Group of the Sub-Commission on Contemporary Forms of Slavery is the only U.N. body with a specific mandate to deal with trafficking.[73] That mandate requires the Working Group to "review developments in the field of the slave-trade in all their practices and manifestations including the slavery-like practices of apartheid and colonialism, the traffic in persons and the exploitation of the prostitution of others as they are defined in the Slavery Convention of 1926, the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956 and the Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others."[74] Since its first meeting in 1975, the Working Group has not been overly constrained by its narrow mandate and has used the definitional uncertainties surrounding the concept of slavery to examine a broad range of human rights questions. In recent years these have included issues as diverse as child labor, incest, early marriage, debt bondage, child soldiers, sex tourism, reservations to the Women's Convention and organ transplants. The Working Group has, however, repeatedly and consistently linked trafficking and forced prostitution with slavery—albeit with little or no legal justification or consideration of the implications of this characterization.

The recently concluded Protocol on Trafficking in Persons especially Women and Children Supplementing the United Nations Convention on Transnational Organized Crime includes specific reference to slavery in its definition of trafficking. The definition refers to movement, through various means, for the purposes of exploitation (including, at a minimum, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labor or services, *slavery or practices similar to slavery*, servitude or the removal of organs).[75] Several observations are warranted here. First, it could be argued that, conceptually, the definition does not seem to leave room for the possibility that trafficking itself is a form of slavery: slavery is identified as one of several end-purposes for which a person may be trafficked. Second, the kind of exploitation that is

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[72] Fourth World Conference on Women, Beijing, Chapter IV, Strategic Objective 131(a) (Sept. 8, 1995) (emphasis added).

[73] The establishment of the Working Group can be traced back to a 1966 resolution of the ECOSOC referring to the Commission on Human Rights "the question of slavery and the slave trade in all their practices and manifestations." U.N. Econ. & Soc. Council Res. [ECOSOC] 1126 (XLI) (1966). In 1974, a standing committee of experts, currently known as the Working Group on Contemporary forms of Slavery, was established to deal with this issue. The Working Group is composed of five members of the Sub-Commission on Promotion and Protection of Human Rights. It meets once a year, immediately before the Sub-Commission's annual session.

[74] Sub-Commission Res. 11 (XXVII), Economic and Social Council Decision 16 (LVI) (May 17, 1974).

[75] Trafficking Protocol, *supra* note 1, art. 3.

traditionally linked to trafficking such as sexual exploitation and forced labor are separately identified from slavery and slave-like practices, thereby inferring that they are distinct from each other. On balance, however, the reference to slavery and slave-like practices in an instrument that deals solely and specifically with trafficking would appear to be sufficient to override these potential caveats. It could therefore be convincingly argued that the inclusion of slavery and slave-like practices in the definition of trafficking is strong evidence of state practice supported by *opinio juris* recognising a substantive link between trafficking and slavery.

The 1998 ILO Convention on the worst forms of child labor,[76] calls for "immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency"[77] including "*all forms of slavery or practices similar to slavery* such as the sale and trafficking of children, debt bondage and servitude and forced or compulsory labour."[78] It is possible to interpret this provision as a recognition that at least one of the listed practices is in fact slavery, rather than the less legally significant "similar to slavery."

The strongest and most recent legislative connection between trafficking and slavery is provided by the European Convention on Trafficking in Human Beings,[79] adopted by the Committee of Ministers of the Council of Europe in May 2005 with the preamble to that Convention specifically recognizing that "trafficking can lead to slavery."[80] Also significant is the 2000 Charter of Fundamental Rights of the European Union.[81] Article 5 of the Charter, entitled "prohibition on slavery" includes a specific prohibition on trafficking in human beings.[82]

Current developments in international humanitarian law and international criminal law also provided a welcome entry point for arguments, including those advanced by

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[76] General Conference of the International Labour Organization, Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (June 17, 1999) [hereinafter Child Labour Convention].

[77] *Id*. art. 1.

[78] *Id*. art. 3(a) (emphasis added).

[79] Committee of Ministers, Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings,* CM(2005)32 Addendum 1 final, 3 May 2005, preamble [hereinafter Council of Europe Convention].

[80] *Id.* preamble.

[81] The Charter of Fundamental Rights of the European Union (http://www.europarl.europa.eu/charter/pdf/text_en.pdf) is not a treaty but was "solemnly proclaimed" by the European Commission, the European Parliament and the Council of the European Union in December 2000. Most, but not all of its provisions reflect the principles and rules contained in the European Convention on Human Rights.

[82] "No-one shall be held in slavery or servitude. No one shall be required to perform forced or compulsory labour. Trafficking in Human Beings is prohibited." *Id*.

Professor Bassiouni,[83] that contemporary situations of trafficking are connected, or even legally equivalent to slavery. One of the most significant of these developments is a decision of the International Criminal Tribunal for the Former Yugoslavia (ICTY) which related to a charge of enslavement as a crime against humanity.[84] In this instance, the Trial Chamber found the count of enslavement proved and, in its analysis, identified a number of elements to be of particular relevance.[85] Many of these elements are typically present in many reported cases of trafficking. The Appeals Chamber in the same case confirmed that the indica of slavery included "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour."[86] It further noted that consent is not a relevant element of the crime as it is "often rendered impossible or irrelevant by a series of influences such as detention, captivity or psychological oppression."[87]

Another recent and helpful boost to the argument that trafficking has become integrated into the international prohibition on slavery is provided by the Statute of the International Criminal Court (ICC). The ICC's Statute specifically includes both "enslavement" and "sexual slavery" as crimes. Enslavement is defined as "the exercise of any or all of the powers attaching to the right of ownership over a person." Enslavement includes "the exercise of such power in the course of trafficking in persons, in particular women and children."[88] Trafficking in this context is not defined. While the term "sexual slavery"[89] is also not defined, the accompanying guide to interpreting crimes within the ICC's ambit defines the *actus reus* of sexual slavery as:

> 1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending, or bartering such a person or persons or by imposing on them a similar deprivation of liberty.
> 2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.[90]

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[83] Bassiouni *Global Perspective*, *supra* note 61.

[84] Prosecutor v. Kunarac et al., Case No. IT-96-23 T & IT-96-23/1-T, Judgment of Trial Chamber II (Feb. 22, 2001) [hereinafter: Kunarac Trial Chamber Judgment]. *See also* Prosecutor v. Kunarac et al., Case No. IT-96-23 & IT-96-23/1-A, Judgment on Appeal, ¶¶ 106-124 (June 12, 2002) [hereinafter Kunarac Appeals Chamber Judgment].

[85] *Id.,* Summary of the Judgment.

[86] Kunarac Appeals Chamber Judgment, *supra* note 82.

[87] *Id.*

[88] Rome Statute, *supra* note 41, art. 7(2)(c).

[89] Rome Statute, *supra* note 41, arts. 7(1)(a), 8(2)(b)(xxii), 8(2)(e)(vi).

[90] Report of the Preparatory Commission for the International Criminal Court, Addendum, *Finalised Draft Text of the Elements of Crimes*, U.N. Doc. PCN ICC/2000/INF/3/Add.2 (July 6, 2000).

Notably, the judgment of the ICTY referred to above goes even further than the ICC provisions relating to both enslavement and sexual slavery in its determination that commercial exchange and deprivation of liberty are not essential elements of the crime of enslavement.[91] In *Siliadin v France*, the European Court of Human Rights returned the discussion to the core definitional element of one exercising a genuine right of ownership over another—thereby reducing that person to an object. In this case, the Court held that being deprived of personal autonomy, even in the most brutal way, is not, of itself, sufficient to constitute slavery.[92]

C. Conclusion: Trafficking as Slavery

What conclusion can be drawn from this analysis of the customary international legal prohibition on slavery? The first and most certain finding is that in its original form, this customary norm included only "classical" or "chattel" slavery. Such practices connect directly to the minimum core content of the norm in relation to which no dispute exists. Certainly the international legal position is more equivocal in relation to the range of institutions and practices linked to but not identified as slavery. Despite evidence of a widening of the norm to embrace practices that go beyond chattel slavery, it remains difficult to sustain an absolute claim that trafficking, in all its modern manifestations, is included in the customary and *jus cogens* norm prohibiting slavery and the slave trade. Egregious cases of trafficking, involving clear elements of ownership not limited in time would provide the strongest base for arguing the existence of slavery and the consequential application of the slavery norm. More generally, a convincing argument could possibly be made that the legal prohibition on an apparently limited list of practices "similar" or "analogous" to slavery has been extended, through the necessary level of State practice and *opinio juris* to include modern trafficking practices—particularly those involving children or debt bondage.[93] The decision of the European Court in *Siliadin v. France*[94] strengthens this position by extending the possibility of certain trafficking situations being characterised as servitude. This development goes well beyond the simple recognition of trafficking as a "contemporary form of slavery" which, while

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[91] Kunarac Trial Chamber Judgment, *supra* note 82 ¶¶ 542-543. For an important discussion of the consequences of the ICC adopting this narrower definition of sexual slavery, see Women's International War Crimes Tribunal, Trial of Japanese Military Sexual Slavery, Case No. PT-2000-I-T, ¶¶ 620-631 (Dec. 4, 2001).

[92] Eur. Ct. H.R. *Siliadin v France*, (Appl. No. 73316/01, judgment of 26 July 2005. In this case the Court held that the applicant had been held in "servitude" within the meaning of Article 4 of the ECHR and that she had also been subject to forced labor. For a detailed analysis of the case including of the Court's finding that the State had breached its positive obligation to provide specific and effective protection against violations of the Convention, see H. Cullen, Siliadin v. France: *Positive Obligations under Article 4 of the European Convention on Human Rights*, HUMAN RIGHTS LAW REVIEW (2006).

[93] This interpretation is strengthened by the reference in the ILO Worst Forms of Child Labor Convention to "… all forms of slavery and practices similar to slavery, such as the sale and trafficking of children." Child Labor Convention, *supra* note 76, art. 3(a).

[94] *Supra* note 92.

perhaps important in rhetorical terms, is without particular legal significance. In relation to each situation: trafficking as slavery and trafficking as "similar to slavery," it is clear that international law is in a state of flux and that changes to the customary norms are currently underway. The extent and effect of those changes remains to be seen. However, on balance, and taking into account recent developments in international criminal law, it appears that Bassiouni's position, linking the two practices and their relevant legal frameworks, is on the ascendancy.

II. The Prohibition on Forced and Compulsory Labor and Debt Bondage

"Forced labor" is widely accepted as a typical end-purpose of trafficking including in the international legal definition of trafficking contained in the Trafficking Protocol. Debt bondage (also referred to as "bonded labor") is commonly employed as a means of compelling trafficked persons to enter and remain in exploitative and abusive work situations. The following paragraphs examine the origin and content of the international legal prohibition on forced labor and debt bondage as well as their connections to both slavery and trafficking.

A. International and Regional Instruments Relevant to Forced Labor and Debt Bondage

The 1926 Slavery Convention was the first international legal instrument to refer to the (undefined) practices of forced and compulsory labor. States Parties to the Convention undertook to adopt all necessary measures to prevent compulsory or forced labor from *developing into conditions analogous to slavery*.[95] The definition of forced or compulsory labor which was first articulated in the 1930 ILO Forced Labour Convention is still widely accepted.[96] Under the 1930 Convention, the term refers to "all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[97] The prohibition contains a subjective element (*involuntariness*) as well as objective requirements which are met when the State or a private individual orders personal work or service and a punishment or sanction is threatened if the order is not obeyed.[98] The 1930 Convention requires the criminalization of forced or compulsory labor[99] in all but a limited range of circumstances and imposes a duty on States Parties to suppress the use of such practices within the shortest possible period[100] as well as to prosecute violations.[101] The ILO's 1957 Abolition

[95] 1926 Slavery Convention, *supra* note 16, art. 5.

[96] The ILO definition would apply, for example, to the reference to forced labor contained in the recently concluded Trafficking Protocol, *supra* note 1.

[97] Convention Concerning Forced or Compulsory Labor (ILO No. 29) (June 28, 1930), INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS Vol I, 115-124, art. 2 [hereinafter ILO Convention No. 29]. The Convention has been ratified by 165 States as of April, 2005.

[98] NOWAK, *supra* note 17, at 150, and sources cited.

[99] ILO Convention No. 29 *supra* note 93, art. 25.

[100] *Id*. art. 1.1.

of Forced Labor Convention[102] goes further, obliging States Parties to take effective measures to secure the immediate and complete abolition of forced or compulsory labor.[103] States are to "[s]uppress and not make use of any form of forced or compulsory labor" which is used as a means of political coercion and economic development as well as racial, social, national or religious discrimination."[104] Under both Conventions, States Parties are held accountable for the actions of corporations and private persons.[105] The Declaration on Fundamental Principles and Rights at Work, adopted by the International Labour Conference in 1998,[106] reiterates the obligation, on all ILO members, whether or not they have ratified the relevant conventions, to respect, promote and realize the principles concerning fundamental rights including the elimination of forced or compulsory labor. The ILO's Governing Body has confirmed the application of the relevant conventions to forced labor exacted by private bodies and individuals, including slavery, bonded labor and certain forms of child labor.[107]

The Universal Declaration on Human Rights indirectly addressed the issue of forced and compulsory labor in its provision that "[e]veryone has the right to work, to free choice of employment, to just and favourable conditions of work."[108] The right to employment which an individual freely chooses and accepts is also guaranteed in the International Covenant on Economic, Social and Cultural Rights.[109] The International Covenant on Civil and Political Rights makes direct reference to forced or compulsory labor in connection with its prohibition on slavery and servitude. Under the terms of this instrument, and subject to a number of carefully circumscribed exceptions, none of which

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[101] *Id.* art. 25.

[102] Abolition of Forced Labor Convention (ILO No. 105), June 25, 1957, 320 U.N.T.S. 291.

[103] *Id.* art. 2.

[104] *Id*. art. 1.

[105] ILO Convention No. 129, *supra* note 93, art. 4(1): "The competent authority shall not impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations." ILO Convention No. 105 does not contain any specific reference to private parties. However, its application to private parties may be inferred from the obligation of States parties to suppress any form of forced or compulsory labor as a means of mobilizing and using labor for purposes of economic development, and as a means of labor discipline. *Id.*, art. 1, ¶¶ (b), (c).

[106] International Labour Conference (ILO), Declaration on Fundamental Principles and Rights at Work, 86th Sess., Geneva, June 18, 1998, 37 I.L.M. 1233.

[107] ILO Governing Body report, para 32, ILO Doc. GB 265/2 (1996), *cited in* Weissbrodt and Dottridge, *supra* note 21, Add. 1 ¶ 11.

[108] Universal Declaration of Human Rights, *supra* note 21, art. 23.

[109] International Covenant on Economic, Social and Cultural Rights art. 6, Dec. 16, 1966, 993 U.N.T.S. 3. The Covenant also refers, in its Article 7, to the entitlement of everyone to "just and favorable conditions of work."

would be relevant in the present context,[110] "no-one shall be required to perform forced or compulsory labor."[111] The ICCPR's prohibition on forced and compulsory labor is reflected in all the major regional human rights treaties except the African Charter.[112] In relation to the relevant article of the European Convention, the European Commission has indicated that the concept of forced or compulsive labor involves two necessary and distinct elements as follows: " . . . that the work or service is performed by the worker against his will and, secondly, that the requirement that the work or service be performed is unjust or oppressive or the work or service itself involves avoidable hardship."[113]

What about debt bondage? This practice 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.[114]

Unlike forced labor, the definition makes no reference to the concept of voluntariness. It would appear, therefore, that international law does not envisage the possibility of an individual being able to consent to debt bondage. The Convention identifies debt bondage as a practice which is *similar to slavery*[115] and defines a victim of debt bondage as "*a person of servile status.*"[116] States Parties are required to take the necessary

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[110] For further discussion on these exceptions, see BOSSUYT, *supra* note 31, at 169-185 and NOWAK, *supra* note 17, at 151-157.

[111] ICCPR, *supra* note 29, art. 8(3).

[112] The European Convention, *supra* note 37 art. 4(2); and the American Convention, *supra* note 36 arts. 6(2) and 6(3). Note that the European Commission on Human Rights has determined that the prohibition on forced labor contains two essential elements: "firstly, that the work is performed against the complainant's will and secondly, that the work entail unavoidable hardship to the complainant", X v. Federal Republic of Germany, Eur. Comm'n H. R. 46 (1974). While the African Charter, *supra* note 35, does not specifically prohibit forced or compulsory labor, it does, in Article 15, protect the rights of all persons to "equitable and satisfactory working conditions."

[113] Iverson v. Norway, 1963 Y.B. Eur. Conv. On H.R. 278, 328 (Eur. Comm'n on H.R.).

[114] Supplementary Convention, *supra* note 20, art. 1(a). It should be noted that while the legal concept of debt bondage is clearly an important part of the anti-trafficking framework, its definition is limited in a number of important respects. The exploitative aspect of much cross-border trafficking, particularly into wealthy, difficult-to-access countries, is often the size of the original debt for travel. For example, a Thai woman may incur a debt of up to $U.S. 50,000 for being taken to work in a brothel in Australia. The value of the services she is providing may well be assessed at commercial rates and applied towards liquidation of the debt. The length and nature of the services may also be defined and known to her. However, under the definition provided above, this would not be considered a situation of debt bondage, even if the original debt were twice this amount.

[115] *See id.* § III.

[116] *Id.* art. 7(b).

legislative and other measures to ensure the abolition of debt bondage[117] and are to criminalize the act of "inducing another person to place himself or a person dependent upon him into the servile status resulting from [debt bondage]."[118]

Debt bondage is said to be included within the prohibition on servitude contained in the International Covenant on Civil and Political Rights[119] and is identified as one of the "worst forms" of child labor prohibited by the Worst Forms of Child Labour Convention.[120] It is argued that debt bondage has, over time, been assimilated into the broader notion of forced labor and therefore within the ambit of ILO Convention No. 29[121] as well as, presumably, the ICCPR. There is also some limited support for the contention that extremely low wages are themselves a cause of both debt bondage and forced labor.[122]

B. The Distinction Between Slavery and Forced Labor

What is the difference between slavery and forced labor? A separation of these two concepts is clearly important. As noted above, the characterisation of a situation or set of circumstances as "slavery" has very particular legal consequences as well as strong political and moral overtones. Forced or compulsory labor, on the other hand, while clearly prohibited under international law, does not carry anywhere near the same weight of approbation. The distinction between these two concepts has always been unclear in both theory and practice—although the history of their respective prohibitions confirms that States did perceive (and sought to uphold) a difference between them. The 1926 Slavery Convention, for example, requires States Parties to take all necessary measures to "prevent compulsory or forced labour from developing into conditions analogous to slavery."[123] Some commentators have argued that, unlike slavery which has traditionally been defined with reference to *legal ownership*, the core definitional feature of forced/compulsory labor is, as noted by the European Court, its *involuntariness.*[124] Some view the distinction as being one of degree, with the label "slavery" being reserved for the most egregious cases of economic exploitation: "[slavery] is completely unacceptable

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[117] *Id.* art. 1.

[118] *Id.* art. 6.2.

[119] NOWAK, *supra* note 17, 148. This interpretation is supported by the Human Rights Committee's consideration of issues of bonded labor. *See, e.g.,* U.N. Human Rights Committee, *Concluding Observations on India*, U.N. Doc. CCPR/C/79/Add.81, ¶ 29 (Apr. 8, 1997).

[120] Child Labor Convention, *supra* note 76, art. 3(a).

[121] Weissbrodt and Dottridge, *supra* note 21, ¶ 39.

[122] Weissbrodt and Dottridge take this position, citing a decision of the Supreme Court of India that any workers who were paid less than the minimum wage were bonded laborers. Weissbrodt and Dottridge, *supra* note 21, ¶ 17.

[123] 1926 Slavery Convention, *supra* note 16, art. 5.

[124] *See, e.g.,* Nowak, *supra* note 17, at 149.

while [forced labor] is merely undesirable."[125] For others, the character of the oppressor is definitive: slavery is practiced by private individuals; forced or compulsory labor is exacted by the State or government.[126] The temporal factor has also been deemed relevant: slavery is a continual state of being; forced labor can arise incidentally or on a temporary basis.[127] It is unclear whether the recent, tentative linking of slavery and forced labor in the Statute of the ICC will operate to alter this well established uinderstanding of a separation between the two concepts.[128]

C. The Relationship Between Trafficking, Forced Labor and Debt Bondage

The relationship between trafficking and forced labor would appear to be an obvious one. However, while some commentators have casually linked trafficking with forced labor,[129] the international prohibition on forced and compulsory labor has, thus far, not been directly invoked at the international or regional level in relation to a situation of trafficking, forced prostitution or exploitation of prostitution. Clearly the reluctance to

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[125] Bassiouni, *supra* note 11, at 468.

[126] *See* Lassen, *supra* note 11, at 205 (citing an address by the Secretary of the Anti-Slavery Society: "forced labour is exaction of involuntary labour by the Government, whereas slavery is exaction of involuntary labour by an individual springing from that individuals right of property in the person compelled to work"). Nowak implicitly endorses this view with his comment that the prohibition on forced or compulsory labor as contained in Article 8 of the ICCPR is directed primarily at States—that in contrast with the prohibition on slavery, the *State* is being prohibited from compelling an individual to work against his or her own will. Nowak 1993, *supra* note 17, at 150 (emphasis added). Gomien et al. uphold this interpretation in the context of their examination of the European Convention's prohibition on forced and compulsory labor: "The concepts of forced or compulsory labour are distinguishable in the sense that they may refer to duties imposed by the State but not by another private subject," DONNA GOMIEN, DAVID HARRIS, & LEO ZWAAK, LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER 121 (1996).

[127] JACOBS AND WHITE, *supra* note 39, at 69. The authors go on to argue that the wording of the prohibition on slavery contained in Article 4.1 of the European Convention (*supra* note 36) indicates that both slavery and servitude are conceived of as questions of status. European Convention, *supra* note 37. By contrast, the prohibition on forced or compulsory labor contained in Article 4.2.: "is intended to protect persons who are at liberty." *Id.* This is also the position taken by the authors of the official commentary to the Charter of Fundamental Rights of the European Union: "[the prohibition on] forced or compulsory labour is intended to protect people who are at liberty. In contrast to slavery and servitude, which are continuing states, forced labour may arise incidentally or on a more temporary basis." EU Network of Independent Experts on Fundamental Rights, COMMENTARY OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, (2006) at 57, available from: [http://ec.europa.eu/justice_home/doc_centre/rights/charter/doc_rights_charter_en.htm#network_commentary].

[128] The Elements of the Crime Against Humanity of Enslavement refer to the perpetrator "exercising any or all of the powers attaching to the right of ownership such as by purchasing, selling, lending, or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labor or otherwise reducing a person to servile status as defined in the [1956] Convention." Rome Statute *supra* note 46, art. 7(1)(c).

[129] Farrior, for example, sets out the ILO definition of forced labor and comments, without further analysis, that: "[t]his definition may be construed as applicable to persons who have been trafficked."

identify typical end results of trafficking, particularly sex work, as labor is one reason for this failure to mount what would appear to be a fairly obvious line of attack. Another complicating issue could be presented by the concept of voluntariness which, as noted by the European Court, is central to the definition of forced labor.[130] Can someone consent to or voluntarily enter into a coercive labor situation? It has been argued that an individual could be identified as a victim of trafficking for forced labor if that person was *not* fully informed as to the exploitative nature and coercive conditions of the work situation and was therefore unable to offer her labor voluntarily.[131] It follows from this line of argument that a fully informed individual may opt to work in exploitative circumstances "because other options are less socially and economically attractive."[132] In such a case, there could be no forced labor because there is no true "force." Whilst this approach is appealing for its apparent simplicity, application would not be particularly easy. How can meaningful consent be ascertained? On which party should the burden of proving consent rest? Could a finding of meaningful consent serve as a barrier to prosecution of trafficking-related offences such as restriction on freedom of movement, unsafe working conditions and violence? Ultimately, is not the notion of consent to coercion counter-intuitive? These issues are yet to be explored in any depth and are unlikely to be resolved unless and until the international bodies charged with overseeing the various instruments outlined above make and explore the implications of a connection between trafficking and forced labor. A similar situation exists with regard to debt bondage. While the relationship between trafficking and debt bondage is both intuitive and empirically justified, little attention has been given to exploring the implications of this connection.

Conclusion: Trafficking as a Violation of International Human Rights Law

There is an inescapable link between trafficking and international human rights law. As noted in the introduction to this Chapter, trafficking goes to the very heart of what human rights law is trying to prevent. The devil, however, is in the details. Ultimately, if we want to change behavior (surely the central goal of the international human rights project), then it is necessary to apply law to the problems it is supposed to help solve. This presupposes that we know, with some degree of certainty, what the rules actually are. States must understand what is required of them before it becomes possible for these

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[130] Farrior, *supra* note 60, at 223. See the Van der Mussele case where the European Court considered the question of prior consent in relation to a charge of forced labor. The Court concluded, *inter alia*, that the giving of prior consent to what could potentially be called 'forced labor' was not, of itself, conclusive. However, in a situation where prior consent was given, a finding of forced labour required: "a considerable and unreasonable imbalance" between the aim pursued and the obligations accepted as a condition of achieving that. In determining whether such imbalance existed, the Court considered whether the service in question imposed a "burden which was so excessive or disproportionate … that [it] could not be treated as having been voluntarily accepted." Van der Mussele v. Belgium, 37 Eur. Ct. H.R. (ser. A) at 37-40 (1983).

[131] Inglis, *supra* note 60, § D. This same point is made (in identical language) in Malone, *supra* note 60, at 62.

[132] Inglis, *supra* note 60, § D. This same point is made (again in identical language) in Malone, *supra* note 60, at 63.

same requirements to influence their decision-making. In relation to trafficking and human rights, we know there are laws but we know them only in the most general terms. Very rarely can we actually apply those laws easily to real situations, involving real people in real countries. This lack of rigor, this absence of concrete detail, has provided a welcome escape clause for governments who, naturally enough, have other things on their mind than human rights. As long as the law remains unclear, States can keep arguing about it. As long as the law remains unclear, States will not be brought to task for failing to apply it.

Linking trafficking to widely accepted international legal principles—principles that are also part of national and international legal traditions—is an important step in the process of normative clarification. As Professor Bassiouni's work continually reminds us, the prohibitions on slavery, the slave trade, servitude, forced labor and debt bondage are amongst the oldest and least ambiguous of all international human rights laws. Their relevance to the trafficking context is indisputable. Recent legal and policy developments, not least those in Professor Bassiouni's field of international criminal law, have provided a solid foundation and justification for the application of these prohibitions by international, regional and national legal systems. Such application would, without a doubt, contribute substantially towards ending impunity for traffickers and securing much overdue justice for victims.