

April 2020

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### Recommended Citation

Alice Edwards, Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor, 36 Denv. J. Int'l L. & Pol'y 9 (2007).

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# TRAFFIC IN HUMAN BEINGS: AT THE INTERSECTION OF CRIMINAL JUSTICE, HUMAN RIGHTS, ASYLUM/MIGRATION AND LABOR

ALICE EDWARDS\*

## I. TRAFFICKING IN CONTEXT

Trafficking in human beings is a worldwide phenomenon that affects the lives of hundreds of thousands, if not millions, of people each year.<sup>1</sup> The United Nations Office on Drugs and Crime (UNODC) reports that human beings are trafficked from 127 source countries into 137 destination countries, across all geographical regions.<sup>2</sup> Over the past decade, widespread attention has been paid to this issue. Governments in ever increasing numbers have adopted laws, policies and programs to combat and to criminalize trafficking, as well as, in some instances, to offer protection to its victims.<sup>3</sup> International organizations and bodies with mandates over transnational organized crime, refugees, migration, human

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1. Accurately determining the number of victims of trafficking is difficult. According to the US Department of State, between 600,000 – 800,000 individuals are trafficked annually. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 6 (2005), available at <http://www.state.gov/documents/organization/47255.pdf>. On the problem of collating accurate statistics, see, e.g., Guri Tyldum & Anette Brunovskis, *Describing the Unobserved: Methodological Challenges in Empirical Studies on Human Trafficking*, INT'L MIGRATION, Issue 1/2, at 17, 18 (2005) (introducing special combined issue on empirical research); ANTI-HUMAN TRAFFICKING UNIT, UNITED NATIONS OFFICE ON DRUGS AND CRIME, TRAFFICKING IN PERSONS: GLOBAL PATTERNS 43-45 (2006), available at [http://www.unodc.org/pdf/traffickinginpersons\\_report\\_2006ver2.pdf](http://www.unodc.org/pdf/traffickinginpersons_report_2006ver2.pdf).

2. ANTI-HUMAN TRAFFICKING UNIT, *supra* note 1, at 17.

3. See, e.g., Bernadette McSherry & Susan Kneebone, *Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights*, 12 INT'L J. HUM. RTS. 67 (2008); Kellie Brennan, Comment, *The New Thirteenth Amendment: America's Fight Against International Human Trafficking*, 23 IMMIGR. & NAT'LITY L. REV. 643, 651, 658 (2002); [2 National Texts] COUNCIL OF EUROPE, TRAFFICKING IN HUMAN BEINGS: COMPILATION OF THE MAIN LEGAL INSTRUMENTS AND ANALYTICAL REPORTS DEALING WITH TRAFFICKING IN HUMAN BEINGS AT INTERNATIONAL, REGIONAL AND NATIONAL LEVELS (2001), available at [http://www.coe.int/t/dg2/trafficking/campaign/Source/EG2000-2rev1\\_en.pdf](http://www.coe.int/t/dg2/trafficking/campaign/Source/EG2000-2rev1_en.pdf).

rights or labor have issued statements or guidelines on trafficking, or have embarked upon deterrence, prevention, or protection programs at the field level.<sup>4</sup> Non-governmental organizations have taken up the issue with fervor,<sup>5</sup> while the academy has studied it from a range of disciplinary perspectives. The issue remains complex, not least due to the large number of legal instruments which touch upon obligations relating to trafficking and the associated international agencies that this implicates.

This article explores the issue of trafficking in human beings from four cross-cutting and intersecting areas of international law: criminal justice, human rights, asylum/migration, and labor. It is argued that trafficking in human beings is a complex phenomenon that cannot be readily understood by focusing on only one of these areas of study. This may seem obvious, yet many international and government agencies and individuals working on the issue of human trafficking come from isolated and distinct disciplines. At an international level, various United Nations (UN) and regional bodies view human trafficking with a particular perspective in mind, usually dictated by the scope and limits of their mandates. While there has been an improved level of coordination between different UN organizations over the last five years or so in relation to trafficking, it appears to have occurred on an *ad hoc* basis, and without the designation of a lead (or central) authority. Many inter-governmental or inter-agency working groups and bodies lack legal personality, transparency, or any implementation mandates. Moreover, international instruments on trafficking – such as those on slavery, migrant workers, refugees/asylum, women's rights, children's rights, forced labor or transnational organized crime – offer a patchwork tapestry that has yet to connect all the dots or to fill all the gaps. Rarely are individual instruments comprehensive or sufficiently inter-connected. Even when an instrument incorporates provisions touching upon a number of these areas of law, it is still usually weighted heavily in favor of one of them.

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4. See Division for the Advancement of Women, U. N. Dep't of Int'l Econ. & Soc. Affairs, *The United Nations Response to Trafficking in Women and Girls*, at 5, U.N. Doc. EGM/TRAF/2002/WP.2 (Nov. 8, 2002).

5. See AMNESTY INTERNATIONAL, KOSOVO (SERBIA AND MONTENEGRO): "SO DOES IT MEAN THAT WE HAVE THE RIGHTS?" PROTECTING THE HUMAN RIGHTS OF WOMEN AND GIRLS TRAFFICKED FOR FORCED PROSTITUTION IN KOSOVO 2 (2004), available at <http://web.amnesty.org/library/Index/ENGEUR700102004>; ANTI-SLAVERY INTERNATIONAL, SUB REGIONAL PROJECT ON ERADICATING CHILD DOMESTIC WORK AND CHILD TRAFFICKING IN WEST AND CENTRAL AFRICA 1-2 (2003), available at <http://www.antislavery.org/homepage/resources/Code%20of%20Conduct%20English%202003%20for%20PDF.pdf>; HUMAN RIGHTS WATCH, A MODERN FORM OF SLAVERY: TRAFFICKING OF BURMESE WOMEN AND GIRLS INTO BROTHELS IN THAILAND (1993), <http://www.hrw.org/reports/1993/thailand>; HUMAN RIGHTS WATCH, BORDERLINE SLAVERY: CHILD TRAFFICKING IN TOGO 6 (2003), available at <http://hrw.org/reports/2003/togo0403/togo0403.pdf>; HUMAN RIGHTS WATCH, HOPES BETRAYED: TRAFFICKING OF WOMEN AND GIRLS TO POST-CONFLICT BOSNIA AND HERZEGOVINA FOR FORCED PROSTITUTION 4-5 (2002), available at <http://www.hrw.org/reports/2002/bosnia/Bosnia1102.pdf>; see also Marina Tzvetkova, *NGO responses to trafficking in women*, in GENDER, TRAFFICKING, AND SLAVERY 60 (Rachel Masika ed., 2002).

Meanwhile, national governments have tended to approach trafficking in human beings principally from a criminal justice/prosecution or an immigration perspective, the latter in vigorous and increasing attempts to control irregular migration. It is widely acknowledged that lack of or inadequate support and coordination between different branches of government is one of the major obstacles to the effective prevention of and response to trafficking at the national level. Where police, immigration services and community services do not communicate or cooperate, prosecutions collapse. This may occur because, for example, victims are not given the type of protection or stability they need and may refuse to testify. Similarly, immigration or border control measures that stop potential trafficking victims from boarding planes or crossing borders do little to curb the rate of trafficking, but rather push back potential victims to be trafficked elsewhere or for their traffickers to try again another day. Moreover, immigration control measures that do not attempt to distinguish between individuals who have been smuggled as opposed to those who have been trafficked or who are at risk of future exploitation, can make individuals vulnerable to deportation and render them unable to speak up about their ordeal. As a result, police lose the opportunity to gather relevant and important information about trafficking routes and activities, and potential or actual trafficking victims are exposed to further risks. These difficulties at the national level in terms of the organization of government are largely mirrored at the international level. It is possible to draw parallels between, for example, the roles and focus of national/local police and the same of the UNODC and its associated instruments that treat trafficking principally as an issue of organized crime; between immigration services and their wide discretion at the national level and the absence of an international migration law<sup>6</sup>; and between community, social and child services at national and local levels and the myriad international human rights treaties and the large number of UN agencies that deal with related concerns.

What is clear is that the divisions between these four areas of law - criminal justice, human rights, asylum/migration, and labor - can have a direct impact on the understanding of the phenomenon and the approach taken to prevention, protection, and redress, whether at an international or a national level. This article is concerned with these divisions at the level of international law only, while noting that if efforts to combat trafficking are to be effective, such divisions need to be resolved at the national level also. It is argued that reconciling these different areas of law is particularly important in combating trafficking, more than in relation to other violations of human rights, due to the transnational character of the abuse, which frequently implicates more than one State as a source, transit or destination country, each with inter-linked obligations. Similarly, there may be difficulties in utilizing human rights procedures to address violations in which two or more States may be implicated.<sup>7</sup> This is to be distinguished from other human

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6. The 1951 Refugee Convention and the Migrant Workers Convention, *infra* notes 157 and 167, are above all status- and rights-granting instruments and not migration-control or migration-management instruments.

7. Andrew Byrnes, *Using International Human Rights Law and Procedures to Advance Women's*

rights violations that typically occur within the boundaries of a single State. Even though several of the key trafficking treaties limit their application to transnational trafficking, it is acknowledged in this article that not all trafficking has an international dimension.

This article is organized around these four areas of law. An overview of relevant instruments is presented under each of these headings, focusing on definitions/concepts, prevention strategies, victim protection, and enforcement mechanisms. Where relevant, overlap between these areas of law is noted and analyzed. Of course, any demarcation of this kind will suffer from a degree of artificiality, not least because not all instruments can be classified neatly under a single theme. Nonetheless, an attempt has been made to do so based upon each treaty's principal objective. From this overview, an analysis follows and asks whether these varying approaches can be reconciled conceptually, normatively, and institutionally; or whether this diversity operates only to confuse, conflate, and undermine efforts at the international level to address and respond to human trafficking. It is argued that the uneven emphasis on particular components of trafficking can and does work against the effectiveness of an overall legal response.

## II. CRIMINAL JUSTICE

### A. *Trafficking-Specific Treaties*

#### 1. **Definitions and Concepts**

The earliest trafficking-specific treaties do not offer any definitions of human trafficking, but they do set limits on the scope of international law in relation to the issue. Both the 1904 International Agreement for the Suppression of the White Slave Traffic (1904 White Slave Traffic Agreement)<sup>8</sup> and the subsequent 1910 International Convention on the Suppression of the White Slave Traffic (1910 White Slave Traffic Convention)<sup>9</sup> identified victims of the "white slave traffic" as white women or girls and the perceived threat was to their "purity" or "chastity"<sup>10</sup>; that is, the concept of trafficking that they dealt with was in relation to so-called "immoral purposes"<sup>11</sup> or prostitution. No distinctions were made between forced or voluntary prostitution, or to issues of consent.

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*Human Rights*, in 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 79, 100 (Kelly D. Askin & Dorean M. Koenig eds., 2000).

8. International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83 [hereinafter 1904 White Slave Traffic Agreement].

9. International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 3 L.N.T.S. 278.

10. Special Rapporteur on Violence Against Women, *Report on Trafficking in Women, Women's Migration and Violence Against Women, Submitted in Accordance with Commission on Human Rights Resolution 1997/44*, at 10, delivered to the U.N. Economic & Social Council [ECOSOC] and the Commission on Human Rights, U.N. Doc. E/CN.4/2000/68 (Feb. 29, 2000) [hereinafter *Report on Trafficking*].

11. 1904 White Slave Traffic Agreement, *supra* note 8, art. 1.

With the creation of the League of Nations came a general mandate over trafficking in women and children.<sup>12</sup> Notably, the UN Charter creating its successor does not contain a trafficking-specific provision (or in fact any other specific human rights provisions), although it does refer to human rights in a general sense.<sup>13</sup> In addition to the anti-trafficking provision in the Covenant of the League of Nations, the League concluded two further trafficking treaties, namely the 1921 Convention for the Suppression of the Traffic in Women and Children<sup>14</sup> and the 1933 International Convention for the Suppression of the Traffic in Women of Full Age.<sup>15</sup> The former expands the understanding of trafficking to apply to not only women and girls, but also to boy children. Like the earlier treaties, these instruments cover trafficking for the purposes of prostitution only. The first United Nations attempt to promulgate a treaty on trafficking was the 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (1949 Trafficking Convention).<sup>16</sup> Although it adopted more gender-neutral language by referring to “persons” rather than to women and/or children, it still concerned trafficking for the purposes of prostitution, regardless of the consent of the “victim”; and the political focus remained squarely on women and children.

More recently, the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000 TP),<sup>17</sup> supplementing the UN Convention on Transnational Organized Crime,<sup>18</sup> offered the first ever international definition of trafficking, as follows:

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or

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12. League of Nations Covenant art. 23 reads:

Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League: . . . (c) will entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children and the traffic in opium and other dangerous drugs . . .

13. U.N. Charter, art. 1, paras. 2, 3.

14. International Convention for the Suppression of the Traffic in Women and Children, *opened for signature* Sept. 30, 1921, 9 L.N.T.S. 416 (*entered into force* June 15, 1922).

15. International Convention for the Suppression of Traffic in Women of Full Age, *opened for signature* Oct. 11, 1933, 53 U.N.T.S. 50 (*entered into force* Aug. 24, 1934) [hereinafter *Traffic in Women of Full Age Convention*].

16. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, *opened for signature* Mar. 21, 1950, 96 U.N.T.S. 273 (*entered into force* June 25, 1951) [hereinafter *1949 Trafficking Convention*].

17. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, *opened for signature* Dec. 12, 2000, S. TREATY DOC. NO. 108-16, 40 I.L.M. 335 (*entered into force* Dec. 25, 2003) [hereinafter *2000 TP*].

18. United Nations Convention Against Transnational Organized Crime, *opened for signature* Dec. 12, 2000, S. TREATY DOC. NO. 108-16, 40 I.L.M. 335 (*entered into force* Sept. 29, 2003) [hereinafter *2000 Convention Against Transnational Organized Crime*].

receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs....<sup>19</sup>

Exploitation is viewed as fundamental to the trafficking experience and a range of exploitative acts are referred to in the definition. The list is non-exhaustive. Consent is deemed irrelevant where any of the means in Article 3 have been used,<sup>20</sup> so impliedly, consent will be relevant where none of those means is present, thus recognizing a degree of individual agency, choice or self-determination within the trafficking experience. In the case of children, consent is considered simply irrelevant.<sup>21</sup> There has thus been a shift away from prostitution *per se* to exploitation, which continues to invoke considerable debate, especially among some feminist scholars.<sup>22</sup>

In addition, the 2000 TP encompasses a range of non-prostitution-related trafficking offenses, such as trafficking for forced labor or services, slavery, servitude, and removal of organs. Notably, begging, unlawful adoption, child recruitment into military service, or forced marriage were not singled out as specific examples of human trafficking, arguably a retrograde step from earlier anti-slavery provisions and some human rights instruments (see below). Moreover, the Protocol has seen a shift from a singular focus on women and children to one encompassing all persons. The inclusion of a range of trafficking offenses beyond prostitution supports this broader view. Nonetheless, in spite of the normative shift, what appears to have occurred in reality is that the focus has remained steadfastly on women and children, not least on account of their special mention in the title. Other forms of trafficking, including trafficking for forced or exploitative labor, whether of men, women or children, have not been given equal attention, but this is slowly changing.<sup>23</sup> Because of this, the definition in the 2000 TP continues to be seen by some as an anti-prostitution instrument.<sup>24</sup>

19. 2000 TP, *supra* note 17, at art. 3.

20. *Id.* at art. 3(b).

21. *Id.* at art. 3(c). A child is stated as any person under 18 years of age. *Id.* at art. 3(d).

22. See Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 HARV. HUM. RTS. J. 65, 87 (1998); Jo Doezema, *Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women*, GENDER ISSUES, Winter 2000, at 23, 33; Kamala Kempadoo, *Commentary, Slavery or Work? Reconceptualizing Third World Prostitution*, 7 POSITIONS 225, 234 (1999); Joyce Outshoorn, *The Political Debates on Prostitution and Trafficking of Women*, 12 SOC. POL.: INT'L STUD. GENDER ST. & SOC'Y 141, 145 (2005); Nandita Sharma, *Anti-Trafficking Rhetoric and the Making of a Global Apartheid*, NWSA J., Fall 2005, at 88, 89; Barbara Sullivan, *Trafficking in Women: Feminism and New International Law*, 5 INT'L FEMINIST J. POL. 67, 74 (2003).

23. See the work of the International Labour Organization (ILO), *infra* pp. 140-42, in relation to trafficking in the context of forced or exploitative labor.

24. See, e.g., Jo Doezema, *Who gets to choose? Coercion, Consent, and the UN Trafficking Protocol*, in GENDER, TRAFFICKING, AND SLAVERY, *supra* note 5, at 24.

While there is no doubt that trafficking for such purposes as forced labor or organ removal are worthy of regulation, this all-inclusive framework provokes the question whether all forms of trafficking are of a similar nature and are therefore well-suited to conjoined regulation. What these different forms of trafficking have in common appears to be the method of transportation, clandestine movement, or the form of coercion or deception employed, rather than the type of exploitation or the causes of that trafficking; with each of these aspects of the trafficking cycle requiring distinct responses and solutions. The 2000 TP in its attempts to be holistic may in fact be too blunt an instrument for dealing with the myriad types of trafficking to which it has been tasked, noting particularly that its prostitution and women-specific predecessors failed when attempting to address a single form or type of trafficking.

All of the early trafficking-specific instruments were concerned with trafficking of a transnational or cross-border character.<sup>25</sup> Similarly, the 2000 TP omits internal trafficking from its remit, explicable by its international focus under the umbrella of transnational organized crime. Yet, in doing so, it has no specific mandate over links between national and international trafficking. Therefore, in order for States to seek guidance on their obligations in respect of internal trafficking or for victims to obtain redress for such trafficking, recourse would need to be made to the international human rights instruments, rather than the trafficking-specific protocol. Moreover, the Palermo definition is also restricted to trafficking within the context of organized crime, which is narrower than some subsequently concluded regional treaties,<sup>26</sup> as well as international human rights law.

## 2. Prevention Strategies

### a. Criminalization

Apart from the 1904 Agreement, all trafficking-specific treaties had and continue to adopt a criminal law focus. In fact, the 1904 Agreement, which emphasized the protection of victims rather than the prosecution or punishment of perpetrators, was considered to have been ineffective and these criticisms account for the shift in position away from a victim-centered to a perpetrator-centered approach. It is worthwhile noting that there has been a push for a shift back to a victim-centered approach under the guise of making human rights central to the response to trafficking since the 2000 TP.<sup>27</sup> The 1910 Convention sought to punish

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25. 2000 TP, *supra* note 17, at arts. 1, 4.

26. *See, e.g.*, South Asian Association for Regional Cooperation's ("SAARC") Convention on Preventing and Combating Trafficking in Women and Children for Prostitution art. 1, Jan. 5, 2002, available at <http://www.sarc-sec.org/old/freepubs/conv-trafficking.pdf> (defining "traffickers" as "persons, agencies or institutions engaged in any form of trafficking"); Council of Europe Convention on Action Against Trafficking in Human Beings art. 2, May 16, 2005, C.E.T.S. 197, 45 I.L.M. 12 (2006) ("The Convention shall apply to all forms of trafficking in human beings, whether national or transnational, whether or not connected with organized crime.").

27. *See, e.g.*, United Nations High Commissioner for Human Rights [UNHCHR], *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Report of the United Nations High*



procurers, while the 1921 Convention called for the prosecution of persons involved in trafficking in women and children, the licensing of employment agencies, and the protection of women and children who immigrate or emigrate. It thus had as its primary focus criminal justice but the treaty also recognized the migratory nature of the trafficking experience and the link between individuals seeking employment through legitimate means, such as employment agencies, and their risk of being trafficked. That is, there was some reference to labor migration as framing the trafficking experience, which has arguably been lost in later treaties. The 1933 Treaty repeated the focus of the 1910 Convention by seeking to punish persons who participate in trafficking women of full age, irrespective of the woman's consent.

Not unlike the earlier treaties, the 1949 Trafficking Convention adopted a similar approach to trafficking, but it went further by expanding criminalization to persons who keep, manage, knowingly finance or take part in the financing of brothels, or knowingly let or rent a building or other place for the purpose of the prostitution of others.<sup>28</sup> The inclusion of such an objective arose out of UN studies at the time which argued that State regulation of brothels and prostitution sends a message that the State tolerates forced prostitution.<sup>29</sup> Prostitution *per se* was considered to be "incompatible with the dignity and worth of the human person" and to "endanger the welfare of the individual, the family and the community".<sup>30</sup> Although not couched in human rights terms specifically, this preambular opening statement places trafficking within a human rights paradigm of "human dignity". In spite of this, its substantive provisions continue to focus on criminal prosecution and punishment. Arising out of a prohibitionist history, the 1949 Trafficking Convention seeks to criminalize acts associated with prostitution, though it does not criminalize prostitution itself.<sup>31</sup>

In the lead-up to the adoption of the 2000 TP, the 1949 Trafficking Convention faced intense scrutiny. In brief, it was generally criticized for (a) failing to take a human rights or victims' rights approach; (b) like its predecessors, limiting its scope to prostitution and not incorporating other purposes for which trafficking was said to be undertaken, such as other sex work, domestic, manual or industrial labor, or marriage, adoption or other intimate relationships; (c) failing to protect 'sex workers' or victims from being prosecuted themselves; and (d) sanctioning the expulsion of victims of trafficking.<sup>32</sup>

Partly in response to these criticisms, the 2000 TP offered three specific purposes:

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*Commissioner for Human Rights to the Economic and Social Council, delivered to the Economic and Social Council, U.N. Doc. E/2002/68/Add. 1 (May 20, 2002).*

28. 1949 Trafficking Convention, *supra* note 16, at art. 2.

29. See Stephanie Farrow, *The International Law on Trafficking in Women and Children for Prostitution: Making it Live Up to its Potential*, 10 HARV. HUM. RTS J. 213, 218 (1997).

30. 1949 Trafficking Convention, *supra* note 16, at pmbl.

31. *Report on Trafficking*, *supra* note 10, at para. 22.

32. See, e.g., *Report on Trafficking*, *supra* note 10, at paras. 22, 24, 25.

To prevent and combat trafficking in persons, paying particular attention to women and children;

To protect and assist the victims of trafficking, with full respect for their human rights; and

To promote cooperation among States parties in order to meet those objectives.

In spite of being the first trafficking-specific treaty to openly disclose the human rights of victims as an explicit objective, its focus is nonetheless weighted in favor of criminal prosecution and punishment. In fact, none of the criticisms outlined above were taken up fully by the 2000 TP. Even its expanded mandate does not expressly encompass issues of marriage, adoption or other intimate relationships. Its preambular paragraph does not make any references to past anti-trafficking or human rights (such as slavery) instruments, but appears to stand in isolation. This is not to say that there are no human rights aspects, but the main impetus behind the creation of an additional protocol was to target specific types of crime, and the human rights of victims were not center stage. In fact, Argentina, the proposer of a new legal instrument against trafficking in minors specifically (due to dissatisfaction with progress on an additional protocol to the Convention on the Rights of the Child 1989<sup>33</sup>), believed that a purely human rights perspective to this issue would be insufficient and that trafficking should be dealt with as part of the broader international framework on transnational organized crime.<sup>34</sup> This was also the position of some States in relation to the failings of the 1904 Agreement, which had as its principal focus the protection of victims. Other commentators have argued that the definition of trafficking in the 2000 TP situates trafficking within a forced migration paradigm, and recognizes the impact of globalization and global inequality in the distribution of wealth and access to education, in addition to the effects of militarized conflicts, dispossession of land, and racial, gender or ethnic conflicts on forced migration.<sup>35</sup> The inclusion of a definition reads not as a *stricto sensu* human rights violation, but rather as a criminal offense, not least due to the fact that the protocol is attached to the UN Convention on Transnational Organized Crime and falls under the responsibility of the UN Office on Drugs and Crime.<sup>36</sup> In fact, the first obligation under the 2000 TP is for a State to recognize trafficking as a specific and serious crime.

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33. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (entered into force Sept. 2, 1990).

34. Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. QTY 975, 982 (2001).

35. Kamala Kempadoo, *From Moral Panic to Global Justice: Changing Perspectives, on Trafficking, Introduction to TRAFFICKING AND PROSTITUTION RECONSIDERED*, at vii, xvii (Kamala Kempadoo et al. eds., 2005).

36. The website of the United Nations Office on Drugs and Crime can be found at <http://www.unodc.org>.

*b. Border or Migration Controls*

The second prevention strategy identified in the 2000 TP is in relation to border or migration control. This indicates a clear recognition by States that trafficking is a form of migration. Article 11 provides that States shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons. Although noting that any measures of border control must be compatible with other international commitments in relation to the free movement of people,<sup>37</sup> the protocol provides very little real guidance to States on what such border controls ought to entail. Many of the proposals are sufficiently vaguely worded to give a wide discretion to States, satisfactory to States in protecting their national sovereignty. The inclusion of migration-style provisions shows that trafficking is viewed by States as part of a migration framework or, at a minimum, recognition that it has migratory aspects. But even this view of a trafficking-migration nexus is limited to irregular migration as a problem to be countered by border controls and other entry-preventing measures, without regard to any causes of that migration, such as labor shortages in the global North and correlative poverty and economic deficits in the global South. Nor is there any clear acknowledgement in the 2000 TP that migration measures impact on victims of trafficking and that this needs to be taken into account in developing and implementing migration management strategies.

At the same time as the 2000 TP was created, a separate protocol on smuggling of migrants by land, sea and air was adopted (“Smuggling Protocol”),<sup>38</sup> indicating that the two issues were considered quite separately. In treating these two phenomena separately, there is limited, if any, acknowledgement in the 2000 TP of the migratory aspects of trafficking, the close links between trafficking and smuggling, or the fact that many migrants may in fact be trafficked, especially those working under forced or exploitative labor conditions.<sup>39</sup> Failing to understand and/or acknowledge the inter-linkages between trafficking and migration can distort the approaches taken to trafficking, leading it to be viewed as essentially a criminal justice matter of recruiters, rather than recognizing the migratory aspirations of many of its victims, even if they are not aware of or do not consent to its abuses. The distinction is particularly difficult to apply in practice and is largely artificial. It overlooks the fact that “[m]ost transported undocumented migrants appear to consent in some way to an initial proposition to travel but frequently *en route* or on arrival in the destination country circumstances

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37. 2000 TP, *supra* note 17, at art. 11.

38. Protocol Against the Smuggling of Migrants by Land, Sea or Air, supplementing the Convention on Transnational Organized Crime, *opened for signature* Nov. 15, 2000, S. TREATY DOC. NO. 108-16 (2004), 40 I.L.M. 335 (*entered into force* Jan. 28, 2004) [hereinafter Smuggling Protocol]. The Smuggling Protocol has 107 State Parties as of the date of writing. United Nations Office on Drugs and Crime, Signatories to the UN Convention Against Transnational Crime and its Protocols, [http://www.unodc.org/unodc/crime\\_cicp\\_signatures.html](http://www.unodc.org/unodc/crime_cicp_signatures.html) (last visited Oct. 22, 2007).

39. For an overview of the Smuggling Protocol, see Gallagher, *supra* note 34, at 995-999. See also Jacqueline Bhabha & Monette Zard, *Smuggled or Trafficked?*, 25 FORCED MIGRATION REV. 6, 6-8 (2006).

change.”<sup>40</sup> In fact, many documented and regular migrants, including those within the European Union, are caught up in trafficking rings in spite of their initial wish to migrate to work or live and their pursuit of the same through legal or regular migration channels.<sup>41</sup> How one is classified under international law can determine how one is viewed and treated by others and what rights one is granted.

Furthermore, there is no acknowledgement in the 2000 TP that measures adopted to prevent and combat smuggling, including those mandated by the parallel Smuggling Protocol, may impact, either negatively or positively, on preventing and combating trafficking, especially the difficulty of identifying trafficked individuals within broader migratory flows. In fact, the wording of the provisions relating to border measures and security and control of documents is almost identical between the two instruments.<sup>42</sup> Anne Gallagher argues that “[t]he principle [*sic*] emphasis of the [trafficking] protocol remains firmly on the interception of traffickers rather than the identification and protection of victims.”<sup>43</sup> She worries too that the structure of the two protocols means that “a clear incentive” is created for national authorities to identify irregular migrants as smuggled rather than trafficked due to the protection obligations placed upon a State under the 2000 TP.<sup>44</sup> Jacqueline Bhabha and Monette Zard similarly state that the two protocols “are thus framed around a central dichotomy: between coerced and consenting illegal migrants, between victims and agents, and between innocence and guilt.”<sup>45</sup> They argue that “[t]here is much to be gained from being classified as trafficked, and much to lose from being considered smuggled.”<sup>46</sup> The reality is usually more blurred. This dichotomy has yet to be fully reconciled in law.

### *c. Root Causes*

There are references to the root causes of trafficking in the 2000 TP. Article 9(4) requires States to “take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment, and lack of equal opportunity”. Article 9(5) requires States to adopt or strengthen legislative or other measures that create the demand that fosters all forms of exploitation. In other words, a rights-based approach to trafficking in which denial of rights is viewed as part and parcel of the causes of or push factors into trafficking is included in the Protocol. The real challenge in tackling root causes appears to be two-fold. First, demand and causes of trafficking vary between different forms of trafficking and this is not acknowledged in the protocol, nor well

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40. Bhabha & Zard, *supra* note 39, at 7.

41. WOMEN’S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, THE STRUGGLE BETWEEN MIGRATION CONTROL AND VICTIM PROTECTION: THE UK APPROACH TO HUMAN TRAFFICKING 16-17 (2005), available at [http://www.womenscommission.org/pdf/UK\\_Trafficking.pdf](http://www.womenscommission.org/pdf/UK_Trafficking.pdf).

42. See 2000 TP, *supra* note 17, at arts. 11-12; Smuggling Protocol, *supra* note 38, at arts. 11-13.

43. Gallagher, *supra* note 34, at 994.

44. *Id.* at 995.

45. Bhabha & Zard, *supra* note 39, at 6.

46. *Id.* at 7.

understood by relevant actors and governments. Second, it requires a coordinated response, made harder by the large number of international institutions that this implicates in such issues as poverty, development, or discrimination (see Institutional Congestion below).

### 3. Victim Protection

A number of human rights or victims' rights are included in the 2000 TP, but these remain couched in discretionary language,<sup>47</sup> and hence do little to reinforce or supplement protections under human rights law. States are encouraged to adopt measures for the physical, psychological and social recovery of victims, such as providing appropriate housing, counseling, medical, psychological and material assistance and employment, educational and training opportunities.<sup>48</sup> The age, gender and special needs of victims are to be taken into account in doing so.<sup>49</sup>

States are also requested to consider introducing measures that permit trafficking victims to remain in its territory in appropriate cases (either temporarily or permanently), or to repatriate victims.<sup>50</sup> The 2000 TP stops short of requiring complementary or subsidiary forms of protection to be offered to trafficking victims, as many delegates feared that "the Protocol might inadvertently become a means of illicit migration".<sup>51</sup> Correspondingly, Article 24 of the UN Convention on Transnational Organized Crime obliges States to "take appropriate measures to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony... and, as appropriate, for their relatives and other persons close to them." Article 24 further provides that "effective protection" may include relocating witnesses, or even entering into agreements with other States for their relocation. Article 24 of the parent treaty already provides a basis for some forms of relocation assistance and rights, but it applies only to victims as witnesses, not generally.<sup>52</sup> While most States are still reluctant to record in law any right to stay in the territory of a State party for victims of trafficking, some have done so at the national level.<sup>53</sup> What is

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47. Gallagher, *supra* note 34, 975, 990; cf. Ryszard Piotrowicz, *Irregular Migration Networks: The Challenge Posed by People Traffickers to States and Human Rights*, in *IRREGULAR MIGRATION AND HUMAN RIGHTS: THEORETICAL, EUROPEAN AND INTERNATIONAL PERSPECTIVES* 138 (Barbara Bogusz et al. eds. 2004).

48. 2000 TP, *supra* note 17, at art. 6(3).

49. *Id.* at art. 6(4).

50. *Id.* at arts. 7(1), 8(1).

51. L.G. Potts, Jr., Note, *Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons*, 35 *GEO. WASH. INT'L L. REV.* 227, 240 (2003).

52. Cf. Council of Europe Convention on Action Against Trafficking in Human Beings, *supra* note 26, at art. 13 (calling for a 30-day "recovery and reflection" period in addition to longer-term stay possibilities, although these provisions remain discretionary). The Council of Europe Convention on Action against Trafficking adds an obligation to issue renewable residence permits to victims of trafficking in two specific situations: when it is considered necessary due to their personal situation, or it is necessary for them to participate in criminal investigation or prosecution. *Id.* at art. 14. There is no elaboration as to what one's "personal situation" would need to be to qualify for an extended stay.

53. For example, the United States offers a T-visa under its Trafficking Victims Protection Act 2000. According to the Department of Homeland Security, 112 T-visas were granted to foreign survivors of human trafficking in FY 2005.

encouraging though is that rights arising under other international instruments, including under international refugee law, continue to apply. This is specifically noted in a savings clause in the 2000 TP.<sup>54</sup> It should also be noted that nowhere in the 2000 TP is there an explicit right to immunity from prosecution for victims of trafficking. It may be impliedly inferred through reference to other provisions, although this omission nonetheless represents a significant oversight. Under the Smuggling Protocol, in comparison, smuggled migrants do have an explicit legal protection against criminal prosecution.<sup>55</sup>

#### 4. Inter-State Cooperation Rather than Enforcement Mechanisms

In terms of enforcement, the 2000 TP does not have any enforcement mechanisms akin to those available to some of the human rights treaty bodies, such as periodic reporting, individual complaints or fact-finding visits. Rather, the Protocol encourages cooperation between States through information exchange.<sup>56</sup> Similarly, the UN Convention against Transnational Organized Crime, the parent treaty, does not set up proper enforcement or monitoring mechanisms. Instead, it establishes a conference aimed, among other things, to “promote and review implementation of the Convention”<sup>57</sup> and otherwise calls on States to cooperate.<sup>58</sup> The Conference is intended to agree upon ways to improve the implementation of the Convention, including through such methods as periodic reporting. To date, States parties agreed at the first session of the Conference in 2004 to circulate and respond to a questionnaire on implementation of the 2000 TP.<sup>59</sup> Only 43 percent of States parties responded.<sup>60</sup> The associated analytical report concerned only the criminalization aspects of trafficking,<sup>61</sup> although the Conference confirmed that this is to be expanded at its next session to include matters related to victim

54. The 2000 TP provides that:

1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* contained therein. 2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

2000 TP, *supra* note 17, at art. 14.

55. Smuggling Protocol, *supra* note 38, at art. 5 (“Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.”).

56. 2000 TP, *supra* note 17, at art. 10(1).

57. 2000 Convention Against Transnational Organized Crime, *supra* note 18, at art. 32.

58. *Id.* at arts. 13, 27, 30.

59. Conference of Parties to the U.N. Convention Against Transnational Organized Crime, 1<sup>st</sup> Sess., June 28-July 8, 2004, *Decision 1/5*, ¶¶ c-f.

60. Conference of the Parties to the U.N. Convention against Transnational Organized Crime, Oct. 10-21, 2005, *Review of the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, ¶ 11, U.N. Doc. CTOC/COP/2005/3 (Sept. 14, 2005).

61. *See generally id.*

assistance and protection, repatriation, border measures, and issues relating to documentation.<sup>62</sup>

### *B. War Crimes and Crimes Against Humanity*

The Statute of the International Criminal Court (ICC) contains a range of provisions related to trafficking, including recognition that rape, enslavement, sexual slavery and enforced prostitution constitute both war crimes and crimes against humanity, the latter when part of a widespread or systematic attack directed against any civilian population, with knowledge of that attack.<sup>63</sup> “Enslavement” has been defined by the ICC Statute as “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.”<sup>64</sup> This definition follows the decision of the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the case of *Kunarac* that held that enslavement was a crime against humanity and included trafficking in human beings.<sup>65</sup> The decision further held that enslavement as a crime against humanity, as defined by reference to “ownership”, was part of customary international law.<sup>66</sup> Such an interpretation is also in line with earlier slavery suppression treaties (see below) which similarly identify “ownership” or exercising powers of ownership as central to whether trafficking or slavery has occurred. This is to be contrasted with the 2000 TP, which centers on “exploitation”, although it is unclear what the real (if any) distinctions are between the two terms; or between trafficking and slavery.<sup>67</sup> The existence of these provisions reinforces the view of trafficking as an issue of criminal law.

## III. HUMAN RIGHTS

### *A. Slavery, Servitude or Forced Labor*

The League of Nations’ 1926 Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention (1926 Slavery Convention)<sup>68</sup> defined

62. Conference of Parties to the United Nations Convention against Transnational Organized Crime, 2<sup>nd</sup> Sess., Oct. 10-21, 2004, *Decision 2/3*, ¶ m.

63. Rome Statute of the International Criminal Court arts. 7(1)(c), 7(1)(g), 8(2)(h)(xxii), 8(2)(e)(vi), U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter ICC Statute]. See also Statute of the International Tribunal for the Former Yugoslavia (ICTY) art. 5(c) & (g), S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (May 25, 1993) (identifying enslavement and rape respectively as crimes against humanity when committed in armed conflict (international or internal character) and directed against any civilian population); Statute of the International Tribunal for Rwanda (ICTR) art. 3(c) & (g), S.C. Res. 955, U.N. SCOR, 49th Sess., 3453 mtg. at 1, U.N. Doc. S/RES/955 (Nov. 8, 1994) (providing that enslavement and rape respectively are crimes against humanity when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds).

64. ICC Statute, *supra* note 63, at art. 7(2)(c).

65. Prosecutor v. Kunarac, Case No. IT-96-23&23/1, Judgment, ¶¶ 541-542 (Feb. 22, 2001).

66. *Id.* ¶ 539.

67. See Tom Obokata, *Trafficking of Human Beings as a Crime Against Humanity: Some Implications for the International Legal System*, 54 Int’l Comp. L.Q. 445, 449 (2005).

68. League of Nations, Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926, Sept. 29, 1926, 60 L.N.T.S. 253 [hereinafter 1926 Slavery Convention].

“slavery” as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”<sup>69</sup> It also identified what was involved in the “slave-trade”<sup>70</sup> and cautioned against recourse to forced or compulsory labor by calling on State parties “to take all necessary measures to prevent such labor from developing into conditions analogous to slavery.”<sup>71</sup> The 1926 treaty sought to “prevent and suppress the slave trade” and “[t]o bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms.”<sup>72</sup> The only suggestions on how to achieve this included adopting “all appropriate measures” to prevent and suppress the “embarkation, disembarkation and transport of slaves in their territorial waters and upon all vessels flying their respective flags.”<sup>73</sup> These measures are early examples of slavery-management mechanisms and reflect similar current practices adopted by some governments in relation to combating trafficking through border controls, whether by land, air or sea. The 1926 Slavery Convention further called on parties to update their laws to give effect to the Convention provisions and to adopt severe penalties for breach.<sup>74</sup>

The enforcement mechanisms were weak, requiring only that States communicate to each other and to the Secretary-General of the League of Nations any laws and regulations that may have been enacted. The 1926 Slavery Convention has, at its heart, criminal sanctions and border controls at sea, without any mention of the human rights of those taken into slavery. Although not a trafficking-specific treaty, its definition reflects the trafficking experience and it has now been widely accepted that trafficking is a contemporary form of slavery.<sup>75</sup>

A subsequent treaty, the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956 Supplementary Slavery Convention)<sup>76</sup> builds upon the 1926 Slavery Convention, but also ensures that the earlier treaty was brought within the UN system. Like the 1926 Slavery Convention, the latter treaty calls for the progressive, yet as soon as

69. *Id.* at art. 1.

70. *Id.* Article 1(2) provides that:

The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

71. *Id.* at art. 5.

72. *Id.* at art. 2.

73. *Id.* at art. 3(1).

74. *Id.* at art. 6; *see also* U.N. Office of the High Commissioner for Human Rights (UNHCHR), Fact Sheet No.14, Contemporary Forms of Slavery, available at <http://www.unhchr.ch/html/menu6/2/fs14.htm> (summarizing contemporary forms of slavery and urging states to take concerted action to combat modern forms of slavery).

75. *See, e.g.*, U.N. Econ. & Soc. Council [ECOSOC], Report of the Working Group on Contemporary Forms of Slavery, 23<sup>rd</sup> Sess., at 23, *Recommendation 4*, U.N. Doc. E/CN.4/Sub.2/1998/14 (July 6, 1998).

76. Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 3[hereinafter 1956 Supplementary Slavery Convention].



possible “complete abolition or abandonment” of a range of institutions and practices associated with slavery, “*whether or not* they are covered by the definition of slavery in Article 1 of the 1926 Slavery Convention” (emphasis added). Importantly, it adds debt bondage, serfdom, and a range of institutions or practices to the specific definition of slavery in the 1926 Slavery Convention, including those involving the selling or promising into marriage by payment, the right to transfer a woman to another person for payment, or inheritance of women.<sup>77</sup> For these reasons, a specific provision relates to prescribing a minimum marriage age, requiring consent to marriage, and the registration of marriages.<sup>78</sup> Some of these practices may also be considered to be trafficking within the definition contained in the 2000 TP, but notably they were not explicitly listed therein. The 1956 treaty further adds a definition of “a person of servile status” as “a person in the condition or status resulting from any of the institutions or practices mentioned in article 1 of this Convention”<sup>79</sup> and it defines “the slave trade” in the same terms as its predecessor.<sup>80</sup>

Like its earlier counterparts, the main thrust of the supplementary treaty is on creating criminal offenses for various acts relating to slavery<sup>81</sup> and to take

77. Article 1 of the 1956 Supplementary Convention on Slavery provides:

(a) Debt bondage, which is defined as ‘the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined’;

(b) Serfdom, which is defined as ‘the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinative service to such other person, whether for reward or not, and is not free to change his status’;

(c) Any institution or practice whereby:

(i) A woman, without the right to refuse, is promised or given to marriage on payment of a consideration of money or in kind to her parents, guardian, family or any other person or group; or

(ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or

(iii) A woman on the death of her husband is liable to be inherited by another person;

(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

*Id.* at art. 1.

78. *Id.* at art. 2.

79. *Id.* at art. 7(b).

80. *Id.* at art. 7(c). Article 7(c) of the 1956 Supplementary Convention on Slavery provides that:

“Slave trade” means and includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged; and, in general, every act of trade or transport in slaves by whatever means of conveyance.

81. *Id.* at art. 3(1) (conveyance of slaves), art. 5 (the act of mutilating, branding or otherwise

measures to prevent the transportation or conveyance of slaves at ports, airfields and coasts (that is, border control).<sup>82</sup> By way of rights, it offered “freedom” to any slave who takes refuge on board any vessel of a State party.<sup>83</sup> Like the 1926 Slavery Convention, its enforcement mechanisms are weak – calling only on States to cooperate with each other and with the UN and to communicate to the UN Secretary-General copies of laws, regulations and administrative measures enacted or put into effect to implement the provisions of this Convention.<sup>84</sup> However, it remains a relevant and important treaty due to its 119 States parties, more than the number of current parties to the 2000 TP.<sup>85</sup>

### *B. Civil and Political Rights*

The Universal Declaration on Human Rights 1948 (UDHR)<sup>86</sup> clearly states that “[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”<sup>87</sup> The International Covenant on Civil and Political Rights 1966 (ICCPR)<sup>88</sup> introduced an identical prohibition, adding also a prohibition on forced or compulsory labor with a number of exceptions for military service, work or service during detention, or emergency service.<sup>89</sup> Even though the terms of the ICCPR were agreed long after the 1956 Supplementary Slavery Convention, none of the additional forms of slavery identified in the later treaty

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marking a slave or a person of servile status), art. 6(1) (the act of enslaving or attempting to enslave another person, including inducements).

82. *Id.* at art. 3.

83. *Id.* at art. 4.

84. *Id.* at art. 8.

85. The 2000 TP has 115 State Parties as of date of writing. United Nations Office on Drugs and Crime, *supra* note 38.

86. G.A. Res. 217A (III), at 73, U.N. Doc A/810 (Dec. 12, 1948).

87. *Id.* at art. 4.

88. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 6 I.L.M. 368 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR].

89. *Id.* at art. 8(1). Article 8 provides that:

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3. (a) No one shall be required to perform forced or compulsory labour;
  - (b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;
  - (c) For the purpose of this paragraph the term ‘forced or compulsory labour’ shall not include:
    - (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
    - (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;
    - (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
    - (iv) Any work or service which forms part of normal civil obligations.

were incorporated into the ICCPR, apart from clear provisions regarding marriage.<sup>90</sup> Nonetheless, the importance of the ICCPR should not be underestimated in regards to slavery and trafficking due to the treaty's enforcement provisions which are stronger than its earlier counterparts', most notably its reporting mechanisms and individual petition system.<sup>91</sup> Having said this, however, there have been very few individual communications decided under Article 8 (the slavery prohibition), and none so far in relation to trafficking.<sup>92</sup>

In addition, the Human Rights Committee has not (yet) issued a general comment on Article 8, although its general comment on equality between women and men links the obligations under Article 8 to trafficking in women and children, both within and across national borders, as well as to forced prostitution.<sup>93</sup> The Committee also refers to the fact that slavery may be disguised as domestic or other kinds of personal service.<sup>94</sup> However, this general comment does not make links to trafficking for other purposes, such as trafficking for forced or exploitative labor, or of men and boys. As far as the inheritance laws that were viewed as forms of slavery under the 1956 Supplementary Slavery Convention are concerned, the Human Rights Committee has implied into Article 16 of the ICCPR (the right to be recognized everywhere as a person before the law), rather than Article 8, that "women may not be treated as objects to be given, together with the property of the deceased husband, to his family."<sup>95</sup>

Today, the Human Rights Committee makes constant references to trafficking under Article 8 in its concluding observations on State party reports, recognizing its prevalence in almost every society worldwide, whether remarking upon the actions (or lack thereof) of a predominantly source, transit or receiving country. Such comments largely supplant specific references to slavery *per se*.<sup>96</sup> Almost every State party to the ICCPR is now questioned about steps taken to eliminate trafficking in human beings, particularly trafficking in women and/or children.<sup>97</sup> In 1998, for example, the Human Rights Committee characterized trafficking of women and others for the purposes of prostitution "as acts which can be assimilated to slavery and contrary to international and national law."<sup>98</sup> In relation

90. *Id.* at art. 23.

91. *Id.* at arts. 40, 41 and Optional Protocol to the ICCPR, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 302 (*entered into force* Mar. 23, 1976).

92. See SARAH JOSEPH, JENNY SCHULTZ & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY* 294-98 (2d ed. 2004).

93. Human Rights Comm. *General Comment No. 28, Equality of Rights Between Men and Women* (article 3), ¶12, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000).

94. *Id.*

95. *Id.* ¶19.

96. Human Rights Comm., *Concluding Observations on Slovakia*, U.N. Doc. CCPR/CO/78/SVK (Aug. 22, 2003); Human Rights Comm., *Report of the Human Rights Committee*, § 82(15) (Albania), §87(13) (Iceland), §86(25) (Kenya) (child trafficking and prostitution), §92(24) (Tajikistan), §95(20) (Thailand), U.N. Doc. A/60/40 (Vol. I) (2004-2005).

97. Human Rights Comm., *Report of the Human Rights Committee*, §72(15) (Belgium), §71(14) (Lithuania) (low number of criminal proceedings), §61(13) (Philippines), §64(10) (Russian Federation), §66(14) (Sri Lanka), §69(13) (Suriname), U.N. Doc. A/59/40 (Vol. I) (2003-2004).

98. Human Rights Comm., *Report of the Human Rights Committee*, ¶333, U.N. Doc. A/53/40

to children and trafficking, the Human Rights Committee has noted that “[t]he main purpose of the obligation to register children after birth [in Article 24 of the ICCPR] is to reduce the danger of abduction, sale or of traffic in children, or of other types of treatment that are incompatible with the enjoyment of rights provided for in the Covenant.”<sup>99</sup>

As individual States continue to debate whether victims of trafficking have or ought to have a right to remain in the territory to where they have been trafficked, Article 7 of the ICCPR provides an absolute right not to be returned to where there is a serious risk of torture or other forms of ill-treatment or punishment. Article 3 of the United Nations Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment 1984<sup>100</sup> (UNCAT) provides a similar guarantee, albeit one limited to torture.<sup>101</sup> Although it is not inconceivable for a similar *non-refoulement* guarantee to be read into Article 8, the Human Rights Committee has yet to do so.<sup>102</sup>

### C. Economic, Social and Cultural Rights

As mentioned above, many of the approaches to trafficking in various international instruments do not include any focus on or do not sufficiently emphasize root causes of trafficking, or make only passing reference to such factors. Although the International Covenant on Economic, Social and Cultural Rights<sup>103</sup> (ICESCR) does not address trafficking *per se*, its provisions do provide a framework for the elimination of poverty, unemployment and general economic depression, factors that have been recognized as causes of trafficking. The ICESCR and its Committee can therefore play a preventative role by improving social, cultural and economic conditions in countries of origin and transit.

Apart from its preventative role, there are overlaps between breaches of economic rights and the experience of trafficking. Article 6 of the ICESCR provides “the right to work, which includes the right of everyone to the opportunity to gain his [or her] living by work which he [or she] *freely chooses and accepts*...” (my emphasis). As much as Article 6 is a right geared towards ensuring access to the labor market, it is also an anti-forced labor provision<sup>104</sup> and very much complementary to the anti-forced labor provisions in Article 8(3) of the ICCPR. If

(Vol. 1) (1998) (concluding observations on Italy); *see also* Human Rights Comm., *Report of the Human Rights Committee*, ¶171, U.N. Doc. A/54/40 (Vol. 1) (1999) (concluding observations on Japan).

99. Human Rights Comm. *General Comment No. 17: Rights of the Child*, ¶7, (Apr. 7, 1989).

100. Convention Against Torture and Cruel, Inhuman or Degrading Treatment of Punishment, *opened for signature* Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 (*entered into force* June 26, 1987).

101. *Id.*

102. It is noted that the European Court of Human Rights has held that a non-return component is part of its slavery prohibition. *See Ould Barar v. Sweden*, App. No. 42367/98 (Eur. Ct. H.R. Jan. 19, 1999).

103. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (*entered into force* Jan. 3, 1976) [hereinafter ICESCR].

104. *See* Comm. on Econ., Soc. and Cultural Rights [ICESCR], *General Comment No. 18*, ¶¶ 6, 10, U.N. Doc. E/C 12/GC/18 (Feb. 6, 2006).

an individual is forced into a particular job or employment, then arguably this is in breach of Article 6 of the ICESCR, but if that situation has arisen by reason of deception, fraud, abuse of power or one or more of the other factors outlined in the 2000 TP for the purposes of exploitation, then it is also a situation of trafficking.

Additionally, Article 7 of the ICESCR provides that “States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work....” Many of these provisions are violated in the context of trafficking. Article 7 guarantees to individuals fair wages and equal remuneration for work of equal value without distinction of any kind, a decent living for themselves and their families, safe and healthy working conditions, and rest, leisure and reasonable limitation of working hours and periodic holidays with pay. Notably, Article 7 of the ICESCR is not an absolute guarantee as the ICESCR is framed to allow for “progressive implementation” to a “maximum of [a State’s] available resources.” Moreover, it allows a specific exception for developing countries with regard to economic rights for non-nationals,<sup>105</sup> but these limitations would need to be carefully evaluated in a given situation.<sup>106</sup> Discrimination in the enjoyment of these rights in the ICESCR is prohibited and is absolute.<sup>107</sup>

It is arguable that where an individual who otherwise voluntarily enters into a contract of employment and moves to work abroad under that contract and then faces conditions that do not satisfy Article 7 requirements, that such labor is exploitative or in breach of Articles 6 or 7 of the ICESCR. What begins as voluntarily assumed work can become forced labor under unacceptable conditions of employment. It may also amount to trafficking under the 2000 TP, where deceit, fraud, abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of an individual are used for the purposes of exploitation. Traffickers deny many of the rights of Article 7 to their victims, by assigning arbitrary debts (debt bondage), excessive hours, and little compensation.<sup>108</sup> Health and safety are concerns for all trafficked persons, but are particularly important for those engaged in dangerous industries, for children, and for women and children trafficked into the sex industry who face the routine denial of medical care, who may be forced to perform sexual acts without contraceptives, increasing the risk of infection of HIV/AIDS and other sexually transmitted diseases, unwanted pregnancies, or forced abortions. The International Labour Organization (ILO) argues that States must introduce legislative protections against these abuses, including employment tribunals and a system of inspection visits or monitoring.<sup>109</sup> In terms of enforcement, apart from the reporting

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105. ICESCR, *supra* note 103, at art. 2(1), (3).

106. See Alice Edwards, *Human Rights, Refugees and the Right to “Enjoy” Asylum*, 17 INT’L J. REF. L. 293, 320-330 (2005) (discussing limitations on this aspect of the right to work).

107. ICESCR, *supra* note 103, at art. 2(2); ICCPR, *supra* note 88, at art. 26.

108. Fara Gold, *Redefining the Slave Trade: The Current Trends in the International Trafficking of Women*, 11 U. MIAMI INT’L & COMP. L. REV. 99, 122 (2003).

109. International Labour Organization [ILO], *Forced Labour, Child Labour and Human Trafficking in Europe: An ILO Perspective* (2002).

obligations, there is not (yet) the possibility of making an individual complaint to the Committee.

#### *D. Women's Rights*

The 1979 Convention on the Elimination of All Forms of Discrimination against Women<sup>110</sup> (CEDAW) contains a specific prohibition on trafficking.<sup>111</sup> Regrettably, the general prohibition on slavery as appears in the UDHR and the ICCPR has been reduced to a specific prohibition on trafficking in the CEDAW and the broader terminology has been lost, thus forms of slavery not amounting to trafficking or exploitation of prostitution fall to the ICCPR's broader prohibition on slavery and servitude. Like the ICCPR, the advantage of the CEDAW is its reporting requirements as well as its newly created individual petition system.<sup>112</sup> So far, however, the Women's Committee has not (yet) heard a communication relating to trafficking.

Although no general comment has been issued by the Women's Committee on trafficking or Article 6 specifically, its General Comment No. 19 on violence against women is relevant, albeit it is limited to women. General Comment No. 19 refers to "poverty and unemployment" as factors that increase opportunities for trafficking in women, by forcing many women, including young girls, into prostitution. In addition, it notes that prostitutes are especially vulnerable to violence because of their status, which may be unlawful, and that this status tends to marginalize them. The Committee argues that these women need equal legal protection against rape and other forms of violence.<sup>113</sup> The Committee further notes that new forms of trafficking for sexual exploitation are taking place, including sex tourism, the recruitment of domestic labor from developing countries to work in developed countries, and organized marriages between women from developing countries and foreign nationals. It states that these practices are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity, in addition to which they place women at special risk of violence and abuse.<sup>114</sup> The General Recommendation also notes that "wars, conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women" and that specific protective and punitive measures are needed to combat these human rights concerns.<sup>115</sup>

Not only does the CEDAW refer to trafficking, but it also contains provisions on non-discrimination and equality, as well as a provision calling for the elimination of social and cultural stereotypes that permit women to be viewed as

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110. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (*entered into force* Sept. 3, 1981) [hereinafter CEDAW].

111. *Id.* at art. 6 ("States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.")

112. Optional Protocol to the CEDAW, *opened for signature* Oct. 6, 1999, 2131 U.N.T.S. 83 (*entered into force* Dec. 22, 2000).

113. Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 19, Violence Against Women*, ¶ 15 (1992).

114. *Id.* ¶14.

115. *Id.* ¶16.

chattels or commodities that can be bought, sold and used. Stephanie Farior argues that the anti-trafficking measures referred to in Article 6 of CEDAW should be read in conjunction with Article 5 that requires States parties to undertake “to modify the social and cultural patterns of conduct of men and women” in order to eliminate stereotypes regarding inferiority or superiority with respect to men or women. She argues that this link ought to be made more directly and more often, as “[t]rafficking will not end until states take steps to modify cultures that allow women and girls to be viewed as commodities to be trafficked.”<sup>116</sup> In fact, the CEDAW’s General Recommendation No. 19 states that “[t]raditional attitudes... perpetuate widespread practices involving violence or coercion.... These attitudes contribute to the propagation of pornography and the depiction and other commercial exploitation of women as sexual objects, rather than as individuals. This in turn contributes to gender-based violence.”<sup>117</sup> The link between discrimination and violence is at the heart of the Women’s Committee’s General Recommendation No.19 and underlies its approaches to all forms of violence against women. General Recommendation No. 19 states that “[g]ender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.”<sup>118</sup>

Without entering into the debate on whether women’s rights are better served by mainstream or specialized treaties and institutions,<sup>119</sup> it must be recognized that although the mandate of the CEDAW is restricted to women and girls, and that the attention of the Committee has been limited largely to forced prostitution, the Committee has been able to take into account, in a relatively comprehensive way, the root causes of this specific form of trafficking, including discrimination, inequality, poverty, and negative cultural stereotypes that facilitate, foster or perpetuate trafficking in women and girls. The Committee has also articulated preventative strategies and victims’ rights.

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116. Stephanie Farior, *The International Law on Trafficking in Women and Children for Prostitution: Making it Live Up to its Potential*, 10 HARV. HUM. RTS J. 213, 229 (1997); see also, Jonathan Todres, *The Importance of Realizing “Other Rights” to Prevent Sex Trafficking*, 12 CARDOZO J. L. & GENDER 885, 889-893 (2006).

117. Comm. on the Elimination of Discrimination Against Women, *supra* note 113, ¶¶11-12.

118. *Id.* ¶1.

119. See, e.g., Mara Bustelo, *The Committee on the Elimination of Discrimination Against Women at the Crossroads*, in THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 79 (Philip Alston & James Crawford eds., 2000); Roberta Jacobson, *The Committee on the Elimination of Discrimination Against Women*, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 444. (Philip Alston ed., 1992); Andrew Byrnes, *Using International Human Rights Law and Procedures to Advance Women’s Human Rights*, in 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 79. (Kelly Askin & Dorean Koenig eds., 1999); Dianne Otto, *A Post-Beijing Reflection on the Limitations and Potential of Human Rights Discourse for Women*, in 1 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 115. (Kelly Askin & Dorean Koenig eds., 1999).

### *E. Children's Rights*

The Convention on the Rights of the Child (CRC)<sup>120</sup> and its two Optional Protocols on the Sale of Children, Child Prostitution and Child Pornography (OPSP),<sup>121</sup> and the Involvement of Children in Armed Conflict (OPAC)<sup>122</sup> respectively contain a number of relevant provisions aimed at preventing trafficking in children as a special group, as well as related to their protection.<sup>123</sup>

The CRC explicitly refers to trafficking in Article 34, which prohibits the abduction, sale or traffic in children “for any purpose or in any form.” The CRC also contains provisions relating to the protection of children from all forms of sexual exploitation and sexual abuse;<sup>124</sup> protection against the illicit transfer and non-return of children abroad;<sup>125</sup> and protection from economic exploitation and “from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.”<sup>126</sup> There is also a general or catchall prohibition against “all other forms of exploitation.”<sup>127</sup> States parties are required to set minimum ages for admission to employment, to regulate hours and conditions of employment, and set appropriate penalties and other sanctions to ensure enforcement of the former obligations.<sup>128</sup> The CRC also aims to guarantee a number of economic and social rights to children, a deprivation of which can make children at risk of trafficking.<sup>129</sup> As the most widely ratified treaty of all the human rights and the anti-trafficking instruments, the CRC is an important source of standards in relation to the protection of children against trafficking, as are its two Optional Protocols.<sup>130</sup>

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120. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (*entered into force* Sept. 2, 1990) [hereinafter CRC].

121. Optional Protocols on the Sale of Children, Child Prostitution and Child Pornography, *opened for signature* May 25, 2000, U.N. Doc. A/RES/54/263 (*entered into force* Jan. 18, 2002) [hereinafter OPSP]. Current ratifications are available at <http://www.unhcr.ch/html/menu2/6/crc/treaties/status-opsc.htm>.

122. Optional Protocols on the Involvement of Children in Armed Conflict, *opened for signature* May 25, 2000, UN Doc. A/RES/54/263 (*entered into force* Feb. 12, 2002) [hereinafter OPAC]. Current ratifications are available at <http://www.unhcr.ch/html/menu2/6/crc/treaties/status-opac.htm>.

123. In addition to the Optional Protocols, there are a number of other relevant international instruments, including: Hague Convention No. 33 on Protection of Children and Cooperation in Response of Inter-Country Adoption 1993; Hague Convention on the Civil Aspects of International Child Abduction; Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children; and the ILO Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.

124. CRC, *supra* note 120, at art. 34.

125. *Id.* at art. 11.

126. *Id.* at art. 32.

127. *Id.* at art. 36.

128. *Id.* at art. 34.

129. See CRC, *supra* note 120, at arts. 27-29.

130. See also Comm. on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, ¶ 2, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005) (citing trafficking as one of the reasons why a child may be



### 1. Sale of Children, Child Prostitution and Child Pornography

The OPSPP obliges States parties to: (1) criminalize a range of offenses associated with the sale of children, child prostitution and child pornography, including sexual exploitation of a child, transfer of the organs of a child for profit, or engagement of a child in forced labor<sup>131</sup>; (2) to afford other States parties the greatest measure of assistance and inter-State cooperation in relation to investigation of criminal or extradition proceedings<sup>132</sup>; (3) to establish the right under national law for the seizure and confiscation of materials, proceeds or premises<sup>133</sup>; (4) to adopt “appropriate measures” to protect the rights and interests of child victims within the criminal justice process<sup>134</sup>; (5) to promote public awareness, to train and educate on the practice<sup>135</sup>; (6) to take “all feasible measures with the aim of ensuring all appropriate assistance to victims of such offenses, including their full social reintegration and their full physical and psychological recovery”<sup>136</sup>; and (7) to grant access to victims to adequate procedures, without discrimination, to seek compensation “for damages from those legally responsible.”<sup>137</sup> In many of these areas, the OPSPP is more detailed than the 2000 TP, in addition to which many of these provisions are framed in obligatory language.

The jurisdiction of the Children’s Committee under the OPSPP covers both internal and transnational trafficking, as well as crimes of trafficking committed on an individual or organized basis.<sup>138</sup> It is, therefore, broader in scope than the 2000 TP in terms of its geographical coverage, but narrower with respect to its mandate over children only. Additionally, its Preamble acknowledges that the elimination of the sale of children, child prostitution, and child pornography will be facilitated by adopting a causation approach, including analyzing contributing factors such as “underdevelopment, poverty, economic disparities, inequitable socio-economic structures, dysfunctioning families, lack of education, urban-rural migration, gender discrimination, irresponsible adult sexual behaviour, harmful traditional practices, armed conflicts, and trafficking in children”<sup>139</sup> and is reflected in Article

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unaccompanied or separated).

131. OPSPP, *supra* note 121, at art. 3(1)(a)(i).

132. *Id.* at arts. 6(1), 10(1).

133. *Id.* at art. 7.

134. *Id.* at art. 8(1). These measures include taking account of the special vulnerability of child victims and child witnesses; informing children of their rights, their role and the scope, timing and progress of the proceedings and of the disposition of their cases; allowing the views, needs and concerns of child victims to be presented and considered in proceedings; providing appropriate support services throughout the legal process; protecting, as appropriate, the privacy and identity of child victims; providing for the safety of victims and witnesses on their behalf and members of their family from intimidation and retaliation; avoiding unnecessary delay in the disposition of cases and the execution of orders granting compensation to child victims. *Id.* at art. 8(1).

135. *Id.* at art. 9(2).

136. *Id.* at art. 9(3).

137. *Id.* at art. 9(4).

138. *Id.* at art. 3(1).

139. *Id.* at pmb., para. 8.

10(3), albeit in summarized form.<sup>140</sup> This is perhaps the most comprehensive listing of root causes contained in any international instrument.

In considering State party reports, the Committee has referred to the insufficient attention paid to the socio-economic aspects or causes of human trafficking, the lack of statistical data, including the need for statistics disaggregated on the basis of age, sex and minority status, and the need for more research on the scale and nature of cross-border as well as national trafficking.<sup>141</sup> It has further recommended to China to focus more attention on the preventative aspects, such as measures to address socio-economic causes, public awareness campaigns, and education for parents and children.<sup>142</sup> Moreover, in its report on Kazakhstan, the Committee outlined what it considered to be “appropriate measures” for victims (presumably in relation to Article 9 of the OPSPP, which are not articulated), namely: non-criminalization of victims, free legal aid, medical and psychosocial attention, free telephone hotlines, accessible crisis centers, social reintegration programs for child victims, access to shelter, and temporary residence permission for foreign victims during the investigation period.<sup>143</sup>

In many ways, these measures of protection for the victim mirror those in the 2000 TP or those articulated by the Human Rights Committee in relation to Article 8 of the ICCPR, although the Children’s Committee has added some additional protection such as free legal aid and free telephone hotlines. In this way, these concluding observations ought to be read as minimum standards for fulfilling due diligence obligations under the CRC as far as victims’ rights are concerned. In addition to this, the Committee has taken note of the particular vulnerabilities of specific categories of children to whom tailored responses may be needed.<sup>144</sup> Corruption and complicity within governments have also been highlighted as obstacles to fighting trafficking.<sup>145</sup>

140. Article 10(3) provides that: “States Parties shall promote the strengthening of international cooperation in order to address the root causes, such as poverty and underdevelopment, contributing to the vulnerability of children to the sale of children, child prostitution, child pornography and child sex tourism.” *Id.* at art. 10(3).

141. Office of the U.N. High Comm’r for Human Rights [OHCHR], Comm. on the Rights of the Child [CRC], *Consideration of Reports Submitted by States Parties under Article 12(1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* [hereinafter *Consideration of Reports*]: *Concluding Observations: Norway*, ¶¶ 11-12, U.N. Doc. CRC/C/OPSA/CO/3 (June 3, 2005); *Consideration of Reports: Concluding Observations: China (including Macau Special Administrative Region)*, ¶¶ 5, 8, 9, 17, 19, U.N. Doc. CRC/C/OPSA/CO/2 (Sept. 30, 2005); *Consideration of Reports: Concluding Observations: Kazakhstan*, ¶¶ 12, 28, U.N. Doc. CRC/C/OPSC/KAZ/CO/1 (Mar 17, 2006); *Consideration of Reports: Concluding Observations: Andorra*, ¶ 11, U.N. Doc. CRC/C/OPSC/AND/CO/1 (Mar. 17, 2006).

142. *Consideration of Reports: Concluding Observations: China (including Macau Special Administrative Region)*, *supra* note 141, ¶ 17.

143. *Consideration of Reports: Concluding Observations: Kazakhstan*, *supra* note 141, ¶ 22.

144. The Committee refers to street children, children who are foreign citizens, or who belong to ethnic minorities; and has further raised concerns over the stigmatization of victims of trafficking who have contracted HIV/AIDS as a consequence of being a victim of trafficking or prostitution. *Id.* ¶¶ 25, 9.

145. *Id.* ¶ 23.

## 2. Child Recruitment into Armed Forces

Although not always recognized or conceived as a form of trafficking, the recruitment of children into State or non-State armed groups possesses many of the characteristics of other forms of trafficking,<sup>146</sup> and it is arguable that it satisfies the definitional criteria in the 2000 TP. Under the CRC, a child is defined as “every human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier.”<sup>147</sup> For recruitment of children into the armed forces, lower age limits are set in the CRC. The CRC provides that “States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.”<sup>148</sup> It further provides that “States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.”<sup>149</sup> But these provisions are not absolute. A State party may still recruit persons between the ages of fifteen and eighteen years, but if it does so it “shall endeavour” to give priority to the oldest children.<sup>150</sup> Under the OPAC, States parties are required to raise the minimum age for voluntary recruitment into the armed forces from fifteen years of age as set out in the CRC,<sup>151</sup> but no minimum age limit is agreed. It provides that if such recruitment is to take place, due account is to be given to the special needs of children under the age of eighteen years of age<sup>152</sup> and the State party must adopt safeguards to ensure that such recruitment is not forced or coerced.<sup>153</sup> In contrast, non-State armed groups must not recruit or use in hostilities children under the age of eighteen years of age.<sup>154</sup> Any child recruited or used in hostilities contrary to these provisions shall, according to the OPAC, be demobilized or released from service, and provided with “all appropriate assistance for their physical and psychological recovery and their social integration.”<sup>155</sup> There is no mention of a right to remain in the territory to where they may have been transported, nor to the itemized list of services outlined by the Children’s Committee in relation to children considered to have been trafficked, although it is open to the Children’s Committee to adopt similar views.

It is, therefore, a human rights violation under the CRC and its OPAC to recruit or use in hostilities any child who is below the minimum age set out in the specific treaty or under national law, regardless of the alleged “voluntary” nature

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146. See, e.g., Sandrine Valentine, *Trafficking of Child Soldiers: Expanding the United Nations Convention on the Rights of the Child and its Optional Protocol on the Involvement of Children in Armed Conflict*, 9 NEW ENG. J. INT’L & COMP. L. 109, 109-10 (2003).

147. CRC, *supra* note 120, at art. 1. . See GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD 15-16* (1995) (discussing the limitations of the definition of child in the CRC).

148. CRC, *supra* note 120, at art. 38(3).

149. *Id.* at art. 38(2).

150. *Id.* at art. 38(3).

151. OPAC, *supra* note 122, at art. 3(1).

152. *Id.* at art. 3(1).

153. *Id.* at art. 3(2).

154. *Id.* at art. 4.

155. *Id.* at art. 6(3).

of that recruitment. In addition, special steps are needed to safeguard against forced or coerced recruitment for children over fifteen and less than eighteen years of age. The Statute of the International Criminal Court classifies as war crimes the conscription or enlistment of children under the age of fifteen years into national armed forces (or armed groups in the context of non-international conflicts) or using them to participate actively in hostilities.<sup>156</sup>

Therefore, under the CRC and its OPAC, determining whether a human rights violation has taken place is dependent on a child's age. It is arguable that this is a far easier test to satisfy because it is a more objective assessment than is required under the 2000 TP. Under the 2000 TP, factors such as 'the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits' need to be established, plus the fact that such "means" need to be pursued for the purpose of "exploitation." It is certainly arguable, although not determinative, that recruiting, training and using children in hostilities is a form of "exploitation", irrespective of the child's age. It is also arguable that there will always be the possibility of "an abuse of power" or at least, "a position of vulnerability" scenario in the case of children. The 2000 TP indicates that consent to trafficking is irrelevant in the case of children, who are defined as below the age of eighteen years. Because of the higher age limit in the 2000 TP, a State may not be breaching the CRC (or the OPAC, depending on the age set by the State party) in recruiting a fifteen, sixteen or seventeen year old into the military, but it may be accused of trafficking under the 2000 TP if those same children should cross an international border and it can be established that there has been a situation of an abuse of power, or the child is in a position of vulnerability such as arising from poverty, the status of being unaccompanied, traumatized due to conflict or other experience, or a child's age and maturity. The child's consent is relevant to the CRC and the OPAC in some situations, but it is not relevant to the 2000 TP. The key stumbling block to advancing such arguments in more than a theoretical way is that the recruitment of children into the military or their use in military operations must be considered to be a form of exploitation. In many practical scenarios it will be, but in others it will be arguable and the general position at international law, by reference to the position so far adopted under the CRC, the OPAC and the ICC Statute, is that it is acceptable to recruit voluntarily children over fifteen years of age but less than eighteen years, subject to the putting in place of certain protection safeguards.

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156. Rome Statute of the International Criminal Court arts. 8(2)(b)(xxvi), 8(2)(e)(vii), July 17, 1998, 2187 U.N.T.S. 90.

## IV. ASYLUM/MIGRATION

## A. 1951 Refugee Convention

The 1951 Convention relating to the Status of Refugees<sup>157</sup> (1951 Refugee Convention) and/or its 1967 Protocol<sup>158</sup> offers international protection to individuals who are outside their country of origin and who have a well-founded fear of being persecuted in their countries of origin on account of their race, religion, nationality, membership of a particular social group, or political opinion.<sup>159</sup> The UNHCR has stated that victims of trafficking or those at risk of trafficking may also be refugees within the meaning of the 1951 Refugee Convention. In its new guidelines, the UNHCR adopts the definition of “trafficking” as included in the 2000 TP.<sup>160</sup> The guidelines provide that trafficking in itself may be a form of persecutory conduct, but additionally that one’s fear of persecution need not be a fear of trafficking. An applicant may fear other persecutory conduct that has arisen due to the trafficking experience, such as community, family ostracism, social exclusion, re-traumatization or victimization, or other violence. There have also been a number of key asylum decisions reinforcing this analysis in several countries, including Austria,<sup>161</sup> Australia,<sup>162</sup> Canada<sup>163</sup> and the United Kingdom.<sup>164</sup>

157. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (*entered into force* Apr. 22, 1954) [hereinafter 1951 Refugee Convention].

158. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (*entered into force* Oct. 4, 1967).

159. 1951 Refugee Convention, *supra* note 157, at art. 1A(2).

160. UNHCR, *Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, ¶ 8, U.N. Doc. HCR/GIP/06/07 (Apr. 7, 2006). See also UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/01 (May 7, 2002).

161. *Verwaltungsgerichtshof* [VwGH] [administrative court] Jan. 31, 2002, docket No. 99/20/0497-6 (Austria) (overruling prior decision which denied refugee status to Nigerian woman trafficked into prostitution and returned for re-consideration).

162. *VXAJ v. Minister for Immigration & Anor*, (2006) F.M.C.A. 234 (Australia) (granting status to sex workers who might be forcibly re-trafficked as being a “particular social group”). Cf. Susan Kneebone & Bernadette McSherry, *Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights*, 12 INT’L J. HUM. RTS 67 (2008) (referring to a number of failed cases).

163. *In re X*, [1999] C.R.D.D. T98-06186 1, 4&7 (regarding Thai woman in sex trade).

164. *Sec’y of State for the Home Dept. v. Dyhygun*, [2000] UKIAT 00TH00728 (Immigration Appeal Tribunal) (appeal taken from U.K.) (refugee status of trafficked Ukrainian woman upheld on appeal); *Ogbeide*, Immigration Appellate Authority Appeal No. HX/08391/2002, May 10, 2002 (16 year old Nigerian girl trafficked for prostitution); *Miss A B*, Immigration Appellate Authority Appeal No. CC/64057/2002, 18 Feb. 2003 (16 year old Nigerian girl trafficked for prostitution); *A*, Immigration Appellate Tribunal Appeal No. CC/63673/2002, Feb. 18, 2003 (Albanian woman forced into prostitution); *K*, Immigration Appellate Tribunal Appeal No. UKIAT00023 K, Aug. 7, 2003; *Tam Thi Dao*, Immigration Appellate Authority Appeal No. HX/28801/2003, 1 Sept. 2003 (Vietnamese girl trafficked for prostitution). See, also, Mike Kaye, Anti-Slavery Int’l, THE MIGRATION-TRAFFICKING NEXUS: COMBATING TRAFFICKING THROUGH THE PROTECTION OF MIGRANTS’ HUMAN RIGHTS 7 (2003); Heaven Crawley & Trine Lester, *Comparative Analysis of Gender-Related Persecution in*

In spite of these developments, the recognition rate continues to be low for victims of trafficking, and there has yet to be any decisions relating to trafficking for forced labor, rather than in relation to sexual slavery or forced prostitution. This can partly be explained by a number of problems inherent in many national asylum systems. Decision-makers are not always (yet) fit to handle the complexity of such cases. Trafficked victims are not always counseled on the options available to them, including their right to apply for asylum. Trafficking victims may be discouraged from applying for asylum due to long delays, complicated procedures, or limited successful case law relating to trafficking and asylum, although this is slowly improving. Added to this are increasingly restrictive policies relating to rights for asylum-seekers while awaiting a decision, including the possibility of detention, other restrictions on freedom of movement, or no or limited work rights or access to legal aid or social security assistance. In practical terms, some trafficking victims begin their journeys in the hope of becoming migrants, not refugees, and many may not wish to identify with the “refugee” or “asylum seeker” label because of its common association with helplessness, dependency, and vulnerability.

Although the asylum route can be a long drawn-out process that does not always guarantee protection, should an individual be successful, she or he will benefit from the range of protections owed to refugees, including protection against *refoulement*. It is clear too that in the absence of other mechanisms in which victims of trafficking may be granted temporary or permanent rights to remain in the country to where they have been trafficked, especially where the trafficking-specific as well as the human rights instruments do not obligate States to offer sanctuary, the asylum channel is often the only one available. Alternatives to asylum include protections against torture or other forms of ill-treatment or punishment under human rights instruments (as outlined above) or discretionary programs of complementary or subsidiary forms of protection.<sup>165</sup>

In recognizing the increased vulnerability of women and children to trafficking in the context of armed conflict, and other situations of insecurity, chaos, and displacement, the UNHCR also sees its role as one of protector of

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*National Asylum Legislation and Practice in Europe*, ¶¶ 416-424, U.N. Doc EPAU/2004/05 (May 2004); Alice Edwards, *Age and Gender Dimensions in International Refugee Law*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 62 (E. Feller, V. Türk & F. Nicholson, eds., 2003).

165. Note that the EU Qualifications Directive does not additionally incorporate victims of trafficking who would not otherwise benefit from non-return to torture or other forms of ill-treatment under the European Convention on Human Rights. See Council Directive 2004/83/EC, 2004 O.J. (L304) 12, 16 (deciding that beneficiaries of subsidiary protection must show substantial grounds for believing that they would be at a real risk of serious harm if returned home). Serious harm consists of: “a) death penalty or execution; or b) torture or inhuman or degrading treatment or punishment; or c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.” Council Directive 2004/83/EC, art. 15, 2004 O.J. (L304) 12. See Ryzard Piotrowicz & Carina van Eck, *Subsidiary Protection and Primary Rights*, 53 INT’L & COMP. L.Q. 107, 115, 136-138 (2004) (relating to subsidiary protection and victims of trafficking).

refugees against the risks of trafficking. In this regard the UNHCR has acknowledged that lack of local integration prospects in host countries may lead women and girls into low-paid jobs only to find themselves forced into prostitution and sexual slavery.<sup>166</sup> Reduction in food security can have the same effect. Similarly, men may be forced to leave refugee camps in order to support and provide for their families. It is often these men and boys who become classified as irregular migrants and who face immigration barriers and penalties. They may find themselves working in exploitative working conditions. Men and children are also particularly susceptible to trafficking for forced recruitment into military groups (see above under Children's Rights). Thus, the global links between displacement and trafficking should be more widely acknowledged, whether that displacement is internal or international. Too often however the fact of having "voluntarily" assumed migratory journeys that end up in forced or exploitative labor conditions are not recognized as trafficking in individual cases, although arguably the definition in the 2000 TP is satisfied, where deceit, fraud or abuse of power or vulnerability is involved.

#### *B. Migrant Workers Convention*

Although the International Convention on the Protection of the Rights of Migrant Workers and Members of their Families<sup>167</sup> (MWC or Migrant Workers Convention) is not readily viewed as an instrument relevant to trafficked individuals, Anti-Slavery International reports that the vast majority of victims of trafficking are in fact migrant workers who have taken a decision to migrate.<sup>168</sup> Ryszard Piotrowicz has described trafficking as "effectively a clandestine form of migration over which States have little if any control."<sup>169</sup>

The MWC, the latest addition to the so-called core human rights treaties, is a human rights, rather than a migration-control, instrument. In fact, it focuses on the rights of migrants and members of their families, rather than on migration control strategies. For example, it does not deal with criminalization of irregular migration. It does, however, refer to "sound, equitable, humane and lawful conditions" of migration programs in Part VI. Article 2 of the MWC defines a "migrant worker" as "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national." Victims of trafficking may, therefore, meet the definition of a "migrant worker" in the MWC and as a result, benefit from its provisions. Article 3 excludes certain persons from its coverage, including specifically refugees and stateless persons, but there is no mention of trafficked persons. It is also unclear from the language of Article 3 whether asylum-seekers would be similarly excluded by virtue of the reference to

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166. UNHCR, *Refugee Women*, ¶ 18, U.N. Doc EC/GC/02/8 (Apr. 25, 2002).

167. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *opened for signature* Dec. 18, 1990, 2220 U.N.T.S. 93 (*entered into force* July 1, 2003) [hereinafter MWC].

168. Kaye, *supra* note 164, at 3.

169. Ryszard Piotrowicz, *Irregular Migration Networks: The Challenge Posed by People Traffickers to States and Human Rights*, in *IRREGULAR MIGRATION AND HUMAN RIGHTS* 137 (Barbara Bogusz et al. eds., 2004).

refugees.<sup>170</sup> The inclusion of asylum-seekers but the exclusion of refugees could lead to a situation where working asylum-seekers benefit from the rights enumerated in the MWC, but would lose those rights as soon as they are recognized as refugees. This also has implications for victims of trafficking who, if successful in their claims to asylum, may lose some rights under the MWC that they previously enjoyed.

Provided individuals who have been trafficked have been remunerated for their activities, they would fall within the scope of the MWC. But not all trafficked individuals are in fact remunerated; so arguably, by interpreting the definition of a 'migrant worker' in Article 2 literally, some may fall outside the scope of the treaty. However, it is not entirely clear that the "remuneration" aspect to the definition of a migrant worker requires that the migrant worker is himself or herself remunerated, rather than the activity itself being remunerated in some way. In most circumstances, the transfer of a victim of trafficking from one trafficker to another involves payment or remuneration of some kind. Whether payment passes from one trafficker to another, or from the victim or his/her family to the traffickers, seems to be irrelevant. The MWC applies to both documented and regular migrants as well as undocumented or irregular migrants,<sup>171</sup> with victims of trafficking more likely to fall within the latter category. Nowhere is trafficking mentioned in the MWC, but neither is there a requirement for the remunerated activity to be legal. It is almost what is not said in the MWC that allows for trafficked persons to benefit from the rights contained therein, rather than any explicit wording.

Having noted that victims of trafficking may be considered to be migrant workers under the MWC, a number of conceptual rather than legal barriers arise in readily viewing the MWC as being applicable, let alone of benefit, to trafficked individuals. First, victims of trafficking are generally considered victims of crime by governments, rather than as laborers or migrant workers. This is slowly changing as international attention moves away from a singular focus on trafficking in women and children for sexual slavery (victims of crime) towards other forms of trafficked persons, such as those in the construction, agriculture, factory, or domestic labor industries (migrant workers or migrants). Second, the problem of viewing exploitative labor, especially non-consensual sexual services, even if remunerated, as an issue of migration or labor could have the effect of downplaying the seriousness of the human rights and criminal law violations that occur. The MWC may, therefore, be conceptually better suited to individuals trafficked into exploitative or forced labor, rather than sexual slavery or forced prostitution, although this is indeed the subject of intense debate among feminists and/or advocates of sex worker rights.<sup>172</sup> Third, victims of trafficking are regularly

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170. See Alice Edwards, *Human Rights, Refugees and the Right to "Enjoy" Asylum*, 17 INT'L J. REF. L. 293, 302-05 (2005).

171. MWC, *supra* note 167, at art. 5.

172. See, e.g., Joyce Outshoorn, *The Political Debates on Prostitution and Trafficking of Women*, 12 INT'L STUDIES IN GENDER, STATE AND SOCIETY 141 (2005); K. Kempadoo, *Commentary: Slavery or Work? Reconceptualizing Third World Prostitution*, 7 POSITIONS 225, 226-27, 232-37



viewed as victims by governments and UN agencies, with limited recognition given to the very real migration-related motivations of many individuals who fall within the definition of 'trafficking' in the 2000 TP.

In contrast, many trafficked victims, especially adults, do view themselves as migrants. They had hoped to migrate to escape poverty or to improve their life situation. Many trafficked individuals did set out to be domestic servants, laborers, caretakers, restaurant workers, or even prostitutes. That is to say that many victims of trafficking had initially intended to be migrants or migrant workers. In fact, many believed that they were part of organized migration channels, having registered with private recruitment companies, filled government quotas for foreign labor, or been encouraged to depart through family or community networks. What many did not realize or could not have foreseen is that "they would be sold as chattel, held in debt bondage, and forced to work in a modern-day form of slavery"<sup>173</sup> or that the conditions they would face would be exploitative or below basic human rights standards. After the ordeal, many wish to remain in the country of destination because they continue to want to migrate. They still view themselves as migrants, rather than as victims of trafficking. Some of these issues were raised in relation to refugees (see above). Meanwhile, States may view them as criminals for having committed immigration offenses and they can become lost in the smuggling-trafficking distinction.

Although most of the rights in the MWC are found elsewhere in various international human rights treaties, the former treaty clarifies that migrants, whether arriving regularly or irregularly, are entitled to a core set of rights. Furthermore, it elaborates certain rights particularly applicable to migrants (and victims of trafficking) such as those relating to collective expulsion, to possession and protection of identity documentation, and to consular and diplomatic assistance.<sup>174</sup> In addition to its rights-based mandate, the MWC also contains provisions related to consultation and cooperation between States parties in relation to "sound, equitable and humane conditions in connection with international migration..."<sup>175</sup> That is, it is more than simply a human rights instrument, but crosses into the migration-management field, although these provisions offer a wide degree of discretion to States.

#### V. LABOR

According to the International Labour Organization (ILO), efforts to combat trafficking need to take account of both formal and informal labor market

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(1999); Jo Doezema, *Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women*, 18 GENDER ISSUES 23, 44-47 (2000).

173. Martina Vandenberg, *Complicity, Corruption, and Human Beings: Trafficking in Human Beings*, 34 CASE W. RES. J. INT'L L. 323, 325 (2002).

174. World Social Forum on Migration, Madrid, Spain, June 2006, Amnesty Int'l, *A Vital Part of a Global Response to International Migration: Why the Migrant Workers Convention Matters*, AI Index POL/33/005/2006, June 22, 2006 (prepared by Klaus Dik Nielsen); Amnesty Int'l, *Living in the Shadows: A primer on the human rights of migrants*, AI Index POL 33/006/2006, (Sept. 1, 2006).

175. MWC, *supra* note 167, at art. 64.

dimensions.<sup>176</sup> The ILO argues that restrictive immigration laws and policies appear to have been adopted with little or no consideration of domestic labor demand and supply factors,<sup>177</sup> which it indicates are the same factors that lead to trafficking. The ILO argues that there is operational value in addressing trafficking from perspectives of “labour market failure,... societal failure and human rights abuse(s)”, as it facilitates the development of strategic and integrated programs that combine poverty reduction and community mobilization in places of origin with economic analysis and law enforcement including the strengthening of labor institutions and the supervision of labor standards in both origin and destination countries.<sup>178</sup> Emek Uçarer argues that the dynamics of trafficking is best explained by migration theory, implicating demand-pull factors, such as levels of economic development, access, and employment prospects.<sup>179</sup> According to some commentators, “The trafficking in human beings is an outcrop of international labour migration, and cannot be separated from it.”<sup>180</sup>

Thus, the ILO comes to the question of trafficking from a forced labor perspective, with its myriad treaties on this subject. Its 1930 Forced Labour Convention (No. 29) aims to suppress the use of forced or compulsory labor in all its forms within the shortest possible period.<sup>181</sup> Convention No. 29 does not refer to trafficking *per se*, but it does provide a definition of “forced labour” which may be of relevance to the same term which appears in the 2000 TP definition. Under this treaty, “forced or compulsory labour” means “all work or service which is exacted from any person under the menace of any penalty, and for which the said person has not offered himself [or herself] voluntarily”, with a number of exceptions.<sup>182</sup> Forced labor is thus a form of trafficking when it is accompanied by the act and method elements in the Palermo definition (see above). Moreover, the ILO’s Committee of Experts that oversees reports of Member States has referred to trafficking, especially of women and children, in relation to reporting under Convention No. 29.<sup>183</sup> Notably, the Committee of Experts has observed that the low number of references to trafficking by Member States in their reports under this Convention can be partly explained by the fact that “victims are all too often likely to be perceived by the authorities as illegal aliens rather than as victims of organized crime.”<sup>184</sup>

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176. EU/IOM STOP European Conference on Preventing and Combating Trafficking in Human Beings, Brussels, Belg., Sept. 18-20, 2002, Int’l Labour Org., *Technical Paper: Forced Labour, Child Labour and Human Trafficking in Europe: An ILO Perspective*, at 3 [hereinafter *An ILO Perspective*].

177. *Id.* at 4.

178. *Id.*

179. Emek M. Uçarer, *Trafficking in Women: Alternate Migration or Modern Slave Trade*, in GENDER POLITICS IN GLOBAL GOVERNANCE 234 (Mary K. Meyer & Elisabeth Prügl eds., 1999).

180. Siriporn Skrobanek, Nataya Boonpakdee & Chutima Jantateero, THE TRAFFIC IN WOMEN: HUMAN REALITIES OF THE INTERNATIONAL SEX TRADE 3 (1997).

181. ILO, Forced Labour Convention art. 2(1), June 28, 1930, 39 U.N.T.S. 612.

182. *Id.*

183. *An ILO Perspective*, *supra* note 176, at 8.

184. *Id.*

In 1955, the General Conference of the ILO made a number of recommendations in relation to the protection of migrant workers in "Underdeveloped Countries and Territories."<sup>185</sup> This document outlines a number of key standards of treatment for migrant workers, including a general policy that migrant workers should be assured "as favourable working and living conditions as those provided by law or in practice to other workers engaged in the same employment...."<sup>186</sup> In 1957, the ILO adopted the Abolition of Forced Labour Convention (No. 105) which calls for the suppression of the use of forced or compulsory labor as a means of political coercion, labor discipline, or racial, social, national or religious discrimination; as a method of mobilizing and using labor for purposes of economic development; and as punishment for having participated in strikes. The Convention does not, however, refer to trafficking in persons explicitly, although arguably trafficking is pursued for some or all of the reasons outlined.

In 1973, the ILO adopted its first major instrument against child labor, the Minimum Age Convention (No. 138), which sought to abolish child labor and "to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons."<sup>187</sup> While leaving minimum age declarations up to individual States, the Convention provides that the minimum age shall not be less than fifteen years.<sup>188</sup> Thus, by definition, any child in employment under the age of fifteen years is in forced labor, with specific exceptions.<sup>189</sup> By comparison, the 2000 TP sets the age of a child at eighteen years for the purposes of satisfying its definition of trafficking. Perhaps the ILO treaty most relevant to trafficking is ILO Worst Forms of Child Labour Convention (No. 182) of 1999. This instrument makes specific reference to trafficking and classifies the "worst forms of child labour" as "all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict."<sup>190</sup>

The ILO argues that the lack of application and enforcement of labor standards in countries of origin as well as some countries of destination is "a major

185. Int'l Labour Org. [ILO], *Recommendation Concerning the Protection of Migrant Workers in Underdeveloped Countries and Territories*, ILO Doc. R100 (June 22, 1955).

186. *Id.* ¶ 20. The *Recommendation* also outlines policies relating to housing, wages, admission to skilled jobs without discrimination, trade union freedoms, the supply of consumer goods, social security, industrial safety and hygiene, contact with families in areas of origin, and material, intellectual and moral welfare.

187. ILO, *Convention Concerning Minimum Age for Admission to Employment* art. 1, June 26, 1973, 1015 U.N.T.S. 297.

188. *Id.* at art. 2, ¶ 3.

189. The exceptions include light work that is not harmful to the health or development or prejudicial to their education for persons 13-15 years of age or participation in artistic performances. *Id.* at art. 7, ¶ 1; art. 8, ¶ 1. Between the ages of 16 and 17 years, it will depend on the circumstances. *Id.* at art. 3.

190. ILO, *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* art. 3(a), June 17, 1999, 2133 U.N.T.S. 161.

incentive for the trafficking in labour.” It further asserts that “tolerance of restrictions on freedom of movement, long working hours, poor or non-existent health and safety protection and non-payment of wages are among the factors that contribute to an expanded market for trafficked migrants who have no choice but to work in conditions that are unacceptable....”<sup>191</sup> In addition, the ILO refers to the absence of labor inspection and worksite monitoring that can help identify workers in situations of forced and compulsory labor, or who have been trafficked into such work. However, applying labor standards or approaching trafficking as a labor issue comes with its own set of difficulties.

Treating trafficking as a labor issue could potentially result in the minimization of the seriousness of the criminal acts, human rights violations and/or violence being committed during the trafficking cycle, especially by governments that see labor issues as requiring regulation, rather than justice and redress. Labor laws may be especially inappropriate in relation to trafficking for the purposes of forced prostitution or sexual slavery, not to mention normative difficulties in countries that have legalized prostitution. Are there any other circumstances in which labor or employment laws, rather than criminal or human rights laws, are considered appropriate to respond to rape and sexual slavery? Adopting a labor lens has its advantages in so far as it recognizes the inter-linkages between migration, labor and trafficking, but it can downplay the serious human rights violations that occur throughout the process. It can also cause difficulties in the context of redress or compensation. Are women who have been forced into prostitution, for example, seeking compensation for work performed? Or are they seeking redress against abuse? This may depend on the individual and circumstances involved and the extent to which they feel aggrieved by the experience, but it is a question that deserves careful consideration. Some women may have voluntarily agreed to perform sexual services, but their objection is to the high levels of debt bondage, restrictions on freedom of movement, and conditions of that employment. Others should be treated as victims of rape, enslavement or servitude and be entitled to seek justice for the abuses they have suffered.

#### VI. NORMATIVE AND CONCEPTUAL CONGESTION

Trafficking in human beings is undoubtedly a question of criminal law.<sup>192</sup> The most recent example of this approach is the 2000 TP attached to the UN Convention against Transnational Organized Crime, which has as its principal purpose the criminalization of acts of trafficking by prescribing a definition, and inserting obligations to investigate, prosecute and punish offenders. It adds border controls to its methods of trafficking prevention. The same criminal law orientation is seen in all the earlier trafficking-specific treaties, with the exception of the 1904 White Slave Traffic Agreement which had the protection of victims as its key focus. Rape, enslavement, sexual slavery and enforced prostitution have been

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191. *An ILO Perspective*, *supra* note 109, at 9.

192. Obokata, *supra* note 67, at 456-57.

recognized as war crimes and crimes against humanity in the ICC Statute and in the instruments of other international country-specific criminal tribunals.<sup>193</sup>

While noting the very important roles that criminal investigation and prosecution play in efforts to combat trafficking, these measures will not solve the trafficking crisis alone, not least due to the low reporting or the low number of prosecutions being carried out in many regions.<sup>194</sup> Moreover, utilizing government and international resources wholly or disproportionately to the criminal law aspects of trafficking can potentially lead to a downplaying or sidelining of other aspects of the trafficking experience that may equally contribute to its reduction. These may include taking account of the migratory aspirations of many victims of trafficking and what this means for prevention strategies, the labor demand components that foster or encourage trafficking, the significance of human rights commitments for victims, including the inter-linkages between witness protection and successful criminal prosecution, or the systemic underlying causes of trafficking such as racism, sexism and poverty.<sup>195</sup>

Many commentators and activists praise the 2000 TP for adopting a more holistic approach to trafficking than previously existed. The Preamble to the newest entrant to the anti-trafficking normative framework provides that in the absence of a comprehensive agreement, “persons who are vulnerable to trafficking will not be sufficiently protected.” It aims to fill those gaps. Although the 2000 TP is broader in scope than its predecessors in its victim identification by encompassing all persons, not just women and children, as well as the acts/abuses/crimes that it covers which extend beyond forced prostitution or sexual slavery to other forms of exploitation, it is still open to challenge whether it has added any additional or new prevention strategies than those already contained in its predecessors or otherwise available under human rights law.

First, not unlike its predecessors, it is still above all a crime control instrument, evidenced by its heavy emphasis on criminal sanction and its additional references to border control measures. Second, the human rights provisions that are included are discretionary and not prescriptive; and they tend to emphasize the protection of victims rather than tackling root causes; the latter having a more direct causal link to preventing trafficking than the former. International human rights and refugee law provisions go further than the 2000 TP in terms of protecting victims of trafficking against *refoulement* to ill-treatment or persecution; or the range of due diligence obligations developing under the ICCPR, the CEDAW, and the CRC.

Third, although the 2000 TP has shifted emphasis from prostitution to exploitation, listing specifically slavery or servitude, forced or exploitative labor, and removal of organs, it has omitted other trafficking-related matters that appeared in the early slavery treaties, such as forced marriage, debt bondage, and

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193. See *supra* note 63 and accompanying text.

194. See *Global Patterns*, *supra* note 1, at 71-72 (on number of recorded and prosecuted cases of trafficking in a number of countries).

195. In relation to the latter, see Todres, *supra* note 116, at 888.

inheritance of women. These latter abuses could be interpreted to fall within the definition of trafficking in Article 1 of the 2000 TP, but, in a given case, may lack one or more of the elements required.

Fourth, the expansion of victim categories beyond women and children to include all persons who are at risk of trafficking has been praised by activists and academics alike<sup>196</sup> (and has been followed at the regional level<sup>197</sup>); however, one ought not accept this expansion (or, equally the expansion of types of trafficking) without question. Some scholars and activists refuse to distinguish between voluntary and forced prostitution on the basis that trafficking for the sex industry is no different than for forced labor or slavery.<sup>198</sup> Others criticize a lack of distinction as de-gendering the trafficking experience, “as the link to prostitution reminds us that it is usually women who are trafficked for the purposes of men’s sexual gratification.”<sup>199</sup>

It is further questioned whether such conflation may have the effect over time of watering down the seriousness of the issue of trafficking for sexual slavery or forced prostitution of women and children to a more generalized idea of trafficking that applies to men, women and children alike, without acknowledging their often very different or gendered experiences. For example, it may have the effect of treating trafficking for exploitative labor through harsh work conditions or unfair pay as being of the same kind or of the same nature as trafficking for sexual slavery. Not only are the experiences and abuses suffered distinct, the necessary preventative strategies and responses need to be tailored to the particular form or type of trafficking. As one of the few areas in which women had early recognition of their specific life experiences, albeit noting that a protective model was employed, it is important to ask whether the shift to be all-inclusive of all persons could dilute the recognition and attention given to the ever-increasing threat to women and girls.

Having said this, what appears to have occurred in reality so far is that the focus has remained steadfastly on women and girls (and increasingly all children). Because of this, the definition in the 2000 TP continues to be seen as an anti-prostitution instrument, with women as “victims” of that crime.<sup>200</sup> Non-sexual forms of trafficking or exploitation (including of women and girls) have not been given equivalent attention. There is some movement to suggest that this is slowly

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196. See, e.g., Coomaraswamy, *supra* note 10, at 6; *Recommended Principles*, *supra* note 27, at 3.

197. Council of Europe Convention, *supra* note 26, at ch. III.

198. See, e.g., Jo Bindman, *An International Perspective on Slavery in the Sex Industry*, in GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION, 65 (Jo Doezeema & Kamala Kempadoo eds., 1998); Jo Doezeema, *Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy*, in GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION, 34 (Jo Doezeema & Kamala Kempadoo eds., 1998); Alison Murray, *Debt-Bondage and Trafficking: Don't Believe the Hype*, in GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION, 51 (Jo Doezeema & Kamala Kempadoo eds., 1998).

199. Outshoorn, *supra* note 22, at 147.

200. B. McSherry & S. Kneebone, *supra* note 3, referring to *Who Gets to Choose?*, *supra* note 24, at 21, 24.

changing, in particular the work of the ILO in the context of trafficking for labor exploitation.

Fundamentally, the all-inclusive framework begs the question whether all forms of trafficking can be dealt with using the same tools and responses, or additionally, whether it suggests that their origins or root causes are the same. What these different forms of trafficking have in common may be the method of transportation, rather than the type of exploitation; with both these aspects of the trafficking cycle requiring distinct responses and solutions. It is arguable that the 2000 TP is too blunt an instrument for dealing with the myriad types of trafficking to which it has been tasked. Moreover, it would be wrong to perceive an instrument as being more effective than its predecessors simply by reason of its supposed all-encompassing, rather than specific, focus, especially when its enforcement and oversight mechanisms remain weak.

Human rights law was the second area of law that was explored in this article, starting with the slavery suppression instruments of 1926 and 1956, in addition to several of the modern human rights instruments, such as the UDHR, the ICCPR, the ICESCR, the CEDAW, and the CRC. Although human rights law is a discreet area of international law, it is important to note the considerable convergence between criminal law at the national level and international human rights law obligations on States. An accepted aspect of human rights law is the criminalization of trafficking, to conduct investigations and prosecutions, and to provide remedies to victims. Where human rights law goes further than criminal law obligations is in relation to the range of emerging due diligence responsibilities, such as the provision of shelters, legal advice, temporary stay, or repatriation.

As seen from the plethora of human rights instruments and the views of their associated institutions outlined in this article, not all instruments or bodies are as advanced as others in elaborating standards of treatment for victims of trafficking. The Committee on the Rights of the Child has outlined detailed due diligence responsibilities in relation to human trafficking under the CRC and its Optional Protocols. Its normative provisions are also the most detailed in comparison with other international human rights instruments. The CEDAW has only a single provision on trafficking that is narrowly constructed around forced prostitution, leaving other forms of slavery or servitude to the ICCPR. The Women's Committee though has fiercely called upon States to take up the issue of trafficking in women and girls, including under the rubric of sex discrimination. None of the treaty bodies (yet) assert that establishing rights of *non-refoulement* (or to stay in the territory) are more than optional, except in the most extreme cases that raise Article 7 ICCPR non-return obligations (or under Article 3 of the UNCAT or relevant regional human rights treaties). As yet, there is not full internal consistency between the treaty bodies in terms of victims' rights. As stated by Ryszard Piotrowicz, "there is a risk of the human rights regime becoming too diffuse. It is certainly cumbersome."<sup>201</sup> Moreover, placing the human rights of

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201. Piotrowicz, *supra* note 47, at 142.

victims of trafficking at the center of trafficking discourse,<sup>202</sup> while certainly an important component of a comprehensive response, is too narrowly confined. The 2000 TP also recommends some victim protection measures, although the language is discretionary and it does not cover the range or detail of the human rights treaty bodies. Moreover, there is a strong need for human rights discourse around human trafficking to be broadened to consistently acknowledge and address root causes, and not only victims' rights. Trafficking occurs along a continuum from the country of origin through to the country of destination. Human rights must be of concern for countries of origin, transit, and destination. Human rights treaties on economic, social and cultural rights have a key role to play in this regard.

The third area of inquiry of this article was asylum/migration. Migration was also particularly relevant to labor and labor migration in the fourth part. Neither the 1951 Refugee Convention nor the Migrant Workers Convention actually addresses the question of trafficking explicitly, nor do they make connections between displacement, migration, and trafficking. Rather, the link between displacement, migration, and trafficking has been made by the international organizations charged at the international level with responsibility over refugees and migration respectively (see below under Institutional Congestion). Instead, these instruments are rights-granting instruments to particular groups of human beings that have been considered by the international community to warrant additional or special rights. With the exception of the obligation not to *refoul* an asylum-seeker or refugee to threats to life or freedom, which includes non-rejection at the frontier,<sup>203</sup> and not to expel migrants collectively and without due process,<sup>204</sup> these two instruments do not impose other obligations upon States parties in relation to controlling migration. Having said this, the MWC does recommend some migration-related measures in Part VI.

In terms of substantive law, the 1951 Refugee Convention offers to some victims of trafficking a legitimate way of being able to remain in the territory should they satisfy the definition of a "refugee" in Article 1 of that treaty. This is particularly relevant today as none of the trafficking-specific treaties obligate States to do so and only limited jurisprudence exists under international human rights law to recognize an obligation of non-return to slavery. As pointed out in the body of this article, the torture or ill-treatment provisions of the ICCPR (or the UNCAT in relation to torture) prevent return to a serious risk of torture or cruel, inhuman or degrading treatment or punishment, which could arguably include future trafficking, reprisals from trafficking rings, victimization, community, family or social exclusion, or other forms of violence. Upon, or pending

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202. See, e.g., *Recommended Principles*, *supra* note 27, Guideline 1, at 5-6.

203. Office of the U.N. High Comm'r for Refugees, Exec. Comm., General Conclusion on Int'l Prot., No. 99 (LV), ¶ 1 (2004), available at <http://www.unhcr.org/excom/EXCOM/41750ef74.html>; Office of the U.N. High Comm'r for Refugees, Exec. Comm., Conclusion on Int'l Prot., No. 85 (XLIX), ¶ q (1998), available at <http://www.unhcr.org/excom/EXCOM/3ae68c6e30.html>.

204. MWC, *supra* note 167, at art. 22.



recognition of status as a refugee, the rights contained in the 1951 Refugee Convention may apply, in particular protection against *refoulement*.<sup>205</sup>

The MWC sets out a range of rights relevant to migrant workers and members of their families, albeit it does not contain a *non-refoulement* or “safe haven” clause. It was noted in this article that a victim of trafficking may be either a refugee or a migrant worker according to the definitions of each contained in these instruments, but she or he cannot be both at the same time. It was also noted that some victims of trafficking may not wish to identify with either label. Apart from the inherent problems in national asylum systems, some trafficked individuals may not wish to apply for asylum because they do not identify with the concept of refugees, which is frequently perceived as *victims* of persecutory conduct, rather than individuals with agency who made choices about their journey and attempted migration. Similarly, it would be conceptually erroneous to conceive of all victims of trafficking and sexual violence as migrant *workers*. Moreover, some trafficked individuals may never have been remunerated, as required by the definition; although as shown above, there are ways around this.

This brings us to the larger conceptual issue of what it means to conceive of trafficking within a migration framework. Frequently governments or national public authorities frame the trafficking experience within an immigration control model as a way of being able to apply restrictive border controls or to impose immigration penalties for illegal entry or stay. These immigration controls, although directed primarily at irregular migration, also affect victims of trafficking of whom the majority are irregular migrants. In doing so, human rights considerations are often circumvented. Such an approach can downplay or ignore the seriousness of the crime or abuses committed against the victim. In spite of these concerns, the migratory aspects of trafficking, such as migration-related motivations or pull factors, including labor shortages in host countries, need to be part of an overall legal and practical response, not least in relation to identifying and responding to root causes.

The last of the four areas of law studied in this article was international labor law. Viewing human trafficking within a labor or labor migration framework allows a closer analysis of particular underlying causes or push and pull factors in relation to particular kinds of trafficking, such as those related to labor exploitation. Doing so, however, cannot be in isolation of other issues, such as criminal justice, human rights, and asylum/migration. One danger of focusing too narrowly on labor aspects of trafficking is that it can result in conceptions of trafficking as principally a question of forced or exploitative labor, rather than other forms of abuses, such as sexual violence, multiple rapes, torture, cruel, inhuman or degrading treatment, arbitrary detention, or slavery. A labor framework is particularly problematic in relation to trafficking for forced prostitution or sexual slavery, and moreover, where it affects children. A labor framework may neither adequately reflect or incorporate the range of harms that

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205. See JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 300-01 (2005); Edwards, *supra* note 106, at 301.

occur during the trafficking cycle, nor be suitable to all forms of trafficking, including because demand is distinct between trafficking for sexual slavery of women and children, compared with trafficking to offset labor shortages. This is not to suggest that labor exploitation is not a serious human rights issue, but rather to point out that there are different gradations or types of harm involved in different forms of trafficking. Similarly, root causes of trafficking for sexual exploitation are based in socio-cultural patterns of patriarchal domination and discrimination against women or children, whereas push/pull factors for labor exploitation are more related to poverty, economic development, and migratory aspirations. The latter, of course, may also influence the migration patterns of women and children; and racial or ethnic discrimination may be a factor in labor exploitation.

#### VII. INSTITUTIONAL CONGESTION

Not only are there a myriad of instruments covering varying aspects of trafficking, there is equally a whole plethora of international agencies with different mandates for action or oversight.<sup>206</sup> This is not to mention the growing number of regional bodies and organizations becoming involved in the issue of trafficking<sup>207</sup> or a range of bilateral and multilateral security, crime control and intelligence agencies.<sup>208</sup> Some bodies or agencies have responsibility over specific legal instruments, whereas others are involved by virtue of their mandates over related subjects, such as migration, refugees, or labor. The large number of organizations involved in trafficking indicates, on one level, the positive recognition of the importance given to this issue by the international community.

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206. See the U.N. Office of Drugs and Crime; the U.N. Office of the High Comm'r for Human Rights; the U.N. human rights treaty bodies including the Human Rights Comm., Children's Comm., Women's Comm., Comm. on Migrant Workers, Economic, Social and Cultural Rights Comm.; the Int'l Criminal Court and other international criminal tribunals; U.N. Special Procedures including the Special Rapporteur on Trafficking in persons, especially women and children, Special Rapporteur on Violence against women, its causes and consequences, the Special Rapporteur on the human rights of migrants, the Special Rapporteur on sale of children, child prostitution and child pornography, and the Working Group on Contemporary Forms of Slavery; the U.N. Children's Agency (UNICEF); the U.N. Development Program; the U.N. High Comm'r for Refugees (UNHCR); the Int'l Org. for Migration (IOM); and the Int'l Labor Org. (ILO).

207. See, e.g., *Council Proposal for a Comprehensive Plan to Combat Illegal Immigration and Trafficking of Human Beings in the European Union*, 2002 O.J. (C 142) 2 (EU); Council Framework Decision of 19 July 2002 on Combating Trafficking in Human Beings 2002/629/JHA, 2002 O.J. (L 203) 1-4 (EU); *Communication from the Commission to the Council and the European Parliament on a Common Policy on Illegal Immigration*, COM (2001) 672 final (Nov. 15, 2001); see also Council of the European Union, Brussels Declaration on Preventing and Combating Trafficking in Human Beings, Nov. 29, 2002, 2003 O.J. (C 137) 2 (EU); John Morrison, *THE TRAFFICKING AND SMUGGLING OF REFUGEES: THE END GAME IN EUROPEAN ASYLUM POLICY?* 15-20 (July 2000) (pre-publication edition available at [http://www.ecre.org/eu\\_developments/controls/traffick.pdf](http://www.ecre.org/eu_developments/controls/traffick.pdf)); Puebla Process, initiated at the Regional Conference on Migration, Panama, May 2004 (a multilateral regional forum on international migration available at <http://www.rcmvs.org>); Bali Process, initiated at the Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, Feb. 2002 (a collaborative effort participated in by over 50 countries and numerous international agencies available at <http://www.baliprocess.net>).

208. See Interpol and Europol.

On the other hand, the consequence can be the difficult task of coordination and cooperation.

There have been various attempts to improve coordination between different international agencies. For example, the Intergovernmental Organization Contact Group on Human Trafficking and Migrant Smuggling (IGO Contact Group) was set up to promote information sharing and to facilitate inter-agency cooperation, while the Action Group on Asylum and Migration (AGAMI), aims to achieve better understanding between UNHCR and IOM on issues related to the asylum-migration nexus.<sup>209</sup> However, these groupings are loose affiliations and do “not claim independent personality.”<sup>210</sup> One of the key issues on the agenda of the IGO Contact Group is to discuss institutional roles and responsibilities. There is no overall designated lead agency on trafficking, leaving it to each group or network to appoint a temporary chair. Similar difficulties occur at the field level. None of the inter-agency groupings have any operational mandate, but must devolve to individual agencies to take issues forward. Moreover, not all international organizations have compatible mandates over trafficking.

As an example, the UNHCR has taken the lead in relation to trafficking in the context of refugees, due to their protection functions at the field level. Similarly, the link between trafficking and migration is made by the IOM and its program of work has expanded accordingly. However, it is the Office of the High Commissioner for Human Rights and the Migrant Workers Committee that has responsibility over the Migrant Workers Convention, and not the IOM. In the absence of a recognized protection, human rights or criminal justice mandate,<sup>211</sup> it must be questioned whether the IOM's functions are truly compatible with others working in the area of trafficking. Having said this, the IOM could play a positive role in encouraging States to adopt liberal migration policies and legal migration channels to reduce the demand for irregular labor migration as a means of prevention, in line with Part VI of the Migrant Workers Convention, just as the ILO works towards improving working conditions in many countries. The IOM does have a role to play in facilitating repatriation of victims on behalf of States, but this must comply with international obligations, including those under international refugee and human rights laws. Additionally, the UN Office on Drugs and Crime has primary institutional responsibility over the 2000 TP but it may over-emphasize the criminal law elements of trafficking.

To what extent can these various bodies cooperate in this area to ensure effective prevention and response strategies? Or, is a single entity or lead agency desirable? The response to these questions may depend on the specific mandates or

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209. Exec. Comm. of the High Comm'r's Programme, *Note on Int'l Prot.*, ¶ 30, U.N. Doc A/AC.96/965 (Sept. 11, 2002).

210. The Secretary-General, *Report of the Secretary-General on the Integration of the Human Rights of Women and a Gender Perspective: Traffic in Women and Girls*, ¶ 46, delivered to the U.N. Econ. & Soc. Council, Commission on Human Rights, U.N. Doc E/CN.4/2003/74 (Jan. 20, 2003).

211. See Guy Goodwin-Gill, Professor, All Souls College, Oxford, Keynote Speech at the Univ. of Oxford Refugee Studies Centre: Extra-Territorial Processing of Asylum Claims from a General Int'l Law Perspective (Dec. 15, 2006) (on file with author).

treaties under which particular organizations function, and/or their willingness to engage with other agencies. It must also be acknowledged that the issue of trafficking is not the only area of international law in which a myriad of bodies exist. What it means, however, is that in efforts to combat trafficking, serious and concerted efforts must be taken to reconcile divergent or competing interests; as well as to ensure that agencies working on these issues develop the necessary expertise, including from a cross-disciplinary perspective. Institutionally, therefore, more attention must be given to how to coordinate and cooperate between the vast number of international bodies.

This article recommends the designation of a lead authority, either at the field or diplomatic (or both) levels, over trafficking. Such a lead authority could vary depending on the type of trafficking at issue. The ILO, for example, may be a candidate for taking the lead in relation to trafficking for forced or exploitative labor, whereas trafficking for sexual slavery may be better suited to be under the guidance of the OHCHR, UNICEF or UNIFEM, with their mandates over issues such as non-discrimination, children's rights and women's rights. The UNHCR would continue its current dual role involved in the prevention of trafficking in the particular context of refugees and increasingly internally displaced persons in conflict situations, and in the education and promotion of asylum as an option for trafficked victims. Other agencies not mentioned in this article may also have a role to play (or potentially a lead), such as the World Health Organization in the fight against trafficking for organ removal. Lessons learned from the multifarious approaches and institutional division of responsibilities to internally displaced persons ought to be taken as a guide, noting in particular that a "collaborative" approach was largely unsuccessful and was hence replaced by a "lead agency" approach.<sup>212</sup> At a minimum, roles and responsibilities ought to be more formalized.

#### VIII. CONCLUSION

The issue of trafficking in human beings is addressed in a range of international instruments. While a proliferation of instruments can be viewed as reflecting international resolve to tackle this issue, it can also lead to contradiction and diffuseness that serves to undermine efforts to do so. At a normative level, the various instruments touching on trafficking are not entirely incompatible or inconsistent, but there is certainly a maze of potentially conflicting standards. Clearly, some treaties go further than others in terms of the following:

- Geographic coverage (international versus intrastate trafficking);
- Thematic orientation (criminal justice, migration, asylum, human rights, labor);
- Perpetrator identification (traffickers, brothel owners, employers, landlords, end-users; organized criminal gangs versus individuals);

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212. See U.N. HIGH COMM'R FOR REFUGEES, *THE STATE OF THE WORLD'S REFUGEES: HUMAN DISPLACEMENT IN THE NEW MILLENNIUM* ch. 7 (April 2006), available at <http://www.unhcr.org/static/publ/sowr2006/toceng.htm>.

Victim identification (white women, women, children, all persons); or

The acts/crimes/abuses covered (slavery, servitude, trafficking, discrimination, violence, rape, forced recruitment into armed forces, forced or exploitative labor, organ removal, unlawful adoption, inheritance of women, debt bondage, forced marriage, war crimes, crimes against humanity).

In terms of rights, a number of instruments repeat the same obligations or recommend the same rights to be observed, albeit these obligations are not always contained in each instrument in the same way. What is obligatory, rather than recommendatory, can vary between instruments. Where these instruments appear to diverge more acutely is in relation to prevention and protection strategies which are general in nature and tend not to be crafted to address particular types or forms of trafficking.

Further challenges emerge at a conceptual level. How trafficking is conceived may ultimately determine whether an individual is perceived as a victim of crime or a criminal, as an irregular migrant or an asylum-seeker, or as a laborer or a human rights victim. It may influence whether a victim is recognized as in need of protection either as a refugee or as a human being at risk of torture or cruel, inhuman or degrading treatment or, alternatively, ought to be repatriated home for breaching immigration rules. It may determine whether the abuse is seen as an infringement of employment laws, as serious violence or assault, or as a human rights violation. Moreover, how governments conceive of human trafficking will determine policies relating to the appropriate preventative strategy, whether that be criminal justice, border controls, labor regulation, victim protection or tackling root causes, or a combination of two or more of these.

While it is acknowledged that this proliferation of treaties is not unique to the issue of trafficking but rather is universal to the UN system as a whole,<sup>213</sup> it is asserted that it is arguably of greater consequence to trafficking than in other areas of human rights where abuses are generally confined within the borders of a single country. This is especially so in relation to transnational trafficking, which regularly implicates more than one State as a source, transit or destination country, each with inter-linked obligations. If neighboring countries are applying different international standards, or different definitions of trafficking, the response to trafficking will always be piecemeal, uncoordinated and ineffective. Even where trafficking is intrastate only, the link between intra-State and inter-State trafficking is not always acknowledged or well understood.

While the international community ought to be congratulated for raising the issue of trafficking as an international concern for over a century, many of the instruments lack effective oversight or enforcement mechanisms and their implementation remains weak.<sup>214</sup> Contributing to this is the fact that there is no

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213. See generally *Special Issue: Reform of the UN Human Rights Machinery*, 7 HUMAN RIGHTS L. REV. 1 (2007).

214. See Fariior, *supra* note 29, at 213.

central depository of instruments relating to trafficking, so each organization or network of organizations appears to self-select the key instruments deemed relevant to their work. Nor is there a lead (or central) authority that has an effective oversight or operational mandate over trafficking, or all four areas of law discussed in this article. The result is that there is no guarantee that action taken has an appropriate focus or follows the highest standard of rights and obligations. What the current system does ensure instead is confusion and overlap, and this in turn plays into the hands of traffickers (as well as some governments seeking, for example, to avoid human rights obligations) who benefit from the congestion of instruments and actors at the international level and the lack of effective and tailored coordination and response.

