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**TITLE: IN SEARCH OF GREENER PASTURES? TOWARDS AN EFFECTIVE INTERNATIONAL LAW CONTROL OF HUMAN TRAFFICKING.**

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Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the LLM in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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## CHAPTER 1

### I. INTRODUCTION

People will always dream of a better world and a better life than they have, especially if they are living in deplorable conditions. A lot of people in third world countries live in poverty and are always looking for a better life that will enable them live such a dream. They hear stories from other people about what life in other areas would offer. They believe that there are greener pastures not realizing how tough life in those areas would be. Globalization has made contact with the outside world so much easier, but with it also comes advanced trade in human beings.

Globalization has come with new technology and crime syndicates have not been lagging behind. In fact they are now using it to maximum effect so that it is even becoming difficult to keep up with their criminal activities. Even though the slave trade has been in existence for centuries and some believe that it has been abolished, it is still thriving in many parts of the world and it has become more advanced and complicated. The 1926 Slavery Convention outlawed slavery worldwide. Article 2 states that parties will take the necessary steps "to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms."<sup>1</sup> But even with its abolition centuries ago, the slave trade still exists and it is said to be worse than it was centuries ago. 'Slaves now are so cheap that they have become cost-effective in many new kinds of work, completely changing how they are seen and used. Buying a slave is no longer a major investment, like buying a car or buying a house (as it was in the old slavery); it is more like buying an inexpensive bicycle or a cheap computer.'<sup>2</sup> Slavery is defined as 'forced labor without pay under the threat of violence.'<sup>3</sup> It must be noted that trafficking is not just in third world countries but it is all over the world, even people in first world countries are trafficked. It is still one of the most degrading crimes which robs people of their dignity as human beings. Its victims are often what are called the 'unpeople' of this world- that massive but quite voiceless 'underclass' of people who are largely invisible,

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<sup>1</sup> Convention to suppress the slave trade and slavery 1926

<sup>2</sup> Kevin Bales Disposable People: New Slavery in the Global Economy (1999) 14

<sup>3</sup> ILO Report 'Global Alliance Against Forced Labour' 2005 accessed at [www.yaleglobal.yale.edu/pdfs/globalalliance.pdf](http://www.yaleglobal.yale.edu/pdfs/globalalliance.pdf)

forgotten and, in almost every catastrophe and war of the last half century, treated as disposable.’<sup>4</sup>

‘As with other forms of organized crime, trafficking has become a global phenomenon. Groups formerly active in specific routes or regions have expanded the geographical scope of their activities to explore new markets. Some have merged or formed cooperative relationships, expanding their geographical reach and range of criminal activities. Trafficking victims have become another commodity in a larger realm of criminal commerce involving other commodities, such as narcotic drugs and firearms or weapons and money laundering that generate illicit revenues or seek to reduce risks for traffickers.’<sup>5</sup>

This paper will first start with definitions of trafficking, the concepts and different forms of trafficking in humans and then briefly look at them. It will then go on to deal with the international law regulation of trafficking, since trafficking is an international problem which can only be combated by using an international perspective. It will look at different instruments designed to curtail trafficking and see how successful these have been over the years. The most important instrument that the paper will concentrate on is the Trafficking Protocol of 2000.

Chapter three is divided into three parts: the international framework, the human rights and the labor law frameworks. This is so because when dealing with trafficking in human beings these three perspectives cannot be separated. People are normally trafficked for labor purposes. Even if we talk of trafficking for prostitution it is so because it is a form of labor and people make profits. In a report called the Sex Sector, the International Labor Organization (ILO), the official labor agency of the United Nations, ‘calls for the economic recognition of the sex industry. It cited expanding reach of the sex industry and its unrecognized contribution to the gross domestic product (GDP) of four countries in

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<sup>4</sup> Brian Iselin ‘Barriers to Effective Human Trafficking Enforcement’ accessed at [www.unodc.un.or.th/factsheet/Barriers.pdf](http://www.unodc.un.or.th/factsheet/Barriers.pdf)

<sup>5</sup> United Nations Office in Drugs and Crime: fact sheet on human trafficking at [www.unodc.org/unodc/en/trafficking\\_victims\\_consent.html#facts](http://www.unodc.org/unodc/en/trafficking_victims_consent.html#facts)

Southeast Asia.’<sup>6</sup> But in the process of been trafficked and even before the victims reach their destination they are subjected to many of human rights abuses. It is therefore important to apply the human rights framework. In applying the human rights framework, the paper will rely on conventions such as the Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW), the Convention on the Rights of the Child (CRC) 1989. Other human rights instruments that indirectly address human trafficking are the International Covenant on Civil and Political Rights (ICCPR) 1966 and the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966. It should be noted that this paper will not examine these two instruments but they will only be looked at briefly.

When looking at trafficking in the labor law context the paper will look at how labor law can be used to help combat trafficking in humans.

Since trafficking is also a labor problem, labor law will be used to address the issue of trafficking. Using a labor law perspective is important for the issue of trafficking because labor law applies to all workers irrespective of their immigration status.

The paper in its conclusion will offer recommendations of how the different perspectives can be used to combat human trafficking. It will end by emphasizing that since human trafficking is an international problem, international law is needed to combat it.

## **1.1 DEFINITION OF TRAFFICKING**

The problem of trafficking is not recent but it is only recently that the international community has become actively engaged in order to combat it. Trafficking has been in existence for a long time and in many different forms. It has been equated to modern day slavery. Trafficking has been defined by the Trafficking Protocol to ‘mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of

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<sup>6</sup> The Sex Sector accessed at [www.ilo.org/public/english/bureau/inf/magazine/26/sex.htm](http://www.ilo.org/public/english/bureau/inf/magazine/26/sex.htm) on 12th July 12, 2005



payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at the minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.’<sup>7</sup>

## 1.2 THE PHENOMENON OF TRAFFICKING

Trafficking can be across borders or within borders. Countries in general have found it very difficult to prevent trafficking as there have been problems with the definition. Many countries also do not have laws on trafficking of humans. Profits from human trafficking fuel other criminal activities. According to the U.S Federal Bureau of Investigation, ‘human trafficking generates an estimated \$9.5 billion in annual revenue. It is closely connected with money laundering, drug trafficking, document forgery and human smuggling.’<sup>8</sup> ‘It is believed to be growing fastest in Central and Eastern Europe and the former Soviet Union. In Asia, girls from villages in Nepal and Bangladesh, the majority of whom are under 18, are sold to brothels in India for \$1000.’<sup>9</sup> In such cases the traffickers usually resell their victims. In most cases people are actually taken from their home for very little by the traffickers, in some cases they are kidnapped or taken under false pretences and promised a better life somewhere. Since the traffickers take them to their destination they believe that they owe the traffickers so much and therefore become indebted to them.

Traffickers actually fall into different categories. It is such a wide network that in most cases it is difficult to establish whether a person is a trafficker. There are three kinds of traffickers. Usually it starts with ordinary people well known in communities and sometimes respected. In rural areas in Africa, it can be either chiefs or persons known for doing good deeds in the community. These will recruit people under the false pretence of

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<sup>7</sup> Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children 2000

<sup>8</sup> US Department of State ‘Trafficking in Persons Report 2005 accessed at [www.state.gov](http://www.state.gov) on 21<sup>st</sup> July 2005

<sup>9</sup> United Nations Office in Drugs and Crime: factsheet on human trafficking at [www.unodc.org/unodc/en/trafficking\\_victim\\_consent.html#facts](http://www.unodc.org/unodc/en/trafficking_victim_consent.html#facts) accessed on 21<sup>st</sup> July 2005

finding them jobs or offering them a good life. The recruited people are then taken to of middlemen, who are connected to well established crime syndicates willing to pay a lot of money for the victims. The middlemen pay some money to the chiefs or whoever brings them the victims, but it will only be a small fraction of what they will get from the organized syndicates. The middlemen then contact the syndicates for the sale of the victims. They will profit from the sale or will be paid with illegal substances such as guns or drugs. The syndicates will trade and use the victims as they wish and make a very big profit. They are usually very well organized and well known in the community so that the victims are scared of reporting them to the authorities.

This crime is not just confined to prostitution as many tend to believe. Since much research is focused on prostitution and other aspects such as forced labor, child soldiers are ignored. Traffickers are therefore concentrating more on those aspects that are ignored. Although human trafficking has now become a subject for discussion at many international conferences, there is very little data on how many people are trafficked worldwide. 'A recent CIA report estimated that between 45,000 to 50,000 women and children are brought to the United States every year under false pretences and forced to work as prostitutes, abused laborers or servants. UNICEF estimates that more that 200, 000 children are enslaved by cross-border smuggling in West and Central Africa. The children are often "sold" by unsuspecting parents who believe that children are going to be looked after, learn a trade or be educated.'<sup>10</sup> According to the recent United States Department of State report, about 600, 000 to 900,000 people were trafficked internationally in the years 2004 to 2005. But others argue that this is too little a number. Because of the nature of the trade, it is very difficult to know exactly how many people are trafficked; many people who are trafficked are not even accounted for. The statistics of the United States Department of State are alarming as they only account for people trafficked internationally. But people are also trafficked internally; child soldiers in Sudan; sex slaves in Uganda taken by the Lord's Resistance Army and children in cocoa plantations but to mention a few. The crime has also not being defined and people do not know when to label an activity as human trafficking. In some parts of the world,

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<sup>10</sup> ibid

especially Africa, it is normal for people to take children from rural areas, place them in their household and pay nothing for their services. Most people do it, even the very educated, and they do not realize that what they are doing is a crime. The United Nations states that the number of trafficked victims is estimated at 7 million or even more.<sup>11</sup> But a recent report by the Global Alliance on forced labor gave a far much more alarming rate. According to the Report, 'today, at least 12.3 million people are victims of forced labor worldwide. Of these, 9.8 million are exploited by private agents, including more than 2.4 million in forced labor as a result of human trafficking.'<sup>12</sup> But the report also noted that the number may actually be greater than the 12.3 million.

'In many cases, trafficking patterns are also related to conflict situations as combatants or even peacekeepers create a market for the services of victims and the effects of conflict erode the capacity of law enforcement and other authorities to combat it.'<sup>13</sup>

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Trafficking Protocol) was adopted in 2000 as the first international instrument to combat trafficking. It supplements the United Nations Convention against Organized Crime 2000. As stated earlier on in this paper, there is a link between trafficking and organized crime. The emphasis of the Protocol is on the protection of the victim's rights and cooperation of States in combating trafficking. Since there is also a connection between trafficking and migration, the Protocol against the Smuggling of Migrants by Land, Sea and Air was also adopted in the year 2000 to supplement the Convention. This protocol talks about migration and how it is connected to organized crime. It emphasizes that those smuggled should be treated with dignity. Article 2 states that 'the purpose of the protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of the smuggled migrants.'<sup>14</sup>

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<sup>11</sup> [www.unodc.org/unodc/en/trafficking\\_human\\_beings.html](http://www.unodc.org/unodc/en/trafficking_human_beings.html) accessed on 23rd April 2005

<sup>12</sup> Global Alliance Report 2005 (n3)

<sup>13</sup> ibid

<sup>14</sup> Article 2 of the Protocol Against the Smuggling of Migrants by Land, Sea and Air 2000

### 1.3 REASONS WHY TRAFFICKING IS THRIVING

Trafficking has really become a world problem and most traffickers are using loopholes in and the absence of trafficking laws to continue their trade. 'The root causes of trafficking are complex and often interrelated with poverty. Weak government, armed conflict or lack of effective protection against discrimination and exploitation all contribute.'<sup>15</sup> But it is important to note that although these are some of the factors we should not generalize about the causes of trafficking. There are many factors that contribute to trafficking. The trade is not chosen just because of the poverty or humanitarian crisis that victims are experiencing. It is chosen because it generates great profits. It has been said to be the third most profitable illegal business in the world. Other factors also make it more complicated such as its uniqueness. Trafficking in humans as commodities is unique because apprehension will not per se result in a loss. Unlike drugs or illegal arms where such products are confiscated and in some cases destroyed, humans will not be destroyed. Even where they are killed traffickers know that they can easily get some more. When not killed they can traffic them again. This is so because of the population boom. 'Since 1945 the world population has almost tripled, increasing from about 2 billion people to 5.7 people.'<sup>16</sup> This means that there are a lot of people with few resources. With globalization, people will always aspire to have better lives than they have.

Another reason is that because of the nature of business it is sometimes very difficult for the victims to tell whether they are been trafficked. In most cases victim knows the traffickers and thinks that the trafficker is doing her/him a favor. The traffickers also use all kinds of reasons to make the victim believe that they are doing it for his/her own good. In some cases they may be well respected people in the community and will approach the victim and his/her family. The trafficker will try to trick the victim into going with him or her. The trafficker may also pay the family money telling them that it is for the good of their child and that their child will be helping them because he/she will be sending money home. In most cases, the trafficker will promise education or a job before leaving a

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<sup>15</sup> Elaine Pearson 'Human traffic, Human rights: Redefining Victim Protection (2002) Anti-Slavery International 6

<sup>16</sup> Kevin Bales *Disposable People: New Slavery in the Global Economy* (1998) 12

country or place of origin, but on or before arrival at the place of destination they may try to convince the victim that the job or education has not yet been organized and that some so they have to look for an alternative.

Since the trafficker is well known to the victim and his/her family, the victim will not doubt his/her intentions initially and will not question him/her. It may take a long time for the victim to know that she/he has been trafficked. Sometimes the victim may never know. For instance people can be trafficked on the pretence that they will be models or football stars, but when they reach their destination they are resold and employed in other sectors. In these cases the traffickers repeatedly tell them that they will still be footballers or models so the victims still work on the assumption that they will one day achieve their dream. This goes on continuously and it may take years before the victim realizes that the trafficker did not bring them to be models or footballers but to do forced labor.

Trafficking has taken on many different forms and it is becoming very difficult to identify the different types of trafficking. People are been trafficked for prostitution, forced labor, adoption, organ transplants and many other reasons. In certain countries parents sell their children to traffickers. 'In Ghana, there have been reports of parents giving their children to a sex god.'<sup>17</sup> With the different forms that it takes and with the lack of legislation in many countries to combat it, it is becoming a fast growing business around the globe. In addition many countries have introduced legislation, which makes it difficult for people to move from one country to another. For instance countries in the first world are tightening their immigration laws and some are confusing trafficking with smuggling therefore applying smuggling laws to those trafficked. The result is that people who want to go to another country for a good cause will be denied entry on the pretence that the country wants to curb trafficking. Human trafficking is also thriving because of corrupt practices in government and because those who are supposed to protect the victims are not protecting them. For instance there have been reports of United Nations security forces using brothels, which they know engage in human trafficking. The people who are supposed to protect the victims are abusing them by

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<sup>17</sup> Kevin Bales *Disposable People: New Slavery in the Global Economy* (1999) 22

engaging in such activities. 'For instance there have been reports of UN peacekeeping forces exchanging food for sex in the Congo.'<sup>18</sup>

When it comes to trafficking within borders, it is even more complex. In most countries there are no laws to combat such trafficking. It is even more appalling that there are no statistics in most countries to show the trend of trafficking. Lack of awareness on trafficking makes it worse. In many countries in Africa, there is yet no awareness thereby making it easier for traffickers to continue their activities. The lack of laws is apparent in most countries where human trafficking takes place. For instance, in Zambia, there are many cases but no law to combat it. 'For instance, a Greek national was found with a pornographic videotape involving Zambian girls as young as 14 years having sex with dogs.'<sup>19</sup> The person was tried in a magistrate's court and just fined stating that Zambia has no laws on such an offence. He was fined K2.8 million (about US \$560) and a deportation order was made which meant that he was free and could go to another country and continue with his business. Some may argue that in all cases of young girls, it can be said to be trafficking, but what about the older women who consented to perform these acts? The counter argument is that applying a human rights perspective such acts are demeaning and the women involved did not act out of their own free will but because of poverty.

Another problem is that most countries are unwilling to admit that trafficking is taking place in them. Others admit it but do not give it any priority. For example, some African countries such as Tanzania and Zambia have been said to have a lot of trafficking activities but up now the Zambia has not enacted a law to deal with it. As a result, Zambia is now seen as an easy target for traffickers. In other countries the fight against trafficking is misdirected. For instance in the United States of America, trafficking and smuggling is usually seen as the same problem. The United States government justified combining the two systems by stating that 'these related problems result in massive human tragedy and affect our national security system, primarily with respect to crime,

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<sup>18</sup> BBC Africa 'Sex for Food' 23<sup>rd</sup> March 2002

<sup>19</sup> Zambia Daily Mail of 13<sup>th</sup> October 2002

health and welfare, and border control.’<sup>20</sup> This has given rise to border controls treating trafficked people as smuggled people thereby denying them their rightful status. In most countries, this has resulted in deportation orders and trafficked people have been labeled as prostitutes and imprisoned. They are then deported. The traffickers are able to evade the law and continue their business making huge profits. Those trafficked have also been unwilling to report to the local authorities because they may be seen as criminal and will have nobody to protect them.

Lack of education on trafficking is also a contributing factor to its expansion. There is usually no education in most countries informing people of the dangers of accompanying people who promise them a better life or career. Most people are ignorant of the problem of trafficking and usually believe the traffickers because in most cases they know them. The trafficker also use power tricks, they know that these people are poor therefore it is easier to recruit them when one tells them of a job prospect. ‘For instance in Benin, there is now a process of educating people about trafficking and now families have become more aware of the problem of letting the children go with strangers.’<sup>21</sup> Discouraging the placement of children with family members or other people has achieved this. Usually in Africa, it was not a problem to place children with other people especially the wealthier ones. This largely contributed to the flourishing of trafficking. Most people, especially the victims, are ignorant about consequences of going with traffickers. Some people may agree to be trafficked as prostitutes and are fully aware of the requirements but are not fully informed of accompanying practices such as confiscation of passports and debt bondage.

Different countries have viewed trafficking in persons differently. While there are different reasons why people are trafficked for instance forced labor, pornography, adoption, prostitution and organ transferring, many countries have concentrated on certain aspect of trafficking and neglected others. Many countries have concentrated on

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<sup>20</sup> Dina Francesca Haynes ‘Used, Abused, Arrested and Deported: Extending Immigration Benefits to Protect the Victims of Trafficking and to Secure the Prosecution of Traffickers’ (2004) (2) 26 Human Rights Quarterly 233

<sup>21</sup> Unicef ‘Child Trafficking in West Africa.’ Innocentia Report accessed on [www.unicef-icdc.org/publications/index.html](http://www.unicef-icdc.org/publications/index.html) on 8th February 2005

trafficking for sexual exploitations thereby leaving other forms of trafficking unregulated. ‘The relationship between human trafficking and (sexual) violence against women had dominated the discussion, and the relationship between trafficking and forced or exploitive labor has been largely unexamined.’<sup>22</sup> For instance the first Convention against trafficking<sup>23</sup> was used to cater for white women who were been trafficked, but it is important to note that even at that time there were women of other races who were been trafficked for commercial and other purposes. There has been an argument that focus on prostitution is due to the influence of the western feminists. ‘The focus on prostitution as a component of trafficking is more meaningful to white, western feminists than to other feminists in that it reflects and reinforces dichotomies of the civilized and the uncivilized, actors and objects, and rescuers and victims.’<sup>24</sup> In Africa trafficking for labor is very rampant but since there is not much written about it, the impact that it is having on Africa and many other developing countries is underestimated. For instance in the United States of America, the T visa is offered to people who were exploited during the process of trafficking and in most cases these visas will go to those trafficked for prostitution and not those trafficked for forced labor or other purposes. ‘The United States Victims of Trafficking and Violence Protection Act of 2000 includes special protection, including non-immigrant visa status, for victims of ‘severe forms of trafficking in persons, defined to mean any type of ‘commercial sex act that has been ‘induced by force, fraud, or coercion, or in which the victim in the commercial sex industry is under 18 years of age.’<sup>25</sup> Other forms of trafficking do not qualify. ‘They only qualify as a severe form of trafficking if a person is trafficked through the use of force, fraud or coercion for the purposes of subjection to involuntary servitude, peonage, debt bondage or slavery.’<sup>26</sup>

There have been laws to combat human trafficking, but these laws were mostly for crime prevention. Countries mainly saw trafficking in humans as a migration and crime control

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<sup>22</sup> Elizabeth M Bruch ‘Models Wanted: The Search for an Effective Response to Human Trafficking’ (2004) 40 *Stanford Journal of International Law* 7

<sup>23</sup> The International Convention for the Suppression of White Slave Traffic 1904 p8

<sup>24</sup> Elizabeth M Bruch (n21) 9

<sup>25</sup> Joan Fitzpatrick ‘Trafficking as a Human Rights Violation: The Complex Intersection of Legal frameworks for Conceptualizing and Combating Trafficking’ (2003) 24 *Michigan Journal of International Law* 1160

<sup>26</sup> *ibid*



issue (and some still do). It is usually not seen as a human rights issue that calls for the protection of individual rights of the victims who are trafficked, but recently States have been taking steps to apply a human rights perspective to the problem of trafficking. These countries usually arrest the victims of trafficking unless they prove their innocence. This has resulted in many human rights abuses for the victim, by traffickers and sometimes by the State in which they find themselves. Infringements of the rights of the victim usually start when they are taken away from their families and continue for a long period of time. Infringements of the victims' rights do not just start when they reach their destinations, they are usually exploited on the way to their destinations. Their passports are taken and are kept by the traffickers. Since they do not have passports, they cannot move freely.

With globalization of trafficking it has become difficult for a single national system to combat it. This is so because of its worldwide global network. Because of this, it is important to apply an international law framework to trafficking. Most of those trafficked (especially internationally) have to use illegal and dangerous means of transport so that they are not discovered. They are sometimes put in congested places; some are put in congested trucks or boats in unhygienic conditions. They are some times starved and kept with no sanitation facilities. It is important to note however that this is only a fraction of those trafficked. In most cases, the traffickers will be well know at control posts or borders, so it will not be difficult for them to arrange travel documents for the victims or bribe those at the control points.

#### **1.4 DIFFERENCE BETWEEN HUMAN TRAFFICKING AND SMUGGLING**

There is a definite distinction between trafficking and smuggling although in most cases it is said to be the same thing. Though there are some similarities it may be difficult to establish whether one is dealing with a case of smuggling or trafficking. In some cases also people agree to being smuggled but end up as victims of trafficking. 'The distinction between trafficking and smuggling essentially turns upon the presence or absence of the elements of deception, coercion, or abuse of power in the relationship between the

perpetrator(s) and the migrant.’<sup>27</sup> It is important to note that although these two concepts have been defined, the definition has not been easy. This is because at times the two concepts overlap. ‘Law enforcement personnel may see the problem as primarily one of organized crime involving illegal immigration and labor; anti-prostitution activists distinguish between trafficking for the sex industry and for other purposes; and some women’s groups focus on exploitation irrespective of the industry.’<sup>28</sup>

The Trafficking Protocol defines trafficking in persons as ‘the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having the 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 labor or services, slavery or practices similar to slavery, servitude or the removal of organs.’<sup>29</sup> Here it is important to note that a person may agree to be an illegal immigrant but with trafficking it is actually impossible for a person to agree to being subjected to the abuse that comes with trafficking. A person can agree to be an illegal immigrant but can in the long run be a victim of trafficking. This usually happens when illegal immigrants reach their destination countries and have their passports taken from them and told to work for the person who smuggled them so that they can repay the cost.

Smuggling of migrants, ‘in contrast, is defined simply as the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident.’<sup>30</sup>

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<sup>27</sup> Joan Fitzpatrick ‘Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frame Works for Conceptualizing and Combating Trafficking’ (2003) 24 Michigan Journal of International Law 1150

<sup>28</sup> Kara Abramson ‘Beyond Consent , Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol’ (2003) 44 Harvard International Law Journal 479

<sup>29</sup> Article 3 of the Trafficking Protocol

<sup>30</sup> Joan Fitzpatrick ‘Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frame Works for Conceptualizing and Combating Trafficking’ (2003) 24 Michigan Journal of International Law 1150

The definitions in the two protocols are supposed to be gender neutral. ‘Although the United Nations’ definition of trafficking uses terms that are largely gender neutral and that apply to persons of all ages, the debate has centered on women and children.’<sup>31</sup>

‘In contrast with the Trafficking Protocol, the UN Protocol Against the Smuggling of Migrants by Land, Sea and Air (the “Smuggling Protocol”), refers to smuggled people not as “victims” but rather as “objects” of smuggling, or “migrants.”<sup>32</sup> ‘While it lacks extensive protective measures, the Smuggling Protocol’s cursory outline of assistance measures calls for State parties to “preserve and protect the rights” of smuggled people and to “take into account the special needs of women and children.’<sup>33</sup>

‘Although it provides that smuggled people shall not be targets of prosecution, its failure to confer victim status upon smuggled persons, and the absence of a prominent female-gendered dimension, suggest that, despite large numbers of female migrants ostensibly covered by the Smuggling Protocol, the facilitated migration of females is conceptualized more as a problem of trafficking.’<sup>34</sup>

An International instrument has now been adopted to safeguard the rights of migrant workers. The Convention on the Protection of Rights of All Migrant Workers and Members of their Families<sup>35</sup>, which came into effect in 2003, recognizes the rights of migrant workers and that they should be treated with dignity. In its preamble, the Convention clearly states that appropriate action should be taken to prevent trafficking. ‘Bearing in mind that the human problems involved in migration are even more serious in the case of irregular migration and convinced therefore that appropriate action should be encouraged in order to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights.’<sup>36</sup>

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<sup>31</sup> *ibid*

<sup>32</sup> Kara Abramson (n27) 482

<sup>33</sup> *ibid* 484

<sup>34</sup> *ibid*

<sup>35</sup> Convention on the Rights of Migrant Workers 1990

<sup>36</sup> Preamble of the Convention of the Rights on Migrant Workers 1990

It also states that no migrant worker shall be held in slavery or made to do forced labor. The problem with the Convention however is that it does not seem to recognize that with illegal migrants it is usually because of their status that their rights will not be respected. This is because the illegal immigrants will not have the protection of the State since they are in the country illegal, they will not report to the State because the State will deport them. They would rather have their rights infringed than report and be deported back to the conditions that they ran away from.

## **CHAPTER II**

### **2. THE DIFFERENT KINDS OF TRAFFICKING**

#### **2.1 INTRODUCTION**

The slave trade was in existence for a long time before it was abolished. With its abolition in 1880's most people believed that it would never flourish again. 'Because it was odious, and because it also had international aspects, slavery was the first area in which international involvement in social welfare and human rights issues occurs.'<sup>37</sup> The abolition has not however been respected and the trade is flourishing now more than ever in the history of mankind. The practice of human bondage persists into the 21<sup>st</sup> century, taking a variety of forms. 'Persons are forced into slave-like conditions even in highly developed democracies, despite the existence of effective criminal justice systems, tight border controls, and entrenched legal protections for fundamental human rights.'<sup>38</sup>

The concept of trafficking has been difficult to define over the years because of the different forms that trafficking takes. There have been so many attempts to define trafficking over the years. It is only recently that the Protocol has come up with a definition of trafficking. The word trafficking to many people still means trading in illegal goods especially drugs. 'The term trafficking carries a connotation of not only

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<sup>37</sup> Joan Fitzpatrick 'Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking' (2003) 24 Michigan Journal of International Law 1146

<sup>38</sup> *ibid* 1147

illegal activity, but also illegal subject matter.<sup>39</sup> Modern trafficking of people is different from smuggling although the two are sometimes confused. ‘The term “trafficking in people” now describes movement of people when the perpetrators use enticement, deception, kidnapping, slavery, debt bondage, forced prostitution, or some other form of exploitation.’<sup>40</sup>

The trafficking of women and children has been of concern on the international agenda for a long time now. To address the problem of trafficking, the international community came up with a treaty in 1904 ‘requiring States to criminalize trafficking and sexual exploitation and to cooperate with each other in prosecuting the perpetrators and rescuing the victims.’<sup>41</sup> ‘The treaty focused on the so called “white slave trade,” the use of deception or coercion to induce or force European or North American women or girls into the sex trade in developing countries or colonies.’<sup>42</sup> But this definition was biased and racist because it only concentrated on white women who were being trafficked. Since trafficking is such a dynamic trade and has advanced with technology a different approach altogether is needed to combat it. ‘While recognizing that trafficked women and children are victims of human rights abuses, preventing and punishing trafficking requires a multi-level game of coordinated norm development, communication concerning activities of transnational criminal groups, mutual assistance in law enforcement, provision of social services to trafficking victims, economic development in source countries, reform in migration policy, involving both State and non-State actors at the international, national and local levels.’<sup>43</sup> Because of the international commitment to curb these crimes the Trafficking Protocol to the UN Convention Against Transnational Organized Crime was drafted. As seen above it contains a definition of ‘trafficking’.

## 2.2 SEX WORKERS

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<sup>39</sup> Joan Fitzpatrick ‘Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking’ (2003) 24 Michigan Journal of International Law 1145

<sup>40</sup> Tiffany st Claire King ‘The Modern Slave Trade’ (2002) 8UC Davis Journal of International Law & Policy 295

<sup>41</sup> Joan Fitzpatrick (n37)1149

<sup>42</sup> *ibid*, 1152

<sup>43</sup> *ibid*, 1155

In this chapter, sex worker is used to mean those people who charge others for sex, although the paper may sometimes refer to them as prostitutes. It is one of the fastest growing businesses because there is always a demand for sex workers. 'Commentators maintain that international sex trafficking is a means of sexually enslaving women; women are sold, abducted, or raped, and then forced to engage in sexual activity for other people's profit.'<sup>44</sup> Their clientele is diverse, from local businessmen to peacekeepers to foreigners. It is estimated that about 1.2 million people are trafficked world wide for commercial sex. According to Global Alliance against Forced Labor, 'profits from forced commercial sexual exploitation totaled \$27.8 billion annually, or \$23,000 per worker.'<sup>45</sup> This trade is international; it exists in Asia, Africa, America and Europe. With globalization, it is becoming a fast growing trade and becoming more sophisticated. 'Ninety-eight percent of forced laborers working in sexual activities are women and girls, the report said, while women and girls account for 56 percent of nonsexual forced labor.'<sup>46</sup>

The trade is thriving because of the amount of money that it is generating. 'Experts agree that while trafficking patterns fluctuate in accordance with the global supply of and demand for trafficked women, trafficking generally originates in impoverished areas that lack viable economic opportunities for women.'<sup>47</sup> Because of the conditions in these 'developing countries or countries transitioning to a market economy, conditions of extreme poverty for women can compel women to involve themselves in sex trafficking.'<sup>48</sup> There are many different ways in which people are trafficked into commercial sex but there are four common methods. 'Some are lured by false promises of employment as models, dancers, waitresses, nannies, seamstresses, but when they arrive at their destination, they are sold into prostitution or other forms of commercial sex

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<sup>44</sup> Katrin Corrigan 'Putting the Brakes on Global Trafficking of Women for the Sex Trade: an Analysis of Existing Regulatory Schemes to stop the Flow of Traffick (2001) 152

<sup>45</sup> Global Alliance against Forced Labor 2005 Report

<sup>46</sup> *ibid*

<sup>47</sup> Katrin Corrigan 'Putting the Brakes on the Global Trafficking of Women for the Sex Trade: An Analysis of Existing Regulatory Schemes to Stop the flow of Traffic' (2001) 25 *Fordham International Law Journal* 154

<sup>48</sup> *ibid*

and held captive, either literally or through a system of debt bondage.’<sup>49</sup> ‘Some of them might have consented to work in the sex industry, but are deceived about the work condition and their freedom to quit any time.’<sup>50</sup> And then there are those who might ‘have been sold by their families, often into debt bondage.’<sup>51</sup> It usually starts with an advertisement for a good paying job somewhere. Or some people know that they are going into prostitution but they do not know that they will be required to pay almost all their earned money to the traffickers. The other reason is that it is increasing because of the current weak trafficking laws or non-existent of such laws in certain countries. Since they are no strict laws in the industry and it generates a lot of profit, the powerful network of international organized crime will be attracted to this activity.<sup>52</sup> ‘Unless specific enforceable trafficking laws aimed at prevention of the crime, prosecution of the perpetrator, and protection of the victim are enacted on the national level and in countries around the world, this serious human rights violation is likely to continue globally.’<sup>53</sup>

The victims will usually be introduced to the business of prostitution later on when they reach their destination. They will have no other option but to give in to the demands of the traffickers because they are usually an organized group.

‘To maintain control of the victims, traffickers use coercive tactics, such as deception, fraud, intimidation, isolation, threat, physical force, and debt bondage.’<sup>54</sup> Traffickers also usually have the cooperation of law enforcement officers in order to carry out their trade. ‘At times, law enforcement agencies further enable human trafficking by “acting in collusion with pimps or organized figures” by accepting bribes, falsifying documents and providing protection.’<sup>55</sup> ‘For instance, in the trafficking of Burmese women and girls

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<sup>49</sup> Abigail Schwartz ‘Sex Trafficking in Cambodia’ (2004) 17 Columbia Journal of Asian Law 378

<sup>50</sup> *ibid*

<sup>51</sup> *ibid*

<sup>52</sup> Susan Tiefenbrun ‘The Saga of Susannah A US Remedy for Sex Trafficking in Women: The Victim of Trafficking & Violence Protection Act of 2000’ (2002) 109

<sup>53</sup> *ibid* 110

<sup>54</sup> Wendy M Gonzalez ‘Human Trafficking: Criminalization of Victims in the Sex Industry’ (2004) 11 Buffalo Women’s Law Journal 20

<sup>55</sup> *ibid*

into Thailand, there is “clear official involvement in virtually every stage of the trafficking process” yet little concerted effort by the Thai authorities to investigate and punish such abuses by their own agents.’<sup>56</sup> Apart from receiving bribes they will also make use of the services of these trafficked women. ‘Similarly, in the trafficking of Nepalese women and girls to India, Indian brothel keepers will inform the police of the arrival of a new victim and pay a price for their silence, and may provide brothel services to Indian police or hire these officers to serve as traffickers themselves.’<sup>57</sup> This shows how big the problem of trafficking is. It is not just a few people who are involved but for it to flourish a number of stakeholders are involved. Usually because these criminal networks are so rich they are easily able to bribe the police who are not paid enough by their respective governments therefore the police will also ensure that the business continues in order for their benefits from the business to continue. They will use the forged documents at border posts to enable the victims to go to another country, but once they reach the destination they will confiscate the documents. This means that the victim will have no one to trust and no one to run to. ‘In Bosnia, civilian police have been accused of buying and selling women, as well as conspiring with organized criminal groups to recruit and smuggle them into brothels. Civilian police, including high-ranking UN officials, have also reportedly patronized brothels in which trafficked women are imprisoned and abused.’<sup>58</sup> Their documents are confiscated or destroyed. They cannot speak the language and it is difficult for them to communicate.

There are reports of multinational corporations, and peacekeepers being actively involved in trafficking for sexual exploitation. ‘There have been reports of peacekeepers in Congo involved in sexual exploitation of women for food and a small fee.’<sup>59</sup> The peacekeepers and multinational organizations encourage the business of trafficking by visiting those brothels and paying high fees compared to the fees that the locals would pay.

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<sup>56</sup> Janie Chung ‘Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Context’ (1998) 11 *Harvard Human Rights Journal* 67

<sup>57</sup> *ibid*

<sup>58</sup> Jennifer Murray ‘Who Will Police the Peace Keepers? The Failure to Establish Accountability for the Participation of United Nations Civilian Police in Trafficking of Women in post-Conflict Bosnia and Herzegovina (2003) 34 *Columbia Human Rights Review* 480

<sup>59</sup> [www.bbcafrica.com](http://www.bbcafrica.com) accessed on 10<sup>th</sup> April 2005



Trafficking for the sex trade is not just international but also happens within borders. Girls and sometimes boys are taken from poverty stricken areas and promised well-paying jobs in urban areas. When they reach their destination, they realize that they have been trafficked. They are usually scared of going back because in most cases they feel that they may not manage to escape, but even if they did they feel that they traffickers may avenge their escape on their families.

Trafficking for commercial sex also includes other forms of trafficking such as child sex tourism, phonograph, military sex trafficking and mail order brides.

### 2.2.1 Sex Tourism

The tourism industry is said to bring in a lot of cash, especially for developing countries. Most of them are investing almost all their resources in it. It is said that it can create more jobs and therefore improve the standard of living for many of these countries. 'It is estimated that by 2010, the number of international tourists will be 967 million.'<sup>60</sup> 'However, there is a darker side to the tourism industry, a side that diverges from the stereotypical tourist seeking to explore a foreign country's landscape and culture. This darker, clandestine side delves instead into the realm of child prostitution and exploitation, namely sex tourism.'<sup>61</sup> 'The rapid growth of the sex industry, the spread of sexual tourism by citizens of the so-called developed world, combined with the often devastating effects of globalization, the politics of structural adjustment, the lack of basic social policies and the lack of acknowledgement of and respect for the rights of children and youth, have created conditions in which the commercial sexual exploitation of children and youth have become a growing phenomenon.'<sup>62</sup> The effects of structural adjustment programs and HIV/AIDS are putting a strain on the children and youth in developing countries. This is not the only problem because there can be no supply without demand. Tourists come to these countries not just to see the natural resources but in search of the exotic other. They have preconceived ideas about exotic women in Africa

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<sup>60</sup> Kathy J Steinman 'Sex Tourism and the Child: Latin America's and the United States' Failure to prosecute Sex Tourism' (2002) 13 *Hastings Women's Law Journal* 54

<sup>61</sup> *ibid*

<sup>62</sup> *ibid* 59

and Asia. With industrialization and also globalization sex tourism is becoming more advanced. The tourists can simply go to the internet, check which countries have relaxed laws on child prostitution and take advantage of that. 'Websites and brochures advertise brothels, accommodation, airfare, and even complete packages, which allow individuals to travel to have sex with young children.'<sup>63</sup>

According to Steinman, there are two kinds of sex tourists. These are the preferential abusers and the situation abusers. 'Preferential abusers, the pedophiles, "have clear and definite sexual preferences for children," while situational abusers generally have not "planned to have commercial sex while abroad, but took the opportunity when it presented itself.'<sup>64</sup>

These tourists are usually from developed countries and from different political and economic backgrounds. They usually range from politicians, lawyers, businessmen to peacekeepers. Economically they are powerful because they will have the money even though they may not be considered rich in their countries. In these poverty-stricken countries they will however be seen as rich. Sex tourism is blooming because of the demand that is made on young girls. Usually these tourists will want young girls because they believe that they are free from diseases and therefore will pay more for their services. The pimps therefore recruit young girls more and sometimes will go out of their way to kidnap them, especially in poor countries just because they are in demand and they bring in a lot of money.

Because of the money that these tourists usually come with, some locals will also take advantage and recruit girls, and sometimes boys, into the industry. These people will usually position themselves in places that are tourist destinations. The traffickers will usually operate under a false name and recruit girls under the pretext that they will be working in other industries. Some girls know however exactly what they are being recruited for, but don't know the abuses that come with it. The traffickers are not

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<sup>63</sup> Shawrona Higgins-Thorton 'Innocence Snatched: A Call for a Multinational Response to Child Abduction that Facilitates Sexual Exploitation' (2003) 31 Georgia Journal of International & Comparative Law 627

<sup>64</sup> Kathy J Steinman (n58) 65

concerned with how the tourists treat the victims, all that matters to them is the money that the tourists pay. The tourists are charged a lot for the services, but the victims only get a minimum fee. The girls are usually desperate for money. Because of structural adjustment programs and poverty they cannot find jobs anywhere so they are unable to feed them selves and their families.

In some cases, the girls will move to such areas on their own, without been trafficked or coerced into such a business. This is so because of poverty and its effect on their families. 'In Zambia, girls as young as 15 years old move to Livingstone the tourist capital to be sex workers. They hear stories from their friends about how well these tourist pay and therefore they migrate there to provide services.'<sup>65</sup> The girls are there because of the demand created by the tourists. If there was no demand they would not be there. In developing countries the trade has been exacerbated by HIV/AIDS. When parents become ill of HIV/AIDS, it is usually the girl child who will assume the responsibility of looking after them and the younger siblings. She will stop going to school to ensure that they are looked after well. This means that she will also miss out on her education. After the parents die, the girl child will assume the responsibility of looking after the whole family. This means she gets no education and no skills. She will therefore try to find other means of surviving and will be an easy prey for tourists who can offer her more money. In many developing countries, governments do not pay social security grants and therefore the burden of raising orphaned children falls on extended families. These families are now overstretched, they cannot look after the orphans so there are now many child households springing up. Children are now heading households and caring for their younger siblings.

### **2.2.2 Child Pornography**

The global age has also contributed to the high rise of child pornography. It involves visual depiction of children up to 18 years engaged in sexually explicit conduct. According to Article 2 (c ) of the Protocol on Child Prostitution, 'child pornography means any representation, by whatever means, of a child engaged in real or simulated

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<sup>65</sup> The Post New Paper, 12<sup>th</sup> April 2004

explicit sexual activity or any representation of the sexual parts of a child for primarily sexual purposes.’<sup>66</sup> ‘This activity can be either heterosexual or homosexual, and such depictions can be in the form of photographs, videotapes, films, magazines or computer-generated images.’<sup>67</sup> The children are vulnerable, they are being exploited by people whom they are supposed to trust. ‘The internet’s powerful technology unleashed the child pornography industry from its former shadows and advanced it beyond the reach of existing laws.’<sup>68</sup> The coming of computer technology has also created problems when it comes to pornography. People are now able to buy pictures of women and children without even leaving their homes. This means people everywhere so long as they have access to the internet. Internet technology has facilitated the exploitation of women and girls. Those who want to view pornographic material are able to do that anywhere for a small subscription. This means that they are anonymous and they don’t have to go to a public place to view such images. With the internet, crime can now be carried on the computer and with the extensive technology that is been used by criminals, it is becoming very difficult for law enforcers to catch up with them.

This kind of business can only thrive where there is a demand for it. Pornographic sites can now be found almost everywhere. It has become so easy with modern technology. Even the kind of material that is being found on these sites is now more explicit than ever. ‘Slave Farm, a web site registered in Denmark, claims to have the “world’s largest collection of real life amateur slaves”. The images include women being subjected to sexual torture, bondage, and fetish sadism.’<sup>69</sup>

The other kind of pornography that is coming up is images of girls or women with animals. ‘In Zambia, there were reports of women, and girls as young as 15, being video

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<sup>66</sup> Article 2(c) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000

<sup>67</sup> Shawronda Higgins-Thornton ‘Innocence Snatched: A Call for a Multinational Response to Child Abduction that facilitates Sexual Exploitation’ (2003) 31 Georgia Journal of International & Comparative Law 627

<sup>68</sup> Jason Hitt ‘Child Pornography and Technology: The Troubling Analysis of United States v Mohrbacher’ (2003) 34 University of California Davis Law Review 1130

<sup>69</sup> Donna M Hughes ‘The Use of New Communications & Information Technologies for Sexual Exploitation of Women and Children’ (2002) 13 Hastings Women’s Law Journal 133

taped with dogs.’<sup>70</sup> The women and girls were paid a small sum. Pornographic film makers are moving from developed to developing countries to make films of more degrading scenes for a much smaller price. They usually pay less than half of what they would pay in developed countries for such scenes. They know that women and girls from developing countries are desperate to earn money just to make a living and are therefore willing to be filmed just for a small amount. They also know that in developing countries, the law enforcers don’t have the kind of technology so that it is very difficult for them to catch up with them. Even if they do catch up with these pornographic film-makers, they know that there are no strict laws and the toughest penalty they can get is deportation. Therefore absence of laws makes it easy for these offenders. When they are served with deportation orders, they will just find another lucrative market for the trade. They will not stop their trade. Instead they will just become more sophisticated in their dealings.

### **2.3 International Laws dealing with the Sexual Exploitation of Children**

The CRC is an instrument that deals specifically with the rights of children. It emphasizes the best interests of a child. Children should be treated with dignity and not as property but as individuals who have their own rights. The articles that are relevant in the context of sexual exploitation are articles 32,34, 35 and 36

#### ***Article 32***

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

#### ***Article 34***

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<sup>70</sup> Times of Zambia, 14<sup>th</sup> August 2002

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

#### **Article 35**

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

#### **Article 36**

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography outlines some of the abuses against children. According to article 2 of the Protocol on the sale of child:

- (a) Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration;
- (b) Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration
- (c) Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.

## **2.4 ORGAN TRAFFICKING**

'The World Health Organization (WHO) estimates that approximately 50,000 kidney transplants take place every year. Of these, an absolute minimum of 15,000 transplants are from live donors.'<sup>71</sup>

Although the traffic in body parts is escalating there is not much being done about it by the international community. There are provisions on it in the trafficking protocol but

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<sup>71</sup> World Health Organization Executive Board, *Human organ and tissue transplantation: Report by the Secretariat*, 112th Session, Provisional agenda item 4.3, EB112.5, 2 May 2003.

State Parties have not effectively legislated to combat it. 'Trafficking for organs occurs, where a third party recruits, transports, transfers, harbours or receives a person, using threats (or use) of force, coercion, abduction, fraud, deception or abuse of authority or a position of vulnerability for the purpose of removing that persons organ/s.'<sup>72</sup>

A lot has been written on trafficking in human beings but there is not much research on trafficking for illegal organs transplants. 'Organ trafficking violates fundamental human rights, such as the rights to life, liberty, security in person, and freedom from cruel or inhuman treatment.'<sup>73</sup>

Organ selling is another illegal business that is becoming more complicated as technology improves. 'Improvements in medical technology and surgical techniques have increased the success rate of organ transplants, thereby increasing the demand for organs.'<sup>74</sup> Usually organs are in demand by the rich, but there is limited supply. Recipients usually have to wait for very long periods of time and finding the organ for them is the only means to survive. They will therefore do everything to find such an organ to save their lives.

Because of the demand poor people will answer adverts for organ transplants. Those involved in this illegal trade will also use trickery on the victims. They may promise them huge sums of money for the organ. And afterwards pay them less or not pay them at all. Sometimes they may be tricked into believing that it is a different kind of operation. Later only will they discover that their organ has been removed. Usually they will be made to sign a contract. In most cases the victims may not even to understand the terms of the contract but will sign it. The traffickers usually do this to cover their tracks. 'Kidney sellers are not supposed to take legal action against traffickers; many are precluded from filing a criminal complaint as they unwittingly signed false affidavits saying they gave

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<sup>72</sup> Elaine Pearson 'Coercion in the Kidney Trade? A Background Study on Trafficking in Human Organs World Wide' (2004) 54

<sup>73</sup> Sheri R Glaser 'Formula to Stop the Illegal Organ Trade: Presumed Consent Laws and Mandatory Reporting Requirements for Doctors' (2005) Human Rights Brief, American University Washington College of Law 21

<sup>74</sup> *ibid*

their kidneys away.’<sup>75</sup> Even if they are paid the money promised, they are usually medical complications that come with the procedure and some even die during the process. Because they are usually poor, they will not be able to go for medical check-ups after the operations, which may therefore lead to further health complications.

Initially there were stories of people selling their organs because they were promised large sums of money, jobs or migration possibilities but now it is becoming more complicated. People are now kidnapped and killed just for their organs. In South Africa “muti” killings are being performed on children. ‘Young children are being killed and have their organs, especially genitals, removed because it is believed that it will make one rich.’<sup>76</sup> These kinds of killing are now taking place in most Southern African countries. ‘In Zambia, there has been an increase in child deaths, these children have been found dead with their genitals or their hearts removed.’<sup>77</sup> Police suspect that children are being used in rituals because people believe that certain body parts of the child can make one rich. The body parts are not just used in one country but are sold internationally, usually to persons who will pay more money for them. The organization Organs Watch estimates that ‘thousands of illegal transplants occur every year bought by patients from the Persian Gulf States, Japan, Italy, Israel, the U.S and Canada supplied by “donor” nations, including India, Pakistan, Turkey, Peru, Mexico, Romania and South Africa.’<sup>78</sup>

Those buying organs are going to less developed countries because they are cheaper there. Because of the demand for illegal organs, people will always find ways of supplying them, even if they have to kill somebody.

The trade is thriving much more than people know because of the secrecy that goes with it. Most people are unwilling to admit that they sold a part of their body for economic gain. Because it is usually a secret operation the people who carry it out will usually not be very qualified for the job. The operation will usually not be carried out under very

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<sup>75</sup> Elaine Pearson ‘Coercion in the Kidney Trade? A Background study on Trafficking in Human Organs World Wide’ (2004)

<sup>76</sup> Special Assignment on SABC 3 on 31<sup>st</sup> May 2003

<sup>77</sup> The Post News Paper 30<sup>th</sup> June 2004

<sup>78</sup> Elaine Pearson ‘Coercion in the Kidney Trade? A Background Study on Trafficking in Human Organs World Wide’ (2004)



hygienic conditions. The instruments used are sometimes not designed for medical operations. The result is the donor is at considerable risk.

The sellers of organs are connected with international syndicates, which involve many stakeholders. 'In China, for example, officials remove organs from executed prisoners to use in transplant surgeries.'<sup>79</sup> The Chinese government usually carries out executions to create a market for organs. 'For instance, Amnesty International reported in March 2004 that China executes 15,000 people per year and that 69 per cent of the nation's executable offenses in the criminal code are for non-violent crimes.'<sup>80</sup> It is alleged that these executions are carried out to satisfy the trafficking of illegal organs. 'Human rights activists also report that Chinese officials systematically remove kidneys, corneal tissue, liver tissue, and heart valves from executed prisoners, giving them to well-connected people, or, more often, selling them on the black market for up to \$30,000.'<sup>81</sup>

'The WHO's Guiding Principles on human organ transplants state that the commercialization of human organs is a violation of human rights and human dignity.'<sup>82</sup>

It outlines various key principles to be taken into consideration when one wants to donate an organ.

'Informed consent of the donor is required for voluntary organ transplantation to take place. Transplants can take place between related donors with a proven genetic relationship and where there is a good match (tissue and blood) between donors. Living donations shall be considered secondary to cadaver donations.'<sup>83</sup>

#### 2.4.1 Legal framework

Article 3 of the Trafficking Protocol defines trafficking in persons and also includes trafficking for the purpose of removal of organs. States that ratify the Protocol are under an obligation to introduce comprehensive criminal measures against organ trafficking and

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<sup>79</sup> Sheri R Glaser 'Formula to stop the Illegal Organ Trade: Presumed Consent Laws and Mandatory Reporting Requirements for Doctors' (2005) Human Rights Brief, American University Washington College of Law 20

<sup>80</sup> *ibid*

<sup>81</sup> *ibid*

<sup>82</sup> Elaine Pearson 'Coercion in the Kidney Trade? A Background study on Trafficking in Human Organs World Wide' (2004)

<sup>83</sup> *ibid*

should consider providing measures for the physical, psychological and social recovery of victims, including (in co-operation with NGOs) counseling and information (especially on their legal rights); medical, psychological and material assistance.<sup>84</sup> 'States should also ensure victims have the possibility of obtaining compensation for damages suffered'<sup>85</sup>.

The World Medical Authority (WMA) has also condemned illegal organ sales. The WMA statement on human organ and tissue donation and transplantation in October 2000, states 'that financial incentives for organ transplantation can be coercive and that in all cases it should be prohibited.'<sup>86</sup> It also stresses the need for consent whenever one wants to donate an organ and that it should be informed.

'The Bellagio Task Force Report was an outcome of a pioneering meeting in 1997 involving transplant surgeons, organ procurement specialists, human rights activists and social scientists to address issues of transplantation, bodily integrity and the international traffic in organs.'<sup>87</sup> 'The Task Force Report considered the arguments for and against sale of organs and found whilst the commercialization of organs from living donors should continue to be prohibited, systems of sale of organs from cadavers could be considered.'<sup>88</sup> 'The Report found that with the existing institutional inequities, legitimizing sale of organs would put poor and powerless people even at a greater risk.'<sup>89</sup>

## 2.5 TRAFFICKING FOR INTER-COUNTRY ADOPTION

It is in the nature of human beings to love and to be loved. Therefore people who cannot have children of their own will usually resort to adoption to fill the vacuum. Usually it is a two way process, a child needs a loving and stable home and families want children to call their own.

Initially adoption was made on humanitarian grounds. The first and second world wars and the Vietnam war created much poverty and those who suffered most were the children. Because of their plight, people in the first world started adopting them on

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<sup>84</sup> Article 6 of the Trafficking Protocol

<sup>85</sup> *ibid*

<sup>86</sup> *ibid*

<sup>87</sup> Rothman, D et al 'The Bellagio Task Force Report on Transplantation, Bodily Integrity and the International Traffic in Organs; quoted from *Transplantation Proceedings*' (1997) 2742

<sup>88</sup> *ibid*

<sup>89</sup> *ibid*

humanitarian grounds. Adoption is now common with people from developed countries adopting children from developing countries. It is now becoming a big business with a child being sold for up to US\$25, 000.

With the coming of HIV/AIDS, many children are orphaned at an early stage and some are being adopted. Adoption has however become so infiltrated by illegal business that some argue that it is altogether bad for a country to allow its children to be adopted. In some cases, mothers are being paid to give up their children after birth. Sometimes hospitals are involved in scams when they tell mothers that their child died after birth and then sell the babies to syndicates. This is so because there is a great demand for adopted children. People wanting children for various reasons are resorting to adoption agencies and paying a lot of money so that the process can be quicker. A UNICEF report on 'intercountry adoption in 1998 noted an upward trend in the mid1990s in the number of children from developing countries being adopted by couples in seven industrialized countries: from 16,027 in 1993 to 23,199 by 1997, with a single country, the United States, accounting for more than half the intercountry adoptions in the seven countries.'<sup>90</sup>

Central America is a region which has been criticized for the process of illegal adoption. Many stakeholders are involved including lawyers who profit greatly from this business. Like in any other trafficking scam, the lawyers use false documents to process the adoption and then profit from it. Even without armed conflict, however, the combination of poverty and social prejudice against unmarried mothers fuels the supply side in the region and in 2000 a UN Special Rapporteur noted with concern that 'intercountry adoption developed into a profitable business as a result of the large number of children who were orphaned or abandoned during the years of conflict.'<sup>91</sup> 'By 1997, 1,252 intercountry adoptions were reported from Guatemala, of which the largest number of children (831) went to the United States, followed by France (163).'<sup>92</sup>

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<sup>90</sup> Mike Dottridge 'Kids as Commodities? Child Trafficking and What to do about it' accessed at [www.stopchildtrafficking.org/site/publications.168.0.html](http://www.stopchildtrafficking.org/site/publications.168.0.html) on 23rd April 2005

<sup>91</sup> *ibid*

<sup>92</sup> *ibid*

The UN Special Rapporteur gave a chilling account of the way she was told business worked in Guatemala City in 2000; ‘the lawyer or notary processing the adoption is the most active actor in the whole procedure (and the person who benefits most), finding the babies to be placed for adoption, representing both the birth mother and the adopter, and issuing the certificate of adoption. It is likewise reported that the lawyers handling the adoptions, in collusion with others, also operate houses where children who are stolen or purchased are for a while kept while awaiting finalization of the intercountry adoption. These are known as ‘casas cunas’ (cot or crib houses) but are often called ‘casas de engordeza’ (fattening houses).’<sup>93</sup>

She also reported that adoptions within the country could cost as little as US\$3000. ‘However, those involved in this illegal business could charge more for intercountry adoption, couples from other countries were reported to pay as much as US\$25,000 per adoption.’<sup>94</sup> ‘The abusive nature of the business was illustrated by a case in which the Special Rapporteur was told that one mother had provided 33 children for adoption over a period of only two- and a half years, alleging all children were her own.’<sup>95</sup> ‘The adoption observed Guatemala’s legal requirements, despite the number of children involved. The case was uncovered by the visa section of the US embassy, but this was too late, it was only after all the 33 children had left Guatemala and the adoptions were considered irreversible.’<sup>96</sup>

### **2.5.1 CONVENTION ON THE RIGHTS OF A CHILD (CRC) 1989**

The CRC provides that a child should be adopted if it is in the best interests of the child. What the CRC does not do is specify exactly what the best interests of the child means. It says that if it is in the best interests of a child to be adopted, the ideal place for a child to be adopted is in his own home country. It is only when it proves to be against the best

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<sup>93</sup> Report on the Mission to Guatemala. Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography. Ms Ofelia Calcetas-Santos. UN DOC.E/CN.4/2000/73/Add.2, 27<sup>th</sup> January 2000

<sup>94</sup> *ibid* para 29

<sup>95</sup> *ibid* para 102

<sup>96</sup> *ibid*

interest of the child to be adopted in his own country, that intercountry adoption should be considered.

Because of the illegal sale in children, the international community came up with the Hague Convention on Intercountry Adoptions. The aim of the Convention is not to prohibit intercountry adoptions but to regulate them. If the intercountry adoptions were banned, this would create a bigger black market for babies which would also be very sophisticated. The Convention also provides that agencies involved in adoptions should be registered.

The Convention on the Rights of the child specifically talks about the rights of the child concerning adoption. It does not provide that children should be adopted but that where the law allows it, it should be in the best interest of a child.

#### *Article 11 of the CRC*

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.
2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

#### *Article 21 of the CRC*

States Parties shall:

- (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counseling as may be necessary;
- (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
- (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

CRC states that a child is any person under the age of 18 years. States have a duty to ensure that when adoptions take place they should be regulated by law.

### 2.5.2 Hague Adoption Convention 1993

The Hague Adoption Convention also deals with intercountry adoption. Its main aim is that adoption should be in the best interest of a child and that no one should make a profit out of the adoption process. The aim is to reduce the illegal sale of children.

An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin-

- a. have established that the child is adoptable;
- b. have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests;
- c. have ensured that
  - (1) the persons, institutions and authorities whose consent is necessary for adoption, have been counseled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin
  - (2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,
  - (3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and
  - (4) the consent of the mother, where required, has been given only after the birth of the child; and
- d. have ensured, having regard to the age and degree of maturity of the child, that
  - (1) he or she has been counseled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,
  - (2) consideration has been given to the child's wishes and opinions,

(3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and

(4) such consent has not been induced by payment or compensation of any kind.<sup>97</sup>

It is important to note that under the Convention, intercountry adoption should only take place if it is in the best interests of the child that the mother fully consents and that consent can only be obtained after she gives birth.

It also provides that adoption cannot take place privately but should have the consent of the competent authority. In this case, if a person from another country wants to adopt, that person must first inform the competent authority in his/her country and then after that the authorities in that country will inform their counterparts in the adoptive countries so as to enable adoption to take place. It is only when the competent authority of the receiving State agrees to such adoption that it will take place.

‘An adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State-

a. have determined that the prospective adoptive parents are eligible and suited to adopt;

b. have ensured that the prospective adoptive parents have been counseled as may be necessary; and

c. have determined that the child is or will be authorized to enter and reside permanently in that State.’<sup>98</sup>

Although the Convention protects children from being sold illegally, it is important to note that it only applies to parties to it.

The main emphasis is that it allows for intercountry adoption as a way to prevent the black market for babies from growing. It specifically calls for adoptions to be regulated by the governments. It also states that if the government itself does not regulate adoptions then it must appoint accredited bodies to do so.

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<sup>97</sup> Article 4 of the Hague Adoption Convention 1993

<sup>98</sup> Article 5 of the Hague Adoption Convention

## 2.6 TRAFFICKING FOR FORCED LABOR

People are being trafficked every day for forced labor. Thousands of people leave their homes in search of jobs. Because there is a growing demand for jobs, these people are being tricked into jobs that do not exist and forced into slave-like conditions. 'Forced labor exists in each and every country'<sup>99</sup>. 'They include deeply entrenched bonded labor systems in parts of South Asia, debt bondage affecting mainly indigenous peoples in parts of Latin America, and the residual slavery-related practices most evident in West Africa.'<sup>100</sup> Forced labor is a problem which is very difficult to define. 'First with very few exceptions, forced labor is not defined in any detail, making it difficult for law enforcement agents to identify and prosecute the offence. Second, and in consequence of this, there have been very few prosecutions for forced labor offences anywhere in the world.'<sup>101</sup> The problem of definition makes it very difficult to pin point what is forced labor and what is not.

### 2.6.1 DEFINITIONS

In order to tackle the problem, we should first try and define what forced labor is. According to article 2 (1) of the ILO Convention No. 29 'forced or compulsory labor is all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.'<sup>102</sup> There are certain exceptions with regard to 'military service for work of purely military character, normal civic obligations, work of prisoners convicted in a court of law and working under the control of a public authority, work in emergency cases such as wars or other calamities, and minor communal services.'<sup>103</sup> Subsequent ILO Convention No. 105, adopted in 1957,

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<sup>99</sup> ILO Report 'Alliance Against Forced Labor'; 2005

<sup>100</sup> ILO Report 'Global Alliance Against Forced Labour' 2005 accessed at [www.yaleglobal.yale.edu/pdfs/globalalliance.pdf](http://www.yaleglobal.yale.edu/pdfs/globalalliance.pdf)

<sup>101</sup> *ibid*

<sup>102</sup> ILO Convention No. 29 of 1930

<sup>103</sup> *ibid.* article 2(2)



specifies that forced labor can never be used for the purpose of economic development or as a means of political education, discrimination, labor discipline or punishment for having participated in strikes.<sup>104</sup>

‘From this definition, it is clear that forced labor is not just equivalent to low wages or poor working conditions. It represents a restriction on human freedom, a violation of human rights, and the exact opposite of “decent work” or “human development” respectively. Forced labor also encompasses situations such as slavery, practices similar to slavery, debt bondage, or serfdom as defined in various international instruments.’<sup>105</sup>

‘The ILO’s definition of forced labor comprises two basic elements: the work or service is exacted under the menace of a penalty and it is undertaken involuntarily.’<sup>106</sup> ‘However, a forced labor situation is determined by the nature of the relation between a person and an “employer”, and not by the type of activity performed, however hard or hazardous the conditions of work may be.’<sup>107</sup> ‘Nor is the legality or illegality under the national law of the activity relevant to determining whether or not the work is forced. A woman forced into prostitution is in a forced labor situation because of the involuntary nature of the work and the menace under which she is working, irrespective of the legality or illegality of that particular activity.’<sup>108</sup> This statement by the ILO is important because it states that whether the activity is illegal or someone is doing the job legally, that person should be protected. The position of ILO also seems to apply to illegal immigrants in that they should not be compelled to engage in forced labor. The position of the ILO is important in that organized crime engages illegal immigrants in forced labor because this group often is not protected under the laws of many countries.

The ILO Report states that the activity need not be recognized as an economic activity for it to qualify as forced labor. Forced labor is also one of the worst forms of child labor. ‘Child labor amounts to forced labor not only when children are forced, as individuals in

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<sup>104</sup> Patrick Belser ‘Forced Labour and Human Trafficking: Estimating the Profits’ p.2 accessed at [www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD\\_BLOB?Var\\_DocumentID=5081](http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=5081) on 18<sup>th</sup> July 2005

<sup>105</sup> *ibid*

<sup>106</sup> ILO report on Global Alliance Against Forced Labor 2005

<sup>107</sup> *ibid*

<sup>108</sup> *ibid*

their own right, by a third party to work under the menace of a penalty, but also when a child's work is included within the forced labor provided by the family as a whole.'<sup>109</sup>

According to the Report, forced labor situations are of three main types. The first one is 'forced labor imposed by the State which includes three main categories namely forced labor exacted by the military, compulsory participation in public works, and forced prison labor.'<sup>110</sup> The second category of forced labor is 'forced labor imposed by private agents for commercial sexual exploitation includes women and men who have involuntarily entered prostitution or other forms of commercial sexual activities, or who have entered prostitution voluntarily but who cannot leave. It also includes all children who are forced into commercial sexual activities.(sic)'<sup>111</sup> The third category is forced labor 'imposed by private agents for economic exploitation comprising all forced labor imposed by private agents other than for commercial sexual exploitation. It includes, among other things, bonded labor, forced domestic work, or forced labor in agriculture and remote rural areas.'<sup>112</sup>

## 2.7 FORCED LABOR

The question that we need to tackle in this paper is what is the connection between human trafficking and forced labor? People everywhere are looking for cheap labor.

'The ILO data indicates that the majority of forced laborers work in traditional economic sectors, such as in agriculture, construction, domestic services and other labor-intensive sectors. And according to the ILO estimate, there are about 8.1 million people in forced labor in these various sectors – a large majority of whom are located in Asia.'<sup>113</sup>

Trafficking for forced labor is more rampant now that people are looking for better opportunities. People are promised well paid jobs and when they reach their destinations, they realize that they have been tricked. It is then too late for them to get out, because the traffickers would have made them sign some kind of contract. Forced labor is in existence everywhere, whether in first world or third world countries. 'Kil- Soo Lee, a Korean businessman, recruited women primarily from China and Vietnam to work in his

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<sup>109</sup> *ibid*

<sup>110</sup> ILO report on Global Alliance Against Forced Labour 2005

<sup>111</sup> *ibid*

<sup>112</sup> *ibid*

<sup>113</sup> Patrick Belser 'Forced Labour and Human Trafficking: Estimating the Profits'

garment factory on the island of American Samoa from 1991 until the factory closed in late 2000. He used employment contract fees and penalties to trap the workers into remaining with the company.’<sup>114</sup> ‘Lakireddy Bali Reddy repeatedly raped and sexually abused his victims and forced them to work in his businesses in Berkeley, California, including a well-established Indian restaurant.’<sup>115</sup> ‘California asparagus harvesters, numbering in the hundreds, were forced to harvest the high-priced vegetable in substandard conditions for virtually no pay on the property of Victoria Islands, an internationally known asparagus grower, during the 2000 growing season. Hired by JB Farm Labor Contractor, the workers, recruited mostly from Mexico, were powerless to stop the huge deductions for transportation and other debts the employer deducted from their weekly paychecks’<sup>116</sup> Most of these people came under the false pretence that they were going to have decent, good paying jobs, but once they reached their destination they realized that they had been trafficked.

Another form of forced labor that exists is bonded labor. ‘Bonded labor involves an illegal transaction in which a person sells him/herself or a member of his/her family to a money lender in exchange for a small loan.’<sup>117</sup> ‘The bond is completely open-ended; the slave must work for the slaveholder until the slaveholder decides the debt is repaid. It may carry over into the second and third generation, growing under fraudulent accounting by the slaveholders, who may also seize and sell the children of the bonded laborer against the debt.’<sup>118</sup> This is usually found in Asia and it continues for generations and generations.

### 2.7.1 CHILD LABOR

In parts of the world, including Africa and Asia, children are known to comprise a significant proportion of the victims of trafficking. ‘In West and Central Africa for

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<sup>114</sup> Free the Slaves, Washington, D.C, And the Human Rights Centre of the University of California, Berkeley ‘Hidden Slaves Forced Labor in the United States’ (2005) 23 Berkeley Journal of International Law 49

<sup>115</sup> *ibid*

<sup>116</sup> *ibid*

<sup>117</sup> Bonded Labor accessed at [www.216.26.190.51/justiceMission?rescue.html](http://www.216.26.190.51/justiceMission?rescue.html) on 23<sup>rd</sup> July 2005

<sup>118</sup> Kevin Bales *Disposable People: New Slavery in the Global Economy* p 17

example, the number of reports of children being trafficked across borders has steadily increased. Moreover, ILO reports that the number of children being trafficked across borders has steadily increased. Recruitment for domestic work appears to have been the most significant factor, though other types of labor exploitation have included work in agricultural plantations, small trade, begging and soliciting.<sup>119</sup>

‘Child domestic labor refers to situations where children are engaged to perform domestic tasks in the home of a third party or employer that are exploitative. Where such exploitation is extreme and includes trafficking, slavery or practices similar to slavery, or work, which by its nature or the circumstances in which it is carried out is hazardous and likely to cause harm the health, safety or morals of children, then this constitutes a worst form of child domestic labor, and it needs to be tackled as a matter of urgency.’<sup>120</sup>

The Minimum Age Convention of the ILO defines child labor as ‘economic activity performed by a person under the aged of fifteen, and prohibits it for being hazardous to the physical, mental, and moral well-being of the child as well as for preventing effective schooling.’<sup>121</sup> Despite the various documents instruments adopted to protect children from forced labor, they are still engaged in dangerous work activities which rob them of their childhood.

Child labor is widespread and exists in almost all parts of the world. It ranges from bonded children in Asia, to domestic workers in Togo, to agriculture workers in America. Although children may work for various reasons, child labor has been widely criticized. This is so because ‘children usually work under the worst conditions, and these unhealthy, unsafe, dangerous, and poisonous work environments cause physical

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<sup>119</sup> Forced Labour, Child Labour and Human Trafficking in Europe: An ILO perspective accessed at [www.ilo.org/public/english/standards/ipecc/publ/policy/brussels\\_taffpaper2002.pdf](http://www.ilo.org/public/english/standards/ipecc/publ/policy/brussels_taffpaper2002.pdf)

<sup>120</sup> ILO Report 2005: Helping Hands or Shackled Lives? Accessed at [www.ilo.org/public/english/standards/ipecc/publ/download/cdl\\_2004\\_helpinghands\\_en.pdf](http://www.ilo.org/public/english/standards/ipecc/publ/download/cdl_2004_helpinghands_en.pdf) on 19th July 2005

<sup>121</sup> Convention 138 adopted in 1973 and entered into force in 1976

deformations and long-term health care problems in children.<sup>122</sup> The other reason is that 'child labor perpetuates poverty because child laborers, deprived of education or healthy physical development, are likely to become adults with low earning prospects.'<sup>123</sup> Child labor is a cycle; it is usually passed on from one generation to another. For instance, if a child is engaged in a worst form of labor, it means that he or she will not have the chance to go to school and that means that as an adult his or her children will also be engaged in forced labor.

Usually trafficking and child labor go hand in hand. As stated above, families especially in developing countries often send their children to well to do families to live with them. If not they may send them to work as domestic workers or to do any kind of work so that they can assist them. This creates a market for trafficking because traffickers know that they can easily persuade poor parents to send their children away on the false promise of a job or education elsewhere. While parents may sometimes send children to work because of poverty, some children are bonded because their families are unable to pay their debts. 'Some country-specific studies and surveys also find that many children who are not even five years old work in harsh conditions, usually without pay, in family farms and businesses, or for their parents' creditors as bound laborers.'<sup>124</sup>

In many parts of the world, children are effectively driven like slaves and treated as the property of the employer. Children who are domestic workers are usually girls and they suffer different kinds of abuse. 'They find themselves traded into someone else's home, lighting the fire before the family gets out of bed, carrying heavy loads and doing dangerous tasks, using hazardous substances such as cleaning fluids, cooking meals for a whole family and washing their clothes, being woken in the middle of the night to service the master's needs, toiling seven days a week, every week of the year.'<sup>125</sup> They also suffer sexual abuse at the hand of their masters and usually they will not report these abuses because they are isolated from the outside world.

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<sup>122</sup> Zehra F Arat 'Analyzing Child Labour as a Human Rights Issue: Its Causes, Aggravating Policies, and Alternative Proposals' (2002) 24 Human Rights Quarterly 179

<sup>123</sup> *ibid*

<sup>124</sup> *ibid* p 181

<sup>125</sup> ILO Report 2004: Helping Hands or Shackled Lives? (n118)

Boys are also trafficked to work in agriculture and also face similar abuses. 'Rather, with the exception of one child trafficked from Togo into factory work in Cote d'Ivoire, boys are trafficked to Benin or Nigeria where they perform long hours of difficult, unpaid agricultural labor, amounting, as in the case of girls, to practices similar to slavery. Most of the boys interviewed by Human Rights Watch reported working on farms in the towns and villages of Nigeria's south west plateau.'<sup>126</sup> 'Boys reported that from the beginning of the dry season in January until the end of the second rainy season in October, they cultivated yams, cassava, rice, beans, peanuts, sorghum, maize, sesame, and millet. Boys trafficked to Benin said they worked on cash crops such as cotton and cashew.'<sup>127</sup> The chocolate industry is another industry that is notorious for child labor. Ivory Coast, apart from being the largest produce of cocoa, is also known for its use of child labor. 'The US State Department estimates that there are approximately 15, 000 children working on cocoa, coffee, and cotton farms in the Cote D'Ivoire. In June 2001, the ILO also reported that trafficked child labor was used in cocoa production in West Africa. Media reports have unveiled stories about boys trickled or sold into slavery, some as young as nine years old to work on cocoa plantations in Cote d'Ivoire.'<sup>128</sup>

### 2.7.2 Child Soldiers

According to the Convention on the Rights of a Child, only children over the age of 15 can be recruited as soldiers but in reality children as young as 9 years old are still recruited to fight in wars. It is not only the rebel groups that use children, to fight, but also some governments also use them as soldiers. In almost all the wars that have been fought in Africa recently, there has been enormous use of children as soldiers. 'The rebel forces in Sierra Leone, for example, handpick children fighters to commit atrocities against civilians. After abducting children, the commandos give the children hard drugs and then send the children off to commit murder, arson, rape and amputations.'<sup>129</sup> Children are mostly used because of their innocent nature. Since they have not yet

<sup>126</sup> Borderline Slavery: Child Trafficking in Togo accessed at [www.hrw.org/reports/2003/togo0403/togo0403.pdf](http://www.hrw.org/reports/2003/togo0403/togo0403.pdf) on 23rd July 2005

<sup>127</sup> *ibid*

<sup>128</sup> Chocolate and Child Slavery: Unfulfilled Promises of the Cocoa Industry. (30<sup>th</sup> June 2004) International Labor Rights Fund

<sup>129</sup> Amy Beth Abott 'Child Soldiers- The Use of Children as Instruments of War (2000) 23 *Sulfolk Transnational Law Review* 515

developed fully emotionally, it is easier for them to commit the worst atrocities. 'Moreover, in Sri Lanka, the community views child members of the guerilla and terrorist campaigns as heroes with an honorable sense of nationalism. The families of child soldiers obtain a special status that relieves them from paying taxes and entitles them to preferential job interviews. While Sri Lanka practices a voluntary enlistment program in theory, custom dictates that each family gives a son or daughter to the cause; non-compliance results in physical violence or the confiscation of property.'<sup>130</sup> Children who participate in wars are robbed of their childhood, and also suffer much of psychological damage. They are robbed of a family at a very tender age and do not have a chance to develop mentally and physically.

Some of the children voluntary agree to join the army. They do so for various reasons. In some cases they are forced to do so because of poverty. In others joining a rebel group is the only way that they will be protected from the effects of war.

Some humanitarian treaties attempt to protect children from being recruited as soldiers. The four Geneva Conventions of 1949, and the additional Protocols of 1977 attempt to protect children. 'International humanitarian law affords children, as members of the civilian population, protection against inhuman treatment and directed attacks during international and domestic armed conflicts. Both Protocols I and II of the Geneva Convention specifically provide children special protection and preferential treatment during warfare.'<sup>131</sup>

### **2.7.3 ILO CONVENTION 182: WORST FORMS OF CHILD LABOUR 1998**

Article 2 of the convention defines a child as a person under the age of 18 years.

Article 3 defines what "the worst forms of child labour" comprises:

- a) 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;
- b) the use, procuring or offering of a child for prostitution, for the production or for pornographic performances;

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<sup>130</sup> ibid 520

<sup>131</sup> ibid 526

- c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

## CHAPTER III

### 3. INTERNATIONAL REGULATION OF TRAFFICKING

Trafficking of people, especially women and children, has been recognized as an offence since the early 20<sup>th</sup> Century. Although the slave trade was abolished in the 1880's, other forms of slavery continued to exist and trafficking of women for prostitution was the most prevalent one.

#### 3.1 THE EARLY TREATIES

'Four treaties were adopted in the early 20<sup>th</sup> Century to combat trafficking in humans. These included the International Agreement for the Suppression of White Slave Traffic, the International Convention for the Suppression of White Slave Traffic, the International Convention for the Suppression of the Traffic in Women and Children and the International Convention on the Suppression of the Traffic in Women of Full Age.'<sup>132</sup> Then in 1949, a Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949 Convention) was adopted.

The 1904 Agreement required that State Parties collect information regarding the procurement of women abroad for immoral purposes. The act of procuring women for sex trafficking was criminalized in the 1910 Convention<sup>133</sup>. 'Under this Convention, State Parties were required to punish any person who hired, abducted, or enticed for immoral purposes any woman under the age of twenty-one, or used violence, fraud, threats, or any compulsion on a woman for the same purpose.'<sup>134</sup> 'Commentators note that the problem of holding women in brothels against their will for purposes of forced prostitution was

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<sup>132</sup> Katrin Corrigan 'Putting the Brakes on the Global Trafficking of Women for the Sex Trade: An Analysis of Existing Regulatory Schemes to stop the Flow of Traffic' (2001) 25 Fordham International Law Journal 156

<sup>133</sup>The International Convention for the Suppression of White Slave Traffic

<sup>134</sup> Katrin Corrigan (n130) 156



beyond the scope of the 1910 Convention because the State parties considered such matters to be within a country's exclusive domestic jurisdiction. Both the 1904 Agreement and the 1910 Convention only contained prohibitions on procurement and physical trafficking and were silent on the resulting forced prostitution.<sup>135</sup> The 1949 Convention was the first to specifically outlaw trafficking of women for prostitution. 'The 1949 Convention was the first International instrument to address sex trafficking in gender- neutral terms and regard forced prostitution as an issue of international law (sic).'<sup>136</sup> This meant that it was not just up to States to prosecute the crime of trafficking but there was an international obligation on them to do so. States should take measures to punish those involved in the trafficking of women. The Convention does not include the racially discriminatory language of the 1904 treaty. Even though it made trafficking illegal, it did not exactly offer a definition of trafficking. 'The 1949 Convention provides substantive prohibitions against international sex trafficking by mandating punishment for traffickers, suggests program to assist victims of forced prostitution and prevent further victimization of others by trafficking networks (sic).'<sup>137</sup>

Article 19 of 1949 Convention contains provisions relating to the care, maintenance and repatriation of trafficking victims.

This Convention contains three general principles. 'The first level of obligation binds States to a general anti-trafficking principle. On the second level, States agree to specific enforcement measures. On the third level, States agree to use social welfare tools, in areas not addressed by criminal enforcement, to rehabilitate and otherwise support survivors of prostitution.'<sup>138</sup>

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<sup>135</sup> *ibid*

<sup>136</sup> *ibid* 166

<sup>137</sup> *ibid* 170

<sup>138</sup> Susan Feanne Toepfer and Bryan Stuart Wells 'The Worldwide Market for Sex: A Review of International and Regional Legal Prohibitions regarding Trafficking in Women' (1994) 2 Michigan Journal of Gender and Law 96

It is important to note that the Convention also took into account the human rights of the victim by emphasizing their safe return to their countries of origin. It only focused however on trafficking for prostitution and ignored other forms of trafficking.

### 3.2 CEDAW

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted in 1979.

The aim of this Convention was to create more opportunities for women and to ensure that women are not discriminated against because of their gender.

*Article 5* provides:

States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

*Article 6* deals with trafficking specifically and provides:

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

It is important to note that some authors have criticized CEDAW in that it does not offer comprehensive protection against trafficking in women. It has been said that the language used is vague that that it does not offer a definition of trafficking. 'First, under Article 6 it is unclear what measures qualify as appropriate. Secondly, in order to suppress trafficking in women, must a State impose a ban with fines or other criminal penalties or is a State simply required to officially condemn prostitution? Given the vagueness of

Article 6, it is unclear whether States must characterize prostitution as an institution built upon coercion and slavery, or whether they can characterize prostitution as a legitimate economic choice.<sup>139</sup> But CEDAW like any other treaty impose a duty on parties to abide by it.

### **3.3 CONVENTION ON THE RIGHTS OF THE CHILD 1989**

The prohibition against trafficking has also been included in other international instruments such as the Convention on the Rights of the Child.<sup>140</sup> As mentioned above in Chapter 2.6.1. Article 34 and 35 of the CRC specifically prohibits the trafficking of children. 'It requires State Parties to take all appropriate measures to prevent the abduction of, sale of, or traffic in children for any purpose or in any form, to prevent the inducement or coercion of a child to engage in any unlawful sexual activity.'<sup>141</sup> The problem with the CRC is that there is no mechanism in place to ensure that State Parties implement all the rights that are enshrined in the Convention. There are no sanctions for such State parties for not implementing the rights in the Convention. Although this may be true it is important to note that although there are no specific enforcement mechanisms, by bringing States before the Committee, the State Parties will try as much as possible to implement those rights because of the shame that comes with bringing a State before a Committee.

#### **3.3.1 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000.**

The protocol has also been adopted to combat the trafficking of children. It prohibits the use of children for any commercial purposes and makes it a criminal offence to traffic children.

**Article 1** provides:

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<sup>139</sup> *ibid* 100

<sup>140</sup> Convention on the Rights of a Child 1989

<sup>141</sup> *ibid*

States Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol.

## **Article 2**

For the purposes of the present Protocol:

(a) Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration;

(b) Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration;

(c) Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.

**Article 3** provides:

1. Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis:

(a) In the context of sale of children as defined in article 2:

(i) Offering, delivering or accepting, by whatever means, a child for the purpose of:

- a. Sexual exploitation of the child;
- b. Transfer of organs of the child for profit;
- c. Engagement of the child in forced labour;

The Protocol is the first to offer definitions and it covers almost all aspects of child trafficking. It is important in that it is not only money but that any consideration is enough to regard it as trafficking. The CRC is a most widely ratified Convention. Almost all countries apart from the United States of America and Somalia have ratified it. It states that children everywhere should be treated with respect and dignity and not as property. Although almost all Countries have ratified the CRC, the ratification of the Protocol is not as wide as the parent Convention.

### 3.4 THE TRAFFICKING PROTOCOL 2000

While the practice of trafficking has been a matter of concern for some time as can be seen from the above Conventions dating from as early as 1904, it emerged as a key issue in the early 1990's. 'At the Seventh Session of the Commission on Crime Presentation (sic) and Criminal Justice in 1998, Argentina proposed the drafting of a new Convention against trafficking in minors, citing growing evidence of the involvement of organized criminal groups in this activity.'<sup>142</sup> 'This initiative was expanded to incorporate trafficking in all persons. It was decided by participating States that the most appropriate way to deal with the issue was to elaborate a Protocol to the UN Convention against Transnational Organized Crime.'<sup>143</sup> This is because as stated earlier in the first chapter, organized criminals are now more involved with human trafficking because people, unlike illegal firearms or drugs, can be easily disposed of and can be sold over and over again. The Convention against Transnational Organized Crime defines an organized criminal group generally as a 'structured group of three or more persons existing for a period of time and having the aim of committing a serious crime in order to, directly or indirectly, obtain a financial or other material benefit.'<sup>144</sup>

'Negotiations on the Protocol were extensive and the Protocol was open to all States in Palermo, Italy in December 2000. The fundamental concept adopted by Member States in negotiating the Protocol was to maintain a carefully crafted balance between law enforcement and the protection of victims.'<sup>145</sup> The Protocol is also important in that it is the first instrument to define the crime of trafficking.

#### 3.4.1 ANALYSIS OF THE TRAFFICKING PROTOCOL

The definition of trafficking in the Protocol has already been given in chapter one of this paper. It is comprised of three basic elements:

1. The recruitment, transportation, transfer, harboring or receipt of persons...

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<sup>142</sup> Elizabeth F Defeis 'Women's Human Rights Violation and Sex Trafficking: Protocol to Prevent, Suppress and Punish Trafficking in Persons-A New Approach' (2004) 10 ILSA Journal of International and Comparative Law 485

<sup>143</sup> *ibid*

<sup>144</sup> Article 2(a) of the Convention 2000

<sup>145</sup> Defeis (n 140) 487

2. by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person...
3. for the purposes of exploitation.<sup>146</sup>

From the above definition, it is important to note that the Protocol states that trafficking can be across borders but also within borders. The second element 'includes both direct application of force as well as trickery and the abuse of vulnerability. The common trend is that there exists a differential in power, and if the victim is a child, this differential is assumed by the Protocol.'<sup>147</sup> The second element can also include economic vulnerability in that a person who is affected by poverty is more vulnerable to trafficking.

It is a common trend that those who have power are mostly likely to influence others in society and when it comes to trafficking those with lesser power are vulnerable. The inclusion of vulnerability and abuse of power is very important in that those who abuse others have been able to get away with it by showing that the victim signed a contract. This is so because in most cases, contract law does not cater for positions of vulnerability and abuse of power. It is important to note that nobody wants to be a victim of trafficking; people end up as victims because of their vulnerability. The Protocol is therefore a powerful tool to combat trafficking because it tries to go to the root cause of the problem. Although on the surface, the problem of human trafficking may seem simple, it is far more complicated because it usually involves power play. Usually the traffickers will have more power than the victim.

Since the crime of trafficking usually involves deception, coercion and the abuse of power, victims will usually consent thinking that there is a greater opportunity awaiting them. By providing that consent is not a defense for the traffickers, the Protocol makes it very difficult for to evade the law.

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<sup>146</sup> Trafficking Protocol 2000

<sup>147</sup> Ted Leggett 'Hidden Agendas? The Risk if Human Trafficking Legislation' (2004) 9 SA Crime Quarterly 2

The Protocol specifically caters for the rights of children and states ‘that the recruitment, transportation, transfer, harboring or receipt of a child for the purposes of exploitation shall be considered trafficking in persons.’<sup>148</sup> This is important because trafficking is a two way street. There is always a demand and that is why it is thriving. Providing that a person who receives a trafficked person also participates in trafficking ensures that people do not get involved in the exploitation of children.

‘The fundamental concept adopted by the Member States in negotiating the Protocol was to maintain a carefully crafted balance between law enforcement and the protection of victims.’<sup>149</sup>

The Protocol sets out three main purposes:

- (a) To prevent and combat trafficking in persons, paying particular attention to women and children
- (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and
- (c) To promote cooperation among State Parties in order to meet those objectives.<sup>150</sup>

It is important to note that the instrument is a Protocol, which means it is not an instrument that operates on its own. It must operate together with its parent Convention (Convention against Transnational Organized Crime) and in order to become a party to the Protocol, a State must first be a part to the Convention. ‘Protocol offenses are deemed to be Convention offenses for the purposes of extradition and other forms of cooperation.’<sup>151</sup>

‘The application of the Protocol is governed by the same rules as the application of the parent Convention. Both instruments apply in any case involving the investigation or

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<sup>148</sup> Article 2 (c ) of the Trafficking Protocol

<sup>149</sup> Elizabeth F Defeis ‘Protocol to Prevent, Suppress and Punish Trafficking in Persons – A New Approach: Women’s Human Rights Violation and Sex Trafficking’ (2004) *ILSA Journal of International and Comparative Law* 486

<sup>150</sup> Article 2 of the Trafficking Protocol 2000

<sup>151</sup> Article 1 of the Trafficking Protocol 2000

prosecution of an offence that is suspected of being transnational in nature and involving an organized criminal group as defined in the Convention.<sup>152</sup>

‘Although victims and witnesses are also dealt with in the parent Convention, the protection of, and assistance to, a victim is specified as a core purpose of the protocol. It considers victim assistance, both as an end in itself and as a means to support the investigation and prosecution of trafficking crimes.’<sup>153</sup>

### **3.4.2 Article 6 of the Trafficking Protocol**

#### *Assistance to and protection of victims of trafficking in persons*

1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.
2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:
  - (a) Information on relevant court and administrative proceedings;
  - (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.
3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of
4. trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:
  - (a) Appropriate housing;
  - (b) Counseling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;
  - (c) Medical, psychological and material assistance; and
  - (d) Employment, educational and training opportunities.
5. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.
6. Each State Party shall endeavor to provide for the physical safety of victims of trafficking in persons while they are within its territory.

<sup>152</sup> Elizabeth F Defeis ‘Protocol to Prevent, Suppress and Punish Trafficking in Persons- A New Approach: Women’s Human Rights Violation and Sex Trafficking’ (2004) ILSA Journal of International and Comparative Law 487

<sup>153</sup> *ibid* p 488



7. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

The Protocol requires that States criminalize trafficking by enacting laws to curb trafficking. This is so because it is important for countries to have laws specifically that prohibit trafficking. 'The law enforcement provisions of the Protocol are mandatory and require law enforcement agencies to cooperate in such matters as the identification of offenders and trafficked persons, sharing information and the training of investigators and victim support personnel.'<sup>154</sup> It also recognizes that trafficking victims are vulnerable and that laws must be put in place to protect the victims. 'It also recognizes that victims of trafficking are often in great danger and in need of assistance and support, particularly if repatriated to their countries of origin.'<sup>155</sup> The Protocol specifically states that the victims of trafficking should be entitled to some degree of confidentiality in legal proceedings involving traffickers and assistance in legal proceedings. This is important because traffickers are usually well organized and may threaten victims or their families who may be intimidated. By ensuring some degree of confidentiality victims will be able to report traffickers. Since most victims do not usually have enough money to go through the legal process, providing assistance will encourage the victims to sue.

The Protocol also specifies that the victims should be provided with appropriate housing, counseling and information, medical, psychological and material assistance. It also provides that the victims should be provided with employment, educational and training opportunities. The Protocol states that the State where the victim finds him or herself should take into consideration the age, gender and special needs of the victim. This means that each case of trafficking will be decided on an individual basis and will not be uniform. This is important in that there are different kinds of trafficking and different victims have different needs. Taking into consideration the special needs of each victim enables the victim to come to terms with what happened to them. Although the Protocol provides for such assistance as stated above, it is not obligatory.

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<sup>154</sup> *ibid*

<sup>155</sup> *ibid*

‘The legal status of trafficked persons and whether they would eventually be returned to their countries of origin was also the subject of extensive negotiations. Generally, the developed countries to which persons are often trafficked took the position that there should not be a legal right to remain since this would provide an incentive both for trafficking and for illegal immigration.’<sup>156</sup> The above provision on social assistance was therefore a subject of negotiation and was not made mandatory. The Protocol as a whole is an important step in combating trafficking because of its emphasis on the rights of victims.

### 3.4.3 CRITICISMS OF THE PROTOCOL

Although the Protocol has been praised for its emphasis on the victims of trafficking, it is not without criticism. ‘Shortly after the United Nations Crime Commission finished negotiations on the Protocol, the Human Rights Caucus, composed of twelve NGO’s, announced that, the new Protocol was inadequate as it did not in fact require governments to provide any services to victims of trafficking and it provided no basis for insisting that governments treat victims of trafficking differently from undocumented migrants.’<sup>157</sup> ‘They challenged the effectiveness of the Protocol on the grounds that it does not require governments to provide emergency shelter, medical or psychological services or legal counseling or to cease arresting, imprisoning and summarily deporting victims. Further they argue that victims are not protected. For example, victims are not notified when traffickers are released from prison. The Protocol fails to protect the identity of victims or permit victims to remain in the country, even temporarily if it is unsafe for them to return home.’<sup>158</sup> The Human Rights Caucus has criticized this lack of social services for the victims and according to them ‘this serious gap in the Protocol is partly due to government reluctance to make any commitments to provide services and protection to undocumented persons even if they are victims of a horrific crime.’<sup>159</sup> They note that ‘governments are unwilling to distinguish between trafficking victims and undocumented

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<sup>156</sup> *ibid* p 488

<sup>157</sup> *ibid* 490

<sup>158</sup> *ibid*

<sup>159</sup> *ibid*

migrants. This means local NGO's will encounter tremendous obstacles in advocating the inclusion of mandatory protection in their domestic trafficking laws.<sup>160</sup>

The making of social assistance non-mandatory is seen as deliberate policy because most countries are unwilling to spend money on foreigners. It is no wonder that in most cases the trafficking problem has been confused with the migration problem. What most countries don't realize is that trafficking is a problem that needs international cooperation. Most people who are trafficked are from developing countries and taken to developed countries. Trafficking will only be curbed with the assistance of the developed countries. This problem will only be eradicated when there are adequate resources and political will on the part of States and the international community as a whole. Enough resources must be put in place to educate people about trafficking. Technical assistance in form of funds is therefore also needed to combat trafficking. Trafficking will only be controlled when there are enough incentives in countries from which victims are trafficked. It is therefore important that the international community work together with developing countries for the realization of this goal. 'President Chissano of Mozambique reminded his colleagues that combating transnational organized crime can only be successful and effective if we bring together our efforts and resources. The richest nations must support unconditionally the most disadvantaged nations by providing them access to financial and material means, to modern technologies know-how. The political will of states to fight crime is not enough, stated Chissano, without transfers of financial and technological assistance from richer to poorer States.'<sup>161</sup>

### 3.5 LABOR LAW AND TRAFFICKING

'Although labor issues are often connected with human trafficking, the International Labour Organization (ILO) and other components of the international labor rights framework have been underutilized for addressing human trafficking.'<sup>162</sup> This is because particular attention has not been paid to trafficking for forced labor but only to trafficking

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<sup>160</sup> *ibid*

<sup>161</sup> LeRoy G Potts 'Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons' (2003) *George Washington International Law Review* 247

<sup>162</sup> Elizabeth M Bruch 'Models Wanted: The Search for an Effective Response to Human Trafficking' (2004) 40 *Stanford Journal of International Law* 23

for prostitution and sexual exploitation. This means that ILO was not as much involved in trying to combat trafficking as it was supposed to be. 'The ILO forced labor Conventions do not specifically mention trafficking, but they would arguably cover some aspects of trafficking. For instance, the State Parties to the 1930 Forced Labour Convention<sup>163</sup> agreed to suppress the use of force or compulsory labor in all its forms within the shortest time possible.'<sup>164</sup>

ILO is now getting more involved in the fight against human trafficking. 'Four years ago, the first Global Report on forced labor drew attention to the gravity of the problems of forced labor in the modern world, the ugly new faces such as human trafficking emerging alongside the older forms.'<sup>165</sup> The Report recognizes that human trafficking for forced labor is becoming a big problem. It also states that forced labor is now changing its dimension linked to new technology. 'Bonded labor now pervades different sectors of the informal economy, as well as the agriculture sector, where the lion's share of bonded labor was formerly to be found. Trafficking in human beings has also taken on new forms and dimensions, linked to recent development in technology, transportation and transnational organized crime.'<sup>166</sup> ILO also recognizes that forced labor is far more complicated and needs the cooperation of all the stakeholders to combat it. It recognizes that it cannot be equated simply with low wages or poor working conditions. 'Forced labor represents a severe violation of human rights and restriction of human freedom, as defined in the ILO Conventions on the subject and in other related international instruments.'<sup>167</sup> 'The ILO<sup>168</sup> definition of forced labor comprises two basic elements: the work or service is exacted under the menace of a penalty and it is undertaken involuntarily.'<sup>169</sup> The penalty does not need to be in the form of penal sanctions, but may also take the form of a loss of rights and privileges. According to ILO 'menace of a penalty may be physical violence or restraint, or death threats addressed to the victim or relatives or the menace may be psychological in nature such as threats to denounce the

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<sup>163</sup> ILO Convention 1930

<sup>164</sup> Elizabeth Bruch (n160) 24

<sup>165</sup> Global Alliance against Forced Labor 2005 (n3)

<sup>166</sup> *ibid*

<sup>167</sup> *ibid*

<sup>168</sup> ILO Report 2005: Alliance Against Forced Labor (n3)

<sup>169</sup> *ibid*

victims to the police or immigration authorities when their employment status is illegal or denunciation to village elders in the case of girls forced to prostitute themselves in distance cities.<sup>170</sup> The definition of forced labor by ILO will help curb trafficking and it is also a good supplement to the Trafficking Protocol 2000.

‘Forced labor is an emotive subject, and governments are sometimes reluctant to probe into and recognize its existence within their national borders. It is far from easy to generate and sustain the political will to instigate the detailed investigations needed to identify forced labor practices and confront them.’<sup>171</sup> The Global Alliance against Forced Labor states that in order to curb forced labor, it is important to understand the salient features of much contemporary forced labor. ‘It is important to note that it is mostly frequently exacted by private agents rather than the State, indebtedness is a key instrument of coercion because of the additional and ever present threat of denunciation to the authorities.’<sup>172</sup> The report recognizes that victims are indebted in a number of ways and the report recognizes different kinds of threat such as retaliation against families and denunciation to the authorities. ‘And also a growing body of research, in particular on the situation of forced labor of victims of trafficking in industrialized destination countries, has served to identify a serious legislative gap which makes it difficult to move forward against the hidden and often subtle forms of coercion in the private economy.’<sup>173</sup> Although there have been laws in all the member States of ILO to deal with forced labor very few cases have been prosecuted. According to ILO, this is due to two main problems. ‘First, with very few exceptions, forced labor is not defined in any detail, making it difficult for law enforcement agents to identify and prosecute the offence. Secondly, and in consequence of this, there have been very few prosecutions for forced labor offences anywhere in the world.’<sup>174</sup> This is repeated over time and it then ‘becomes a vicious cycle, no clear legislation, little or no resources for prosecutions, little awareness or publicity, thus no pressure for clear legislation and so on.’<sup>175</sup> But the Report

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<sup>170</sup> *ibid*

<sup>171</sup> *ibid*

<sup>172</sup> *ibid*

<sup>173</sup> *ibid*

<sup>174</sup> *ibid*

<sup>175</sup> *ibid*

also states that mere criminalization of forced labor is not enough. 'States need to address the structural concerns, including policy and labor market failures that give rise to forced labor in the first place. Labor market regulations or migration policies should be designed in such a way as to reduce the risk of workers getting trapped in forced labor situations.'<sup>176</sup> What this report is arguing is that States should first go to the root cause of the problem of forced labor. It should look into its policies to see what makes forced labor prevalent.

As stated in chapter 3, ILO has also recognized prostitution as a form of work and it states that prostitution should be regarded as labor and that prostitutes should be protected. Although it does not take a position on the legal status of prostitution, 'it has acknowledged that, at least in Southeast Asia, the sex business has assumed the dimensions of a commercial sector, one that contributes substantially to employment and national income in the region.'<sup>177</sup> 'The Report further focuses on structures that sustain prostitution and not just prostitutes themselves. It recommends adopting a macroeconomic analysis that allows for official recognition of sex work activity.'<sup>178</sup> It therefore recommends that States should look into their policies to see what makes people go into prostitution and try and work on that problem. ILO states that people doing forced labor should be protected whether the activity is legal or illegal. Therefore even those countries that do not allow prostitution should protect a person engaged in the activity if they are in forced labor.

ILO has also adopted the Convention on the Worst Forms of Child Labor<sup>179</sup>. The intention is to prevent the trafficking of children for forced labor. It has also adopted the Convention on the Protection of Rights of all Migrant Workers and Members of their Families<sup>180</sup> which recognizes the rights of migrant workers and states that they should be treated with dignity. It states that no migrant worker should be forced to perform forced

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<sup>176</sup> *ibid*

<sup>177</sup> Elizabeth M Bruch 'Models Wanted: The Search for an Effective Response to Human Trafficking' (2004) 40 *Stanford Journal of International Law* 25

<sup>178</sup> *ibid*

<sup>179</sup> ILO Convention 182

<sup>180</sup> Convention on the Protection of Rights of all Migrant Workers and Members of their Families 1990

labor. This is important because although the migrants may be illegal, under labor law they should be protected because no one agrees to perform forced labor. Therefore the labor law perspective combined with the international and human rights perspective is an effective tool to combat human trafficking.

The reporting mechanisms are also easy. Although they do not allow for individual complaints, complaints by governments, employers' associations, and workers' associations are allowed. 'This reflects the tripartite structure of the ILO and its bodies, which includes representatives of governments, employers and workers. The ILO can investigate complaints and issue decisions, including recommendations that may address both the violation at issue and broader concerns.'<sup>181</sup>

### 3.6 HUMAN RIGHTS AND TRAFFICKING

Trafficking is a crime that violates the dignity of a human being. It goes to the very core of the dignity of a person. Traffickers deny victims their freedom even before they reach their destinations. 'By their acts, traffickers deny that all persons are born free and equal in dignity and rights; they deny their victims freedom of movement, freedom of association, and the most basic freedom: to have a childhood. Traffickers profit from arbitrary detention, slavery, rape and cruel, inhuman, and degrading treatment.'<sup>182</sup>

Traffickers will in most cases take the victims from familiar environments as a means to isolate them so that it will be very difficult for them to report the crime. In most cases they take them under a false pretence that there is a job for them. Once they reach their destination they discover that they have been lied to. Since they are isolated from their families and in a strange environment, it will be very difficult for them to report to the relevant authorities. 'Traffickers will use whatever means necessary to ensure the confinement and cooperation of their victims, including drugs, violence, sexual assault, threats to the victims' families, and threats to turn victims over to unsympathetic local authorities.'<sup>183</sup> With sexual assault most of the victims are exposed to HIV/AIDS and are unable to get medical attention. 'Furthermore, if victims initially have identity papers,

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<sup>181</sup> Bruch (n175)

<sup>182</sup> LeRoy G Potts 'Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons' (2003) 35 *George Washington International Law Review* 229

<sup>183</sup> *ibid*

such as passports, the traffickers will seize them both to ensure compliance and as a means to make escape more difficult. And if the victim has paid the trafficker money, the trafficker will tell the victim that the cost of their transport was greater than expected and that the victim must perform additional work before the victim pays off the debt owed to the trafficker.<sup>184</sup> Once the victims are in their country of destination, some may be denied medical attention and may be forced to live in appalling conditions. If they are young they will not be allowed to go to school, thereby denying them a right to an education.

All these infringe individual's rights. To combat it trafficking law enforcement mechanisms should focus on the rights being infringed.

Although the early human rights treaties did not specifically mention trafficking, they have certain articles that can be used to curb trafficking. 'The International bill of rights – the Universal Declaration and Covenants each contain prohibitions and obligations that arguably cover some human trafficking conduct, such as the prohibitions against slavery and the slave trade or involuntary servitude and forced labor.'<sup>185</sup>

### **3.7 UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948**

#### *Article 3 states that*

Everyone has the right to life, liberty and security of person.

#### *Article 4 states*

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

#### *Article 5 provides that*

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

### **3.8 ICCPR (International Covenant on Civil and Political Rights) 1966**

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<sup>184</sup> *ibid*

<sup>185</sup> Elizabeth M Brunch 'Models Wanted: The Search for an Effective Response to Human Trafficking' (2004) 40 *Stanford Journal of International Law* 29



ARTICLE 8 maintains 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.
  1. No one shall be required to perform forced or compulsory labor;

The International Covenant on Economical, Social and Cultural Rights<sup>186</sup> (ICESCR) although it does not specifically address human trafficking ‘recognizes that the rights of an individual derive from the inherent dignity of the human person.’<sup>187</sup>

‘A human rights approach centers on the individual affected and offers the possibility of reconceptualizing that person as a rights holder rather than as a mere victim. In the context of human trafficking, this is particularly important given the historical and continuing focus on the need to identify or construct innocent victims before the international community becomes engaged.’<sup>188</sup> It states that a person has dignity and that his or her rights should not be infringed for whatever reason. ‘Human rights discourse, however, has emphasized the universal and inalienable nature of human rights. One is entitled to protection of those rights simply by virtue of being human, regardless of the complex standards of worthiness for protection that come into play in other contexts.’<sup>189</sup>

The human rights approach has also been endorsed by the Trafficking Protocol 2000. It states that ‘its purpose is to protect and assist the victims of such trafficking, with full respect to their human rights.’<sup>190</sup> It provides that trafficking victims should be assisted as much as possible and that States should ensure that their rights are protected.

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<sup>186</sup> 1966

<sup>187</sup> Preamble of the ICESCR

<sup>188</sup> Bruch (n182)

<sup>189</sup> *ibid*

<sup>190</sup> Article 2(c) of the Trafficking Protocol 2000

Human rights have a significant advantage in addressing human trafficking. This is because people are entitled to their human rights even if initially they agree to be trafficked. The basis of protection is that the traffickers infringe the human rights of the victim. Individuals should have their dignity whether they agree to be trafficked or not. 'The most significant advantage that a human rights approach offers is the ability to hold States accountable for how they treat both their nationals and other individuals under their control. While the accountability for individual traffickers is important, the widespread nature of human trafficking and the compelling evidence of government complicity suggest the need to ensure State responsibility.'<sup>191</sup>

## CHAPTER IV

### 4. SUMMARY AND RECOMMENDATIONS

#### 4.1 The Principle Problems

Although it was abolished in the 1880's, slavery in the form of trafficking still exists today. 'Trafficking still exists today and it is estimated that about 27 million people are held in slave like conditions.'<sup>192</sup> 'Slavery tends to be concentrated in Southeast Asia, northern and western Africa, and parts of South America (but there are some slaves in almost every country in the world, including the United States, Japan, and many European countries).'<sup>193</sup>

The international community has been trying to combat trafficking from as early as 1900 but it did not come up with a definition until 2000. 'The inadequacies of the past and present frameworks for addressing trafficking were evident. Each has struggled with how to define trafficking, marginalized victims or privileged innocent victims, and simply ignored significant aspects of the problem.'<sup>194</sup> People who are trafficked for forced

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<sup>191</sup> Elizabeth M Bruch 'Models Wanted: The Search for an Effective Response to Human Trafficking' (2004) 40 *Stanford Journal of International Law* 26

<sup>192</sup> Kevin Bales *Disposable People: New Slavery in the Global Economy* (1999) 9

<sup>193</sup> *ibid*

<sup>194</sup> Elizabeth M Bruch 'Models Wanted: The Search for an Effective Response to Human Trafficking' (2004) 40 *Stanford Journal of International Law* 37

prostitution are seen to be more like innocent victims than people who agreed to be smuggled but were then forced into prostitution or forced labor. Usually those who agree to be smuggled tend not to receive as much assistance from governments because they are seen as breaking the immigration laws of the country. What most governments forget is that one can not agree to be trafficked and there is a very fine line between being smuggled and being trafficked. A person can agree to be smuggled but nobody can agree to have their integrity as a person violated. Traffickers will use all means to coerce the victims to come with them. In some cases they may use forged documents to smuggle the victims. In other cases they manage to get visas for their victims and when they reach their destination, they confiscate their passports. Once they reach their destination the victims are usually raped and abused in many ways. They are also told that they have to repay the traffickers for their transportation and everything spent on them during the journey. 'If the victim has paid the trafficker money, the trafficker will seize the documents both to ensure compliance and as a means to make escape more difficult.'<sup>195</sup> The amounts are usually exaggerated and therefore the victim become indebted to the trafficker and cannot escape.

Although most authors concentrate on trafficking for sexual exploitation, trafficking for forced labor is more prevalent. 'The biggest part of that 27 million, perhaps 15 to 20 million is represented by bonded labor in India, Pakistan, Bangladesh, and Nepal.'<sup>196</sup> As a result of concentration on sexual exploitation, 'governments and advocates have neither grappled with nor meaningfully addressed other complexities such as the scope of protections for trafficked persons, the relation to migrant smuggling and other migration issues, and the prevalence of trafficking for purposes other than prostitution or sexual exploitation.'<sup>197</sup>

## 4.2 The Three Perspectives

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<sup>195</sup> LeRoy G Potts 'Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons' (2003) 35 *George Washington International Law Review* 229

<sup>196</sup> Kevin Bales *Disposable People: New Slavery in the Global Economy* (1999) 9

<sup>197</sup> Elizabeth M Bruch, *opcit* p 36

With the coming into effect of the Trafficking Protocol, the approach to human trafficking is slowly changing. Firstly it is important to note that as stated earlier in this thesis trafficking is a problem that needs international cooperation in order to combat it. Because it does not just involve one aspect it is important to note that to curb it different approaches should be used. Because of its complex nature, using one approach is usually inadequate as it will only touch certain aspects and not others. When different approaches are used they will touch different aspects and therefore address the problem of trafficking as a whole. 'Each approach also brings strengths to the effort to eliminate human trafficking and addresses components missing from the others.'<sup>198</sup> Trafficking touches on international law, human rights and the labor law framework.

When addressing trafficking from a human rights perspective, the emphasis is that every person, no matter what their status, is entitled to human dignity. It does not matter how a victim got into a country, all that matters is that their rights are being infringed and the government must accord them the status of victims. The Vienna Declaration and Program for Action of 1993 supports this 'All human rights are universal, indivisible, and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.'<sup>199</sup> The labor framework is also important. It recognizes the fact that nobody can voluntarily agree to be paid a lower wage for work done and that it is because of the situations that people find themselves in that make them agree to such situations. According to the ILO Report 2005, 'it recognizes forced labor in the form of trafficking and states that in order to be combated governments need to address the structural concerns, including policy and labor market failures, that give rise to forced labor in the first place. Labor market regulations or migration policies should be designed in such a way as to reduce the risk of workers getting trapped in forced labor situations.'<sup>200</sup> ILO acknowledges that trafficking is not an easy problem that can be solved by enacting laws only. Structures that give rise to trafficking also need to be looked into. Therefore when governments especially in

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<sup>198</sup> Elizabeth Bruch 'Models Wanted: The Search for an Effective Response to Human Trafficking' (2004) 40 *Stanford Journal of International Law* 37

<sup>199</sup> Vienna Declaration and Programme of Action, U.N. Doc. A/CONF. 157/23 (12 July 1993)

<sup>200</sup> ILO Report 2005

developing countries where many victims come from, are making policy they should into consider the effect on their citizens. This is so because people become victims of trafficking mainly because of poverty and they will therefore be searching for opportunities elsewhere.

ILO's definition of forced labor includes work performed under a penalty. The report states that penalty can mean any form of threat from death to being reported to the police or in the case of people involved in prostitution being reported to the elders in villages where they came from. The definition of is important in that threats can be in form of psychological threats and these have the same effect like physical threats.

The problem that most governments, especially those in developing countries, face in enacting labor laws is that they cannot be so strict because they want to attract foreign investors. 'Powerful investors-individuals as well as national or transnational corporations-usually use their power to bribe officials to ignore violations, and encourage governments to restrict labor rights and union activities.'<sup>201</sup>

In some cases the policies of the international community contribute indirectly to the problem of trafficking. Policies such as the structural adjustment program intend to help developing countries but the effect that it has is devastating. 'In the name of economic stability, these agencies require governments to implement measures of fiscal discipline which involve freezing wages, reducing government spending, and privatizing government enterprises.'<sup>202</sup> This means that governments will cut on their social spending and it also means that many will be laid off their jobs. 'Facing increasing unemployment levels, declining wages, and the increase in out of pocket expenditures for essential food items, utilities or transportation, the low income households in receipt countries find themselves tightening their belts more and more.'<sup>203</sup> This means that they will be looking for other means of survival and will therefore be more vulnerable to traffickers' promises of jobs elsewhere or abroad.

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<sup>201</sup> Zehra F Arat 'Analysing Child Labor as a Human Rights Issue: Its Causes, Aggravating Policies, and Alternative Proposals' (2002) 24 Human Rights Quarterly 183

<sup>202</sup> *ibid* 190

<sup>203</sup> *ibid* 191

When it comes to child labor, governments in developing countries must also look at structures that involve children in such labor. Child labor is a cycle. These children usually work because their parents are poor. Governments, by providing social assistance to the parents would therefore be able to combat child labor. Social assistance does not have to be in the form of money but also by enacting laws that ensure that the labor policies are fair and create more jobs. ‘The solution to the problem of child labor has to be a comprehensive one that would work to eliminate the poor family’s need for child labor and create educational opportunities for children.’<sup>204</sup>

### **4.3 THE LEGAL FRAMEWORK- TRAFFICKING PROTOCOL 2000 AND ITS IMPLEMENTATION**

This was the first international document to define trafficking in human beings. It is important in that it not only defines human trafficking but states the rights of the victim of trafficking. The approach emphasizes helping the victims and punishing the traffickers. The question in combating trafficking is how successful have governments been since the coming into effect of the Protocol. It is important to note that the Protocol is new and it may take some time before governments start protecting victims. There has however already been progress by some governments and the international community as a whole. ‘Governments have been making progress through preventive measures, by prosecuting traffickers, and by protecting victims, they have been making valuable strides-unilaterally and multilaterally –against the perpetrators of the crime of trafficking in persons.’<sup>205</sup>

Governments and law enforcement agencies are now treating victims differently. They are acknowledging more and more that victims need to be protected and not punished. ‘The status of victims of trafficking has recently changed in some of the destination countries, including the US, Austria, Belgium, Canada, Italy, the Netherlands, Spain, the Czech Republic, Hungary, Lithuania, and most recently, Australia, all of which granted a

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<sup>204</sup> Zehra F Arat ‘Analysing Child Labor as a Human Rights Issue: Its Causes, Aggravating Policies, and Alternative Proposals (2002) 24 Human Rights Quarterly 200

<sup>205</sup> Linda Smit and Mohamed Mattar ‘Creating International Consensus on Combating Trafficking in Persons: U.S. Policy, The Role of the UN, and Global Responses and Challenges (2004) 28 Fletcher Forum of World Affairs 164

trafficked victim some form of residency status.<sup>206</sup> The United States even has a program in which visas are issued to victims of trafficking. ‘The United States grants up to 5,000 visas a year allowing residency to victims of severe forms of trafficking who would suffer extreme hardship involving unusual and severe harm upon removal from the United States.’<sup>207</sup>

In Australia for instance, ‘the government has recently decided to grant victims of sex trafficking temporary protection visas if they are willing to provide evidence against sex traders. The immigration Department will issue bridging visas for 30 days and temporary protection visas for three years, allowing trafficked women to stay in Australia until it is safe for them to return to their countries.’<sup>208</sup> Although visas have been granted by other countries such as America and Australia, these are only provided to victims of severe trafficking and those are those engaged in forced prostitution. In order to combat trafficking it is important to note that all victims of trafficking should be treated equally. There is no need for some countries to prioritize forms of trafficking while leaving other forms. Forced labor is also a big problem and it is usually a hidden form of trafficking, therefore it should not be seen as a lesser form of trafficking.

‘The government of Sri Lanka has implemented a program a program through which welfare officers are sent to embassies in countries of the Middle East to provide assistance to Sri Lankan victims of trafficking in those countries.’<sup>209</sup> Some African countries also have used the Protocol to curb trafficking. ‘Despite a severe lack of government resources, the government of Burkina Faso along with five other West African countries – Benin, Cote d’Ivoire, Mali, Niger, and Togo – announced the launch of a new common travel document aimed at fighting child trafficking in the region, which went into effect in July 2002. School children were asked by the authorities to suspend

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<sup>206</sup> *ibid*

<sup>207</sup> *ibid*

<sup>208</sup> *ibid*

<sup>209</sup> *ibid* p 165

possible travel to Cote d'Ivoire, a major point of destination, until the travel document which contains the names of adults accompanying children went into effect.'<sup>210</sup>

Although there has been some success in trying to combat trafficking in human beings, there are still some areas that need to be improved upon. Most governments still fail to recognize victims of trafficking as victims. They see the victims as criminals who violate their immigration laws. 'For instance, under the Alien and Nationality Law of Liberia, aliens who are prostitutes or who have been engaged in prostitution, or aliens coming to Liberia solely, principally or incidentally to engage in prostitution are considered prohibited immigrants and are subject to deportation. A similar deportation rule applies in other countries such as Zambia, Uganda, Tanzania, Swaziland, Sri Lanka, Mauritius, Malta, Ethiopia, and Zimbabwe, and is the common approach in most countries today.'<sup>211</sup>

There are still some countries that do not have laws on trafficking or do not consider it a serious crime. 'For instance in Turkey, transporting a person under the age of 21 for the purposes of prostitution is punishable only by one to three years of imprisonment.'<sup>212</sup>

There is also very little case law on trafficking. Although many cases are reported very few are prosecuted. 'In Moldova, according to the 2003 Trafficking in Persons Report, the 2002 national statistics showed that out of 504 arrests, only 42 resulted in prosecution, and 21 in prison sentences.'<sup>213</sup> This may be due to the fact that many victims change their minds and do not testify because they are not given enough protection by the State.

It should be noted that the Protocol does not make it mandatory for States in which victims find them selves to provide social incentives.

Finally, the Protocol talks about international cooperation. This means that developed countries should be helping developing countries to reduce poverty so as to eradicate the root causes of trafficking.

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<sup>210</sup> *ibid*

<sup>211</sup> *ibid* p 159

<sup>212</sup> *ibid*

<sup>213</sup> *ibid*



## 4.4 RECOMMENDATIONS

### 4.4.1 ENFORCEMENT

States should adopt legislation setting out a criminal offence of trafficking that covers trafficking for all purposes, in line with the Trafficking Protocol as part of comprehensive anti-trafficking legislation which protects the rights of trafficked persons.<sup>214</sup>

Since trafficking is a very complex issue, all stake holders should be involved in the fight against trafficking. When different stake holders are involved it will be easier to recognize different types of trafficking and therefore easier to combat it. 'At regional level within countries, justice ministries should create integrated multi-agency task forces to combat trafficking, involving police, immigration officials, labor ministry officials or labor inspectors, prosecutors and non-governmental organizations to co-ordinate their activities in relation to trafficking and thereby to ensure more effective prosecutions of traffickers.'<sup>215</sup>

'Law enforcement officials should inform trafficked persons of the consequences of giving testimony, such as the possibility of secondary trauma, reprisals, seeing their trafficker and his/her relatives or associates at court. This should be clearly explained by the authorities (or by an NGO) at the time they are asked to give a statement against the trafficker.'<sup>216</sup>

'States should provide and guarantee legal rights to confidentiality, in particular, this means instructing law enforcement agencies and the courts not to publish names or addresses of anyone who has been trafficked or information that may easily identify a victim and thus jeopardize his or her safety.'<sup>217</sup> Confidentiality is important because traffickers are usually organized criminals and have got resources therefore making it easier for them to carry out reprisals against the victims and their families.

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<sup>214</sup> Elaine Pearson 'Human Traffic, Human Rights : Redefining Victim Protection (2002) Anti-Slavery International 20

<sup>215</sup> ibid 25

<sup>216</sup> ibid

<sup>217</sup> ibid 52

#### **4.4.2 INTERNATIONAL COOPERATION**

On child prostitution governments should work together with other governments to punish any body who have sex with a child and should put notices in tourists' destination areas where most child prostitutes are found to that effect.

#### **4.4.3 ON ERADICATION OF ROOT CAUSES**

Governments together with other developmental partners must try to provide social incentives for its citizens such as free education up to a certain level because trafficking is mostly caused by poverty and it can only be reduced when people have a form of education.

#### **4.4.4 TRAINING**

'Government agencies responsible for administration of justice should train law enforcement officials (migration and police) and the judiciary (prosecutors, judges, lawyers) as well as service providers (medical, migrant, refugee, trade unions) to help them understand the complex situations and decisions trafficked persons face due to their vulnerable situations.'<sup>218</sup>

#### **4.4.5 EDUCATION**

Governments together with Non Governmental Organizations (NGOs) in developing countries where most victims come from should educate people about the dangers of sending their children to live with other family members and accompanying people who promise jobs or education.

#### **4.4.6 SUPPORT OF VICTIMS**

'Government agencies responsible for administration of justice should develop guidelines and procedures on treatment of trafficked persons by law enforcement officials in

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<sup>218</sup> Elaine Pearson 'Human traffic, Human rights: Redefining Victim Protection (2002) Anti-Slavery International 12

conjunction with non-governmental organizations that deal with trafficked persons on a day to day basis. These need to be circulated widely and updated regularly.<sup>219</sup>

‘States should require law enforcement officials who come into contact with individuals who it is suspected may have been trafficked, to refer such persons to a specialised centre of NGO that can address or assess their mental and physical health needs, inform them of their right to a reflection delay and explain clearly their legal rights and document details of their personal experience and the specific violations committed against them.’<sup>220</sup>

There should be a specialized body to deal with trafficking. This is because it will usually be difficult for law enforcers who are not properly trained to deal with victims. A specialized unit that deals with victims will prove to be more effective. ‘States should ensure that specialized units or task forces, rather than local police forces, deal with trafficking cases, including both trafficking investigations and providing protections from reprisals. Units to investigate reprisals could also be set up within anti-corruption police units.’<sup>221</sup>

#### **4.4.7 REMOVAL OF VICTIMS**

‘The authorities, that is immigration and police services should not remove trafficked persons to a country of origin where there is reasonable suspicion that they may suffer further harm, through stigmatization, discrimination or risk of reprisal.’<sup>222</sup>

‘In returning trafficked persons who want to go home, immigration and police services should provide them with contact information for a law enforcement office in the country of origin that they can contact if a trafficker threatens them.’<sup>223</sup>

‘Law enforcement officials should inform trafficked persons of the consequences of giving testimony, such as the possibility of secondary trauma, reprisals, seeing their trafficker and his/her relatives or associates at court. This should be clearly explained by

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<sup>219</sup> *ibid*

<sup>220</sup> *ibid*

<sup>221</sup> *ibid* 30

<sup>222</sup> *ibid* 55

<sup>223</sup> *ibid* 58

the authorities (or by an NGO) at the time they are asked to give a statement against the trafficker.<sup>224</sup>

#### **4.4.8 A HOLISTIC APPROACH?**

Trafficking is a crime that needs attention from all the stake holders. Whether it is in the form of organ trafficking, illegal adoptions, forced labor or sexual exploitations, trafficking victims should be treated with the dignity that they deserve. Governments and NGOs should not just concentrate on trafficking for sexual exploitation but on all kinds of trafficking. We can only combat trafficking when we recognize the root causes of trafficking and work on them. In this case the effort has to come from the international community as whole and not just countries of origin for the traffickers. Governments should try and help victims as much as possible after their rescue and not just return them to their countries of origin. The answer to trafficking lies in providing victims with incentives to empower them and enable make decisions for them.

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<sup>224</sup> *ibid*

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