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**STATES' POSITIVE OBLIGATIONS WITH RESPECT  
TO HUMAN TRAFFICKING:  
THE EUROPEAN COURT OF HUMAN RIGHTS  
BREAKS NEW GROUND IN  
RANTSEV V. CYPRUS AND RUSSIA**

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#### ABSTRACT

In the dearth of legal interpretation of the phenomenon of human trafficking, a January 7, 2010 decision of the European Court of Human Rights has transfused new blood into the legal paradigms of fighting trafficking. The Court embraces trafficking as a global concern and takes a step forward with respect to its recognition of trafficking as an affront to human dignity by the international community of states. Often labeled “modern-day slavery,” treaties targeting this global scourge date back to the early 20th century. They were constantly supplemented and revised, ending, on the world-wide scale, with the 2000 Palermo Protocol, and regionally, with the 2005 Council of Europe Convention. These two treaties marked the progression from approaching the problem with a focus on the punishment of the perpetrator to focusing on the interests of the abused victim from a more holistic perspective.

Slavery itself, the prohibition of which is a staple of *jus cogens*—the rarefied circle of norms from which no derogation is permitted—has been interpreted by the International Criminal Tribunal for the former Yugoslavia in *Kunarac* as including not only the classic paradigm of the treatment of human beings as items of property law, but also as encompassing any or all features attached to the right of ownership, situations of absolute control of one person over another induced through force, fear or coercion – the paradigm of human trafficking. This definition of “enslavement” as a crime against humanity was endorsed by the international community of states in Article 7(1)(c) of the Rome Statute of the International Criminal Court. In a groundbreaking decision regarding Article 4 of the European Human Rights Convention (the human right to be free from slavery), the European Court of Human Rights in its 2010 case, *Rantsev v. Cyprus*, accepted this enlarged definition and overruled the classical interpretation it had espoused only as recently as 2005 in the case of *Siliadin v. France*. It also formulated novel state duties arising from this construction. Such obligations ranged from raising awareness about the phenomenon of human trafficking, training law enforcement and immigration officials on issues related to human trafficking, implementing administrative measures to regulate the operation of businesses that cover up human trafficking, and instituting necessary changes in the policy and the law related to immigration, criminalization, investigation and prosecution of all aspects of trafficking, to practically and effectively protecting victims’ rights.

This article analyzes this landmark decision and the consequences it might engender in the field of human trafficking. It also puts forth a discussion of the past efforts at addressing this problem and develops recommendations based on a holistic human rights-oriented approach to state duties in the field of human trafficking.

## I. INTRODUCTION

Trafficking in human beings has been an issue at the top of the agenda for international bodies and domestic decision makers in the human rights field. Properly designated as “modern-day slavery,” it has drawn the attention of states since the beginning of the 20th century. States responded with treaties complementing domestic legislation, ranging from the 1904 “White Slave Traffic” Convention to the 2000 Palermo Protocol. The original exclusive focus on the perpetrator has now shifted to include a response to the needs of the victim and society at large. The prevention of trafficking and the rehabilitation of victims have become key policy goals, and enslavement, broadly defined, has increasingly been conceived of as an international crime.

The problem of human trafficking has both a domestic and an international dimension. The dehumanization of individuals, which it so often entails, takes place within and outside the borders of one state and one legal system. When trafficking occurs within a single state, the government of that state can address the issue comprehensively and effectively within its borders. However, when any element of the process relates to a foreign state, be it the nationality of the victim or the state in which the victim is temporarily crossing during his or her trafficking passage, not only is the control of the state over this activity legally and factually limited, but the victim is also put in a precarious position. This reality, facilitated by a globalizing economy and the related easing of travel restrictions around the world, makes trafficking in human beings an issue of global concern<sup>1</sup> and engenders the need for domestic as well as international legal regulations as an adequate response to this scourge of humankind.

The European Court of Human Rights (ECHR) faced a myriad of these issues enumerated above in one of its most recent cases. To its credit, the Court pushed the envelope further by recognizing human traf-

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<sup>1</sup> The literature on this problem has proliferated. See E. BENJAMIN SKINNER, *A CRIME SO MONSTROUS: FACE-TO-FACE WITH MODERN-DAY SLAVERY* 292 (2008); *GLOBAL WOMAN: NANNIES, MAIDS, AND SEX WORKERS IN THE NEW ECONOMY* 273-74 (Barbara Ehrenreich & Arlie Russell Hochschild eds., 2002); *HUMAN TRAFFIC AND TRANSNATIONAL CRIME* 1 (Sally Stoecker & Louise Shelley eds., 2005); *TRAFFICKING IN HUMANS: SOCIAL, CULTURAL AND POLITICAL DIMENSIONS* 4 (Sally Cameron & Edward Newman eds., 2008). See generally *Trafficking in Human Beings*, 1 *INTERCULTURAL HUM. RTS. L. REV.* 73 (2006) (symposium issue containing a wide range of interdisciplinary scholarship on human trafficking).

ficking as slavery and articulating distinct duties of when a state must act to combat this crime generally and in individual cases

The case in point is *Rantsev v. Cyprus and Russia*, a January 7, 2010 decision of a seven-member chamber of the First Section of the European Court of Human Rights (ECHR) under the presidency of Judge Christos Rozakis, a professor of law at the University of Athens. This article will present the facts and the law articulated in this milestone decision (Part I) and place it within the context of the reality of trafficking in human beings as a human rights problem of the highest order, as it proceeds to identify various approaches to attacking the problem, including the criminal justice angle, human rights concern for the victims and their rehabilitation, and global education and awareness (Part II). It will outline the past trends in decision, particularly in treaties at the global and regional levels and their conditioning factors (Part III). This article will then proceed to the consideration of trafficking as enslavement under the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court (ICC) statutes (Part IV) and outline the range of state duties conceivable under present human rights and anti-trafficking conventions (Part V). Finally, it will appraise those past decisions and suggest improved legal responses that may be appropriate in similar future cases, aiming at a desired order of human dignity which allows all human beings maximum access to all the things they value (Part VI).

## II. *RANTSEV V. CYPRUS AND RUSSIA: THE FACTS AND THE LAW*

*Rantsev v. Cyprus and Russia*,<sup>2</sup> involved a Russian national, Nikolay Mikhaylovich Rantsev, who lodged an application with the European Court of Human Rights against the Republic of Cyprus and the Russian Federation. Rantsev alleged violations of, inter alia, a right to life (Article 2), freedom from torture, inhuman and degrading treatment (Article 3), freedom from slavery, servitude, forced and compulsory labor (Article 4), and a right to liberty and security of the person (Article 5) under the European Convention on Human Rights and Fundamental Freedoms. Rantsev alleged that the Republic of Cyprus insufficiently investigated the death of his daughter, Oxana Rantseva. Additionally, he alleged that the Cypriot police inadequately protected Ms. Rantseva while she was still alive, and that the Cypriot government failed to take necessary steps to bring to justice those responsible for her ill-treatment and death.

The applicant further complained under articles 2 and 4 of the Convention that Russia failed to protect Ms. Rantseva from the risk of human trafficking and failed to investigate her subsequent death.

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<sup>2</sup> *Rantsev v. Cyprus and Russia*, App. No. 25965/04 (Eur. Ct. H.R. 2010), available at <http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=79110&sessionId=59826491&skin=hudoc-en&attachment=true>.

### A. *Statement of Facts*

The facts of the case unfolded over the span of less than a month, from March 5, 2001, when Ms. Oxana Rantseva arrived in Cyprus with the intention to work as an “artiste” in a cabaret, until March 28, 2001, when she was found dead on the street with her handbag over her shoulder. Rantseva allegedly fell from the balcony of an apartment on the fifth floor, inside of which hung a bedspread looped through the railing. A cabaret owner, X.A., in the city of Limassol of Cyprus had applied for an “artiste”<sup>3</sup> visa and work permit for Rantseva. In addition to Rantseva’s passport and medical certificate, the visa application included an employment contract, which was not yet signed by Rantseva, and a bond<sup>4</sup> required under Cypriot law. Once in Cyprus, Rantseva was granted a temporary resident permit as a visitor until March 9, 2001. On March 12, 2001 she was granted a work permit valid until June 8, 2001. During this time, she was supposed to work in a cabaret owned by X.A. On March 16, 2001 she began her employment at the cabaret, which was managed by M.A., the brother of X.A. While working at the establishment, she shared an apartment with her colleagues—other young girls working in X.A.’s cabaret.

Only three days later, on March 19, 2001, she apparently left the apartment after collecting all her belongings and leaving behind a letter stating that she was tired and intended to go back to Russia. Once informed by the girls that Rantseva had left, M.A. notified the Limassol Immigration Office of Rantseva’s disappearance—stating that she had “abandoned her place of work and residence.”<sup>5</sup> He requested that Rantseva be arrested and deported to Russia so that he could hire another artiste. The facts indicate that, despite this notification, Rantseva was not included in a police list of wanted persons.

On March 28, 2001 a cabaret artiste spotted Rantseva at a discotheque in Limassol and notified M.A., who immediately informed the police of her whereabouts and requested again that the police arrest her. He then took matters into his own hands by going to the discotheque with a security guard from his cabaret, retrieving Rantseva, and taking her to the Limassol Central Police Station, where he requested that she be detained because she had illegally stayed in the country. He later claimed in his

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<sup>3</sup> The term “artiste” connotes a profession related to live entertainment private enterprises such as cabarets. Citizen’s Charter, *Employment of Aliens*, REPUBLIC OF CYPRUS, available at [http://www.moi.gov.cy/moi/citizenscharter/citizenscharter.nsf/dmlwork\\_en/dmlwork\\_en?opendocument#3](http://www.moi.gov.cy/moi/citizenscharter/citizenscharter.nsf/dmlwork_en/dmlwork_en?opendocument#3).

<sup>4</sup> According to the terms of this bond, X.A., who applied on behalf of Ms. Rantseva’s “artiste visa,” was bound to pay £150 and any other sum which the Republic of Cyprus might need to pay for the relief or support of the immigrant or for expenses related to the immigrant’s repatriation to the Minister of the Interior of the Republic of Cyprus. *Rantsev*, at 3, para. 15.

<sup>5</sup> *Id.* at 3-4, para. 17.

witness statement that Rantseva appeared to be drunk, and that she had neither resisted nor spoken at all during the drive to the police department.<sup>6</sup>

However, despite the trip to the police station, the duty passport officer did not corroborate her illegal presence in Cyprus. Additionally, there were no records of M.A.'s complaint of March 19, nor was Rantseva's name recorded among a list of illegal persons. According to domestic law, a person does not become illegal until 15 days pass after the filing of the complaint. The Police Aliens and Immigration Service advised the Limassol police against her detention, but requested that M.A. pick her up from the station and bring her to the immigration office the following day at 7 a.m. After speaking to a senior police officer over the phone, M.A. picked up Rantseva around 5:20 a.m. and accompanied her to a fifth floor apartment belonging to M.P., one of the cabaret employees. She was placed in a room on the upper level of the apartment, with M.A. sleeping in the living room, thereby blocking her only gateway to the outside. At around 7 a.m., M.A. and M.P. awoke to find police gathered around Rantseva's dead body on the street. Upon investigation, Cypriot authorities concluded that her death was not the result of a criminal act. Her autopsy revealed that the numerous injuries on her body were the result of her accidental fall, which was also the cause of her death. A second autopsy performed in Russia reached the same conclusion as to the cause of her death.

On September 13, 2001, Rantsev approached Russian authorities to apply to the Public Prosecutor of Cyprus on his behalf for free legal assistance and waiver of court costs in order to initiate an additional investigation of his daughter's death, which Rantsev believed had taken place under strange and unestablished circumstances.<sup>7</sup> Not satisfied with the results of the proceedings, or the activities of the two governments regarding this matter, Rantsev, the applicant, brought the case to the European Court of Human Rights on May 26, 2004.

### B. *The Court's Legal Basis*

In addition to the text of the Convention and submissions by the applicant and respondent parties (the Cypriot and Russian governments), the Court reviewed a number of reports detailing the phenomenon of human trafficking in Cyprus generally,<sup>8</sup> as well as the peculiarities of the situa-

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<sup>6</sup> *Id.* at 4, para. 18.

<sup>7</sup> *Id.* at 10, paras. 47-51.

<sup>8</sup> *See id.* at 17-23, paras. 91-107 (summarizing reports on human trafficking in Cyprus issued by both the Council of Europe Commissioner for Human Rights and the U.S. State Department).

tion of “artistes” in Cyprus.<sup>9</sup> The Court further reviewed applicable Cypriot and Russian laws and practices<sup>10</sup> and other regional and international treaties and instruments.<sup>11</sup> Third-party submissions were of particular interest to the Court. An *Interights*<sup>12</sup> report, which assessed the global situation of trafficking in human beings and offered insights and critiques regarding the obligations of states vis-à-vis international treaties, and *AIRE Centre*’s<sup>13</sup> report, which focused particularly on human trafficking victims’ rights, protection, and physical and psychological traumas, played a major role in the Court’s findings and holding.<sup>14</sup>

### C. *Issues at Bar*

#### 1. Admissibility: Continue the Examination of the Case or Strike Out the Application?

There were several issues to be argued before the Court, but the first issue that the Court had to grapple with was whether it should discontinue the examination of the application by striking it out under article 37 (1). The Cypriot government had requested discontinuance of the application, because it argued that it had already offered a solution to the applicant’s concern through a unilateral statement that it submitted to the Court<sup>15</sup> in which it acknowledged some responsibility and reported that it

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<sup>9</sup> See *id.* at 15-17, paras. 80-90 (detailing a report issued by the Cypriot Ombudsman concerning both artistes’ circumstances in Cyprus and the Oxana Rantseva case).

<sup>10</sup> *Id.* at 23-29, paras. 108-36.

<sup>11</sup> See *id.* at 29-41, paras. 137-85.

<sup>12</sup> Interights, the International Centre for the Legal Protection of Human Rights, is a non-governmental organization based in the United Kingdom. The organization defines its main focus as “STRATEGIC LITIGATION—bringing or supporting cases in critical areas where there is either a potential for human rights standards to be developed or where existing standards are under threat.” See *generally* INTERIGHTS—THE INT’L CENTRE FOR THE LEGAL PROTECTION OF HUM. RTS., available at <http://www.interights.org>.

<sup>13</sup> AIRE Centre, Advice on Individual Rights in Europe, is a non-governmental organization located in London that also has a network of lawyers throughout Europe who provide information, legal advice, assistance, and expertise relating to international human rights law. See *generally* The AIRE Centre, available at <http://www.airecentre.org>.

<sup>14</sup> See *Rantsev*, at 64-66, paras. 264-71.

<sup>15</sup> In this April 10, 2009 statement, the Attorney General of the Republic of Cyprus acknowledged a violation of Cyprus’ positive obligations to take preventive measures to protect the life of Rantseva because it had failed to release her, rather than hand her over to M.A., from whom she apparently was trying to escape. Cyprus also acknowledged its failure to effectively investigate whether Rantseva had been subjected to inhuman and degrading treatment, and whether she had been a victim of human trafficking. Furthermore, it acknowledged a violation of the applicant’s right to effective access to court. For the above reasons the Cypriot government had



had ordered an independent investigation into the case. The applicant refuted the effectiveness of the measures proposed in the unilateral statement and pled with the Court to continue the discussion on the merits of the case.<sup>16</sup> The AIRE Centre also made a convincing argument for considering the substantive merits of the case by reminding the Court that there is an “uncertainty surrounding the extent of member States’ obligations to protect victims of trafficking”<sup>17</sup> in matters of protective measures not directly linked with the investigation and the prosecution of trafficking crimes. The AIRE Centre’s submission highlights one of the most relevant issues in victim protection and one of the major concerns of human trafficking discourse: what is the extent of the protection offered to victims who are not witnesses in a case? Generally, national laws and practice ensure the protection of victim-witnesses, but not necessarily of all victims of human trafficking.

In assessing this issue and deciding to continue its examination of this case, the Court specifically observed that allegations of violations of the right to life, the right to be free from torture, inhuman and degrading treatment, the right to be free from slavery, servitude, forced and compulsory labor, and the right to liberty and human security in the context of human trafficking are of a very serious nature and warrant close examination. The decision was also made in light of the “paucity of case-law on the interpretation of Article 4 [freedom from slavery, servitude, etc.] in the context of trafficking cases.”<sup>18</sup> To its credit, the Court acknowledged its obligation to “elucidate, safeguard and develop” guarantees enshrined in the Convention and perceived the examination of trafficking issues to be a necessity.<sup>19</sup>

## 2. Jurisdictional Challenges

Russia had objected to the admissibility of Rantsev’s application based on the Court’s jurisdiction *ratione loci*. According to Russia, the alleged criminal acts happened outside of its sovereign territory, and the complaint directed against the Russia was therefore inadmissible.<sup>20</sup> The applicant argued that Russia’s acts or omissions that produced effects outside of its territory can result in responsibility for Russia.<sup>21</sup> The Court reiterated international law’s understanding of jurisdiction as being pri-

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appointed three independent criminal investigators to investigate research the circumstances of the violations. *Id.* at 41-43, paras. 186-87.

<sup>16</sup> *Id.* at 44, para. 190.

<sup>17</sup> *Id.*, paras. 191-92.

<sup>18</sup> *Id.* at 46, para. 200.

<sup>19</sup> *Id.*, para. 201.

<sup>20</sup> *Id.* at 47, para. 203.

<sup>21</sup> *Id.*, para. 204.

marily territorial,<sup>22</sup> but asserting its competence to examine the case. The Court argued that the alleged trafficking had commenced in Russia, and thus, Russia had obligations to take measures to protect Rantseva from being trafficked and to investigate whether she had been trafficked at all. Hence, the Court had jurisdiction to examine whether Russia had taken the necessary steps to combat trafficking and to find out whether Russia was in breach of its obligations.

Russia also objected on the basis of a lack of jurisdiction *ratione materiae*. According to Russia, this case had nothing to do with slavery, servitude, or forced or compulsory labor—Rantseva’s employment was simply a voluntary undertaking based on a contract, and there was no evidence whatsoever that she was forced to work in any way or by any means.<sup>23</sup> The Russian assertion of a seemingly clear case of a contract gone wrong did not satisfy the Court, which decided to explore this issue within its examination on the merits of the case.<sup>24</sup>

### 3. The Decision on the Merits

#### a. *Alleged Violation of Article 2, the Right to Life*

Rantsev alleged a violation of his daughter’s right to life on the following grounds:

1. Both Russia and Cyprus failed to take steps to protect Rantseva by not taking reasonable measures to avoid a “real and immediate threat” to her life.
2. Both Russia and Cyprus failed to investigate effectively the circumstances that had led to her death.

Regarding the first allegation, the Cypriot government argued that there was no indication of a real or immediate risk to Rantseva’s life because she was calm at the police station, did not complain about her employer or the conditions of her work, and did not object to leaving the station with M.A. In their written submission, the Cypriot authorities accepted responsibility for handing Rantseva over to M.A. rather than releasing her. They contended, however, that their actions had nothing to do with any incumbent obligation on Cyprus regarding Rantseva’s right to life<sup>25</sup>—a claim that they revisited later in the proceedings through a unilateral statement acknowledging responsibility for not taking preventive measures to protect her right to life.<sup>26</sup>

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<sup>22</sup> The Court further explained that “a State’s competence to exercise jurisdiction over its own nationals abroad is subordinate to the other State’s territorial competence and a State may not generally exercise jurisdiction on the territory of another State without the latter’s consent, invitation or acquiescence.” *Id.*, para. 206.

<sup>23</sup> *Id.* at 48, para. 209.

<sup>24</sup> *Id.* at 49, para. 211.

<sup>25</sup> *Id.* at 50, para. 216.

<sup>26</sup> *Id.* at 41-42, para. 187.

The Court elucidated the meaning of article 2 regarding the responsibility of the state in two aspects:

- (1) the State has to refrain from the intentional and unlawful taking of life of a person;
- (2) the State has to take appropriate steps to safeguard the lives of those within its jurisdiction.<sup>27</sup>

The Court went on to clarify that a government must secure the right to life of a person by legislative and enforcement mechanisms. Specifically, it must criminalize acts that jeopardize a person's life by creating proper enforcement machinery that prevents and punishes violations. This duty "also implies a positive obligation . . . to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual."<sup>28</sup> In evaluating this positive obligation, the Court stated that the undisputed suffering and general risk of ill-treatment and cruelty to which the victims of human trafficking usually fall prey "cannot constitute a real and immediate risk to life,"<sup>29</sup> absent a specific showing that such circumstances existed. Each case thus ultimately stands on its own facts. The Court very narrowly interpreted the "foreseeability" of risk to Rantseva's life by the Cypriot police when they handed her over to M.A. It seems that in the Court's view, nothing in the acts of M.A. could have hinted to the Cypriot police that he presented an immediate danger to Rantseva's life. Consequently, the Court found that Cyprus did not violate its positive obligation to protect Rantseva's life.

Regarding the second allegation, the Cypriot government contended that it had already conducted an investigation of Rantseva's death and had held an inquest. They added that three investigations had already been ordered to investigate potential criminal responsibility.<sup>30</sup> Russia contended that it had fulfilled its procedural obligations because it had offered to assist the Cypriot authorities with the investigation of the case. The allegation that Russia had not taken any evidence from the two girls who lived with Rantseva was irrelevant, because there was no legal assistance request from Cyprus at the time.

The Court, *inter alia*, considered the circumstances of Rantseva's death to be "ambiguous." Coupled with the allegations of human trafficking, ill-treatment, and unlawful detention prior to her death, the Court concluded that the situation warranted a detailed investigation to appraise any potential links of Rantseva's alleged trafficking to her subsequent

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<sup>27</sup> *Id.* at 50-51, para. 218.

<sup>28</sup> *Id.* The Court, however, qualified that any such positive obligation should not "impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources." *Id.* at 51, para. 219.

<sup>29</sup> *Id.* at 51-52, para. 222.

<sup>30</sup> *Id.* at 53-54, paras. 227-29.

death.<sup>31</sup> The allegations that she had tried to escape first from the cabaret and then from the apartment were never investigated. There was also no clarity as to her voluntary or involuntary detention in the apartment. Cyprus had not even asked to secure the testimony of the two young girls who had shared an apartment with Rantseva and who were in Russia during the investigation. Such evidence could have shed light onto this case.<sup>32</sup> For failure to effectively investigate Rantseva's death, the Court found a procedural violation of article 2—the right to life—on the part of Cyprus. It did not, however, find grounds for violation on the part of Russia, because under article 2 there is no “free-standing obligation incumbent upon Russia”<sup>33</sup> to investigate the death of its national abroad, absent any special feature that could have imposed on Russia such an obligation.

b. *Alleged Violation of Article 3, the Right to be Free from Torture, Inhumane and Degrading Treatment and Punishment*

Rantsev alleged that Cyprus had violated article 3 because of its failure to fulfill its positive obligation to protect Rantseva from the wrongdoings of a private party. Based on some discrepancies between two forensic reports, Rantsev argued that there was a need to investigate the possibility of ill-treatment of Rantseva by private individuals.<sup>34</sup> The Cypriot government had first contended that there was no indication of any sort of ill-treatment, and hence there was no need for further investigation into the issue.<sup>35</sup> It later accepted, however, that there had been a violation of a procedural obligation to investigate the matter.<sup>36</sup> According to the Court, the present case did not evidence any ill-treatment of Rantseva before her death, but this statement did not resolve the issue as the Court realized the possibility of such treatment in human trafficking cases.<sup>37</sup> The Court emphatically noted that maltreatment and cruelty are well-known, inherent characteristics of human trafficking, and, consequently, it decided to discuss this issue together with the allegations brought under article 4 (freedom from slavery, servitude, forced or compulsory labor).<sup>38</sup>

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<sup>31</sup> *Id.* at 56, para. 234.

<sup>32</sup> *Id.* at 57-58, para. 241.

<sup>33</sup> *Id.* at 58, para. 244. The Court stated that it “does not consider that Article 2 requires member States’ criminal laws to provide for universal jurisdiction in cases involving the death of one of their nationals.” *Id.*

<sup>34</sup> *Id.* at 59-60, para. 249.

<sup>35</sup> *Id.* at 60, para. 250.

<sup>36</sup> *Id.*, para. 251.

<sup>37</sup> *Id.*, para. 252.

<sup>38</sup> *Id.*

c. *Alleged Violation of Article 4, the Right to be Free from Slavery, Servitude, Forced or Compulsory Labor*

The most compelling arguments of the Court are put forward in its considerations of the allegations under article 4. Rantsev contended that both Russia and Cyprus had violated article 4, because of their failure to protect Rantseva from being trafficked, as well as their failure to investigate “the circumstances of her arrival in Cyprus and the nature of her employment there.”<sup>39</sup> To these allegations, the Cypriot government first responded by contesting the allegations. Later, it accepted responsibility for not having conducted an effective investigation into the possibility that Rantseva had been a victim of trafficking and exploitation.

Russia took a different stance by arguing that Rantseva’s situation did not fall within the meaning of article 4’s mandate to protect people from slavery. The allegations against Russia concerned its failure to take preventive measures to protect its citizens from becoming victims of human trafficking abroad. Russia claimed two impediments to doing so. To protect citizens going abroad from any potential harm would mean (1) to interfere with their right to free movement under article 2 of protocol 4 of the Convention, which provides that “everyone has the right to leave any country, including his own;” and (2) to interfere with the sovereignty of the receiving state.<sup>40</sup> Russia purported that it would violate both of the above clauses should it stop an individual at the border before leaving the country, provided that the entry requirements for the receiving country were satisfied, and absent any other circumstance that could prevent leave or entry.<sup>41</sup> Russia further maintained that Cyprus had not previously been found in violation of article 4, so there was no reason to consider movement of Russian citizens to Cyprus to be a particular concern.<sup>42</sup>

Russia also claimed that though there were no specific anti-trafficking laws at the time of the events surrounding the case, Russian criminal law provided enough protection through a set of offenses that encompassed trafficking activities, such as threats to kill or cause harm, abduction, sexual crimes, and unlawful deprivation of liberty. Russia further pointed out that it had made efforts to combat human trafficking by ratifying international instruments such as the 1926 Slavery Convention and the Palermo Protocol,<sup>43</sup> as well as raising public awareness of human trafficking in the media.<sup>44</sup>

Two non-governmental organizations—*Interights* and the AIRE Centre—made third-party submissions to the case. *Interights* helped shed

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<sup>39</sup> *Id.* at 60-61, para. 253.

<sup>40</sup> *Id.* at 60, para. 260.

<sup>41</sup> *Id.* at 63-64, para. 262.

<sup>42</sup> *Id.* at 64, para. 263.

<sup>43</sup> *Id.* at 63, para. 261.

<sup>44</sup> *Id.* at 63-64, para. 262.

light on some general issues related to the phenomenon of human trafficking,<sup>45</sup> whereas the AIRE Centre looked at the issue of human trafficking from the perspective of the protection of victims.<sup>46</sup>

The Court had to answer the following questions:

1. Does article 4 include a protection against human trafficking?

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<sup>45</sup> Such issues may be summarized as follows: (1) Despite a growing awareness of human trafficking globally and regionally, measures taken nationally were at times inadequate and ineffective; (2) there was a need for a multi-disciplinary approach, a human rights-oriented legal framework, and better cooperation amongst States; (3) victim's consent was irrelevant to the intended exploitation; (4) there is a difference between human smuggling and human trafficking—the former being an offense against the State and the latter an offense against the individual; (5) it considered human trafficking to be a form of modern-day slavery, in which reference was made to the *Kunarac* case decided by the ICTY, in which “slavery” was interpreted not to require a “right of ownership,” but only presence of “one or more of the powers attached to such a right.” *Prosecutor v. Kunarac, Kovac & Vukovic*, Case Nos. IT-96-23 & IT-96-23/1-A, Judgement, at 36, para. 118 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002), available at <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>. Situations of trafficking victims subjected to violence, force and coercion give the trafficker absolute control over the victims—an element of power attached to ownership; (6) State obligations regarding human trafficking were enumerated to include: (a) enactment of appropriate legislation on human trafficking, which would criminalize the phenomenon and establish criminal liability for legal and natural persons; (b) introduction of review procedures for the operation of certain businesses known to be a cover for human trafficking; (c) establishment of punishments commensurate to the nature of the crime of trafficking; (d) introduction of measures to discourage demand; (e) assurance of the training of law enforcement for the identification of trafficking victims and for building trust amongst victims and law enforcement; (f) encouragement of research, information campaigns, awareness campaigns, and educational programs; (g) vigorous investigation of allegations of human trafficking. *Rantsev*, at 64-65, paras. 264-68.

<sup>46</sup> AIRE Centre particularly drew attention to: (1) The ever increasing number of victims, particularly of women and children; (2) the fact that victims of human trafficking are too distressed to identify themselves before the authorities because of the severe physical and psychological pressure that they have gone through; (3) the victims of human trafficking lacked rights, and they were subordinated to other anti-trafficking goals, such as the prosecution of perpetrators; (4) practical and effective rights are absent in international and regional anti-trafficking instruments; (5) protections enshrined in the Palermo Protocol were mostly “hortatory or aspirational” because of the soft language used, such as “consider” or “endeavor to” introduce protective measures for victims; (6) there is a vacuum in jurisprudence that could clarify the scope of the positive obligations of the States contained in anti-trafficking international instruments; (7) the jurisprudence of the Court under Article 2, 3, and 8 had already established positive obligation for States to protect an individual in cases when they knew or should have known that the person already was, or was at risk of becoming a victim of human trafficking; (8) the individual should not be left unprotected or, worse yet, be returned to a person or place where he could be trafficked into exploitation. *Rantsev*, at 65-66, paras. 269-71.

2. What is the scope of article 4 vis-à-vis human trafficking?
3. What positive obligations to take anti-trafficking measures, if any, does Cyprus have under article 4? Did Cyprus violate article 4?
4. What positive obligations to take anti-trafficking measures, if any, does Russia have under article 4? Did Russia violate article 4?

Issue No. 1: Does Article 4 Include a Protection Against Human Trafficking?

The Court starts by mentioning the fact that article 4 refers to protections against “slavery,” “servitude,” and “forced or compulsory labor,” but not “human trafficking.”<sup>47</sup> Referring to its previous case law, the Court reiterated that Convention provisions and the concepts they contain cannot be interpreted in “a vacuum,” but must be within the framework of the rules of interpretation in international law, in conformity with the object and purpose of the treaty and the provision in which these words are contained. The Convention should be read as a whole, maintaining consistency in interpretation and harmony amongst its articles.<sup>48</sup> Its object and purpose is the protection of human rights and fundamental freedoms of the individual, so its interpretation should ensure that safeguards enshrined in it be “practical and effective.”<sup>49</sup>

The Court referred to its previous case law defining the concepts of slavery, servitude, and forced and compulsory labor.<sup>50</sup> It also noted the absence of “human trafficking” in the language of article 4, but it brought the issue home by highlighting its early position that the Convention is a living instrument that has to “be interpreted in light of present-day conditions,” hinting that now is the time to address human trafficking within the ambit of article 4. Additionally, the Court admitted that the ever-increasing standards of human rights protections “require greater firmness in assessing breaches of the fundamental values of democratic societies,”<sup>51</sup> making it perfectly clear that it was upgrading its standards of interpretation of the guarantees safeguarded in the Convention.

Arguably, the most significant part of the reasoning of the Court is its reference to *Siliadin v. France*, which is the Court’s only recent case dealing with the treatment associated with human trafficking within the sphere of article 4.<sup>52</sup> In that case, the Court concluded that the victim’s treatment in a human trafficking context had amounted to servitude and

<sup>47</sup> *Id.* at 66, para. 272.

<sup>48</sup> *Id.* at 66-67, paras. 273-74.

<sup>49</sup> *Id.* at 67, para. 275.

<sup>50</sup> The Court refers to cases like *Siliadin v. France*, App. No. 73316/01 (Eur. Ct. H.R. 2005); *Van Droogenbroeck v. Belgium*, 44 Eur. Ct. H.R. (ser. B) (1980); *Seguin v. France*, (dec.), App. No. 42400/98, March 7, 2000; *Van der Musselle v. Belgium*, 70 Eur. Ct. H.R. (ser. A) (1983); *id.*, para. 276.

<sup>51</sup> *Id.*, para. 277.

<sup>52</sup> See *Siliadin v. France*, App. No. 73316/01 at 32, para. 120 and 34, para. 129 (Eur. Ct. H.R. 2005).

forced and compulsory labor, but it had fallen short of slavery. In the present case, the Court revisited its determination of the relationship between “slavery” and “human trafficking,” choosing to see this relationship in light of the “proliferation of both trafficking itself and of measures taken to combat it.”<sup>53</sup>

As such, the Court undertook “to examine the extent to which trafficking itself may be considered to run counter to the spirit and purpose of Article 4 . . . such as to fall within the scope of the guarantees offered by that Article without the need to assess which of the three types of proscribed conduct are engaged by the particular treatment in the case in question.”<sup>54</sup> The Court then referred to the findings of the ICTY, which concluded that the traditional concept of slavery, closely linked to the right of ownership, had now evolved to include a range of contemporary forms of slavery, exercising one or more powers attached to the right of ownership. The ICTY had delineated specific characteristics of a situation similar to slavery, such as the lack of free movement of a person, control over such movement to deter escape, confinement to a place or physical environment, presence of elements of psychological control, control of sexuality, and forced labor. ICTY’s analysis helped the ECHR recognize that human trafficking is, by its very nature and exploitative aim, an exercise of powers attached to ownership. It further described trafficking as a phenomenon that treats human beings as “commodities to be sold and bought,” “put to forced labor with little or no payment,” that implies “close surveillance of the activities of the victims,” “involves violence and threats against victims,” and forces them to “live and work under poor conditions,” ultimately reiterating that human trafficking is the “modern form of the old worldwide slave trade,” a “regime of modern slavery.”<sup>55</sup>

On all those grounds, the Court decided that human trafficking, as a vicious threat to human dignity, is incompatible with the values of a democratic society, and it considered it “unnecessary” to discuss further whether any treatment within the ambit of human trafficking identifies with any of the terms used in article 4, namely “slavery,” “servitude,” and “forced or compulsory labor.” It concluded that human trafficking as defined in article 3(a) of the Palermo Protocol falls within the scope of article 4, and it dismissed Russia’s objection on the grounds of lack of jurisdiction *ratione materiae*.<sup>56</sup> From now on in Europe, protection from human trafficking as defined in the Palermo Protocol and mirrored in the 2005 Council of Europe Convention on Action against Trafficking in Human Beings, is guaranteed through article 4 of the ECHR.

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<sup>53</sup> *Rantsev*, at 68, para. 279.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 68-69, paras. 280-81.

<sup>56</sup> *Id.* at 69, para. 282.



Issue No. 2: What is the Scope of Article 4 vis-à-vis Human Trafficking?

The Court began its discussion of this issue by recalling the fact that safeguards enshrined in article 4 are of a non-derogable nature, even in times of a public emergency that threatens the life of a nation. Consequently, this is an article of paramount importance. To assess compatibility with article 4, the Court considered the national legal and regulatory framework of Cyprus, which in the case of trafficking should prohibit and punish trafficking, as well as provide adequate guarantees for “practical and effective protection of the rights of victims.” The Court further required such guarantees even for “potential victims of trafficking.” It referred to the need for specific measures to regulate the operation of businesses that cover up trafficking and for immigration rules that circumscribe “encouragement, facilitation or tolerance of trafficking.”<sup>57</sup>

The Court further argues in favor of a comprehensive approach to trafficking encompassing three aspects: the prevention of trafficking, protection of victims, and prosecution and punishment of traffickers. Within the meaning of article 4, the Court stated that states have an obligation “to take operational measures to protect victims or potential victims of trafficking” in the circumstances when the state authorities knew or should have known that “an identified person had been or was at real and immediate risk of being trafficked or exploited within the meaning of Article 3 of the Palermo Protocol.”<sup>58</sup> Failing to take such measures would result in a violation of article 4. The Court also mandated training for law enforcement and immigration officials.<sup>59</sup>

Furthermore, the Court stated that governments must investigate once they become aware of a potential situation of trafficking; they cannot wait for a complaint to be launched by a victim or next-of-kin. It added that an effective investigation must be independent of those implicated in the events; the victim has to be urgently removed from the harmful situation, and the victim or its representatives have to be able to pursue their legitimate interests by partaking in the procedure.<sup>60</sup> The Court finds it “logical” that in light of a state’s general obligation to investigate alleged trafficking offenses under article 4, it must “establish jurisdiction over any trafficking offense committed in its territory,” bearing in mind that human trafficking, also a cross-border crime, entails countries of origin, transit and destination, and trafficking offenses can happen in any such country. This also establishes a duty to cooperate amongst states in cases when events related to trafficking might happen outside of a state’s own territory. The Court attributes this conclusion to the objective of the

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<sup>57</sup> *Id.* at 69-70, paras. 283-85.

<sup>58</sup> *Id.* at 70, para. 286.

<sup>59</sup> *Id.*, para. 287.

<sup>60</sup> *Id.* at 70-71, para. 288.

Palermo Protocol “to adopt a comprehensive international approach to trafficking in countries of origin, transit and destination.”<sup>61</sup>

*Issue No. 3: What Positive Obligations to Take Anti-trafficking Measures, if Any, Does Cyprus Have Under Article 4? Did Cyprus Violate Article 4?*

The Court discusses two aspects, *inter alia*, of Cyprus’ positive obligations: (a) positive obligations to put in place an appropriate legislative and administrative framework; and (b) positive obligations to take protective measures.

As to the legislative and administrative framework, the Court found Cyprus’ anti-trafficking law to be consistent with the Palermo Protocol and considered it “satisfactory” and “suitable,”<sup>62</sup> but it found fault with its immigration legal framework and policy. According to the Court, the lack of an immigration policy has facilitated the trafficking of women into Cyprus. In particular, Cyprus’ policy of cabaret owners applying on behalf of “artistes” has rendered the latter dependent upon their employers and at risk of trafficking.<sup>63</sup> Furthermore, the Court found it “unacceptable” that certain measures require cabaret owners to track down missing artistes and to be personally responsible when an artiste leaves their cabaret.<sup>64</sup> The Court held that ensuring compliance with immigration rules and policies is a responsibility of government officials. It was “troubling” to the Court that cabaret owners have to place a bank guarantee to cover the costs of their foreign employees.<sup>65</sup> In relation to the regime of artiste visas, the Court found Cyprus in violation of article 4, because Cyprus failed to “afford to Rantseva practical and effective protection against trafficking and exploitation.”<sup>66</sup>

Regarding protective measures, the Court cited Cypriot authorities’ undoubted awareness of foreign women coming to Cyprus on artiste visas and then being sexually exploited in cabarets and requested that Cyprus not simply ignore such a fact.<sup>67</sup> Additionally, the facts of the case testify to the lack of training of Cypriot police officers in identifying a potential victim of trafficking, though, according to the Court, all indicators were present to cause a credible suspicion of Rantseva’s real and immediate risk of being trafficked or exploited,<sup>68</sup> which in turn would have required investigation without delay and the initiation of operational measures of protection. Not only did the police not act upon these clear indicators, but on the contrary, they released the victim into the custody of the per-

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 71-72, para. 290.

<sup>63</sup> *Id.* at 72, para. 291.

<sup>64</sup> *Id.* at 72-73, para. 292.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 73, para. 293.

<sup>67</sup> *Id.*, para. 294.

<sup>68</sup> *Id.* at 73-74, para. 296.

son from whom she was trying to escape. Under such circumstances, the Court found Cyprus in violation of its obligation under article 4 in regards to protective measures.

*Issue No. 4: What Positive Obligations to Take Anti-trafficking Measures, if Any, Does Russia Have Under Article 4? Did Russia Violate Article 4?*

Three aspects of Russia's positive obligations were reviewed by the Court: (a) positive obligations to put in place an appropriate legislative and administrative framework; (b) positive obligations to take protective measures; and (c) procedural obligations to investigate human trafficking.

In connection to the first two issues, the Court held that Russia had not violated any obligations, because it had taken adequate measures to raise awareness about human trafficking through a media campaign. The Court further held that Russia's responsibility could only arise in connection to acts within its jurisdiction. Therefore, Russia did not fail to afford Rantseva practical and effective protection. Regarding positive obligations for protective measures, the Court stated that, based upon the facts of this case, Russia did not have a credible suspicion of a real and immediate risk of the trafficking of Rantseva. The problem of artiste visas was a general one, for which Russia did what it was supposed to do when it warned the public of potential dangers.<sup>69</sup>

The Court also discussed procedural obligations of Russia to investigate human trafficking, with particular emphasis on recruitment, because Rantseva had been recruited in Russia. The Court stated that failure to investigate recruitment would result in impunity for "an important part of the trafficking chain." It found that Russia had an obligation to investigate the possibility of the involvement of Russian individuals or networks in the trafficking of Rantseva to Cyprus and the means of such recruitment. Therefore, this failure to investigate recruitment, particularly in light of Rantseva's death, amounted to a violation of Russia's procedural obligation to investigate allegations of trafficking under article 4.<sup>70</sup>

d. *Alleged Violation of Article 5, the Right to Liberty and Security of Person*

Rantsev also alleged an arbitrary detention and abuse of power by stating that Cyprus had violated article 5—Rantseva's right to liberty and security of person—because of her treatment at the police station and her subsequent detention in M.P.'s apartment.<sup>71</sup> The Cypriot government assumed responsibility for the illegal deprivation of Rantseva's liberty<sup>72</sup> and for handing her over to M.A. rather than releasing her. The Court observed that Rantseva was detained for about one hour in the police

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<sup>69</sup> *Id.* at 75-76, paras. 301-06.

<sup>70</sup> *Id.* at 76, paras. 307-09.

<sup>71</sup> *Id.* at 78, para. 311.

<sup>72</sup> *Id.* at 78-79, para. 313.

station without being informed of the reasons for her detention and without being interviewed by the police. Even upon finding out that she was not an illegal immigrant and having no grounds for continuing her detention, the police did not release her, but instead surrendered her to M.A.'s custody. The Court further assessed that although the circumstances surrounding her stay in M.P.'s apartment were unclear, "[it would be] reasonable to assume that had she been a guest in the apartment and was free to leave at any time, she would have simply left via the front door."<sup>73</sup> Therefore, the Court concluded that she did not willingly stay in the apartment. The Court further highlighted the "serious nature and consequence of detention" and concluded that her detention at the police station and her captivity in the apartment, though totaling only two hours, still amounted to a deprivation of liberty under article 5.<sup>74</sup> The Court went on to establish Cyprus' responsibility for the deprivation by private actors of Rantseva's liberty. The Court found the fact that Rantseva did not object to going with M.A. irrelevant. Quoting AIRE Centre's statement that trafficking victims are too traumatized to present themselves as victims or that they fear repercussions, the Court concluded that the Cypriot police were actively collaborating with a private party to detain the victim. Hence, "the national authorities acquiesced in Rantseva's loss of liberty."<sup>75</sup>

Finally, on the basis of article 5(1), the Court concluded that Rantseva's deprivation of liberty was both arbitrary and unlawful. Though her initial detention could have been lawful on the ground of verifying compliance with her immigration status, her continued detention in the police station until M.A. came to collect her had no basis in national law. As the police themselves admitted, she did not appear drunk, she was not aggressive and posed no threat to herself or others, she had not requested that M.A. collect her, and she was not a minor. Consequently, there were no grounds whatsoever for transferring her to M.A.'s custody. The Court found a violation of article 5(1) in Cyprus' unlawful and arbitrary detention of Rantseva.

This jurisprudential success of anti-trafficking efforts is the culmination of over a century of prescriptive endeavors on the part of the community of states. A human rights court, albeit a regional one, has opened up prospects for a clear understanding of the ways to deal with the phenomenon of human trafficking and elevated the human rights approach above other advances to combating modern-day slavery. Such approaches will be briefly analyzed in the section below.

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<sup>73</sup> *Id.* at 78-79, para. 316.

<sup>74</sup> *Id.* at 79, paras. 317-18.

<sup>75</sup> *Id.* at 79-80, paras. 320-21.

### III. HUMAN TRAFFICKING: APPROACHES TO ADDRESSING THE PROBLEM

Various approaches to addressing this problem through the international and domestic legal systems have been suggested and implemented over time. Historically, and philosophically, trends have shifted from a hands-off attitude toward the problem, to a utilization of the criminal law, and finally to a focus on the victim under a broadly characterized human-rights approach.

#### A. *The Hands-Off Approach to Trafficking in Human Beings*

The hands-off approach in various societies over time relates to the acceptance by society of the divergent statuses of human beings in society, with slavery being the major case in point. Victims could be the members of other communities defeated in war, such as the *helots*, state-owned serfs in ancient Greece,<sup>76</sup> or they could be members of particular races, ethnic groups, or classes, such as victims of the forced transatlantic passage from Africa to the Americas<sup>77</sup> and other places, or the untouchables in India.<sup>78</sup> Even Aristotle in his work on natural law presented the concept of “natural slaves.”<sup>79</sup> As the status of slavery was legal at that time, the trafficking of people subjected to that status was usually legal as well.<sup>80</sup>

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<sup>76</sup> See SARAH B. POMEROY, STANLEY M. BURSTEIN, WALTER DONLAN & JENNIFER TOLBERT ROBERTS, *ANCIENT GREECE: A POLITICAL, SOCIAL, AND CULTURAL HISTORY* 98 (1999).

<sup>77</sup> See generally IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA* 95 (1998); PETER KOLCHIN, *AMERICAN SLAVERY, 1619-1877* (1995); 3-4 (1993).

<sup>78</sup> OLIVER MENDELSON & MARIKA VICZANY, *THE UNTOUCHABLES: SUBORDINATION, POVERTY AND THE STATE IN MODERN INDIA* 1 (1998); Hillary Mayell, *India's "Untouchables" Face Violence, Discrimination*, NATIONAL GEOGRAPHIC NEWS (June 2, 2003), available at [http://news.nationalgeographic.com/news/2003/06/0602\\_030602\\_untouchables.html](http://news.nationalgeographic.com/news/2003/06/0602_030602_untouchables.html).

<sup>79</sup> The following excerpt from *Politics* is instructive:

But is there any one thus intended by nature to be a slave, and for whom such a condition is expedient and right, or rather is not all slavery a violation of nature?

There is no difficulty in answering this question, on grounds both of reason and of fact. For that some should rule and others be ruled is a thing not only necessary, but expedient; from the hour of their birth, some are marked out for subjection, others for rule.

ARISTOTLE, *POLITICS*, 58 (Benjamin Jowett trans., Random House 1943) (350 B.C.E.).

<sup>80</sup> This, however, was not completely true for the United States. As Finkelman points out, “The African slave trade was legal in what became the United States for nearly 200 years—from the 1620s when African slaves began to arrive in the Dutch and British colonies until 1808 when the law banning the trade went into effect . . . . Slavery remained legal in the United States until the ratification of the Thirteenth

From a legal perspective, slavery as ownership of one human being by another, as an item of property law (chattel slavery) has been outlawed globally and domestically virtually everywhere.<sup>81</sup> Still, facets of this concept persist in reality, if not in the law.<sup>82</sup> In South Asia, for example, debt peonage or debt bondage<sup>83</sup> not only keep the debtor obligated to work for the creditor for the debtor's life, this obligation succeeds to the debtor's children and subsequent generations, creating a permanent (under)class of people with the opportunities of life foreclosed and with no hope in sight.<sup>84</sup>

Besides the law, the rationale of the market may also lead to a hands-off approach to trafficking. The idea that persons may sell their labor at a price they bargain freely and individually without interference by the government lies at the heart of modern economic structures. This freedom is articulated by Adam Smith as the basis of the wealth of nations.<sup>85</sup> Extreme proponents of this theory, joined by social Darwinists,<sup>86</sup> would have a hard time conceiving of limits to this idealized freedom. This may range from moral limits on the types of contracts involved, as in sexual slavery, to the modalities of entering into the contract (lopsided bargaining power, for example), as well as to restrictions on working times and conditions, and a requirement of a minimum wage. The end of an unrestricted market may lead to the acceptance of the means of driving persons into situations where their moral and economic autonomy is nothing more than a charade.

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Amendment in 1865.” Paul Finkelman, *The American Suppression of the African Slave Trade: Lessons on Legal Change, Social Policy, and Legislation*, 42 AKRON L. REV. 431, 432-33 (2009).

<sup>81</sup> See James C. Hathaway maintains that “traditional slavery is alive and well in the form of chattel slavery systems, especially in parts of Africa”—due to its deep roots “in custom and tradition.” James C. Hathaway, *The Human Rights Quagmire of “Human Trafficking,”* 49 VA. J. INT’L L. 1, 16 (2008).

<sup>82</sup> *Id.*

<sup>83</sup> Kevin Bales estimates that 15 to 20 million people are held in bonded labor in Bangladesh, India, Nepal, and Pakistan. KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* 9, 201-03 (1999).

<sup>84</sup> *Id.*

<sup>85</sup> ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 421-23 (Edwin Cannon ed., Random House 1937) (1776).

<sup>86</sup> According to their philosophy, prevalent in late Victorian Britain, the survival of the fittest was not only an empirical statement, but a moral command. See Herbert Spencer, *Progress: Its Law and Causes*, 67 THE WESTMINSTER REV. 445, 455-56 (1857); see generally ROBERT C. BANNISTER, *SOCIAL DARWINISM: SCIENCE AND MYTH IN ANGLO-AMERICAN SOCIAL THOUGHT* (1979); MIKE HAWKINS, *SOCIAL DARWINISM IN EUROPEAN AND AMERICAN THOUGHT, 1860-1945: NATURE AS MODEL AND NATURE AS THREAT* 8-9 (1997).

## B. *The Criminal Law Approach*

On the other hand, this horrible scourge may be addressed with the traditionally sharpest sword the law wields: the criminal or penal law.<sup>87</sup> The idea is to legislatively prohibit not only the end result of exploitation, but also the means of reaching it, and to attach criminal sanctions, such as severe terms of incarceration and/or fines to any violation of such laws. A paradigm of this approach is the so-called Mann Act, a U.S. statute from 1910,<sup>88</sup> which prohibited the movement of women across state lines for the purposes of prostitution, “debauchery,” or any other immoral purpose.

Following this criminal law approach, international conventions were drafted to obligate states to make trafficking in human beings a crime and to cooperate in the enforcement of these proscriptions across borders.<sup>89</sup> Trafficking in persons was urged to be declared an international crime,<sup>90</sup> which slightly enlarged the definition of “enslavement,” classified as a crime against humanity, under article 7(1)(c) of the Rome Statute.<sup>91</sup>

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<sup>87</sup> See Edward R. Kleemans, *Organized Crime, Transit Crime, and Racketeering*, 35 CRIME & JUST. 163, 183-86 (2007); Joseph F. Ritch, *They'll Make You An Offer You Can't Refuse: A Comparative Analysis of International Organized Crime*, 9 TULSA J. COMP. & INT'L L. 569, 601 (2002); Susan W. Tiefenbrun, *Sex Sells but Drugs Don't Talk: Trafficking of Women Sex Workers*, 23 T. JEFFERSON L. REV. 199, 214 (2001). For a take on corruption as a vital component of human trafficking, see Osita Agbu, *Corruption and Human Trafficking: The Nigeria Case*, 4 W. AFR. REV. 1, 5 (2003).

<sup>88</sup> The current version of the law has replaced the rather ambiguous wording of “debauchery” and “other immoral purpose” with “any sexual activity for which any person can be charged with a criminal offense”). White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424, (2006)). See generally DAVID J. LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT, 3 (1994) (describing absurd results stemming from the law’s overinclusiveness).

<sup>89</sup> The Palermo Protocol is one such example of an international instrument criminalizing human trafficking. See *infra* note 114. In many countries, however, human trafficking offenses are not classified as serious crimes and the number of prosecutions is too low. See Marilyn R. Walter, *Trafficking in Humans: Now and in Herman Melville's Benito Cereno*, 12 WM. & MARY J. WOMEN & L. 135, 168 (2005).

<sup>90</sup> *The Miami Declaration of Principles on Human Trafficking*, 1 INTERCULTURAL HUM. RTS. L. REV. 11, 12 (2006).

<sup>91</sup> This crime was defined as “the exercise of any or all of the powers attaching to the right of ownership over a person.” It “includes the exercise of such power in the course of trafficking in persons, in particular women and children.” Rome Statute of the International Criminal Court, art. 7(2)(c), *adopted on July 17, 1998*, 2187 U.N.T.S. 90.

C. *The Regulatory Approach: Labor Law and Immigration/Refugee Law*

The administrative regulation of private contracts is another way to address the human trafficking problem.<sup>92</sup> This approach is particularly suited for exploitative labor situations. Historically, the union movement pushed the legislature to regulate the validity of employment contracts. For example, in the U.S., labor law was born both on federal and state levels. It made illegal, and thus unenforceable, contracts of employment that violated its regulations.<sup>93</sup> On the international level, conventions under the umbrella of the International Labor Organization (ILO) tackled issues of forced labor,<sup>94</sup> child labor, minimum wage, and maximum hours of work to address the most graphic situations of exploitation on the labor market.

Another important part of the regulatory environment affected by human trafficking issues is immigration and asylum law.<sup>95</sup> Efforts have been made to protect victims of human trafficking from some of the harsh consequences they were often forced into by traffickers, such as their illegal stays in their host countries.<sup>96</sup> Depending on the circumstances, special visas that allow them to stay legally or even extensions of refugee status have been envisioned.<sup>97</sup>

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<sup>92</sup> The International Marriage Broker Regulation Act of 2005 (IMBRA), which took effect on March 8, 2006, imposes a number of obligations on the international marriage broker industry, mostly known as the mail order bride industry. 8 U.S.C. § 1375(d) (2006). An interesting discussion on this issue can be found in Suzanne H. Jackson, *Marriages of Convenience: International Marriage Brokers, "Mail-Order Brides," and Domestic Servitude*, 38 U. TOL. L. REV. 895 (2006). For a creative idea on combating human trafficking using taxation, see Diane L. Fahey, *Can Tax Policy Stop Human Trafficking?*, 40 GEO. J. INT'L L. 345, 347 (2009).

<sup>93</sup> See Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201,-19 (2006) (establishing minimum wage, overtime pay, recordkeeping, and youth employment standards that affect employees in the private sector as well as federal, state, and local governments); Jennifer S. Nam, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1664 (2007). *But cf.* Note, *Remedying the Injustices of Human Trafficking through Tort Law*, 119 Harv. L. Rev. 2574, 2588 (2006).

<sup>94</sup> See Kevin Bales, *International Labor Standards: Quality of Information and Measures of Progress in Combating Forced Labor*, 24 COMP. LAB. L. & POL'Y J. 321, 329 (2003).

<sup>95</sup> See generally Salvador A. Cicero-Domínguez, *Assessing the U.S.-Mexico Fight Against Human Trafficking and Smuggling: Unintended Results of U.S. Immigration Policy*, 4 Nw. U. J. INT'L HUM. RTS. 303, 303 (2005).

<sup>96</sup> See Nidhi Kumar, *Reinforcing Thirteenth and Fourteenth Amendment Principles in the Twenty-first Century: How to Punish Today's Masters and Compensate Their Immigrant Slaves*, 58 RUTGERS L. REV. 303, 306 (2005).

<sup>97</sup> See Tala Hartsough, *Asylum for Trafficked Women: Escape Strategies Beyond the T-Visa*, 13 HASTINGS WOMEN'S L.J. 77, 98-99 (2002).



#### D. *The Human Rights Approach*

Under the United Nations Charter, in 1945, the term “human rights” entered the glossary of positive international law. For the first time, a universal treaty, made by states, had as its goal the promotion of rights defined as entitlements *against* the state. In subsequent global and regional treaties, these rights were further circumscribed and implemented. It is subject to doctrinal debate whether these “rights” are legal entitlements belonging to the individuals holding them, or whether the individual rights holders are mere beneficiaries of the human rights treaties that engender rights and duties belonging to the states that are parties to them. The first stance would more likely view the individual as a new subject of international law, expanding the post-Westphalian restriction of actors of modern international legal process to modern nation-states.

The human trafficking context has been addressed from this human rights perspective.<sup>98</sup> In particular, beyond the need for criminalization of the conduct of the perpetrator, the needs of the victims have been put front and center.<sup>99</sup> The human rights approach sees the problem of human trafficking as encompassing prevention by raising awareness and addressing the root causes of trafficking, prosecution, and protection and rehabilitation of victims. The proponents of this approach also argue that the already established institutions monitoring compliance with human rights can be a stalwart promoter of states’ responsibilities in combating human trafficking. *Rantsev* itself unquestionably paved the way for a proper legal interpretation of the different elements of human trafficking from a human rights perspective, as it rested its holding on the positive obligations of states. Part V of this paper contains an analysis of these elements of a human rights approach.

But before we go there, let us explore the successes, if any, that these various approaches to the problem of human trafficking have yielded over time. In particular, what responses in the legal arena, both international and domestic, did they evoke? The following section will highlight the achievements and failures of the various approaches.

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<sup>98</sup> See TOM OBOKATA, *TRAFFICKING OF HUMAN BEINGS FROM A HUMAN RIGHTS PERSPECTIVE: TOWARDS A HOLISTIC APPROACH* 174 (2006); see also HELI ASKOLA, *LEGAL RESPONSES TO TRAFFICKING IN WOMEN FOR SEXUAL EXPLOITATION IN THE EUROPEAN UNION* 133 (2007).

<sup>99</sup> Federico Lenzerini, *International Legal Instruments on Human Trafficking and a Victim-Oriented Approach: Which Gaps Are to Be Filled?*, 4 *INTERCULTURAL HUM. RTS. L. REV.* 205, 270 (2009) [hereinafter *International Legal Instruments*]. See also OBOKATA, *supra* note 98, at 175.

#### IV. TREATIES ON POINT: FROM “WHITE SLAVERY” AGREEMENTS TO THE PALERMO PROTOCOL AND THE COUNCIL OF EUROPE CONVENTION

In today’s parlance, human trafficking is referred to as modern-day slavery.<sup>100</sup> As controversial as the statement is, human trafficking nevertheless possesses large-scale similarities with the old, institutionalized phenomenon of slavery.<sup>101</sup> Consequently, this article looks at the issue of human trafficking as modern-day slavery, which in turn warrants a careful look at the concerted and responsive efforts made by the community of nations to confront the lingering phenomenon of certain aspects of slavery, although not necessarily institutionalized as a *de jure* form of property (chattel slavery), nor essentially permanent in a general sense, as the hereditary system of slavery was. This section analyzes briefly and chronologically the past trends in struggling against such practices, and the conditioning factors in the processes of communication that led to the resulting laws.

##### A. *Early Responses to the Remnants of Slavery, Slavery-Like Practices, and Forced Labor*

###### 1. 1904 International Agreement for the Suppression of the “White Slave Traffic”

As early as 1904, the world’s dominant actors observed a new form of slavery: the trafficking of mostly European, white females across borders for the purposes of prostitution. This does not necessarily mean that females of other races were not prone to such exploitation. The term “white slave,” however, is at least conceptually exclusionary; it provides a striking contrast to the concept of traditional slavery, imposed, paradigmatically and predominantly, in the consciousness and memory of the time, on black people.

The response to this phenomenon was the formulation and entry into force of the *International Agreement for the Suppression of the “White Slave Traffic.”*<sup>102</sup> Its preamble enumerates the authorities of the kings

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<sup>100</sup> See U.S. Dep’t of State, Office to Monitor and Combat Trafficking in Persons, available at <http://www.state.gov/g/tip/what/index.htm>; see also Hillary Clinton, Sec’y of State, Remarks on the Release of the 10th Annual Trafficking in Persons Report (Jun. 14, 2010), available at <http://www.state.gov/secretary/rm/2010/06/143113.htm>; Andrew Cockburn, *21st Century Slaves*, NATIONAL GEOGRAPHIC MAGAZINE, available at <http://ngm.nationalgeographic.com/ngm/0309/feature1/>.

<sup>101</sup> See Fara Gold, Note, *Redefining the Slave Trade: The Current Trends in the International Trafficking of Women*, 11 U. MIAMI INT’L & COMP. L. REV. 99, 118 (2003); Finkelman, *supra* note 83 (pointing out differences between human trafficking and the African slave trade).

<sup>102</sup> International Agreement for the Suppression of the “White Slave Traffic,” opened for signature May 18, 1904, 35 Stat. 1979, 1979 (entered into force July 18, 1905) [hereinafter 1904 White Slave Traffic Agreement].

and queens of European countries<sup>103</sup> being “desirous of securing to women of full age who have suffered abuse or compulsion, as also to women and girls under age, effective protection against the criminal traffic known as the ‘White Slave Traffic.’”<sup>104</sup> Article 2 of this agreement is quite specific as to places to be kept under control, such as railway stations and ports of embarkation, and requires that officials be instructed “to obtain, within legal limits, all information likely to lead to the detection of criminal traffic.”<sup>105</sup> The agreement also addresses concerns about the care and security of identified victims, recognizes the role of “public or private charitable institutions” in this regard,<sup>106</sup> and describes procedures for victims’ repatriation.<sup>107</sup> It also obligates the contracting governments to supervise those offices and agencies that were involved in finding employment abroad for women and girls.<sup>108</sup> This agreement planted the seeds of a number of issues related to human trafficking that continue to be dealt with today.

## 2. 1910 International Convention for the Suppression of the “White Slave Traffic”

The criminalization of trafficking acts described in articles 2 and 3 of the *International Convention for the Suppression of the “White Slave Traffic”*<sup>109</sup> and the punishment for perpetrators was the focus of the 1910

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<sup>103</sup> The named royalty are mostly from Western Europe, except for Russia, namely: His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India; His Majesty the German Emperor, King of Prussia, in the name of the German Empire; His Majesty the King of the Belgians; His Majesty the King of Denmark; His Majesty the King of Spain; the President of the French Republic; His Majesty the King of Italy; Her Majesty the Queen of the Netherlands; His Majesty the King of Portugal and of the Algarves; His Majesty the Emperor of all the Russians; His Majesty the King of Sweden and Norway; and the Swiss Federal Council. *Id.* at 1980-81.

<sup>104</sup> *Id.* at 1980.

<sup>105</sup> *Id.* at 1982.

<sup>106</sup> *Id.* at 1982-83.

<sup>107</sup> *Id.* Professor Federico Lenzerini considers these two articles to be the forerunners of a “victim-oriented approach” to the issue of trafficking in persons. See *International Legal Instruments, supra* note 99, at 206.

<sup>108</sup> 1904 WHITE SLAVE TRAFFIC AGREEMENT, *supra* note 102, art.6. At that time, the Ministry of Foreign Affairs of the French Republic was vested with the depository functions with regard to this agreement amongst mostly European states.

<sup>109</sup> INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE WHITE SLAVE TRAFFIC, MAY 4, 1910, ART. 2-3, GR. BRIT. T.S. No. 20 (1912) (Cd. 6326) [hereinafter 1910 Convention for Suppression of White Slave Traffic], *as amended by* Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic, May 4, 1949, 2 U.S.T. 1999, 30 U.N.T.S. 23, *entered into force* June 21, 1951.

Convention. These two articles place criminal liability on “[w]hoever, [who] in order to gratify the passions of another person, has procured, enticed, or led away, even with her consent, a woman or girl under age, for immoral purposes . . .”<sup>110</sup>—irrespective of the country where such acts have been committed. As seen in the wording of the article, consent is irrelevant in cases when the victim is a minor. Article 2 describes the prohibited means against women and girls “over age,” namely, fraud, violence, threats, abuse of authority, or any other method of compulsion.<sup>111</sup> However, the drafters felt the necessity of clarifying that this is to be considered a minimum standard, and countries were free to punish other acts as well, such as the procurement of women over age, even absent fraud or compulsion.<sup>112</sup> These criminal elements, as well as the attempt to coordinate the anti-trafficking efforts of the states through extradition treaties or the sharing of information,<sup>113</sup> resemble the globally accepted definition of human trafficking today, though ninety years have passed between this Convention and the Palermo Protocol.<sup>114</sup>

### 3. 1921 International Convention for the Suppression of the Traffic in Women and Children

In 1921, the *International Convention for the Suppression of the Traffic in Women and Children*<sup>115</sup> was intended to supplement the two above mentioned instruments. It urged participating states to ratify the 1904

<sup>110</sup> *Id.* at 270.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* The Final Protocol also specifies that “the law should decree, in every case, a punishment involving loss of liberty, without prejudice to other penalties, principal or accessory; it should also take into account, apart from the age of the victim, the various aggravating circumstances which exist in the case, such as those referred to in Article 2, or the fact that the victim has been in effect delivered over to an immoral life.” *Id.* at 279.

<sup>113</sup> *Id.* at 270-71.

<sup>114</sup> *Cf.* UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *opened for signature* Nov. 15, 2000, T.I.A.S. No. 13127, 2237 U.N.T.S. 319, art. 3 (entered into force Dec. 25, 2003) [hereinafter Palermo Protocol].

<sup>115</sup> *See* International Convention for the Suppression of the Traffic in Women and Children *opened for signature* Sept. 30, 1921, 9 L.N.T.S. 415. The participating countries were: Albania, Germany, Austria, Belgium, Brazil, the British Empire (with Canada, the Commonwealth of Australia, the Union of South Africa, New Zealand and India), Chile, China, Colombia, Costa Rica, Cuba, Estonia, Greece, Hungary, Italy, Japan, Latvia, Lithuania, Norway, the Netherlands, Persia, Poland (with Danzig), Portugal, Romania, Siam, Sweden, Switzerland and Czechoslovakia. The convention observed the recommendations contained in the Final Act of the International Conference which was summoned by the Council of the League of Nations in Geneva from 30 June to 5 July 1921. *Id.*; *see also id.* pmbl.

and 1910 agreements by reiterating the concepts underlying their provisions. However, it increased the “under-age” limit to twenty-one “completed years of age.”<sup>116</sup> Article 7 highlights the concern of the time: the growth of trafficking as the result of emigration.<sup>117</sup> It advises states to adopt administrative and legislative measures that ensure better control of the trafficking in women and children.<sup>118</sup> Locating “emigrant ships” at departure, arrival, and during the journey as “hot spots,” this 1921 Convention requires states to raise awareness of the danger of trafficking by exhibiting notices that would not only warn women and children of this danger, but also inform them of places where they could obtain accommodation and assistance.<sup>119</sup>

#### 4. 1926 Slavery Convention

The Slavery Convention of 1926<sup>120</sup> is concerned with forced labor. It aims to thwart advances of forced labor into conditions analogous to slavery.<sup>121</sup>

In article 1, the Slavery Convention defines “slavery” as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”<sup>122</sup> It further enumerates acts that define the “slave trade” as:

[A]ll acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.<sup>123</sup>

Aiming at “the complete abolition of slavery in all its forms,”<sup>124</sup> the Slavery Convention obligates states to act progressively and as soon as possible to end the slave trade.

Despite its good intentions, the Slavery Convention did not have enough teeth. First, it allowed any state to declare inapplicability of the Slavery Convention to “some or all of the territories placed under its sov-

<sup>116</sup> *Id.* art. 5.

<sup>117</sup> *Id.* art. 7.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Slavery Convention pmb., art.5, Sept. 25, 1926, T.S. 778, 60 L.N.T.S. 253, amended by Slavery Convention Protocol, opened for signature Dec. 7, 1953, 7 U.S.T. 479. Its forerunner was the General Act of the Brussels Conference of 1889-90, which declared that its signatories were mindful of and firmly intent on putting an end to the traffic in African slaves. *Id.* pmb.

<sup>121</sup> *Id.* pmb., art.5.

<sup>122</sup> *Id.* art. 1.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* art. 2(a)-(b).

ereignty, jurisdiction, protection, suzerainty or tutelage in respect of all or any provisions of the Convention,”<sup>125</sup> and second, it provided for the denunciation of the present Slavery Convention at any time.<sup>126</sup>

5. 1930 ILO Forced Labor Convention (Convention No. 29)

The ILO adopted, in 1930, the Forced Labor Convention.<sup>127</sup> The Forced Labor Convention mandates each member of the ILO that ratifies the Forced Labor Convention “to suppress the use of forced or compulsory labor in all its forms [and] within the shortest possible period.”<sup>128</sup> Defined in article 2 of the Forced Labor Convention, “forced or compulsory labor” means “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”<sup>129</sup> We can thus see that the underlying essence of human trafficking today bears a great deal of resemblance to the meaning of the term “forced or compulsory labor.”

6. 1933 International Convention for the Suppression of the Traffic in Women of Full Age

At the League of Nations, the 1933 international community, invigorated by the report of the Traffic in Women and Children Committee,<sup>130</sup> readdressed the issue of trafficking in women, aiming to complete the previous conventions relating to the suppression of the traffic in women and children.<sup>131</sup> This time, the issue of the full age women trafficked into prostitution was seen as a problem not only of Western Europe, but also of many Central and Eastern European countries,<sup>132</sup> Central and Latin America,<sup>133</sup> and even China<sup>134</sup>—an indicator of the fact that the traffick-

<sup>125</sup> *Id.* art. 9.

<sup>126</sup> *Id.* art. 10. The Slavery Convention was amended in 1953, through a Protocol, in order to vest the United Nations with the functions and duties once performed by the League of Nations. Slavery Convention Protocol, *supra* note 120.

<sup>127</sup> Convention Concerning Forced or Compulsory Labour, *adopted* June 28, 1930, 39 U.N.T.S. 55 [hereinafter Forced Labor Convention], *available at* <http://www2.ohchr.org/english/law/forcedlabour.htm>.

<sup>128</sup> *Id.* art. 1.

<sup>129</sup> *Id.* art. 2.

<sup>130</sup> *See* INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE TRAFFIC IN WOMEN OF FULL AGE, P.M.B.L., OCT. 11, 1933, 150 L.N.T.S. 433.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* The preamble mentions, *inter alia*: His Majesty the King of the Albanians; His Majesty the King of the Bulgarians; the President of the Polish Republic, for the Free City of Danzig; His Serene Highness the Regent of the Kingdom of Hungary; the President of the Latvian Republic; the President of the Republic of Lithuania; the President of the Polish Republic; the President of the Czechoslovak Republic; and His Majesty the King of Yugoslavia.

<sup>133</sup> *Id.* The President of the Republic of Panama and the President of the Republic of Chile are mentioned.

ing issue had been gaining ground, had spread to all continents, but also of the fact that awareness of the issue had been increasing, and, consequently, inter-governmental responses were formulated on a global plane.

In many ways, this International Convention replicates the 1910 Convention, though the objects of protection under the International Convention are women and girls of full age. Furthermore, the International Convention extends the principle of the irrelevancy of “consent” to women and girls of full age.<sup>135</sup> Moreover, the International Convention criminalizes the attempt to engage in any of the prohibited acts related to trafficking, by adding, in its article 1: “[a]ttempted offences, and, within the legal limits, acts preparatory to the offences in question, shall also be punishable.”<sup>136</sup>

#### 7. 1951 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others

The phenomenon of human trafficking took center stage right after World War II. As early as 1949, the General Assembly of the United Nations adopted the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.<sup>137</sup> It considers prostitution and “the accompanying evil” of the trafficking in persons as “incompatible with the dignity and worth of the human person” and observes that such a phenomenon endangers not only the welfare of the individual, but also of the family and the community at large.<sup>138</sup> Taking heed of all the existing international instruments established to combat this scourge, the drafters of this 1951 Convention intended to consolidate these instruments and extend the scope of anti-trafficking legislation. While it reiterates, sometimes verbatim, the provisions of previous instruments, by confirming the irrelevancy of consent, the 1951 Convention brings a novelty, particularly as it addresses the issue of brothels, previously left out of consideration. Its article 2 provides:

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<sup>134</sup> *Id.* The President of the National Government of the Republic of China is also noted.

<sup>135</sup> *Id.* art.1 (“Whoever, in order to gratify the passions of another person, has procured, enticed or led away *even with her consent*, a woman or girl of full age for immoral purposes to be carried out in another country, shall be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries.”) (emphasis added).

<sup>136</sup> *Id.* art. 1.

<sup>137</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, *opened for signature* Mar. 21, 1950, 96 U.N.T.S. 271, available at <http://www2.ohchr.org/english/law/trafficpersons.htm> [hereinafter Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others].

<sup>138</sup> *Id.* p.mbl.

The Parties to the present Convention further agree to punish any person who:

- (1) Keeps or manages, or knowingly finances or takes part in the financing of a brothel;
- (2) Knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others.<sup>139</sup>

This novelty and its adoption of the abolitionist approach to prostitution turns out to also be its curse. To date, there are only 81 states that have ratified the 1951 Convention.<sup>140</sup> Many of the states are generally reluctant to adopt an abolitionist approach to prostitution; rather they prefer to continue regulating prostitution in the traditional way, mostly by legalizing it.<sup>141</sup> The qualification “to the extent permitted by domestic law” made by the 1951 Convention in several of its articles,<sup>142</sup> also does not seem to adequately appease states.

#### 8. 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery

“[F]reedom is the birthright of every human being,” is how the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery<sup>143</sup> opens its preamble. Its reference to the UN Charter’s affirmation of dignity and worth of the human person, its invocation of the UN Declaration of Human Rights (UNDHR) as a common standard of the achievement for all peoples and all nations, and particularly the UNDHR’s provision that “no one shall be held in slavery or servitude and that slavery and the slave trade shall be prohibited in all their forms,”<sup>144</sup> proves that human rights language

<sup>139</sup> *Id.* art.2.

<sup>140</sup> See United Nations, *Multilateral Treaties Deposited with the Secretary-General*, vol. 1, at 614, U.N. Doc. ST/LEG/SER.E/26, U.N. Sales No. E.09.V.3 (April 2009).

<sup>141</sup> Cf. Michael Conant, *Federalism, the Mann Act, and the Imperative to Decriminalize Prostitution*, 5 CORNELL J.L. & PUB. POL’Y, 99 (1996). The U.S. has criminalized prostitution, while many other countries have legalized it. In this article, Conant argues that a “rational analysis of the history of the Mann Act leads to the conclusion that it is ready for repeal.” *Id.* at 99. A good discussion and analysis of the issues related to the legalization and criminalization of prostitution in different countries can be found in *THE POLITICS OF PROSTITUTION: WOMEN’S MOVEMENTS, DEMOCRATIC STATES AND THE GLOBALISATION OF SEX COMMERCE* (Joyce Outshoorn ed., 2004).

<sup>142</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others arts. 3-4, *supra* note 137.

<sup>143</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, pmbl., Sept. 7, 1956, *adopted*, 18 U.S.T. 3201, 266 U.N.T.S. 40 [hereinafter *Supplementary Slavery Convention*].

<sup>144</sup> *Id.*



has now come to be viewed as the standard terminology in anti-slavery efforts. The recognition that slavery, the slave trade, as well as institutions and practices akin to slavery, were all still in existence in many parts of the world,<sup>145</sup> urged the complete abolition or abandonment of a number of pertinent institutions and practices, whether covered by or left out from the definition of slavery in the Slavery Convention.

In article 1, the Supplementary Convention describes each of the institutions and practices of debt bondage,<sup>146</sup> serfdom,<sup>147</sup> institutions related to marriage that are oppressive to women,<sup>148</sup> and practices exploitative of children.<sup>149</sup> The Supplementary Convention urges states to prescribe suitable minimum ages of marriage and to formalize the consent of both parties to a marriage in the presence of a competent civil or religious authority. It also encourages the registration of marriages.<sup>150</sup> The Supplementary Convention also sanctions the criminalization of the following acts: the act to convey and the attempt to convey slaves across borders no matter what means of transport are employed;<sup>151</sup> the act of mutilating, branding, marking a slave or a person of servile status so as to indicate such a status, as a punishment, or for any other reason;<sup>152</sup> “the act of enslaving a person or of inducing another person to give himself or a person dependent upon him into slavery,” the attempt to commit these acts, and the conspiracy to accomplish any such acts;<sup>153</sup> and also the act of being an accessory to any of the above.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* art. 1(a) (“Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.”).

<sup>147</sup> *Id.* art. 1(b) (“Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status.”).

<sup>148</sup> *Id.* art. 1(c) (“Any institution or practice whereby: (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or (iii) A woman on the death of her husband is liable to be inherited by another person.”).

<sup>149</sup> *Id.* art. 1(d) (“Any institution or practice whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.”).

<sup>150</sup> *Id.* art. 2.

<sup>151</sup> *Id.* art. 3.

<sup>152</sup> *Id.* art. 5.

<sup>153</sup> *Id.* art. 6.

In its article 7, the Supplementary Convention reiterates the definition of “slavery” under the Slavery Convention and defines the concept of “a person in servile status.”<sup>154</sup> The definition of the *slave trade* replicates the 1926 description, including, in general, the phrase “every act of trade or transport in slaves,” but the Supplementary Convention adds “by whatever means of conveyance,”<sup>155</sup> thereby looking beyond the paradigm of the cross-Atlantic slave trade.

The language of this Supplementary Convention is stronger than that used in any of the previous instruments. It not only requires states to cooperate amongst themselves, but also mandates that they send copies of their laws giving effect to the Supplementary Convention to the Secretary General of the United Nations.<sup>156</sup> Such texts are further submitted to other states and to the UN Economic and Social Council for review and recommendations<sup>157</sup> Most importantly, the Supplementary Convention prohibits states from making any reservations.<sup>158</sup>

#### 9. 1957 ILO Convention Concerning the Abolition of Forced Labor (Convention No. 105)

The ILO one more time turns to the issue of forced labor by adopting the 1957 Convention Concerning the Abolition of Forced Labor.<sup>159</sup> The 1957 Convention mandates the immediate and complete abolition of certain forms of forced or compulsory labor.<sup>160</sup> Its article 5 puts a lot of constraints regarding the possibility of denunciation of this Convention. A state that ratifies this 1957 Convention can denounce it only “after the

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<sup>154</sup> *Id.* art. 7(a)-(b) (“‘A person of servile status’ means a person in the condition or status resulting from any of the institutions or practices mentioned in article 1 of this Convention.”).

<sup>155</sup> *Id.* art. 7(c).

<sup>156</sup> *Id.* art. 8(2).

<sup>157</sup> *Id.* art. 8(3).

<sup>158</sup> *Id.* art. 9. Finally, though it provides for the opportunity of denunciation of the Convention, in light of the fact that the application of this Convention is divided into successive periods of three years, any denunciation, however, shall only take effect at the expiration of the current three-year period. This creates room for application of laws and policies. *Id.* art. 14 (1), 14(3).

<sup>159</sup> Convention Concerning the Abolition of Forced Labour, *adopted* June 25, 1957, 320 U.N.T.S. 291.

<sup>160</sup> *Id.* art. 2. These forms were specified in Article 1 of the Convention, which provides: “Each Member of the International Labor Organization which ratifies this Convention undertakes to suppress and not to make use of any form of forced or compulsory labor: (a) As a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system; (b) As a method of mobilizing and using labor for purposes of economic development; (c) As a means of labor discipline; (d) As a punishment for having participated in strikes; (e) As a means of racial, social, national or religious discrimination.” *Id.* art. 1.

expiration of ten years from the date on which the Convention first comes into force.”<sup>161</sup>

10. 1999 ILO Worst Forms of Child Labor Convention (Convention No. 182)

In 1999, the ILO took up the issue of child labor by adopting the Worst Forms of Child Labor Convention (No. 182).<sup>162</sup> Its preamble describes the prohibition and elimination of the worst forms of child labor as the main priority for any national and international action.<sup>163</sup> It also recognizes poverty as a root cause of child labor and calls for sustained economic growth, social progress, poverty alleviation, and universal education.<sup>164</sup>

The Child Labor Convention recognizes a “child” to be under 18 years,<sup>165</sup> and in its article 3 it defines the worst forms of child labor as comprising:

- (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 of pornography or for pornographic performances;
- (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.<sup>166</sup>

Abolition of these forms of labor is considered a matter of urgency,<sup>167</sup> and denunciation of this Child Labor Convention can only be made after the introductory period of ten years has expired.<sup>168</sup>

<sup>161</sup> *Id.* art. 5(1). Also, if this denunciation is not made with the first year upon expiration of the first ten years, the country will be bound by the Convention for a period of ten years, and “thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this article.” *Id.* art. 5(2).

<sup>162</sup> Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, T.I.A.S. No. 13045 (*also known as* Worst Forms of Child Labour Convention).

<sup>163</sup> *Id.* pmb.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* art. 2.

<sup>166</sup> *Id.* art. 3.

<sup>167</sup> *Id.* art. 1 (“Each Member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labor as a matter of urgency.”).

<sup>168</sup> *Id.* art. 11.

11. 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography

The following year, the UN adopted another international instrument that addressed the scourge of human trafficking with a specific focus on children.<sup>169</sup> The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography<sup>170</sup> is a full-fledged instrument that deals with the trafficking of children in several aspects. Article 2 of the Optional Protocol provides the following definitions of “sale of children,” “child prostitution,” and “child pornography”:

- (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.<sup>171</sup>

The Optional Protocol prohibits and criminalizes the following acts:

The offering, delivering or accepting, by whatever means, a child for the purpose of: [s]exual exploitation of the child; [t]ransfer of organs of the child for profit; [e]ngagement or engagement of the child in forced labour; [i]mproperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal

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<sup>169</sup> See generally Sara Dillon, *What Human Rights Law Obscures: Global Sex Trafficking and the Demand for Children*, 17 UCLA WOMEN'S L.J. 121, 122 (2008) (“Across cultures, children are in demand for use in a global sex industry” such that child trafficking is no longer a “niche perversion or a psychological oddity.”). For accounts of children trapped into trafficking, see generally Virginia Garrard, *Sad Stories: Trafficking in Children: Unique Situations Requiring New Solutions*, 35 GA. J. INT'L & COMP. L. 145, 147 (2006), and Katrina L. Baker, *Don't Forget the Family: A Proposal for Expanding Immediate Protection to Families of Human Trafficking Survivors*, 30 FORDHAM INT'L L.J. 836 (2007).

<sup>170</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *opened for signature* May 25, 2000, T.I.A.S. No. 13,095 (entered into force Jan. 18, 2002) [hereinafter the Protocol].

<sup>171</sup> *Id.* art. 2. For more on the issue of pornography as trafficking see generally Catharine MacKinnon, *Pornography as Trafficking*, 26 MICH. J. INT'L L. 993 (2005). According to the author, pornography creates demand for prostitution, and consequently for human trafficking. *Id.* at 999.

instruments on adoption; [and] [o]ffering, obtaining, procuring or providing a child for child prostitution . . . .<sup>172</sup>

The Optional Protocol also addresses issues of protection and the reintegration of child victims into society while taking into account the particular vulnerability of the child victim and the need to create a suitable social background for preventing the trafficking of children.<sup>173</sup>

## B. Recent Legal Developments

1. 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (“Palermo Protocol”)

On a global level, the most important modern-day instrument dealing specifically with the complex issue of trafficking in human beings is no doubt the Palermo Protocol.<sup>174</sup> It provides a globally accepted definition of human trafficking,<sup>175</sup> and it determines the scope of its application, as well as that of the United Nations Convention against Transnational Organized Crime, to trafficking activities. Namely, the Palermo Protocol defines the scope of application to the prevention, investigation, and

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<sup>172</sup> The Protocol, *supra* note 170, art. 3(1) *Id.* art. 3 (1) (internal formatting omitted). For an account of female child prostitution see *Demand for Virgins Fueling Sex Trade in Cambodia*, HUMANTRAFFICKING.ORG (Oct. 8, 2007), available at <http://www.humantrafficking.org/updates/725>. According to this report, the sex trade in Cambodia is prevalent and the International Organization for Migration has found that most children sold their virginity at 16 or 17 years of age. A few said that they entered prostitution willingly, but most of them are lured and trapped into it by family members and friends.

<sup>173</sup> For a good analysis of the issues addressed in the Protocol, see Lenzerini, *supra* note 99, at 211-14. See generally Rachel Stevens, *The Trafficking of Children: A Modern form of Slavery, Using the Alien Tort Statute to Provide Legal Provide legal Recourse*, 5 WHITTIER J. CHILD & FAM. ADVOC. 645 (2006). Stevens further describes that poverty and economic degradation is a cause of child trafficking. *Id.* at 647.

<sup>174</sup> Palermo Protocol, *supra* note 114; see Susan Tiefenbrun & Christie J. Edwards, *Gendercide and the Cultural Context of Sex Trafficking in China*, 32 FORDHAM INT'L L.J. 731, 736 (2009). A good analysis of the Palermo Protocol is found in Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM RTS. Q. 9765 (2001); see also Linda Smith & Mohamed Mattar, *Creating International Consensus on Combating Trafficking in Persons: U.S. Policy, the Role of the UN, and Global Responses and Challenges*, 28 FLETCHER F. WORLD AFF. 155 (2004).

<sup>175</sup> Palermo Protocol, *supra* note 114, art. 3(a). Some scholars, however, note that there is no classification of the crime within the framework of international law. See Alison Cole, *Reconceptualizing Female Trafficking: The Inhumane Trade in Women*, 26 WOMEN'S RTS. L. REP. 97, 111-12 REV. 789, 808 (2005).

prosecution of the Palermo Protocol offenses, and the protection of victims.<sup>176</sup>

As the most comprehensive and detailed global treaty on the subject of trafficking in persons today,<sup>177</sup> the Palermo Protocol applies to trafficking in persons involving organized criminal groups, which is generally transnational in nature.<sup>178</sup> Article 3(a) of the Palermo Protocol defines trafficking in persons as:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.<sup>179</sup>

Exploitation is described as “includ[ing], at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs . . . .”<sup>180</sup>

<sup>176</sup> Palermo Protocol, *supra* note 114, art. 4.

<sup>177</sup> *Id.* pmb. (“Taking into account the fact that despite the existence of a variety on international instruments containing rules and practical measures to combat the exploitation of persons especially women and children, there is no universal instrument that addresses all aspects of trafficking in persons . . . .”).

<sup>178</sup> Transnationality is a main characteristic of human trafficking, which often involves the forced movement of human beings, men, women, and children, from poor source countries through loose-bordered transition countries and into relatively rich destination countries, such as the United States, Western Europe, North America, Australia, China, and Japan. See Susan Tiefenbrun, *The Saga of Susannah a U.S. Remedy for Sex Trafficking in Women: The Victims of Trafficking and Violence Protection Act of 2000*, 2002 UTAH L. REV. 107, 131-33 (2002).

<sup>179</sup> Palermo Protocol, *supra* note 114, art. 3.

<sup>180</sup> *Id.* For a discussion of the issues of different forms of exploitation, see generally David Matas & David Kilgour, *Bloody Harvest: Revised Report into Allegations of Organ Harvesting of Falun Gong Practitioners in China*, ORGANHARVESTINVESTIGATION.NET (Jan. 31, 2007), available at <http://organharvestinginvesigation.net>; Bruce Zagaris, *Trafficking in Human Beings and Organs: South Africa and Brazil Act Against Trafficking in Human Organ Ring*, 20 INT’L ENFORCEMENT L. REP. 61 (2004); Elizabeth Pugliese, *Organ Trafficking and the TVPA: Why One Word Makes a Difference in International Enforcement Efforts*, 24 J. CONTEMP. HEALTH L. & POL’Y. 181 (2007); Andrew J. Hughes, *You Get What You Pay For?: Rethinking U.S. Organ Procurement Policy in Light of Foreign Models*, 42 VAND. J. TRANSNAT’L L. 351 (2009); Luz Estella Nagle, *Selling Souls: The Effect of Globalization on Human Trafficking and Forced Servitude*, 26 WIS. INT’L L.J. 131(2008); Glenda Labadie-Jackson, *Reflections on Domestic Work and the Feminization of Migration*, 31 CAMPBELL L. REV. 67 (2008); Janie Chuang, *Beyond a Snapshot: Preventing Human Trafficking in the Global Economy*, 13 IND. J. GLOBAL LEGAL STUD. 137 (2006); Svati P. Shah, *Distinguishing Poverty and Trafficking: Lessons from Field Research in Mumbai*, 14 GEO. J. ON POVERTY L. & POL’Y 441

The Palermo Protocol supplements, and forms part of, the United Nations Convention against Transnational Organized Crime (CTOC).<sup>181</sup> The Palermo Protocol requires states to criminalize intentional acts of trafficking in persons and other associated acts.<sup>182</sup> It adopts a human rights approach to the problem of trafficking and incorporates prevention, victim protection, and assistance<sup>183</sup> as cardinal objectives.<sup>184</sup> It institutes a number of measures to combat trafficking, which include protective, preventive and cooperative measures,<sup>185</sup> while retaining the validity of other established international instruments and mechanisms that are already in place and that may provide additional or perhaps better protection for victims, such as the 1951 Convention for the Protection of Refugees.<sup>186</sup> The Palermo Protocol requires states to take, among others, the following protective measures: “to protect the privacy and identity of victims,” to ensure that victims are adequately informed about relevant proceedings and that their concerns and views are presented in such proceedings; to provide victims with needed care and assistance

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(2007); Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN. J. C.R. & C.L. LIBERTIES 317 (2007); Shelley Case Inglis, *Expanding International and National Protections Against Trafficking For Forced Labor Using A Human Rights Framework*, 7 BUFF. HUM. RTS. L. REV. 55 (2001).

<sup>181</sup> The United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, T.I.A.S. No. 13,127, 2225 U.N.T.S. 209 (entered into force Sept. 29, 2003) [hereinafter CTOC]. The Convention is supplemented by three protocols, which target specific areas and manifestations of organized crime: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition. Countries must become parties to the Convention itself before they can become parties to any of the protocols. On its part, the CTOC defines terms not defined in the Protocol but used in it, such as “organized criminal group” and “transnational crime.” The CTOC establishes the legal liability of legal and natural persons for offences established under it and by implication the Protocol. It also requires prosecution, adjudication and sanctions to be effected by State parties in respect of the offences it establishes. The CTOC is reviewed and implemented by a Conference of Parties.

<sup>182</sup> Palermo Protocol, *supra* note 114, art. 5.

<sup>183</sup> The Palermo Protocol has, however, been extensively criticized on several issues. See Robyn Emerton, *Translating International and Regional Trafficking Norms into Domestic Reality: A Hong Kong Case Study*, 10 BUFF. HUM. RTS. L. REV. 215, 220, 228 (2004) (critiquing the lack of an answer by the Palermo Protocol on the “thorny issue of whether *all* facilitated migration for prostitution constitutes trafficking,” and the debated flexible nature of the protection provisions).

<sup>184</sup> Palermo Protocol, *supra* note 114, art. 2.

<sup>185</sup> *Id.* art. 14.

<sup>186</sup> *Id.* art. 14.

physically and otherwise; and to ensure the safety of victims.<sup>187</sup> States are also encouraged to consider allowing victims to remain in their territories where appropriate.<sup>188</sup> Alternatively, victims are to be returned to their home countries when it is safe to do so.<sup>189</sup>

With respect to preventive and cooperative measures, the Palermo Protocol requires states to establish and undertake preventive programs such as research, “social and economic initiatives” to reduce the demand for, and the vulnerability of people to, trafficking.<sup>190</sup> States are also required to ensure cooperation in the area of law enforcement,<sup>191</sup> border security,<sup>192</sup> and control of identity and travel documents,<sup>193</sup> as well as the verification of such documents.<sup>194</sup>

More concretely, the Palermo Protocol provides a common basis for the criminalization of certain trafficking related activities, the formulation of laws, the drafting of procedures, and the general support and assistance of victims.<sup>195</sup> The CTOC clarifies that offenses will be “established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group . . . .”<sup>196</sup> So, elements of transnationality and organized crime are only necessary for the applicability of the CTOC and the Palermo Protocol between states, not internally within a country. A state must ratify the CTOC in order to become a party to the Palermo Protocol, since the CTOC and the Palermo Protocol must be interpreted together. States are required to criminalize the conduct detailed in article 3 of the Palermo Protocol.<sup>197</sup> While that constitutes a threshold, domestic legislation covers additional activities by broadening the scope of prohibited acts and by providing more severe penalties. The Palermo Protocol promotes a global approach to trafficking by mandating cooperation between states.<sup>198</sup> The CTOC aims at facilitating investigation and prosecution of criminal activities across borders through mandating specific extradition require-

<sup>187</sup> *Id.* arts. 6(1), 6(2)(a)-(b), 6(3), 6(5).

<sup>188</sup> *Id.* art. 7(1).

<sup>189</sup> *Id.* art. 7(1).

<sup>190</sup> *Id.* arts. 9(2), 9(5), 9(4).

<sup>191</sup> *Id.* art. 10(1).

<sup>192</sup> *Id.* art. 11(6).

<sup>193</sup> *Id.* art. 12(a)-(b).

<sup>194</sup> *Id.* art. 13.

<sup>195</sup> *Id.* at 343-51. *But see* Mohamed Y. Mattar, *Comparative Models of Reporting Mechanisms on the Status of Trafficking in Human Beings*, 41 VANDERBILT J. TRANSNAT'L. L. 1355, 1396-97 (2008) (finding that the Palermo inadequately addresses issues that deal with the identification and immigration status of victims, issues that relate to curbing the demand for trafficking, and “the role of NGOs and other members of civil society,” among other things).

<sup>196</sup> *See* CTOC, *supra* note 181, art. 34(2).

<sup>197</sup> *See* Palermo Protocol, *supra* note 114, art. 5.

<sup>198</sup> *Id.* art. 10.



ments,<sup>199</sup> and both the CTOC and Palermo Protocol provide for mutual legal assistance.<sup>200</sup> These instruments create ample grounds for substantive and procedural standards that would lead to harmonizing legislation among different national legal systems<sup>201</sup> and to the gradual elimination of major differences in defining prohibited acts and establishing pertinent punishments.

### *Monitoring States' Compliance*

In article 32(1), the CTOC establishes a Conference of Parties, an organ tasked with the responsibility to periodically assess and examine the implementation of the provisions of the CTOC, to “mak[e] recommendations to improve th[e] [CTOC] and its implementation.”<sup>202</sup> In order to comply with such tasks:

[T]he Conference of the Parties shall acquire the necessary knowledge of the measures taken by States Parties in implementing this Convention and the difficulties encountered by them in doing so through information provided by them and through such supplemental review mechanisms as may be established by the Conference of the Parties.<sup>203</sup>

Each state must provide the Conference with required information regarding its programs, plans, practices, and legislative and administrative measures that go towards effective implementation of the CTOC.<sup>204</sup> According to article 1 of the Palermo Protocol, the provisions of the CTOC are applicable *mutatis mutandis* to the Palermo Protocol,<sup>205</sup> so the Conference also monitors compliance of the states with the provisions of the Palermo Protocol. To this effect, the Conference, which had its first session from June 28—July 8, 2004, launched its first reporting cycle asking the states to submit reports as to their implementation of the Palermo Protocol,<sup>206</sup> while also providing a pertinent questionnaire.<sup>207</sup> A year

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<sup>199</sup> CTOC, *supra* note 178, art. 16.

<sup>200</sup> *Id.* at art. 18; Palermo Protocol, *supra* note 114, arts. 10(1), 10(3), 11(6), 13.

<sup>201</sup> For a discussion on corporate mischief, see generally Claire Moore Dickerson, *Transnational Codes of Conduct through Dialogue: Leveling the Playing Field for Developing-Country Workers*, 53 FLA. L. REV. 611 (2001).

<sup>202</sup> CTOC, *supra* note 177, art. 32(3)(d)-(e).

<sup>203</sup> *Id.* art. 32(4).

<sup>204</sup> *Id.* art. 32(5).

<sup>205</sup> Palermo Protocol, *supra* note 114, art. 1(2) (“The provisions of the CTOC shall apply, *mutatis mutandis*, to this Protocol unless otherwise provided herein.”).

<sup>206</sup> Conference of the Parties to the United Nations Convention Against Transnational Organized Crime, June 28-July 8, 2004, Rep. on its 1st Sess., pp. 3-5, U.N. Doc. CTOC/COP/2004/6 (Sept. 23, 2004).

<sup>207</sup> Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Questionnaire on the Implementation of the Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational

later, the Conference focused mostly on the measures that the states had taken towards the criminalization of trafficking and the difficulties that they had encountered in the implementation of such legislation. It also discussed the cooperation and technical assistance among the states and the exchange of experiences regarding protection of victims and prevention efforts.<sup>208</sup>

States' reporting to the Conference encountered stumbling blocks during the second cycle of reporting, this time regarding the provisions, *inter alia*, that have to do with the assistance and protection of victims of human trafficking (article 6), the status of victims in receiving states (article 7), and their repatriation (article 8).<sup>209</sup> The states were not as responsive with respect to their reporting obligations.<sup>210</sup> The Conference was quick to justify the lack of response by stating that the adoption of recovery measures "[was] not mandatory for States parties to the Protocol because of the cost it entails and the fact that it refers to all States in which victims are found . . . ."<sup>211</sup> This statement implied that compliance with provisions could be burdensome for countries with scarce available resources.<sup>212</sup> It did nevertheless push for compliance, however—all in light of the linkage of victims' protection with the interest of the state in prosecuting the crime of trafficking.<sup>213</sup> International cooperation, extradition, mutual legal assistance, and international cooperation for the purpose of confiscation, as well as the establishment and strengthening of central authorities are on the agenda for the fifth session scheduled to take place in October 2010.<sup>214</sup> It waits to be seen how states will respond to this matter of utmost necessity.

In conclusion, though this kind of monitoring is not necessarily a response coming from a human rights approach—after all, the CTOC and the Protocol are anti-crime agreements—it does nevertheless put pres-

Organized Crime (July 28, 2004), available at [http://www.unodc.org/pdf/ctoccop\\_2005/quest\\_1-5\\_e.pdf](http://www.unodc.org/pdf/ctoccop_2005/quest_1-5_e.pdf).

<sup>208</sup> Conference of the Parties to the U.N. Convention against Transnational Crime, Oct. 10-21, 2005, Rep. on its 2nd Sess., at 20-28, U.N. Doc. CTOC/COP/2005/8 (Dec. 1, 2005).

<sup>209</sup> See generally Secretariat, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Vienna, Rep. of Austria, Oct. 8-18, 2008, *Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime: Consolidated Information Received From States for the Second Reporting Cycle*, U.N. Doc. CTOC/COP/2006/6/Rev.1 (Sept. 9, 2008).

<sup>210</sup> *Id.* at 21-25.

<sup>211</sup> *Id.* at 7.

<sup>212</sup> *Id.* at 7-8, 19.

<sup>213</sup> *Id.* at 7-8.

<sup>214</sup> *Id.* at 79, Annex VII.

sure on states to ensure compliance with their obligations under international law.

## 2. Council of Europe Convention on Action Against Human Trafficking

The Council of Europe Convention on Action Against Trafficking in Human Beings (COE) is the only treaty on trafficking in persons in Europe.<sup>215</sup> Its provisions are similar in many respects to the Palermo

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<sup>215</sup> Eur. Consult. Ass., *Convention on Action Against Trafficking in Human Beings*, May 16, 2005, C.E.T.S. No. 197 [hereinafter COE]. There are currently 30 State parties to the COE. *Status of Signature and Ratification of the Council of Europe Convention on Action against Trafficking in Human Beings as of today*, COUNCIL OF EUROPE, available at [http://www.coe.int/t/dghl/monitoring/trafficking/Flags-sos\\_en.asp](http://www.coe.int/t/dghl/monitoring/trafficking/Flags-sos_en.asp).

By comparison, in Asia, efforts to combat trafficking in persons are spread across various sub-regions and are not unified. There is however a treaty, adopted by the South Asian Association for Regional Cooperation (“SAARC”). See *SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prosecution, opened for signature* Jan. 5, 2002, HUMANTRAFFICKING.ORG, available at <http://www.saarc-sec.org/userfiles/conv-trafficking.pdf>. The treaty concerns mainly trafficking for prostitution purposes and provides a limited definition of trafficking. *Id.* art. I(3). Nevertheless, it requires states to the Convention to criminalize trafficking and effectively prosecute it. *Id.* art. III. Further, it provides, among others, that measures be taken to extradite offenders, prevent trafficking as defined, protect and care for victims and implement its provisions. *Id.* arts. VII–X.

Also of interest is the Regional Conference on Trafficking in Women, Nov. 3-4, 1998, *Bangkok Accord and Plan of Action to Combat Trafficking in Women*, available at [http://www.unescap.org/esid/GAD/Resources/Plan\\_of\\_action/poa-bkk.pdf](http://www.unescap.org/esid/GAD/Resources/Plan_of_action/poa-bkk.pdf) [hereinafter *Bangkok Accord*], which was convened by the UN Economic and Social Commission for Asia and the Pacific (UN ESCAP). The *Bangkok Accord* makes recommendations for participating states to adopt plans of action nationally and regionally in fighting trafficking in persons in the areas of prevention, protection, and prosecution. *Id.* paras. 12-48. Such recommendations cover the conduct of situation analysis on the issue, criminalization and adoption of stiff penalties, training of personnel, education of women and children, conduct of research, prevention of re-victimization, protection of victims and witnesses, provision of legal assistance to victims, prevention of the criminalization of victims, safe return of victims to their home countries, and the reintegration of victims. It also recommends enactment and adoption of a treaty on this issue, the implementation of regional actions plans, establishment of regional task force, and creation of a mechanism to implement the *Bangkok Accord*. *Id.*

Another interesting initiative is what is known as *The Bali Statements*. *Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN, available at [http://www.mofa.go.jp/POLICY/i\\_crime/people/conf0202.html](http://www.mofa.go.jp/POLICY/i_crime/people/conf0202.html). This is an effort from the region containing recommendations for the prevention and combating of human trafficking by participating countries. *The Bali Statements* did not focus exclusively on human trafficking but considered and included recommendations for combating

Protocol. It adopts the same definition of trafficking as the Palermo Protocol<sup>216</sup> and focuses on prevention, protection, and prosecution.<sup>217</sup> Its provisions are, however, richer in various respects.<sup>218</sup> The COE, unlike the Palermo Protocol, applies to trafficking cases irrespective of whether they involve organized crime or are transnational in nature.<sup>219</sup> It is particular about ensuring gender equality and non-discrimination<sup>220</sup> and makes special provisions for the care and treatment of child victims.<sup>221</sup> The objects of the COE are “to prevent and combat trafficking in human beings . . . to protect[ ] and assist[ ] . . . victims and witnesses . . . to ensure effective investigation and prosecution . . . [and] to promote while promoting international cooperation . . . .”<sup>222</sup> The COE seeks to discourage the demand for trafficking, supports “research on best practices, methods and strategies,” values the “role of media and civil society,” and focuses on preventive measures, placing emphasis on education.<sup>223</sup>

The COE is specific about “[i]dentification of the victims,”<sup>224</sup> “[p]rotection of private life,”<sup>225</sup> “[a]ssistance to victims” (particularly for “their physical, psychological and social recovery”),<sup>226</sup> “[r]ecovery and reflection period” (lasting no less than 30 days, during which period no expulsion order will be enforceable against the victim),<sup>227</sup> issuance of residence permits to child victims necessary and in their best interest,<sup>228</sup> “[c]ompensation and legal redress,”<sup>229</sup> and “[r]epatriation and return of victims,” all “with due regard for [their] rights, safety and dignity.”<sup>230</sup>

The states that are parties to the COE will soon start reckoning with the Group of Experts on Action Against Trafficking in Human Beings (GRETA). GRETA is a specific monitoring system comprised of a group

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people smuggling, illegal migration and other crimes as well. A voluntary mechanism was developed from these conferences to promote sustainable and effective measures to combat people smuggling, human trafficking and other crimes in the region. *Id.* para. 23.

<sup>216</sup> *Id.* at art. 4(a).

<sup>217</sup> *Id.* at art. 1(a)-(b).

<sup>218</sup> For a good discussion of the COE, see generally Anke Sembacher, *The Council of Europe Convention on Action Against Trafficking in Human Being*, 14 TUL. J. INT’L & COMP. L. 435 (2006).

<sup>219</sup> COE, *supra* note 215, art. 3.

<sup>220</sup> *Id.* art. 3.

<sup>221</sup> *Id.* art. 3.

<sup>222</sup> *Id.* art. 1(a)-(c) (internal formatting omitted).

<sup>223</sup> *Id.* art 6.

<sup>224</sup> *Id.* art.

<sup>225</sup> *Id.* art. 11.

<sup>226</sup> *Id.* art. 12.

<sup>227</sup> *Id.* art. 13.

<sup>228</sup> *Id.* art. 14.

<sup>229</sup> *Id.* art. 15.

<sup>230</sup> *Id.* art. 16.

of independent experts, set up under article 36 of the COE, and acting in their personal capacity.<sup>231</sup> Under article 38, the duty of GRETA is to ensure that the states that are parties to the COE provide for an effective implementation of the guarantees enshrined in it.<sup>232</sup> Its tasks are to regularly draw up reports where it analyzes and evaluates the measures taken by the state under discussion, and to make recommendations for the best way to deal with the specific issues provided in the COE.<sup>233</sup> The report and the recommendations are to be submitted by GRETA to the Committee of the Parties,<sup>234</sup> the other pillar of the monitoring system.<sup>235</sup> The Committee of the Parties is a political organ comprised of “representatives in the Committee of Ministers of the Parties to the Convention and of representatives of Parties non-members of the Council of Europe.”<sup>236</sup> Based on GRETA’s conclusions, “the Committee of the Parties may adopt recommendations indicating the measures to be taken by the Party concerned,” even setting up a date for the State Party to submit information of the implementation of such recommendations.<sup>237</sup> GRETA could also decide to engage civil society in providing information and even organize country visits for a more direct assessment.<sup>238</sup> The states are obliged to respond to GRETA’s requests and to engage in a constructive dialogue with it.<sup>239</sup> GRETA will also publish its report and conclusions as well as any comments from the state concerned.<sup>240</sup>

GRETA had its first meeting from February 24-27, 2009,<sup>241</sup> and its fifth meeting took place from March 16-19, 2010.<sup>242</sup> In the fifth meeting, it was noted that GRETA started its monitoring process by requesting states to complete a questionnaire, entitled *Questionnaire for the evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the parties*, on the basis of which GRETA might follow up with additional requests. That questionnaire

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<sup>231</sup> *Id.* art. 36.

<sup>232</sup> *Id.* art. 38.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* art. 37.

<sup>236</sup> *Id.* arts. 36-38.

<sup>237</sup> *Id.* art. 38.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> Group of Experts on Action against Trafficking in Human Beings, List of Items Discussed and Decisions Taken, 1st Meeting of GRETA (Feb. 24-27, 2009), available at [http://www.coe.int/t/dghl/monitoring/trafficking/docs/GRETA\\_MeetingDocs/Lists%20of%20decisions/LD1\\_en.pdf](http://www.coe.int/t/dghl/monitoring/trafficking/docs/GRETA_MeetingDocs/Lists%20of%20decisions/LD1_en.pdf).

<sup>242</sup> Group of Experts on Action against Trafficking in Human Beings, List of Items Discussed and Decisions Taken, 5th Meeting of GRETA (Mar. 16-19, 2010), available at [http://www.coe.int/t/dghl/monitoring/trafficking/docs/GRETA\\_MeetingDocs/Lists%20of%20decisions/THB-GRETA\(2010\)LD5\\_en.pdf](http://www.coe.int/t/dghl/monitoring/trafficking/docs/GRETA_MeetingDocs/Lists%20of%20decisions/THB-GRETA(2010)LD5_en.pdf) [hereinafter GRETA].

was sent to the first ten states that became parties to the COE, which the states then had until September 1, 2010 to return.<sup>243</sup> While monitoring compliance of the State parties to the COE, GRETA has vouched to take into account:

[T]he judgment of the European Court of Human Rights, *Rantsev v. Cyprus and Russia* of 7 July 2010, where the Court concluded that trafficking in human beings itself, within the meaning of Article 4-a of the *Council of Europe Convention on Action against Trafficking in Human Beings*, fell within the scope of Article 4 of the European Convention on Human Rights on the prohibition of slavery and forced labour.<sup>244</sup>

It remains to be seen what specific direction GRETA will take in discharging its monitoring functions. However, it is important that this organ utilizes a comprehensive methodology which will enable assessment and monitoring of state action towards prevention and addressing of root causes of human trafficking, and not merely the state's efforts in suppressing human trafficking through crime and immigration control.

The interest in the work of GRETA and the importance of the COE are further heightened by article 42, which provides that “[the COE] shall be open for signature by the member States of the Council of Europe, the non member States which have participated in its elaboration and the European Community,” such as Canada, the Holy See, Japan, Mexico, and the United States.<sup>245</sup>

Now that the COE has entered into force, and after certain voting procedures have taken place, other non-member states may be invited to accede to the Convention.<sup>246</sup> The global significance of the COE is evidenced also in the fact that it is “the first international legally-binding instrument which affirms that trafficking in human beings constitutes a violation of human rights and is an offence to the dignity and integrity of the human being.”<sup>247</sup>

### 3. UN Special Rapporteur on Trafficking in Persons, Especially in Women and Children

Another tool of monitoring compliance of state obligations under international law in the United Nations system is through the office of a Special Rapporteur. In 2004, the United Nations Commission on Human

<sup>243</sup> *Id.* at 3, para. 2.

<sup>244</sup> *Id.* at 4, para. 15 (italicized case name omitted).

<sup>245</sup> COE, *supra* note 215, art. 42.

<sup>246</sup> *Id.* art. 43.

<sup>247</sup> Terry Davis, Secretary General, Council of Europe, Speech at the First Meeting of GRETA (Feb. 24, 2009), available at [http://www.coe.int/t/secretarygeneral/sg/speeches/archives/2009/F\\_24022009\\_1st\\_meeting\\_GRETA\\_EN.asp](http://www.coe.int/t/secretarygeneral/sg/speeches/archives/2009/F_24022009_1st_meeting_GRETA_EN.asp). He also noted in that speech that “[i]t is the only international treaty focusing on the human rights of the victims.” *Id.*

Rights appointed a Special Rapporteur on Trafficking in Persons with a mandate to focus on the human rights aspects of victims of trafficking, especially women and children.<sup>248</sup> The office of the Special Rapporteur on Trafficking in Persons serves as an important instrument in combating human trafficking. It does so through generating annual reports and respective recommendations to uphold and protect the human rights of victims of human trafficking, conducting country visits, developing questionnaires, engaging in other types of communications with governments and other stakeholders, and taking action on individual complaints.<sup>249</sup> Its mandate covers both actual and potential victims of human trafficking.<sup>250</sup>

In her first report, the Special Rapporteur noted that human trafficking “represents the denial of virtually all human rights.”<sup>251</sup> She further clarified the basic principles that would guide her activity, namely: “(a) that the human rights of trafficked persons shall be at the centre of all efforts to combat trafficking and to protect, assist and provide redress to those affected by trafficking; and (b) that anti-trafficking measures should not adversely affect the human rights and dignity of the persons concerned.”<sup>252</sup> One crucial issue raised by the Special Rapporteur is the interpretation of the provisions of the Palermo Protocol based on the Universal Declaration of Human Rights<sup>253</sup> and other international human rights instruments.<sup>254</sup> Consistency in the interpretation of human rights guarantees of individuals, and treatment of trafficking offences as gross violations of human rights creates a sound ground for holding states

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<sup>248</sup> U.N. Econ. & Soc. Council, Comm’n on Human Rights, Special Rapporteur on Trafficking in Persons, Especially in Women and Children, U.N. Doc. E/CN.4/2004/110 (April 19, 2004), available at [http://ap.ohchr.org/documents/E/CHR/decisions/E-CN\\_4-DEC-2004-110.doc](http://ap.ohchr.org/documents/E/CHR/decisions/E-CN_4-DEC-2004-110.doc).

<sup>249</sup> U.N. Econ. & Soc. Council, Comm’n on Human Rights, Report of the Special Rapporteur on trafficking in persons, especially women and children, *Integration of Human Rights of Women and the Gender Perspective*, paras. 24-47, U.N. Doc. E/CN.4/2005/71 (December 22, 2004) (by Sigma Huda) [hereinafter UNESC Report].

<sup>250</sup> *Id.* para. 1.

<sup>251</sup> *Id.* para. 9.

<sup>252</sup> *Id.* para. 11. In discussing the legal framework, the Special Rapporteur emphasized that she would “refer to the [U.N. High Commissioner for Human Rights to the Economic and Social Council’s] *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1 (May 20, 2002), [which] provide practical, rights-based policy guidance on the prevention of trafficking and the protection of trafficked persons and with a view to facilitating the integration of a human rights perspective into national, regional and international anti-trafficking laws, policies and interventions.” *Id.* para. 14.

<sup>253</sup> See generally Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/810 at 71 (1948), and particularly arts. 1, 2, 4, 22, 23 and 25 [hereinafter Universal Declaration].

<sup>254</sup> See UNESC Report, *supra* note 247, para 17.

responsible for complying with their human rights obligations beyond the strict scope of the Palermo Protocol.

A later report by the Special Rapporteur focused on an integrated approach to the human rights of present and potential victims of human trafficking.<sup>255</sup> Establishing a broad human rights legal framework, she reiterated the need for a “global action plan with quantifiable and time-bound targets . . . to galvanize the political and economic will to achieve the fundamental objectives and purpose of human rights promotion and protection.”<sup>256</sup> Realizing that the states have made insufficient efforts in addressing the root causes of trafficking (such as the demand for cheap labor, the bloom of sex tourism, widespread poverty, never-ending gender discrimination, political conflicts and unrest, government corruption, as well as restrictive immigration policies predominant in most favored destination countries for migrants), the Special Rapporteur recommended that any “strategies must be people-centered.”<sup>257</sup> Stating that restorative justice was “central to combating human trafficking,” she urged states not to lose sight of the fact that “human trafficking is about persons whose basic right to live free particularly from fear and want is under constant threat,”<sup>258</sup> and that recognition of people’s dignity and right to survival and development remains the subject of the day. The Special Rapporteur, in her most recent report, also focused on victim protection and reintegration by providing several recommendations for states in their prevention and protection activities.<sup>259</sup>

Human rights law, however, does not constitute the only anti-trafficking paradigm of our modern times. International criminal law has also made major developments in the last decade, as will be analyzed below.

## V. REDEFINING SLAVERY: HUMAN TRAFFICKING AS AN INTERNATIONAL CRIME

Slavery, as traditionally defined as human beings owned by other human beings, was part of the exclusive circle of offensive acts that was prohibited under all circumstances—a charter member of the club of *jus*

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<sup>255</sup> The Office of the United Nations High Commissioner for Human Rights, Special Rapporteur on Trafficking Persons, Especially Women and Children, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights Including the Rights to Development, U.N. Doc. A/HRC/10/16 (Feb. 20, 2009) (by Joy Ngozi Ezeilo) [hereinafter OHCHR Report].

<sup>256</sup> *Id.* at 20, para. 59.

<sup>257</sup> *Id.* at 25-27.

<sup>258</sup> *Id.*

<sup>259</sup> U.N. Secretary-General, *Rep. of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, U.N. GA, U.N. Doc. A/64/290 (Aug. 12, 2009).



*cogens* norms.<sup>260</sup> As a crime against humanity, it was also part of the Nuremberg Charter,<sup>261</sup> the Tokyo Charter,<sup>262</sup> and the Statutes of the ICTY<sup>263</sup> and ICTR.<sup>264</sup> Alas, it was not defined in any of these documents. Neither did the human rights conventions prohibiting “slavery” on a universal or regional level contain any elementally express definition of the term. Various cases in the context of World War II could be read as including forced or compulsory labor under enslavement as a crime against humanity.<sup>265</sup>

This was to change (1) in the Rome Statute establishing the International Criminal Court, (ICC), and (2), in even greater detail, in the context of the atrocities committed in the former Yugoslavia.

The 1998 Rome Statute included “enslavement” as a crime against humanity in article 7(1)(c).<sup>266</sup> It also defined “enslavement” as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.”<sup>267</sup>

This language was clarified in great detail by the ICC’s sister international criminal court, the ICTY, in the ICTY’s 2002 Trial Chamber judgment in the case of *Prosecutor v. Kunarac et al.*<sup>268</sup> As background, a leader of a Bosnian Serb reconnaissance unit, Dragoljub Kunarac, and two of his underlings, Radomir Kovac and Zoran Vukovic, were put on trial and convicted of the multiple torture and rape of Bosnian Muslim

<sup>260</sup> Cf. WETZEL ET AL, THE VIENNA CONVENTION ON THE LAW OF TREATIES: TRAVAUX PRÉPARATOIRES, arts. 53, 60 (Metzner ed. 1978).

<sup>261</sup> Charter of the Int’l Military Trib. of 1945, art. 6(c), August 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

<sup>262</sup> Charter of the Int’l Military Trib. for the Far East, art. 5(c), January 19, 1946, T.I.A.S. 1589, 4 Bevans 20.

<sup>263</sup> Statute of the Int’l Crim. Trib. for the Former Yugoslavia, S.C. Res. 827, art. 5(c), U.N. Doc. S/RES/827 (May 25, 1993).

<sup>264</sup> Statute of the Int’l Crim. Trib. for Rwanda, S.C. Res. 49/955, art. 3(c), U.N. Doc. S/Res/955/Annex (Nov. 8, 1994).

<sup>265</sup> IMT Judgment, *reprinted in* 22 TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, at 565-66 (1947) (regarding Baldur von Schirach), trans. *available at* <http://avalon.law.yale.edu/imt/I0-01-46.asp>; U.S. v Milch, Opinion and Judgment of the U.S. Military Trib. II, *reprinted in* TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 773, 789 (1997); U.S. v Oswald Pohl and Others, Opinion and Judgment of the U.S. Military Trib. II of November 3, 1947, *reprinted in* 5 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 958, 970 (1997).

<sup>266</sup> Rome Stat. of the Int’l Crim. Ct. of 1998, art. 7(1)(c), July 17, 1998) 2187 U.N.T.S. 93 [hereinafter ICC Statute].

<sup>267</sup> *Id.* art. 7(2)(c).

<sup>268</sup> *Prosecutor v. Dragoljub Kunarac et. al.*, Case No. IT-96-23-T & IT-96-23/1-T, Trial Court Judgment, at 178, para. 520 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

women and girls in the city of Foèa.<sup>269</sup> In a groundbreaking decision, Kunarac and Kovac were also convicted of the crime of enslavement.<sup>270</sup>

In determining the meaning of “slavery,” the Trial Chamber started with the 1926 Slavery Convention’s definition, as listed above,<sup>271</sup> of “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised,” noting its nearly universal acceptance and repetition in the 1956 Supplementary Convention,<sup>272</sup> and concluding that this definition reflects customary international law.<sup>273</sup> This conclusion was also buttressed by the Trial Chamber’s reference to the International Law Commission’s (ILC) 1996 Draft Code of Crimes against the Peace and Security of Mankind, which included enslavement as a crime against humanity.<sup>274</sup> In the ILC Draft Code, “enslavement” was defined to mean the act of:

[E]stablishing or maintaining over persons a status of slavery, servitude or forced labour contrary to well-established and widely recognized standards of international law, such as: the 1926 Slavery Convention (slavery); the 1956 [Supplementary Slavery Convention] (slavery and servitude); the [ICCPR] (slavery and servitude); and the 1957 [Forced Labour Convention] (forced labour).<sup>275</sup>

Due to the expertise of this body, the Trial Chamber considered this work, at least on this issue, to be evidence of customary international law.<sup>276</sup>

The Trial Chamber thus defined enslavement in line with the 1926 Slavery Convention, as a “crime against humanity in customary international law consist[ing] of the exercise of any or all of the powers attaching to the right of ownership over a person.”<sup>277</sup>

The key progress made in this judgment was the fact that the Trial Chamber identified elements of exploitation and the surrounding factors that were sufficient to constitute the exercise of “any or all” powers of ownership. It is thus necessary to produce verbatim the Trial Chamber’s reasoning on this issue:

542. Under this definition, indications of enslavement include elements of control and ownership; the restriction or control of an individual’s autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or

<sup>269</sup> *Id.* at 14-15, para. 9.

<sup>270</sup> *Id.* at 281, para. 883.

<sup>271</sup> Slavery Convention, *supra* note 120, art. 1(1).

<sup>272</sup> See Supplementary Slavery Convention, *supra* note 142, art. 7.

<sup>273</sup> Kunarac, at 178, para. 520.

<sup>274</sup> Rep. of the Int’l Law Comm’n, 48th sess., May 26-July 26, 1996, U.N. Doc. A/51/10, at 93 (Art. 18Code); GAOR, 51st sess, Supp. No. 10 (1996).

<sup>275</sup> *Id.* at 98.

<sup>276</sup> Kunarac, at 191-92, para. 537.

<sup>277</sup> *Id.* at 192, para. 539.

free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking. With respect to forced or compulsory labour or service, international law, including some of the provisions of Geneva Convention IV and the Additional Protocols, make clear that not all labour or service by protected persons, including civilians, in armed conflicts, is prohibited—strict conditions are, however, set for such labour or service. The “acquisition” or “disposal” of someone for monetary or other compensation, is not a requirement for enslavement. Doing so, however, is a prime example of the exercise of the right of ownership over someone. The duration of the suspected exercise of powers attaching to the right of ownership is another factor that may be considered when determining whether someone was enslaved; however, its importance in any given case will depend on the existence of other indications of enslavement. Detaining or keeping someone in captivity, without more, would, depending on the circumstances of a case, usually not constitute enslavement.

543. The Trial Chamber is therefore in general agreement with the factors put forward by the Prosecutor, to be taken into consideration in determining whether enslavement was committed. These are the control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour. The Prosecutor also submitted that the mere ability to buy, sell, trade or inherit a person or his or her labours or services could be a relevant factor. The Trial Chamber considers that the *mere ability* to do so is insufficient, such actions actually occurring could be a relevant factor.<sup>278</sup>

Applying these factors to the facts of the case at bar, the Chamber found Defendant Kunarac guilty of enslavement. Presiding Judge Florence Mumba addressed the defendant this way:

The Trial Chamber . . . finds that Witness FWS-186 and Witness FWS-191 were kept for several months in the house in Trnovace, where they were treated as private property by both you and DP6.

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<sup>278</sup> *Id.* at 193-94, paras. 542-43.

The Trial Chamber considers the following elements to be of particular relevance for the crime of *enslavement*:

- (i) the fact that the girls were detained;
- (ii) the fact that they had to do everything they were ordered to do, including the cooking and household chores;
- (iii) the fact that you asserted exclusivity over FWS-191 by reserving her for yourself;
- (iv) that they were at the constant disposal of you and DP6;
- (v) other degrading treatment such as offering one soldier the permission to rape her for DM 100 in the presence of Witness FWS-191; and
- (vi) that they were effectively denied any control about their lives.

The Trial Chamber is of the view that you and DP6 acted in combination and aided and abetted each other regarding the enslavement of these women.<sup>279</sup>

The ICTY's Appeals Chamber agreed with this definition and the Trial Chamber's application in the case.<sup>280</sup> Anyone who reads this judgment of the ICTY cannot but observe the absolute similitude of *enslavement* to the crime of human trafficking. The ICTY also established individual criminal liability in the case. On a larger scale, the ICTY opened the doors for better understanding of the elements of a human trafficking crime and laid the foundation for applying the prohibition of slavery to human trafficking, or *modern-day* slavery.

Thus, we can now see that the novelty of the *Rantsev* case lies in its application of *Kunarac's* definition of enslavement to the prohibition of slavery under article 4 of the European Convention on Human Rights<sup>281</sup> and goes a step further to consider human trafficking as falling within the scope of article 4. International criminal law and the premier system of human rights law therefore agree on the inclusion of certain forms of human trafficking in the concept of enslavement or slavery.

<sup>279</sup> Press Release, Int'l Crim. Trib. for the Former Yugoslavia., Judgment of Trial Chamber II in the *Kunarac, Kovac and Vukovic* Case, (February 22, 2001) available at <http://www.icty.org/sid/8018>.

<sup>280</sup> Prosecutor v. Dragoljub Kunarac et. al., Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, at 38, para. 124 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002) (“[T]he Appeals Chamber is of the opinion that the Trial Chamber’s definition of the crime of enslavement is not too broad and reflects customary international law at the time when the alleged crimes were committed.”).

<sup>281</sup> See Prosecutor v. Kunarac, Kovac & Vukovic, Case Nos. IT-96-23 & IT-96-23/1-A, Judgement, at 189, paras. 534-35 (Int'l Crim. Trib. for the Former Yugoslavia, June 12, 2002), available at <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>.

## VI. HUMAN RIGHTS AND STATE RESPONSIBILITY: EXPANDING STATE DUTIES

*Rantsev* formulated new state duties with respect to human trafficking, as spelled out above.<sup>282</sup> It is important to put those specific duties into the context of general state responsibilities in the field of human rights.

As stated in *Rantsev*, a state has positive obligations to put in place an appropriate legislative and administrative framework to combat human trafficking; it has positive obligations to take protective measures on behalf of human trafficking victims; and it also has procedural obligations to investigate human trafficking.<sup>283</sup> The European Court of Human Rights also established a duty to cooperate amongst states in cases where events related to human trafficking may happen outside of a state's own territory.<sup>284</sup>

To evaluate this extension of state duties in the human trafficking context, it would help to put the *Rantsev* determination in the more general legal environment of state duties under human rights regimes—here, as outlined with respect to the universal treaty, the 1966 International Covenant on Civil and Political Rights (ICCPR).<sup>285</sup> This overview of a conceptual nature is applicable to the regional conventions as well.

### A. *The Duty to Respect*

Under article 2(1) of the ICCPR, “each state party. . .undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the right recognized in the present Covenant, without distinction of any kind . . . .”<sup>286</sup> The duty to respect, the most fundamental of state obligations, is thus the first duty that a state undertakes by subscribing to the international law of human rights. This duty, considered to be of a negative nature,<sup>287</sup> merely asks of non-interference on the part of the state. The state should refrain from harmful acts towards the individual, except as per limitations provided for by law for certain pre-

<sup>282</sup> See *supra* note 28 *et seq.*

<sup>283</sup> *Rantsev v. Cyprus and Russia*, App. No. 25965/04, at 2 (Eur. Ct. H.R. 2010), at 70-71, paras. 286-88, available at <http://cmiskp.echr.coe.int/tpk197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=79110&sessionId=59826491&skin=hudoc-en&attachment=true>.

<sup>284</sup> *Id.* at 62, para. 257.

<sup>285</sup> G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, UN Doc. A/6316, at 49 (1966).

<sup>286</sup> *Id.* art. 2(1).

<sup>287</sup> The distinction between negative and positive obligations of states as regards the human rights discourse is not without controversy. Cf. TARA MELISH, HUMAN RIGHTS TO FOOD IN GUATEMALA: FROM RHETORIC TO REALITY 45-67 (Wayland Press, 1997) with Neil Stammers, *A Critique of Social Approaches to Human Rights*, 17 HUM. RTS. Q. 488-508 (1995).

scribed purposes.<sup>288</sup> In the context of human trafficking, according to this interpretation, the state does not incur responsibility so long as it does not make it a state policy to involve itself in human trafficking. Also, the state is clean and clear as long as its agents, performing on behalf of the state, do not directly get involved in the following activities:

[T]he recruitment, transportation, transfer harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.<sup>289</sup>

Concerns could also arise as regards to the conduct of law enforcement personnel and border control agents towards the treatment of human trafficking victims. Designation of a trafficked person, illegally crossing the border, as a criminal rather than a victim, could be considered a failure of the state in its duty to respect certain human rights of the trafficked victims. This same failure could exist in a state's deportation of human trafficking victims, in violation of the principle of *non-refoulement*, because their life is endangered in the country to which she or he is returned. On the other hand, if a state agent happens to get involved for financial benefits, at any stage of the trafficking activity, that act does not, a priori, result in the state's liability. If, consequently, the state investigates the situation, prosecutes the perpetrator, in this case the corrupt official, and punishes him accordingly, the duty of the state to respect has not been breached. The state remains in good standing as to its obligations. This would be a good indicator of state compliance, but a state's duties do not end here. The duty to ensure, though closely interrelated to the duty to respect,<sup>290</sup> goes further in establishing certain state obligations.

### B. *The Duty to Ensure*

The second duty that article 2 of the ICCPR establishes is the duty to ensure. The same duty, though not expressed in equal terms, is also found in article 2<sup>291</sup> and article 3<sup>292</sup> of the International Covenant on

<sup>288</sup> For a detailed analysis of limitations on rights see Roza Pati, *Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective*, 23 BERKELEY J. INT'L L. 223 (2005).

<sup>289</sup> Palermo Protocol, *supra* note 114, art. 3.

<sup>290</sup> ECKART KLEIN, *The Duty to Protect and to Ensure Human Rights under the International Covenant on Civil and Political Rights*, in *THE DUTY TO PROTECT AND TO ENSURE HUMAN RIGHTS* 300 (Eckart Klein ed., 1999).

<sup>291</sup> Art. 2(1) of the ICESCR provides: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights

Economic, Social and Cultural Rights (ICESCR). The Committee on Economic Social and Cultural Rights has particularly clarified that “the *raison d’être*, of the Covenant . . . is to establish clear obligations for States parties in respect of the full realization of the rights in question.”<sup>293</sup> The duty to ensure, particularly in the context of the ICESCR, could be interpreted to consist of three components: the duty to protect, the duty to promote and facilitate, and the duty to fulfill human rights.<sup>294</sup>

### 1. The Duty to Protect

The state is under an obligation to safeguard an individual by preventing harm that third-party, non-state actors could cause to that person. Private conduct that interferes with the liberty of the individual obligates

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recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 49, U.N. Doc. A/6316 (1966). Article 2(2) requires that “the rights enunciated in the present Covenant will be exercised without discrimination of any kind.” *Id.* art. 2(2).

<sup>292</sup> Article 3 of the ICESCR provides: “States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.” *Id.* at 50.

<sup>293</sup> U.N. Office of the High Comm’r for H.R., CESCR, General Cmt. 3, “The Nature of States Parties Obligations (Art. 2, par.1),” ¶ 9 (Dec. 14, 1990), *available at* <http://www2.ohchr.org/english/bodies/cescr/comments.htm>.

<sup>294</sup> There are a number of instruments, in which one finds the language that gives meaning to the rights and duties enshrined in treaties. Such categorization of duties is well recognized by treaty-monitoring bodies as well as regional human rights enforcement bodies. Several General Comments of the Committee on Economic, Social and Cultural Rights are of particular importance to a proper understanding of these rights. These comments are conveniently found at <http://www2.ohchr.org/english/bodies/cescr/comments.htm>. As an example, see General Comment No. 19, The Right to Social Security (art. 9), E/C.12/GC/19, 4 February 2008, in which the Committee delineates the meaning of this right that could sound quite abstract otherwise. The duty language is also generally found in the reasoning of the Inter-American Court of Human Rights, in the Case of Velázquez Rodríguez, Judgment of 29 July 1988, Series C, No. 4. In the African context, see generally Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria, African Commission on Human and Peoples’ Rights, Communication No. 155/96, October 2001. See, for instance, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, GA Res. 53/144 of 9 December 1998, *available at* <http://www2.ohchr.org/english/law/freedom.htm>. In art. 2, it declares that states have a “prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms.” It further notes that states “shall ensure and support” (art. 14) and “promote and facilitate” (art. 15) the understanding and realization of human rights.

the state to take positive measures against the encroachment of rights by power forces beyond the state.<sup>295</sup>

The state's protection function does not end at criminalizing the act of human trafficking by creating offences that relate to human trafficking activities. Such protection functions also include administrative and legislative measures to ensure fair labor standards, minimum wages, adequate working conditions, access to health care and standards of health care services, prohibition of child labor, access to food and fair food pricing, access to decent shelter and a healthy environment, access to movement without improper restrictions, fair and non-discriminatory immigration policy and law, and more.

Creating these protections reduces the vulnerability and potentiality of trafficking. As a matter of fact, many of the components of the protection functions of the state are already enshrined in state laws. The problem seems to be the lack of clarity of these laws, the lack of respective regulations on their implementation, the lack of enforcement mechanisms, and the lack of the will to exercise accountability.

Protection also means strict enforcement of existing rules, regulations, and laws. Penalties that the law sanctions with regard to each offense have to be commensurate to gravity of the offense. However, the existence of criminalized acts and their respective penalties do not, on their own, ensure the rights of the protected groups. The state must make sure that its whole machinery counteracts encroachment. This means that the state's administrative and legal system must function properly, and its legislation and judiciary must prevent and remedy infringing activities and acts (such as enslavement, and even life-threatening working conditions) that would permanently and negatively affect the vulnerable groups at issue.

The state has no escape from its duty to protect. Even a crime like torture, which has for a long time been attributed to the state alone, has more recently been integrated so as to create liabilities for the state when committed by private actors. A state must therefore identify the criminal activities related to human trafficking and investigate, prosecute, and properly punish the individuals involved in them. A lack of investigations, scarce prosecutions, and low penalties violate the duty of the state to protect the rights of the individuals in its territory or under its jurisdiction. Under international law, the state has a duty to prevent a third-party, private wrong, and when it has already happened, the state has a duty to redress the wrong.<sup>296</sup> Lack of due diligence on the part of the

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<sup>295</sup> Klein, *supra* note 290, at 301.

<sup>296</sup> Such conduct could be an internationally wrongful act invoking state responsibility. See ILC Int'l Law Comm'n, art. 3 of the Draft Articles on State Responsibility, 37 I.L.M., 1998, 442, 443 (1998). On the doctrine of due diligence, see a discussion in U.N. Econ. Soc. Council, Comm'n on Human Rights, Final Rep. of the Special Rapporteur, *Specific Human Rights Issues: New Priorities, in Particular*



state is a violation imputable to the state, no matter what form it takes: direct omission, tolerating the act, or, even worse, covering it up.<sup>297</sup> The state, as a protector, is thus an imperative function in combating trafficking in persons.

## 2. The Duty to Promote and to Facilitate

The fact is that nations around the globe are collectively threatened by human trafficking, no matter what ideology the state pursues.<sup>298</sup> The polarization of societies is undoubtedly a reason for the expansion of human trafficking. The very rich become richer often by exploiting the most vulnerable, and, as a result, the very poor become poorer—often losing even their freedom. In this unpleasant mosaic, the role of the state to build a bridge between these two poles, by creating and maintaining a middle class. Hence, the duty to promote and facilitate is extremely important.

A state that puts people first is responsible for rehabilitating its societies, and not just the victims of human trafficking. This rehabilitation requires resisting corporate commodification of social relations kept alive through the doctrine of individualism and exploitation resulting from poverty and powerlessness. Empowering the underserved and the forgotten remains the main duty of the state, and this goes beyond rehabilitation of the victim. Treating the root causes of human trafficking through vigorous preventive action is what constitutes the heart of the state's duty regarding the elimination of human trafficking. The policy and the law that it instructs should create the conditions that provide the marginalized groups with equal access to security. This requires access to employment, food, health care, shelter, and education. The discussion goes to the core of economic, social and cultural rights, which are indivisible from civil and political rights, complement one another, and cannot function independently. The notion of human security particularly concentrates on the universalism of what humans need and demand of life. It emphasizes the interconnectedness of all, it espouses prevention as the ultimate necessity to reaching a long-term solution of the problem of human traf-

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*Terrorism and Counter-Terrorism: Terrorism and Human Rights*, at 17-18, paras. 50-51, U.N. Doc. E/CN.4/Sub.2/2004/40 (June 25, 2004), (by Kalliopi K. Koufa). For a general overview on the Articles on State Responsibility, see Siegfried Wiessner, *The Articles on State Responsibility and Contemporary International Law*, 34 *Thesaurus Acroasium* 241 (2006).

<sup>297</sup> See *supra* note 296.

<sup>298</sup> Human trafficking threatens liberal state ideology based on democracy, liberty, and the free market, like the U.S., Kingdom of Sweden, or more centralized economies like China, Cuba, or Venezuela, and even smaller self-governing tribal communities. As to the duty to promote and facilitate, Tara Melish writes an excellent account of this duty *vis-à-vis* the right to food in Guatemala. See generally Melish *supra* note 287.

ficking, and it champions the observable fact that no solution is good enough, unless it is people-centered.

The state should eschew its apathy in attaining human rights for all individuals under its effective jurisdiction. It is time for rethinking, reformulating, reworking, and re-estimating the old paradigm of “taking steps progressively” and “within means.” In the context of human trafficking, such “steps” need to be taken now. The risks are too high to be neglected; this agenda item warrants no postponement *ad calendas graecas*.

The promotion of human rights does not mean charity for the people. It means opportunity. Thus, the state is under a duty to become the promoter and the facilitator of opportunities through which the vulnerable groups will overcome their susceptibility to trafficking. In the human trafficking context, the state has to focus on ways in which the development of policies, delivering of services, establishment of rules and regulations, and discharge of enforcement will all create a positive atmosphere for the empowerment of the individual and the community to face human trafficking. Enabling marginalized communities to take their fate in their own hands, to share a commitment to their own development, to allow them to have a say in decisions that affect their lives, but also to monitor, review, and evaluate the programs aimed at such development and empowerment, is a duty of the state. It is the state that can produce incentives and provide technological and infrastructural assets—which would ultimately benefit the progress and human development of such at-risk groups.

### 3. The Duty to Fulfill

Ultimately, when no other way has been successful, the state has a duty to be the direct provider of goods and services, through humanitarian aid, and to deliver life’s necessities to the people who cannot provide for themselves on their own. In the trafficking context, the state’s duty to fulfill materializes in the circumstances of natural disasters, political strife, civil conflict, and economic recessions. Reality has shown that in these circumstances, the occurrence of human trafficking increases, and women and children become increasing targets of exploitation.<sup>299</sup> There

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<sup>299</sup> For accounts describing concerns and providing information on such issues, see Elise Labott, *Recession Boosts Human Trafficking, Report Says*, June 16, 2009, available at [http://articles.cnn.com/2009-06-16/us/human.trafficking.report\\_1\\_human-trafficking-six-african-nations-slavery?\\_s=PM:US](http://articles.cnn.com/2009-06-16/us/human.trafficking.report_1_human-trafficking-six-african-nations-slavery?_s=PM:US); Gerardo Reyes & Jacqueline Charles, *Exclusive Investigation: Guards Cash in on Smuggling Haitian Children*, THE MIAMI HERALD, October 26, 2010, available at <http://www.miamiherald.com/2010/10/26/1893693/guards-cash-in-on-smuggling.html#storylink=fbuser>; Jane Morse, *U.S. Intensifies Efforts to Prevent Human Trafficking in Haiti: State Department Joins UNICEF to Protect Vulnerable Children*, BUREAU OF INTERNATIONAL INFORMATION PROGRAMS, January 29, 2010, available at <http://www.america.gov/st/democracyhr->

are also other conditions already foreseen in the first modern personification of human rights, the Universal Declaration of Human Rights. For example, its article 25(1) guarantees “the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”<sup>300</sup> These rights are well-established in international law, as shown above.

## VII. APPRAISAL AND RECOMMENDATIONS

As legal responses to the trafficking in humans have proliferated, inevitably criticisms have entered the fray. These issues must be addressed and taken seriously. This article addresses one such criticism, which holds that human trafficking is not a human rights issue, but merely an extension of criminal law.

A principled objection has been made to the characterization of human trafficking as a human rights issue. Apart from situations in which a state or one of its agents is participating in the individual trafficking scheme, it is said, human rights are not at issue since the violation of human dignity is not being committed by the state, the sole addressee of human rights.<sup>301</sup> This argument constitutes, to say the least, a very narrow reading of the anti-human trafficking instruments. For one, the present trend in human rights lawmaking on the international plane is to extend obligations under human rights treaties from the holders of public power to the holders of private power, in particular, transnational corporations.<sup>302</sup> Whether these obligations are called “duties” or “responsibilities,” an argument Professor Piotrowicz advances to justify lesser obligations of such corporations,<sup>303</sup> does not detract or subtract from their binding nature. If it were different, the important provisions of international law

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english/2010/January/20100129151408ajesrom0.63\_02454.html; Stephen McGarvey, *Human Traffickers Prey on Tsunami's Most Vulnerable Victims*, available at <http://www.crosswalk.com/1308575/>; *Indonesia Moves to Prevent Child Trafficking: Smugglers Expected to Take Advantage of Tsunami Crisis*, MSNBC, January 8, 2005, available at <http://www.msnbc.msn.com/id/6798561/>.

<sup>300</sup> See Universal Declaration, *supra* note 253, art. 25.

<sup>301</sup> For a detailed exposition of this argument, see Ryszard Piotrowicz, *The Legal Nature of Trafficking in Human Beings*, 4 INTERCULTURAL HUM. RTS. L. REV. 175, 186-191 (2009). See also *Trafficking of Human Beings and Their Human Rights in the Migration Context*, in INTERNATIONAL MIGRATION LAW. DEVELOPING PARADIGMS AND KEY CHALLENGES 275, 278-81 (Ryszard Cholewiński, Richard Perruchoud & Euan MacDonald eds., 2007).

<sup>302</sup> Cf. Special Representative of the Secretary-General, *Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, H.R. Council, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie).

<sup>303</sup> Piotrowicz, *supra* note 301, at 196 n.74.

regarding state “responsibility” for illegal conduct<sup>304</sup> would lack the binding force of law.

More importantly, criminal law, while an important weapon in the struggle against human trafficking, is not sufficient to address this global scourge in an effective and sustained fashion. Other measures must be taken. States should address the root causes of economic despair and dislocations based on conflict, for instance.<sup>305</sup> States must raise public awareness of this problem of human trafficking, particularly in the countries of origin and help the victims heal by not imprisoning or deporting them.<sup>306</sup> Whether states achieve these goals by conferring upon victims legally enforceable rights or by simple state obligations, the issue is one of a holistic approach to the problem, which is not encompassed within the criminal law or the prosecutorial approach alone.

Viewed from the perspective of the victim, several rights at issue here would be the right to safety; the right to privacy; the right to information; the right to legal representation; the right to be heard in court; the right to compensation for damages; the right to medical assistance; the right to social assistance; the right to seek residence; and the right to return to their country of origin.<sup>307</sup> These are rights of a negative character, but also, and more often, these are rights of a positive nature (information, representation, rehabilitation, for instance). But they have not yet reached the status of positive customary international law. If they are granted by treaties (such as the Council of Europe Convention on Action against Trafficking in Human Beings<sup>308</sup>), however, they will become a part of this positive law, and they will add to the criminal law provisions.

If these provisions can be legitimately called rights and a part of the human rights universe, then it is scarcely comprehensible why the more fundamental right underlying all human trafficking instruments, the right to be free from being trafficked, can only be part of the criminal law. Both with respect to structure and content, this right is no different than the right to be free from torture or the right to life. They cannot be classified as mere reflections of the criminal prohibition of torture or homicide.

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<sup>304</sup> Cf. Rep. of the Int’l Law Comm’n, 53rd sess, April 23-June 1, July 2-Aug. 10, 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10, at 43 (2001).

<sup>305</sup> Cf. Gregor Noll, *The Insecurity of Trafficking in International Law*, in GLOBALIZATION, MIGRATION AND HUMAN RIGHTS: INTERNATIONAL LAW UNDER REVIEW 343, 353 (Vincent Chetail ed., 2007).

<sup>306</sup> For an overview, see *The Miami Declaration of Principles on Human Trafficking*, *supra* note 90, at 12-13, para. 4; see also Roza Pati, *The Miami Declaration of Principles on Human Trafficking: Its Genesis and Purpose*, 1 INTERCULTURAL HUM. RTS. L. REV. 5, 5-9 (2006) (explaining the document).

<sup>307</sup> *The Miami Declaration of Principles on Human Trafficking*, *supra* note 90, at 12-13, para. 4.

<sup>308</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, *supra* note 137.

They are human rights of the highest degree, and so should be the right to be free from being trafficked.

Unquestionably, trafficking in human beings is modern-day slavery. The barbaric enslavement of society's most vulnerable, an infamy that poisons human society,<sup>309</sup> has continued to linger for centuries, alive and well, causing devastation and human disaster of unforeseen and immeasurable magnitude.<sup>310</sup>

Consequently, human trafficking deserves precedence under the hierarchy of evils that overpower the social fabric of our everyday lives. The plague of its casualties is unspeakable and is immeasurably aggravated by the element of transnationality and by the specific characteristics of many of its forms. For instance, the brutality and traumatization of trafficked sex slaves are unique and unrepairable. They are left only with a feeling of helplessness. The domestic slaves trapped alone in closed spaces are another case in point. Without any communal, cultural or language support systems, they are deprived of even the slightest comfort within an exploitative environment.

These unparalleled characteristics of human trafficking, its severity and magnitude, seen in light of efforts made over time to put an end to such shocking phenomenon prove that the different stances and approaches have not been entirely successful. The most recent efforts—the Palermo Protocol on the global scale, the COE on a regional level, and domestic laws like the U.S. Trafficking Victim Protection Act—offer a good approach to combating human trafficking. However, they will only be really workable, when such human rights advances translate into duties on the part of the states, as evidenced in the *Rantsev* case.

This article asserts that human trafficking is a gross violation of human rights and freedoms. Human trafficking serves as a fountain for the growth of organized crime, is a global health risk, and is an issue of security that affects every nation. Such risks require states to dedicate their efforts towards curbing the demand for human trafficking through restoring our global society to moral health and to a functional political, legal, and institutional posture. It also requires the state to work towards draining the supply of potential human trafficking victims through the empowerment of women and reduction of poverty, healing of family and societal support systems for children, minimalization of political conflicts, quick response to natural disasters, regulation of the free movement of people, and monitoring of global communications within the boundaries of the rule of law.

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<sup>309</sup> Letter from Pope John Paul II to Archbishop Jean-Louis Tauran, in *STOP TRAFFICKING IN HUMAN BEINGS* (Franco Angeli s.r.l. ed., 2003).

<sup>310</sup> Roza Pati, *Beyond the Duty to Protect: Expanding Accountability and Responsibilities of the State in Combating Human Trafficking*, in *THE DIVERSITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF PROFESSOR KALLIOPI K. KOUFA* 319, 319 (Martinus Nijhoff Publishers ed., 2009).

Opining that human trafficking “is declining,”<sup>311</sup> is at best euphoric, and at worst utopian. At present, we have just scratched the surface to see the tip of the iceberg. Human trafficking is a global illicit business with a booming and lucrative market for traffickers. It thrives in the new era of modern communications technology. It originated in, and continues to be augmented by, the devastating polarization of the socio-economic status of developing and affluent countries. It is here to stay for quite some time. The problem of human trafficking requires, by default, the concerted efforts of every country to acutely engage in combat on all fronts: to review all of its policies and laws and their enforcement; to reduce poverty and create opportunities for the underserved to prevent them from becoming victims of human trafficking; to promote human rights and create awareness of the phenomenon, which is still unknown to the overwhelming majority of the world population; and to identify and protect victims and prosecute perpetrators. Ridding humanity of trafficking and its ramifications cannot be achieved overnight by simply criminalizing the act. It will require time and resources, and above all, the willingness to hit the phenomenon from all angles. This aim can only be achieved when the state starts discharging all of its responsibilities under human rights law. The *Rantsev* case proves the necessity of compliance of states with their positive obligations under international law. It is only then that a state can claim to be serious in its efforts to combat human trafficking.<sup>312</sup>

Simultaneously, orating that present international anti-trafficking efforts present a risk of “net human rights regression”<sup>313</sup> does no justice to addressing the issue. The solution to the root causes of human trafficking is not through open borders, but through international and domestic responsibility in creating opportunities for people, mostly in their communities. Such opportunities arise by fighting human greed and moral corrosion, mending broken social and political structures in our societies, transforming antiquated and insensitive cultural practices, repairing the debilitated support systems of community life, providing for impoverished households, doing away with archaic laws and dysfunctional legal systems, and steadfastly opposing corrupt governments.

A human rights approach to trafficking paves the road ahead. A robust concerted effort, where the individual’s rights and the state’s responsibilities simultaneously take center stage, remains the best solution to the problem of human trafficking.

The modus operandi to make this effort successful is to urge the states as major players in international arena not only to affirm values of human dignity in the abstract, but to enhance their realization through a clear

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<sup>311</sup> See OHCHR Report, *supra* note 253, at 6-7, para. 9 (noting that some governments have said that human trafficking, though serious, “is declining”).

<sup>312</sup> *Id.* at para. 6.

<sup>313</sup> Hathaway, *supra* note 81, at 59.

prescription and implementation of the law; i.e., the control intent inherent in the law should remain continuous throughout the life of the norm.<sup>314</sup> The *Rantsev* decision speaks volumes in this regard.

### VIII. CONCLUSION

The gravity of the phenomenon of trafficking in human beings remains an urgent issue topping the agenda of the world community, as evidenced by a variety of pertinent treaties and international instruments. Still, not enough has been done yet to stem this tide of evil. The *Rantsev* case offers a ray of light at the end of the tunnel. It also informs us of the paramount importance of regional arrangements on human rights and human trafficking. The Americas, Asia, and other regions affected by human trafficking should follow the model that was so carefully established by the European regional arrangement in *Rantsev*.

In *Rantsev*, the European Court of Human Rights and Fundamental Freedoms was able to hold Cyprus and Russia accountable for breaching their positive obligations. It formulated novel state duties arising from the construction of human trafficking as de facto slavery.<sup>315</sup> Such obligations range from raising awareness about the phenomenon of human trafficking to the training of law enforcement and immigration officials on issues related to human trafficking, and from administrative measures to regulate the operation of businesses that cover up human trafficking to necessary changes in policy and law. These state duties are related to immigration, criminalization, and the investigation and prosecution of all aspects of trafficking. This article goes a step further. States should be required to comply with their obligations under international law by observing their duty to protect, promote, facilitate, and fulfill applicable human rights, as described above in the context of a human trafficking legal regime.

Generations of humankind have faced many challenges that in the eyes of some might have seemed insurmountable. In his famous Gettysburg Address, President Abraham Lincoln told his compatriots that the challenge of their generation was to put an end to slavery and to “have a new birth of freedom.”<sup>316</sup> And so he and his generation did; they institutionally put an end to slavery even though it required a great sacrifice of blood. The Civil War ultimately unified this great nation in pursuit of equal human dignity. Ending modern-day slavery is the challenge of *our*

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<sup>314</sup> W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC'Y INT'L L. PROC. 101 (1981).

<sup>315</sup> See Roza Pati, *Addressing the Scourge of Human Trafficking: The Challenge Ahead*, 1 INTERCULTURAL HUM. RTS. L. REV. 75 (2006).

<sup>316</sup> Abraham Lincoln, Gettysburg Address, at the dedication of the Soldiers' National Cemetery in Gettysburg, Pennsylvania (Nov. 19, 1863) (transcript and image available at <http://www.ourdocuments.gov/doc.php?flash=true&doc=36&page=transcript>).

generation. Now it is our turn. Divided as we might be on our stances toward confronting the issue, we must have the passion to continue in our efforts. We must end the culture of exploitation incarnated in human trafficking by joining “the dream and the hope of the [modern] slave[s]” as they “[leave] behind nights of terror and fear,” and help them rise “into a daybreak that’s wondrously clear.”<sup>317</sup>

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<sup>317</sup> MAYA ANGELOU, *Still I Rise*, in THE COMPLETE COLLECTED POEMS OF MAYA ANGELOU 163 (1994).