

**SHARED BUT DIFFERENTIATED RESPONSIBILITY:
INTEGRATION OF INTERNATIONAL OBLIGATIONS IN FIGHT AGAINST
TRAFFICKING IN HUMAN BEINGS**

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I. INTRODUCTION

Trafficking in persons is a serious violation of fundamental, predominant and non-derogable human rights and freedoms. It is deeply rooted within the very heart of international world order and invokes not only moral, but also legal, economic, social and political implications.

Although the states have acknowledged the graveness of the consequences of trafficking, government complacency, corruption and lack of political will resulted in unchecked escalation of trafficking in human beings. The connection of trafficking and prostitution, together with strict state immigration policies have stalled international legal and political counter-trafficking efforts. The widespread nature of human trafficking, violations of fundamental principles of international law and human rights it implies, and evident fragmentation and lack of effectiveness and enforcement capacity of current laws, suggest a need for reform.

The process of trafficking consists of three distinct phases, interconnected but not entirely dependent on each other: (i) the actual act of trafficking; (ii) the subsequent phase of exploitation that the act of trafficking is committed for; and (iii) post-trafficking rehabilitation.¹ The execution of the act of trafficking is independent of the realization of its intended purpose² and implies the notion of criminal intent as its main characteristic. The structure of the trafficking chains involves (a) agents in the home state of the victims, (b) the transit states which host the victims on their way to final destination, and (c) the states receiving the victims of traffic. The three distinct components of the chain involve a multiplicity of different countries and thus evoke different aspects of human rights, criminal, immigration, labor and public international law, and imply different international obligations and responsibilities of the states involved.

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1. With the third stage only indirectly related to the topic of this paper, the focus of the paper is predominantly on the act of trafficking as such and its consequences, without dwelling into a detailed analysis of specific implications of each of the exploitative purposes for which trafficking is conducted.

2. A person is considered trafficked despite the work of the law-enforcement authorities which may 'rescue' the victim at the very beginning of the trafficking journey envisioned for him or her. The victim is subjected to the initial coercion or deception, regardless of whether these techniques succeed at placing the person within the 'trafficking industry.'

Being an international malady, trafficking cannot be solved by independent domestic responses. This essay will argue that in order for the anti-trafficking policies to become successful they must combine and integrate the various obligations of the involved countries into a single non-fragmented framework built on the foundations of the norms of international human rights law. Within this framework, the states of origin, transit and receiving end of the trafficking chain must assume their part of the shared responsibility for ensuring the protection of the vital social, political and economic rights of the victims, as means for preventing the trafficking in human beings and addressing its consequences; while realizing their obligations of international criminal, immigration and refugee law, ensuring deterrence, prevention and adequate remedies for the victims.

This essay will summarize some of the most pertinent norms and obligations of international human rights relevant for human trafficking. It will analyze the obligations and responsibilities of states deriving from these norms, general principles of international law and specific legal provisions addressing human trafficking directly. On the basis of these normative summaries and implications, it will propose a model of differentiated state responsibility based on a mainstreamed and simplified system of legal human rights commitments integrated within other domains of international law, namely that of criminal and refugee law. By doing so, it will create and discuss in detail a two-fold anti-trafficking model of state responsibility, which will include the responsibility for the act of trafficking; as well as the responsibility for the subsequent exploitation arising out of such 'act'. Among the purposes of trafficking addressed here, prostitution and forced labor aspects will be covered in more detail in this essay.

II. IN SEARCH FOR A DEFINITION

Human trafficking is a complex phenomenon that involves various social, political, cultural and legal aspects. It touches upon some of the most sensitive and rudimentary elements of international order, such as the notions of morality and sovereignty, and spreads across the entire globe. In order to provide in-depth analysis of the legal connotations of trafficking, we shall first discuss the scope and magnitude of the phenomenon; analyze some of the main elements, root-causes of the recent escalation and linkages of human trafficking with violations of human rights; and study the definitions of human trafficking contained in various instruments of international law.

A. *The Scope of the Problem*

The International Labor Organization (ILO) estimates there are 12.3 million people in forced labor, bonded labor, forced child labor, and sexual servitude at any given time.³ The US Department of State approximates that 600,000-800,000 people are annually trafficked across national borders, which does not include millions trafficked within their own countries.⁴ Trafficking is the third most

3. PATRICK BELSER ET AL., INT'L LABOUR ORG., ILO MINIMUM ESTIMATE OF FORCED LABOUR IN THE WORLD 8, (Int'l Labour Office 2005), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_081913.pdf.

4. *Id.* at 35.

lucrative illicit business in the world after arms and drug trafficking and is a major source of organized crime revenue.⁵ The initial sale of trafficked persons generates an estimated US\$ 7 to \$12 billion annually, with subsequent sales generating additional US\$ 32 billion a year.⁶

“The nationalities of trafficked people are as diverse as the world’s cultures.”⁷ South-East Asia and South Asia are home to the largest numbers of internationally trafficked persons, with 225,000 and 150,000 persons trafficked respectively.⁸ About 100,000 persons are trafficked from the former Soviet Union, 75,000 from Eastern Europe, 100,000 from Latin America and the Caribbean and 50,000 from Africa each year.⁹ In Asia the largest numbers of women are trafficked within one or between multiple regions. In South Asia and Middle East, child trafficking for domestic exploitation is of particular concern.¹⁰

Approximately 80 percent of transnational victims are women and girls and up to 50 percent are minors.¹¹ The majority of cross-border victims are females trafficked into commercial sexual exploitation, with the greater part of persons trafficked within their countries being used for forced and bonded labor.¹² Usually persons who fall into the hands of traffickers desire to leave their countries, seeking to improve their lives through low-skilled jobs in more prosperous states.¹³ Child trafficking mostly relies on kidnapped minors or children given by their families to relatives in hope for education and earning opportunities, who in turn sell them into exploitation.¹⁴

In many cases the exploitation of victims of traffic is progressive: a person trafficked into one form of labor may be further exploited in another. The victims are often beaten and sexually abused, suffer from forced substance abuse, sexually transmitted diseases and HIV/AIDS, food deprivation, psychological torture, which often lead to death.

Despite the common misconception, trafficking is as much of a local and regional phenomenon, as it is an international one. A person may decide to travel within or outside his or her own country for a job, and subsequently fall into involuntary servitude. Trafficking also implies placement of the victim in an unfamiliar milieu where he or she is culturally, linguistically or physically isolated and denied legal identity or access to justice. Such dislocation increases the

5. UNITED NATIONS POPULATION FUND, STATE OF WORLD POPULATION REPORT 44 (2006), available at http://www.unfpa.org/upload/lib_pub_file/650_filename_sowp06-en.pdf [hereinafter UNFPA].

6. *Id.*

7. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 8 (June 2006), available at <http://www.state.gov/documents/organization/66086.pdf> [hereinafter TIP REPORT].

8. UNFPA, *supra* note 5, at 45.

9. *Id.*

10. *Id.*

11. TIP REPORT, *supra* note 7.

12. *Id.*

13. *Id.* at 8-10.

14. *Id.* at 10.

marginalization and, therefore, the risk of abuse, violence, exploitation, domination or discrimination both by traffickers and by state officials represented by the police, the courts, immigration officials, etc.

Trafficking chain starts with the recruiter or the person facilitating migration and ends with the last person who buys or receives the victim and holds him or her in conditions of slavery or slavery-like practices, forced labor or servitude. Despite the fact that the victims of trafficking are often the victims of crime, they are often perceived and treated as criminals in countries of destination.¹⁵

*B. Trafficking—The Dark ‘Underside’ of Globalization*¹⁶

Historically, human trafficking has been directly affiliated with prostitution. Consequently, given the ambiguous moral implications of prostitution, the issue of trafficking remained absent from the international political arena for centuries. The moral aspects evoked by this connection were perceived as internal sovereign matter of each state and have traditionally remained within their margin of appreciation.¹⁷ Ironically, the earliest international response to human trafficking grew out of the 1900s movement against growing numbers of women trafficked into prostitution.¹⁸ It specifically focused on the trafficking of white women and girls for the purpose of prostitution or sexual exploitation, reflected by the terms ‘white slave traffic’ and “the procuring of women or girls for immoral purposes abroad.”¹⁹ Consent became the formative factor for determining the trafficking status of white-skinned prostitutes.²⁰

15. *Id.* at 36.

16. The Director-General, Int'l Labour Conference, Geneva, Switz., 89th Sess., Int'l Labour Org. [ILO], *Stopping Forced Labour: A Global Report Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, at 47, Report I (B) (2001).

17. The legalization of prostitution, abortion, euthanasia, and same sex marriages and adoptions remain within the ‘margin of appreciation’ of the sovereign states. See *Vo v. France*, App. No. 53924/00, 2004-VIII Eur. Ct. H.R. 84; *Pretty v. United Kingdom*, 41 Eur. Ct. H.R. 155 (2002); *R.H. v. Norway*, Decision on Admissibility, App. No. 17004/90, 73 Eur. Comm'n H.R. Dec. & Rep. 155 (1992); *Boso v. Italy*, Decision on Admissibility, 7 Eur. Ct. H.R. 451 (2002); *Paton v. United Kingdom*, App. No. 8416/78, 3 Eur. H.R. Rep. 408 (1981) (Commission report); *Case C-268/99, Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie*, 2001 E.C.R. I-08615 (illustrating the differences between nations regarding the judicial treatment of issues evoking strong moral reactions).

18. See International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 1 L.N.T.S. 83 [hereinafter Agreement]; International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 211 Consol. T.S. 45, 1912 GR. Brit. T.S. No. 20, 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 [hereinafter Convention]; International Labour Organization Convention Concerning Forced or Compulsory Labour, June 28, 1930, ILO No. 29, 39 U.N.T.S. 55 [hereinafter Forced Labour].

19. Agreement, *supra* note 18, art. 1.

20. Recently the European Court of Human Rights ruled on the issue of consent in prostitution, and subsequent characterization of prostitution as a means of employment in *Aldona Malgorzata Jany v Staatssecretaris van Justitie*. Case C-268/99, *Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie*, 2001 E.C.R. I-08615 (2001).

In response to the ineffectiveness of consent-based policies, the international community was forced to gradually agree that consent was an irrelevant parameter in determining and punishing the crime of trafficking.²¹ Instead, it was the element of coercion, deception or use of force that set trafficking apart from other forms of persons' smuggling and illegal migration. The resolution of the consent debate had an additional outcome. The authorities dealing with trafficking came to realize that by focusing on trafficking for prostitution and sexual exploitation they failed to address trafficking of women and girls as well as men and boys for other purposes such as bonded/forced labour, child soldiers, domestic work or organ donations. Such widened understanding of the concept of human trafficking has in turn expanded the application of the instruments of international human rights law.

The recent rise in the scope of international trafficking is attributable to a number of political, social and economic factors. Globalization of the world markets, demand for cheap workers, growing global economic gaps, lack of opportunities for development, discrimination and violence against women and children, corruption and organized crime, political instability and armed conflict, growing deprivation and marginalization of the poor, extreme poverty, governmental complacency, discrimination, communication technologies and transport advancements; have all contributed to a recent increase in sales of people.

Political and economic global changes brought about by the end of Cold War and opening of international borders in Asia, resulted in the creation of a massive highly mobile migrant workforce.²² In the absence of employment opportunities, growing poverty and discrimination in the newly independent and developing countries, the possibility to earn a decent living abroad has lured many into illegal migration and trafficking. While the numbers of those looking for opportunities to immigrate for work rose exponentially, the immigration policies of the developed states have been becoming increasingly restrictive.²³ "Trafficking economies—which arise out of a combination of supply, demand and illegality—are less likely to develop in situations in which opportunities for legal migrant work exist."²⁴ By limiting the possibilities of legal entry, national authorities of these states have not

21. See generally D. Scharie Tavcer, Causal Factors in the Crime of Trafficking of Women for the Purpose of Sexual Exploitation: An Exploration into Push and Pull Factors Relevant to Women Trafficked from Moldova to Western Europe, at 57-63 (November 2006) (unpublished doctoral dissertation, Mount Royal College) (on file with author), http://www.freidok.unifreiburg.de/volltexte/4426/pdf/Tavcer_Doktorarbeit.pdf.

22. Paul J. Smith, *Military Responses to the Global Migration Crisis: A Glimpse of Things to Come*, 23 FLETCHER F. WORLD AFF. 77, 78-79 (Fall 1999). The ILO estimates the population of migrant laborers to be 120 million. Saudi Arabia (7.5 million), the United Arab Emirates (2.3 million), Malaysia (2.3 million) and Kuwait (1.3 million) lead the markets in demand for foreign migrant workers. The Philippines (7 million), Indonesia (3 million), Bangladesh (3 million), and Sri Lanka (1.5 million) are the leading suppliers of these workers. TIP REPORT, *supra* note 7, at 7.

23. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Integration of the Human Rights of Women and the Gender Perspective, Violence Against Women*, ¶ 61, U.N. Doc. E/CN.4/2000/68 (Feb. 29, 2000) [hereinafter ECOSOC Report].

24. *Id.* at 22.

discouraged would-be migrants, and have forced many to look for alternative, often illegal ways that lead them to traffickers.²⁵

In the global market of trafficking, victims occupy the supply side, whereas the abusive employers and sex buyers represent the demand. Sex tourism and child pornography have become worldwide industries, facilitated by the Internet. Although consumers of forced labor products are ignorant of their involvement with slavery, their existence in high numbers increases the demand for sex workers. Consequently, the demand for cheap illegal labor and prostitution is the primary “pull” factor for the unchecked escalation of human trafficking.

Anti-immigration policies also fuel trafficking. Statistics demonstrate that inflexible policies of exclusion, enforced through severe penal punishments and deportation for their breach, feed directly into the hands of traffickers.²⁶ Strict anti-immigration policies reduce opportunities for legal migration, encourage migrants to turn to third parties for assistance, and “serve to provide an ever-growing number of clients to the increasing number of underground networks of immigrant smugglers.”²⁷

C. Legal Definition

A clear, usable legal consensus definition accepted by all actors in the international community is a key first step to drafting and implementing successful anti-trafficking policies. The first of such legally binding definition emerged in 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (UN Protocol), supplementary to the United Nations Convention against Organized Crime (UNCOC).²⁸ The definition discussed in more detail in subsequent chapters reads:

(a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the *threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power* or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person *having control over another person, for the purpose of exploitation*. Exploitation shall include, at a minimum, the exploitation of the *prostitution* of others or other forms of *sexual exploitation, forced labor* or services, *slavery or practices similar to slavery, servitude or the removal of organs*;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

25. *Id.*

26. *Id.* at 21.

27. *Id.* at 22.

28. Convention Against Transnational Organized Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children art. 3, G.A. Res. 55/25, at 53, U.N. Doc. A/55/383, A/Res/55/25/Annex II (Nov. 15, 2000) [hereinafter Prevent Trafficking].

(c) The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article.²⁹

Additionally, as noted by the Special Rapporteur on Violence against Women, the separation of the victims with their own community must be included as the defining factor of trafficking.³⁰

The definition contained in the Protocol creates an important legal threshold. It specifically distinguishes the differences between trafficking, illegal migration and migrant smuggling as contained in the variety of acts involved in traffic (recruitment, transportation, transfer, harboring, purchase, sale, receipt of person), actors (chain of individuals or criminal enterprise in various countries constituting the import, transit and export states), means (threat, attempt or use of force, violence or other forms of coercion, abduction, fraud, deception, abuse of power, etc), intended exploitative purposes (forced labor or services, debt bondage, slavery or slavery-like conditions, sexual exploitation, servitude, etc) in unfamiliar and foreign to the victims’ location.³¹

It is, however, important to note that since any apparent, implied, or express consent is mitigated by the use of deception, coercion, or other forms of violence, the matter of victim’s consent is an element of evidence, not of definition. A person who hires a “smuggler” or travels for a job promised by a “recruiter” is unaware that the “smuggler” or “recruiter” intends to hold or place him or her in forced labor, servitude or slavery-like conditions.³² In accordance with the above definitions, it is the element of criminal intent, *mens rea*, to coerce a person into

29. *Id.* at annex II, art. 3(a) (emphasis added). According to the Victims of Trafficking and Violence Protection Act of 2000, Sex trafficking is “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sexual act.” “Involuntary servitude includes a condition of servitude induced by means of (a) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or (b) the abuse or threatened abuse of the legal process.” “Debt bondage means the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.” “Coercion means (a) threats of serious harm to or physical restraint against any person; (b) any scheme, plan or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or, (c) the abuse or threatened abuse of the legal process.” Victims of Trafficking and Violence Protection Act of 2000, § 103, Oct. 28, 2000, 114 Stat. 1464 [hereinafter Victims] (codified as 22 U.S.S. 7101) (emphasis added).

30. “Recruitment, transportation, purchase, sale, transfer, harboring or receipt of persons: (i) by threat or use of violence, abduction, force, fraud, deception or coercion including abuse of authority, or debt bondage, for the purpose of; (ii) placing or holding such person, whether for pay or not, in forced labour or slavery-like practices, in a community other than the one in which such person lived at the time of the original act described in (i).” ECOSOC Report, *supra* note 23, at ¶ 4.

31. Prevent Trafficking, *supra* note 28.

32. OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, TRAFFICKING IN HUMAN BEINGS (2007), <http://www.legislationline.org/?tid=178&jid=1&less=false>.

forced labour, not the actual execution of the intent, that is decisive in determining the crime of trafficking.³³ It is, the extreme degree of coercion with intent for potential lifetime servitude to an 'owner' who exercises dominion over all aspects of a person's life will be regarded as defining elements of the process of trafficking in this paper.

III. LEGAL INSTRUMENTS AGAINST TRAFFICKING IN HUMAN BEINGS

Coercion, use of force or deception with intent to broker human beings via inter or intra-national transport into exploitative or servile conditions in unfamiliar and foreign to the victims' locations are key steps of human trafficking pattern.³⁴ Each of these steps entails serious violations of fundamental human rights and freedoms, such as (a) the right not to be held in slavery or servitude; (b) the right to liberty and security of person; (c) the right to be free from torture, cruel or inhumane treatment; (d) freedom of movement; (e) freedom from discrimination; and (f) the right to life.

International law imposes positive and negative obligations on all the states to recognize, prevent, ensure, and protect these rights within their territory and jurisdiction. Consequently, the crime of human trafficking evokes a number of such obligations inscribed in the fundamental international and regional human rights instruments described in this Chapter in more detail.

A. *International Human Rights Instruments Against Trafficking*

1. **Prohibition of Trafficking as a Form of Slavery**

Article 1(1) of the 1926 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...."³⁵ In accordance with this definition, slavery entails a life-long permanent ownership over another human being, who is consequently deprived of the right to liberty and property. While not meeting all of the criteria of classic slavery, human trafficking is strikingly similar to it in its allusion to ownership accompanied by extreme physical and psychological coercion.

The core elements of the act of trafficking, as described in the internationally accepted definition, is the application of deception, coercion, or use of force for the purpose of exploitation of the victim often involving severe physical and psychological abuse.³⁶ The use of deception, coercion, or use of force places the victim under absolute control of his or her traffickers or owners and deprives him or her of fundamental rights and freedoms for the entire period of retention in servitude and thus constitute the condition of slavery. In the context of trafficking,

33. ECOSOC Report, *supra* note 23, ¶¶ 12-14, 16.

34. *Id.* ¶¶ 13, 15.

35. Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 art. 1(1), 60 L.N.T.S. 253; *See also* Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 226 U.N.T.S. 7 [hereinafter Supplementary Convention].

36. *See* OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, U.S. DEP'T OF STATE, HOW CAN I RECOGNIZE TRAFFICKING VICTIMS? (2004), available at <http://www.state.gov/g/tip/rls/fs/34563.htm>.

exploitation of a person subsequent to the act of enslavement often results in full, albeit non-permanent, ownership, equivalent to slavery.³⁷

Article 8 of The International Covenant of Civil and Political Rights (ICCPR) provides that no one shall be held in slavery, servitude, or be required to perform forced or compulsory labor, and awards the prohibition of slavery a non-derogable character.³⁸ Article 4 of the European Convention on Human Rights similarly establishes an absolute non-derogable prohibition of slavery, forced and compulsory labor.³⁹ In 1948, the Universal Declaration of Human Rights proclaimed that “no one shall be held in slavery or servitude....”⁴⁰ However, more than half a century after the complete abolition of slavery by the Universal Declaration of Human Rights,⁴¹ the problems of slavery and slave-labor have expanded and evolved beyond their historical characterizations into the phenomenon of human trafficking.

The debt bondage form of trafficking defined as the condition arising from a pledge by a debtor of his personal services or those of a person under his control as security for a debt, if the value of those services is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited, is specifically outlawed in Article 1 of the Supplementary Convention to the Slavery Convention.⁴² The Supplementary Convention also contains explicit prohibitions of other forms of human trafficking, such as forced marriages, transfer of women “for value received or otherwise,” and delivery of a child “to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.”⁴³ The International Labor Organization Convention Concerning Forced or Compulsory Labor also prohibits the use of all forms of forced or compulsory labor that trafficked persons similarly to slaves are forced to perform.⁴⁴

2. Trafficking as a Form of Torture, Inhuman or Degrading Treatment

The type of treatment that victims of trafficking are exposed to undoubtedly constitutes torture, inhuman and degrading treatment. The 1984 Convention against Torture (CAT) proclaimed that any act of torture or other cruel, inhuman or

37. See LeRoy G. Potts, Jr., Note, *Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons*, 35 GEO. WASH. INT'L L. REV 227, 237 (2003).

38. International Covenant on Civil and Political Rights art. 8, Dec. 16, 1966, U.N. Doc. A/6316, 999 U.N.T.S. 171 [hereinafter ICCPR]; view confirmed by the International Court of Justice in *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 33-34 (Feb. 5) (Second Phase Judgment).

39. Convention for the Protection of Human Rights and Fundamental Freedoms art. 4, Nov. 4, 1950, 213 U.N.T.S. 221 (also known as the European Convention on Human Rights) [hereinafter Protection].

40. Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, art. 4, U.N. Doc. A/810 (Dec. 10, 1948).

41. *Id.*

42. Supplementary Convention, *supra* note 35, art. 1.

43. *Id.*

44. Forced Labour, *supra* note 18, art. 2..

degrading treatment or punishment is an offense to human dignity that should be condemned as the violation of the main principles of human rights.⁴⁵ ICCPR and European Human Rights Convention also confirm that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.⁴⁶ Under international law, states under any circumstances may not tolerate torture or similar practices or derogate from their duty to prevent and punish torture and inhuman treatment.⁴⁷

Involuntary engagement in forced sexual acts evident in prostitution of trafficked women has been numerously acknowledged as such.⁴⁸ Rape and extreme physical maltreatment conducted by persons in position of authority such as traffickers or 'owners' has been explicitly recognized by the jurisprudence and Statutes of international tribunals as a form of torture.⁴⁹ Although cases in which trafficking is recognized as inhuman or degrading treatment are still rare, the European Court of Human Rights has ruled on a few of them, thereby substantiating the linkage between these violations and human trafficking.⁵⁰

3. Trafficking and Discrimination

As noted above, discrimination on various grounds contributes to the proliferation of trafficking both as its root-cause and consequence. The discriminatory policies and practices of governments help to create a climate in which human rights violations are officially tolerated, if not encouraged, or in some cases perpetrated by the state actors.⁵¹ The principles of equality before the law, equal protection before the law and non-discrimination are at the foundations of the legal structure of national and international public order. "Discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable."⁵²

4. Trafficking as Women's and Children's Rights Issue

Since sexual exploitation of women and girls is one of the main purposes of trafficking, it is undoubtedly a women's rights issue. As mentioned earlier, discrimination against women in the source countries is one of the main root-causes of trafficking. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) condemns such discrimination in all

45. See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1974, U.N. Doc. A/39/46, 1465 U.N.T.S. 85 [hereinafter Torture].

46. ICCPR, *supra* note 38, art. 7; Protection, *supra* note 39, art. 3.

47. ICCPR, *supra* note 38, art. 4(2).

48. See, e.g., Aydin v. Turkey, App. No. 23178/94, 25 Eur. H.R. Rep. 251 (1997).

49. See *id.*; see also Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment ¶¶ 4,8,10 (Sept. 2, 1998).

50. Cyprus v. Turkey, App. Nos. 6780/74 & 6950/75, 4 Eur. H.R. Rep. 482, 493, 536-7 (1976).

51. ECOSOC Report, *supra* note 23, ¶ 4.

52. Juridical Condition and Rights of the Undocumented Migrants, Inter-Am. C.H.R. Advisory Op., OC-18/03, ¶ 101 (Sept. 17, 2003), available at http://www.cidh.org/migrantes/seriea_18_ing.doc.

forms and obliges the States Parties to ensure its complete elimination.⁵³ According to the Convention, the States Parties are required to take all appropriate measures to achieve the elimination of prejudice and stereotyped roles for men and women, thereby ensuring the full development and advancement of women.⁵⁴ Furthermore, CEDAW explicitly requires States Parties to “take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”⁵⁵ Article 6(1) of the American Convention on Human Rights (ACHR) and Article 14 of the European Convention also contain provisions specific to discrimination of women,⁵⁶ while the rights of trafficked children are explicitly addressed by the Inter-American Convention on International Traffic in Minors (1994)⁵⁷ and the Convention on the Rights of the Child (CRC).⁵⁸

The Convention on the Rights of the Child (CRC) provides that children shall be given opportunities and facilities for healthy and adequate physical, mental, moral, spiritual, and social development with special consideration given to the children living in exceptionally difficult conditions.⁵⁹ With respect to trafficking, the CRC explicitly provides that: “States Parties shall take measures to combat the illicit transfer and non-return of children abroad[,]”⁶⁰ as well as protect the children from all forms of sexual exploitation and abuse,⁶¹ abduction, sale, or traffic for any purpose or of any form.⁶² Moreover, it requires states to “protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse,”⁶³ economic exploitation and performance of work harmful to child’s health or “physical, mental, spiritual, moral or social development,”⁶⁴ all of which are inherent results of trafficking.⁶⁵ International Covenant on Economic, Social and Cultural Rights

53. Convention on the Elimination of All Forms of Discrimination Against Women art. 2, Dec. 18, 1979, U.N. Doc. A/34/180, 1249 U.N.T.S. 13 [hereinafter CEDAW].

54. Bertrand G. Ramcharan, *A Victims’ Perspective on the International Human Rights Treaty Regime*, in *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: FIFTY YEARS AND BEYOND* 30 (Yael Danieli et al. eds., Baywood Publishing Company 1999).

55. CEDAW, *supra* note 53, art. 6.

56. Organization of American States, American Convention on Human Rights art. 6(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Protection, *supra* note 39, art. 14.

57. Organization of American States, Inter-American Convention on International Traffic in Minors art. 1, Mar. 18, 1994, O.A.S.T.S. No. 79, 33 I.L.M. 721.

58. Convention on the Rights of the Child, Nov. 20, 1989, U.N. Doc. A/44/49, 1577 U.N.T.S. 3 [hereinafter CRC].

59. *Id.* art. 3.

60. *Id.* art. 11.

61. *Id.* art. 34.

62. *Id.* art. 35.

63. *Id.* art. 19(1).

64. *Id.* art. 32(1).

65. Article 24 of ICCPR and Article 10 of ICESCR require adequate measures of protection from economic and social exploitation of each child in his status of a minor. Article 10(3) of ICESCR explicitly requires that special measures of protection and assistance be taken on behalf of all children and young persons to protect them from economic and social exploitation; employment that may be harmful to their morals or health or dangerous to life or likely to hamper their normal development.

also contains a specific provision on protection of children from economic and social exploitation.⁶⁶

Trafficking also violates two other absolute prohibitions set by the CRC: (a) torture, inhuman or degrading treatment or punishment; and (b) unlawful or arbitrary deprivation of liberty.⁶⁷ Should a child become a victim of exploitation, abuse, torture, or any other form of cruel, inhuman or degrading treatment or punishment, such as trafficking, the states (not only their state of nationality, but also the state within the jurisdiction of which the child is found) are under an obligation to take all appropriate measures to promote physical and psychological recovery and social reintegration.⁶⁸

B. International Trafficking – Specific Conventions

A number of important regional and international documents specifically addressing trafficking in human beings set a plethora of international norms and obligations. Among these, were the early 20th century Convention against White Slave Traffic, 1951 Trafficking Convention, followed by 2003 UN Convention against Organized Crime and its Protocol on Trafficking, as well as Special Protocol on the Sale of Children of the CRC. The transnational treaties and agreements are supplemented by numerous regional ones, such as Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (2002) adopted by the member-States of South Asian Association for Regional Cooperation (SAARC).⁶⁹ ECOWAS Action Plan and African Charter of Human and Peoples' Rights⁷⁰ also contain important provisions aimed at eliminating trafficking in human beings in the region. For the purpose of this paper, however, we shall focus on the specific policies and programs implemented through international agreements as well as some of the European legislative bodies and agencies.⁷¹

1. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others and Preceding Agreements.

The international trend to address the crime of trafficking in persons goes back to 18 May 1904 when the governments of a handful of states came together to conclude the International Agreement for the Suppression of the White Slave

ICCPR, *supra* note 38, art. 24; International Covenant on Economic, Social and Cultural Rights art. 10, Dec. 16, 1966, U.N. Doc. A/6316, 993 U.N.T.S. 3 [hereinafter ICESCR].

66. ICESCR, *supra* note 65, art. 10(3)..

67. CRC, *supra* note 58, art. 37.

68. *Id.* art 39.

69. South Asian Association for Regional Cooperation, Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, Jan 5, 2002, *available at* http://www.humantrafficking.org/uploads/publications/SAARC_Convention_on_Trafficking_Prostitution.pdf (adopted by Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka).

70. African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58.

71. The analysis of European action against trafficking will not include all regional and state specific programs and policies (the Commonwealth of Independent States and Eastern European initiatives will not be highlighted); instead, the analysis will focus on some of those affecting the whole European continent.

Traffic.⁷² The agreement was followed by the 4 May 1910 International Convention for the Suppression of the White Slave Traffic,⁷³ the 30 September 1921 International Convention for the Suppression of the Traffic in Women and Children⁷⁴ (amended by the Protocol approved by the General Assembly of the United Nations on 20 October 1947), and the International Convention of 11 October 1933 for the Suppression of the Traffic in Women of Full Age.⁷⁵ The goal of these agreements was to secure effective protection against the criminal ‘white slave traffic’ of women or under-age girls. Consequently, the agreements were inapplicable to boys or women and girls of color and focused on prostitution as the main purpose of trafficking.

The 1904 Agreement defined trafficking as the “procuring of women or girls for immoral purposes abroad,” thereby limiting the scope of its application to international, trans-border traffic.⁷⁶ “While the agreement obliged [the] states to adopt measures in the areas of information exchange, identification of victims, and supervision of employment agencies,” no section of it specifically provided for victims’ protection or enhanced law enforcement.⁷⁷ The law enforcement aspect of trafficking was addressed by the 1910 International Convention for the Suppression of the White Slave Traffic, which urged the states to amend national legislation to extradite and punish the offenders.⁷⁸

Although the 1921 International Convention for the Suppression of the Traffic in Women and Children maintained the traditional focus on prostitution and sexual exploitation, explicit in the earlier agreements, the term “white slave traffic” was omitted from the title, thereby extending the application of the Convention to women and children, both girls and boys, of any race.⁷⁹

The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others was approved by General Assembly Resolution 317(IV) of 2 December 1949 and entered into force 25 July 1951.⁸⁰ The Convention similarly to the earlier agreements equated human trafficking with prostitution.⁸¹ It imposed an obligation on the States Parties to instigate criminal proceedings against “any person who, to gratify the passions of another: (1)

72. Agreement, *supra* note 18. State-parties included the UK, India, Prussia, Belgium, Spain, France, Italy, the Netherlands, Portugal, Russia, Sweden, Norway and Switzerland.

73. Convention, *supra* note 18.

74. International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 96 L.N.T.S. 271 [hereinafter Women and Children].

75. International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431.

76. Agreement, *supra* note 18, art. 1.

77. TOM OBOKATA, HUMAN TRAFFICKING FROM A HUMAN RIGHTS PERSPECTIVE: TOWARDS A HOLISTIC APPROACH 14 (MARTINUS NIHOFF 2006).

78. Agreement, *supra* note 18.

79. Women and Children, *supra* note 74.

80. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Mar. 21, 1950, 96 U.N.T.S. 271 [hereinafter Exploitation] (currently, the Convention has 14 signatories and 74 state-parties).

81. *Id.*

Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; (2) Exploits the prostitution of another person, even with the consent of that person.”⁸² The Convention retained the 1921 gender neutral approach to trafficking. It focused on criminalization of offenders, trafficking of both men and women for prostitution inter and intra-nationally, but ignored modern forms of prostitution such as sex tourism and other forms of exploitation such as forced labor and marriage.⁸³

Although providing important steps in criminalizing trafficking, the 1951 Convention and its predecessors failed to prevent its spread. They lacked universality in ratification and application: the Convention, being the most ratified instrument of all, only had 74 States Parties.⁸⁴ The focus on prostitution as main motif for trafficking overlooked other purposes and awarded inadequate protection to the potential victims. The absence of a clear-cut legal definition led to implementation problems for criminal law specialists and governmental agents, who equated trafficking with illegal migration and treated its victims in accordance with the national immigration laws.

2. The UN Convention against Transnational Organized Crime & Additional Protocol to Prevent, Suppress and Punish Trafficking in Persons

The UN Convention against Transnational Organized Crime & Additional Protocol to Prevent, Suppress and Punish Trafficking in Persons⁸⁵ was adopted by the General Assembly of the UN on 15 November 2000 and entered into force 29 September 2003.⁸⁶ Unlike its predecessors, the Convention is open for signature not only to states but also to regional economic integration organizations, provided that at least one Member State of such organization has signed the Convention.⁸⁷ Its main purpose is to punish and prevent crimes committed by organized criminal groups where either the crimes or the groups that commit them have an element of transnational involvement. Among the measures undertaken by States Parties in accordance with the Convention are “adoption of domestic legislation and measures to establish [relevant] criminal offenses; measures to assist and protect victims and witnesses; frameworks for mutual legal assistance; extradition; law enforcement cooperation; technical assistance and training provisions.”⁸⁸

The Convention is supplemented by two additional protocols of direct relevance to the crime of trafficking—one against the Smuggling of Migrants by Land Sea and Air and another to Prevent, Suppress and Punish Trafficking in

82. *Id.* art. 1.

83. Laura Reanda, *Prostitution as a Human Rights Question*, 13 HUMAN RIGHTS Q. 202, 210 (1991).

84. *See* Exploitation, *supra* note 80.

85. *See* Prevent Trafficking, *supra* note 28.

86. The Protocol currently has 147 signatories and 133 state-parties from all regions and continents. *Id.*

87. *Id.* art. 36.

88. Valerie Wahl, *Trafficking in Human Beings for the Purposes of Sexual Exploitation—Legal Challenges in the Fight Against Modern Slavery in Crisis Regions: A Case Study of Bosnia and Herzegovina*, in PRACTICE AND POLICIES OF MODERN PEACE SUPPORT OPERATIONS UNDER INTERNATIONAL LAW 229 (Roberta Arnold & Geert-Jan Alexander Knoops eds., 2006).

Persons, especially Women and Children.⁸⁹ Although the Migrants Protocol has some relevance to the issue in discussion, as it addresses the problem of organized criminal groups smuggling migrants across the borders, it is the Trafficking Protocol that will be discussed here in more detail.

Adopted by the General Assembly, the Protocol⁹⁰ came into force on 25 December 2003 and currently has 93 parties (states and organizations) and 117 signatories.⁹¹ It sets international legal standards on criminal characterization of the crime of trafficking, makes suggestions on the severity of criminal punishment for the trafficking offenses, as well as provides benchmarks for anti-trafficking preventive policies and effective human rights measures to protect the victims.⁹² It contains provisions ensuring that trafficked persons are treated as victims and not as criminals, and, therefore, assigns them specific human rights protections, regardless of their origin, race, religion, occupation, or other characteristics.⁹³ These measures are direct reflection of already existent international human rights and criminal law norms that States have an obligation to respect and enforce. Thereby, the Protocol does not establish a new category of rights, but sets out specific measures aimed at enforcing the existing ones.

Article 3 of the Protocol introduces the first comprehensive international definition of Trafficking in Human Beings and exploitation for the purposes of trafficking.⁹⁴ The definition awards the status of victims of trafficking to all persons, men and women, recruited, transported or transferred by the means of coercion, deception, threat or use of force for the purpose of exploitation of sexual or other nature with or without their initial consent. According to the Protocol, traffic of children occurs in all the cases where “recruitment, transportation, transfer, harbouring or receipt of [a child]...for the purpose of exploitation” is involved even in situations where coercion or threat against the victims is not applied.⁹⁵

The definition regards as trafficking all steps in the process: “transportation, transferring and harboring, for the purposes of exploitation.”⁹⁶ Its provisions are not gender-specific and thus recognize that trafficking affects both genders

89. Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex III, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/45/49 (Nov. 15, 2000); Prevent Trafficking, *supra* note 28.

90. See Prevent Trafficking, *supra* note 28.

91. Press Release, U.S. Department of State, United Nations Convention against Transnational Organized Crime (TOC) (Nov. 3, 2005), available at <http://www.state.gov/r/pa/prs/ps/2005/56006.htm>.

92. United Nations Office of Drugs and Crime, UNODC and Human Trafficking, <http://www.unodc.org/unodc/en/human-trafficking/index.html> (last visited Sept. 27, 2008).

93. These rights include temporary resident status, temporary shelter, medical and psychological services, access to justice, compensation, and restitution. United Nations Office of Drugs and Crime, Protecting Victims of Human Trafficking, <http://www.unodc.org/unodc/en/human-trafficking/protection.html> (last visited Sept. 27, 2008).

94. Prevent Trafficking, *supra* note 28, art. 3.

95. *Id.*

96. Bruce Oswald & Sarah Finnin, *Combating the Trafficking of Persons on Peace Operations*, in 10 INT'L PEACEKEEPING: THE Y.B OF INT'L PEACE OPERATIONS 1, 5 (2006).

equally. It does not require cross-border movement and thereby includes within its scope of application the internal in-country traffic. However, being a supplement to the framework Convention on Transnational Organized Crime, the Protocol can only be applied to the offences of transnational character, i.e. those that either involve cross-border transfer of victims, are committed by foreign nationals on the territory of the given state, or as part of a larger transnational organized crime scheme.⁹⁷

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

Another international document worth noting in this section is the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.⁹⁸ The main purpose of the Protocol, as described in its Preamble, is addressing “significant and increasing international traffic in children for the purpose of the sale of children, child prostitution and child pornography... “ through the adoption of “a holistic approach, addressing the contributing factors, including underdevelopment, poverty, economic disparities, inequitable socio-economic structure, dysfunctioning families, lack of education, urban-rural migration, gender discrimination, irresponsible adult sexual behaviour, harmful traditional practices, [and] armed conflicts and trafficking in children....”⁹⁹ To this effect, the Protocol prohibits: (a) sale of children, defined as “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration;”¹⁰⁰ (b) child prostitution, defined as “the use of a child in sexual activities for remuneration or any other form of consideration;”¹⁰¹ and (c) child pornography, i.e. “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.”¹⁰²

The Protocol maintains a predominantly criminal law approach, evidenced by the Article 3(1), which requires the States Parties to ensure national criminal liability for the acts related to international or domestic sale of children, including attempt to commit and complicity for participation, offering, delivering or accepting a child for the purpose of sexual exploitation; organs sales; engagement in forced labor; illegal adoption; engaging a child in prostitution or production and dissemination of child pornography.¹⁰³

97. Prevent Trafficking, *supra* note 28, arts. 1, 4.

98. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, G.A. Res. 54/263, U.N. Doc. A/RES/54/263 (Jan. 18, 2002) [hereinafter Child Prostitution].

99. *Id.* at pmb1.

100. *Id.* arts. 1, 2(a).

101. *Id.* art. 2(b).

102. *Id.* art. 2(c).

103. *Id.* art. (3)(1).

C. Case-Study: Europe

European continent, represented by the Council of Europe (CoE), is an interesting example of a region divided into various political and economic entities and hosting receiving, transit and shipping segments of the trafficking chain. Europe has witnessed a substantial increase in trafficking since the collapse of the Soviet Union.¹⁰⁴ Men, women, and children from Eastern Europe found themselves trapped in numerous brothels and sweatshops, engaged in prostitution, slave and bonded labor, sale of organs, and pornographic materials in the West.¹⁰⁵

In order to suppress the future spread of human trafficking European States have traditionally put much emphasis on co-operation in criminal matters. In doing so they have often relied on regional instruments to suppress the act of trafficking, such as the European Convention on Extradition and its Additional Protocols¹⁰⁶ and the Europol Convention, as well as more general treaties containing relevant provisions, such as the Treaty of Amsterdam and European Convention on Human Rights.¹⁰⁷ Although co-operation in criminal matters still remains an important aspect of the European anti-trafficking policies, the recent policies of the Council of Europe (CoE), the Organization for Security and Cooperation in Europe (OSCE) and the European Union (EU), experienced a significant shift towards the protection of human rights of the victims.¹⁰⁸

1. Council of Europe Convention on Action Against Trafficking in Human Beings

A plethora of agreements, resolutions and programs was implemented by the Council of Europe to fight trafficking in human beings. Among these, a central place is occupied by the two conventions briefly discussed in this paper: the Convention for Protection of Human Rights and Fundamental Freedoms¹⁰⁹ and the Council of Europe Convention on Action against Trafficking in Human Beings.¹¹⁰

The 2005 Convention on Action against Trafficking in Human Beings is a comprehensive treaty aimed to “protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution.”¹¹¹ It contains a number of provisions to

104. Ryszard Piotrowicz, *The UNHCR's Guidelines on Human Trafficking*, 20 INT'L J. REFUGEE L. 242, 242 (2008).

105. Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and The Trans-Atlantic Slave Trade*, 25 B.U. INT'L L.J. 207, 218, 225, 237, 249-50 (2007).

106. Tom Obokata, 'Trafficking' and 'Smuggling' of Human Beings in Europe: Protection of Individual Rights or States' Interests?, 5 WEB J. CURRENT LEGAL ISSUES (2001), <http://webjcli.ncl.ac.uk/2001/issue5/obok5.html>.

107. *Id*

108. *Id*.

109. Protocol No. 8 for the Protection of Human Rights and Fundamental Freedoms, *done* Mar. 19, 1985, 1604 U.N.T.S. 271.

110. Convention on Action against Trafficking in Human Beings, *opened for signature* May 16, 2005, Europ. T.S. 197.

111. *Id*. art. 1(1)(b).

prevent trafficking in the supply countries as well as discourage the demand for trafficking on the recipient end.¹¹² It applies to all forms of trafficking, national or transnational, whether or not connected to organized crime involving persons legally and illegally residing in the country. The Convention also applies regardless of whether the victims are women, men, or children or whether their exploitation is of sexual, forced labor, slavery, servitude or organ trade nature.¹¹³ Consequently, it creates a different, more comprehensive and all-inclusive definition of the phenomenon, which states that ‘trafficking in human beings’

shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.¹¹⁴

Article 4 of the Convention establishes three conditions that must be present simultaneously for trafficking of adults to occur: action, means, and purpose. When it comes to children, however, “recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation” constitutes a sufficient trafficking threshold, according to the Convention.¹¹⁵

When compared to other international anti-trafficking instruments, the Convention contains a number of revolutionary features that target all forms of the trafficking sequence and aim to protect and prosecute all parties involved. As noted in its commentary, it is the first international binding document that explicitly recognized human trafficking as a violation of human rights and focuses primarily on assistance to victims and protection of their rights.¹¹⁶ Additionally, unlike its international predecessors, the Convention establishes an independent monitoring mechanism, a Group of Experts on Action against Trafficking in Human Beings (GRETA), charged with monitoring its implementation.¹¹⁷ Furthermore, as a regional instrument with a higher degree of applicability and justiciability than international treaties, the Convention recognizes the need for truly international efforts to combat trafficking and therefore attempts at creating

112. *Id.* art. 5-6.

113. *Id.* arts. 2, 4.

114. *Id.* art. 4(a).

115. *Id.* art. 4(c); *see also* COUNCIL OF EUROPE, COUNCIL OF EUROPE CONVENTION ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS AND ITS EXPLANATORY REPORT ¶57 (2005), *available at* http://www.coe.int/t/dg2/trafficking/campaign/Source/PDF_Conv_197_Trafficking_E.pdf [hereinafter Explanatory Report].

116. Although the degree to which it is binding is severely damaged by currently low number of ratifications and consequent lack of justiciability of the Treaty in the absence of the required number of ratifications necessary for its entry into force. *See* Explanatory Report, *supra* note 115, ¶ 51.

117. *Id.* ¶¶ 51, 59.

an international regime of human rights protection and criminalization of trafficking by allowing non-European States as parties.¹¹⁸

IV. PRINCIPLES OF HUMAN RIGHTS LAW AND STATES' RESPONSIBILITY

A. *Human Rights Law and Norms of Jus Cogens*

Prior to discussing the applicability of human rights law and its particular normative structure to human trafficking, one must clearly understand the purpose of human rights, the very idea of which presupposes a certain concept of the human being whose rights are being protected. By assigning legal entitlements to every person regardless of gender, age, color, or occupation, the international community recognized the dignity of every person, which is to be respected under any circumstances.¹¹⁹ Human rights are, therefore, "rights which a person enjoys by virtue of being human, without any supplementary condition being required."¹²⁰

The domain of human rights under the international law includes two categories of rights: fundamental and secondary rights.¹²¹ The fundamental human rights category includes the rights that are non-derogable.¹²² They form the peremptory norms of general international law, embodied in the notions of *jus cogens* and *erga omnes*.¹²³ The norms of *jus cogens* introduce a category of imperative uncontestable international law existent in contrast to *jus dispositivum*,¹²⁴ and include the right to life, prohibition of torture, "genocide, slavery, racial discrimination, aggression, the acquisition of territory by force, and the forcible suppression of the right of peoples to self-determination."¹²⁵

B. *Obligations Under Human Rights Treaties*

Violations contained in the crime of trafficking lead to direct infringement of a number of these non-derogable rights and appeals to specific obligations of the international community and all of its members on the basis of treaty and customary international law.¹²⁶ The 'universal' acceptance of general rules of

118. *Id.* ¶¶ 30, 381. Instead of limiting its scope to State-Parties of the Council of Europe, the Convention was envisioned as a truly international instrument, with its membership being available not only to member States, but also to States directly involved in its drafting, that of Canada, Holy See, Japan, Mexico and the United States.

119. The principle of 'human dignity' is implicitly expressed in the Preamble of the UDHR: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . ." Universal Declaration of Human Rights, *supra* note 40, at pmb1.

120. CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 3 (Philip Alston, Gráinne de Búrca, & Bruno de Witte, eds., Oxford University Press 2003).

121. ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 8 (Vaughan Lowe ed., Oxford University Press 2006).

122. *Id.*

123. *Id.* at 8, 268-70.

124. *Id.* at 53-54.

125. *Id.* at 54.

126. *See id.* at 53-58. While multilateral treaties on any given issue bind only those States that ratify them, customary international rules bind all State-parties unless one of them acted as a persistent objector during the rule's formation. The rule of the persistent objector is inapplicable to the formation of non-derogable peremptory norms of *jus cogens*.

customary international law justifies the *erga omnes* character of the obligations, thereby recognizing that all states have a collective interest to stop and prevent acts that are *delicta juris gentium*.¹²⁷ The provisions of the Universal Declaration and the two Covenants, together with the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, form the core of customary international human rights law.¹²⁸ Being widely accepted among the States, the provisions of these instruments become the norms of customary international law, and in theory generate obligations binding even non-signatory states.

In practice, however, the degree to which these instruments are binding varies considerably. Although, regional treaty regimes, such as the European or American systems, have strong enforcement capabilities from within the regions, their systems have limited potential for enforcing trafficking prohibitions worldwide.¹²⁹ Evidently, the rights constituting the core of ICCPR imply strict obligations, some of *jus cogens* statute, which States Parties are obliged to abide by. However, almost all of the rights contained in the Covenant are accompanied by limitation clauses which permit reduction in their scope in accordance with the strict requirement of proportionality. Moreover, the Covenant has allowed a number of reservations applicable to all but non-derogable civil and political rights. Additionally, strict applicability, judiciability and binding power of the provisions of ICCPR are limited by the magnitude of its ratification status. Despite that, the Covenant has been widely recognized by the states, it currently has 67 signatories (including China) and 153 States Parties.¹³⁰

Covenant on Economic, Social and Cultural Rights currently has 68 signatories and 159 Parties, with Pakistan, South Africa, and the USA remaining as non-parties.¹³¹ Since economic and social rights are “context-dependent” on the state being the potent provider of these rights, their application is limited by the scarcity of available resources.¹³² Furthermore, the rights to education, health, work, etc. gain legal stature only once the fundamental rights (to life, liberty,

127. See Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 VA. J. INT'L L. 303, 307 (1999). “In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, [and] as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.” *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5) (Second Phase Judgment).

128. TOMUSCHAT, *supra* note 120, at 32.

129. *Convention for the Protection of Human Rights and Fundamental Freedoms* art. 32, Nov. 4, 1950, Europ.T.S. 5.

130. ICCPR, *supra* note 38; see also U.S. DEP'T OF STATE, TREATIES IN FORCE 85 (2007), available at <http://www.state.gov/documents/organization/89668.pdf> (listing the parties adopting the Covenants).

131. See ICESCR, *supra* note 66; see also Office of the United Nations High Commissioner for Human Rights, *International Covenant on Economic, Social and Cultural Rights*, Sept. 26, 2008, available at <http://www2.ohchr.org/English/bodies/ratification/3.htm> (listing information regarding signatories and parties).

132. TOMUSCHAT, *supra* note 120, at 39.

movement, security, freedom from slavery and torture and non-discrimination) are fully achieved.

The rights of the child included in the International Convention on the Rights of the Child form a special category of rights. Due to its practically universal acceptance, the CRC and its two Additional Protocols created a universal binding rule of international law which prohibits child labor and outlaws the sale of children, child prostitution and pornography and the use of children in armed conflict.¹³³

Although the international community has given a lot of attention to the rights of the 'third generation' such as freedom from poverty, right to development, etc.,¹³⁴ these rights do evoke binding obligations of the states and retain their political, recommendatory character. Recognized as important in achieving high standards of living and preventing such massive human rights violations, as human trafficking, they are non-universal, non-binding or justiciable on international level. Their justiciability remains within the discretion of state sovereignty and state margin of appreciation.

Also, norms establishing the legal basis for equality and non-discrimination provide "a legal standard which is intimately related to the very concept of human rights" and thereby create their own category of international human rights norms.¹³⁵ They are indispensable for the realization of many of the fundamental as well as the majority of social and economic rights and thereby require high degree of enforcement.

C. States Responsibility for Violations of Human Rights Obligations

"Legal rules, unlike rules of morality or ethics, are not addressed solely to human conscience. Since they are committed to the care of the public authorities of the community concerned, they are, or should be, vigorously defended, and sanctions should be imposed on anyone committing a breach."¹³⁶ Enforcement under international law entails state responsibility triggering a state to cease its wrongful conduct and to remedy its consequences.¹³⁷

As provided by the ILC Draft Articles on the Responsibility of the States for Internationally Wrongful Acts, "[e]very internationally wrongful act of a State entails the international responsibility of that State."¹³⁸ However, in cases of human trafficking, can an act of an individual or criminal network be attributed to a particular state? The Draft Articles stipulate that an act is attributable to the given state "when conduct consisting of an action or omission (a) is attributable to the State under international law; and (b) constitutes a breach of an international

133.CRC, *supra* note 58, arts. 34-35, 38-39.

134.*See, e.g.*, Millennium Declaration of the United Nations, G.A. Res. 55/2 ¶¶ 11-20, U.N. Doc. A/RES/55/2 (Sept. 8, 2000).

135.TOMUSCHAT, *supra* note 120, at 41.

136.*Id.* at 1.

137.CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW 5 (2005).

138.Draft Articles on the Responsibility of the States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. Doc. A56/49(Vol. I)/Corr.4 (Dec. 12, 2001) [hereinafter Draft Articles].

obligation of the State".¹³⁹ The Articles also provide that a breach of an obligation of peremptory norm by a state is considered serious if it "involves a gross or systematic failure by the responsible State to fulfill the obligation,"¹⁴⁰ evidenced by the scope and magnitude of trafficking worldwide.

In cases where violations of human rights reach exceptionally high proportions, where they may even be classified as crimes against humanity, the individual criminal responsibility must be complemented with the responsibility of the state, often that of positive nature. The state responsibility under international law is evoked in cases where state authorities fail or neglect to protect their citizens, prevent the violations or punish the perpetrators and apply penal sanctions.¹⁴¹

Therefore, if trafficking or the events and conditions leading to the act of trafficking as well as violations occurring during the process of trafficking and subsequent exploitation are established as states' 'omissions' to prevent this conduct, they are to be considered internationally wrongful acts that evoke responsibility of the states involved.¹⁴² Human rights violations may arise from an action of any authority, official, agent, or person who *de jure* or *de facto* is a member of the state authorities, or from an omission of the state's duty to abide by and meet the conditions necessary for the effective and general, non-discriminatory, respect of human rights.¹⁴³

Should an internationally wrongful act occur, the Draft Articles continue, the responsible state(s) is under an obligation to provide measures for immediate cessation and non-repetition as well as relevant reparations as proscribed by the international law.¹⁴⁴ The responsibility of the state in reparation of the human rights violation is not criminal in nature. Traditionally, in human rights cases before the international courts, the responsibility established does not entail the punishment of the offender, instead, it entails that the guarantees for the exercise of the violated rights are safeguarded in the future, that their consequences and root-causes are remedied and that relevant indemnifications are paid.¹⁴⁵

V. PRINCIPLES OF STATES RESPONSIBILITY AND HUMAN TRAFFICKING

International human rights instruments impose a duty upon the states to respect and ensure respect for human rights law, which entails the duty to prevent and investigate violations, to take appropriate action against violators and to afford remedies and reparation to those who have been injured as a consequence of such violations. Together, these duties constitute the state's responsibility to act with

139.*Id.* arts. 1-2.

140.*Id.* art. 40.

141.*Id.* art 42.

142.*Id.* art. 15.

143.Hector Gros Espiell, *International Responsibility of the State and Individual Criminal Responsibility in the International Protection of Human Rights*, in INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 153 (Maurizio Ragazzi ed., Martinus Nijhoff 2005).

144.Draft Articles, *supra* note 138, arts. 29-31.

145.Espiell, *supra* note 143, at 152.

due diligence to “prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted by the damages resulting from the violation.”¹⁴⁶ Such ‘due diligence’ standard has been widely accepted as the measure by which state responsibility for violations of human rights by non-state actors is measured.¹⁴⁷

This principle, supported by the Protocol to the CRC Convention, invokes an explicit obligation of the states to ensure “prevention, detection, investigation, prosecution and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography and child sex tourism,” including providing international assistance to the victims and alleviating the root causes of the crimes against children.¹⁴⁸ European Court of Human Rights has similarly interpreted the obligations under the European Convention to include the duty of each Contracting State to:

[S]ecure to everyone within [its] jurisdiction the rights and freedoms defined in...[the] Convention”; hence, if a violation of one of those rights and freedoms is the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged.... The responsibility of the respondent State for any resultant breach of the Convention is thus engaged on this basis.¹⁴⁹

A. *Obligation to Prevent—Addressing the Root-causes of Trafficking*

The notion of positive obligations is supported by the Draft Articles on State Responsibility and jurisprudence of international courts and tribunals and constitutes one of the main assertions of human rights law and international law in general.¹⁵⁰ The sheer magnitude of the problem of human trafficking¹⁵¹ leads us to believe that the process itself and the crimes it involves justify the conclusion that a threat to life and well-being of certain particularly vulnerable populations exists. The very existence of such ‘reason to believe’ puts the states involved under an obligation to fight poverty and discrimination as causes of trafficking. Poverty reduction calls upon the obligation of the states to provide for medical care, education, foodstuffs and basic housing, which if not implemented may incur

146. Velásquez-Rodriguez v. Uruguay, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, at 166.

147. See generally ECOSOC Report, *supra* note 18. Reports of Special Rapporteurs on Violence against Women, on torture, on extrajudicial, summary and arbitrary executions, and on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination; by treaty bodies such as the Committee on the Elimination of All Forms of Discrimination against Women, and the Committee on the Elimination of All Forms of Racial Discrimination; by expert group meetings such as the meeting on children and juveniles in detention; in resolutions and declarations, particularly on violence against women.

148. Child Prostitution, *supra* note 98, art. 10.

149. Young James and Webster v. United Kingdom, 44 Eur. Ct. H.R. (ser. A) at 49 (1981).

150. See, e.g., Osman v. United Kingdom, 101 Eur. Ct. H.R. (1998) (discussing the notion of positive obligations).

151. 600,000-800,000 people trafficked every year according to the U.S. D. of State. TIP REPORT, *supra* note 7, at 6.

accountability for violations.¹⁵² It also requires receiving states and states of transit to co-operate to ensure full realization of economic, social and cultural rights.¹⁵³

In the context of human trafficking, the insurance of such positive obligations is mostly applicable to the initial phase, precluding the actual execution of the act of trafficking. In other words, it implies the states' duty to address the root-causes of trafficking in order to prevent the violations from occurring. The failure of national authorities to prevent foreseeable violations of human rights, such as trafficking from impoverished or war-torn areas, constitutes a direct breach of the obligations of the States Parties to the European Convention as well as international obligations under customary international and treaty law and evokes direct state responsibility.

Among the roots of trafficking, poverty, lack of opportunity, economic stagnation, are embodied in the ICESCR, which by "recognizing the fundamental right of everyone to be free from hunger" imposes an obligation on States Parties to take, individually and through international co-operation, the measures, including specific programs, which are needed to (a) improve methods of food production, conservation and distribution through dissemination of relevant knowledge; and (b) ensuring equitable distribution of world food supplies in relation to need.¹⁵⁴

Discrimination (racial, religious, and gender) and violence against women are also among the root-causes of trafficking. Therefore, to prevent human rights violations from occurring, the States Parties are obliged to "undertake to ensure the equal rights of men and women to the enjoyment of all civil and political rights."¹⁵⁵

However, such measures must not be left for the source states to solve alone. Trafficking constitutes an international, transboundary criminal act that involves every country in the world, and therefore involves universal responsibility of all the states. Therefore, in accordance with human rights instruments as well as trafficking-specific conventions, states are under an obligation to take steps individually and through international assistance and cooperation to the maximum of their available resources to ensure full implementation of protective human rights measures that would fight trafficking from its roots.¹⁵⁶

B. Obligation to Investigate and Punish the Offenders

The obligation to investigate, prosecute, and punish the offenders is the key feature of the rule of law. In case of trafficking, it refers to obligations of the states to criminalize the conduct of traffickers, pass necessary legislation and other measures to ensure such criminalization, coordinate information, provide sufficient training for law enforcement agents, cooperate in border control for the purpose of

152.OBOKATA, *supra* note 77, at 162.

153.ICESCR, *supra* note 66, art. 2; Comm'n. on Econ. Soc. and Cultural Rights [ECOSOC], General Comment 3, 5th Sess., U.N. Doc. E/1991/23, annex III at 86 (1991).

154.ICESCR, *supra* note 66, art. 11.

155.ICCPR, *supra* note 38, art. 3.

156.Protection, *supra* note 39, art. 1.

prevention, and provide access to justice for the victims and traffickers.¹⁵⁷ This obligation embodies the law enforcement strategies traditionally favored by the states. The integral part of the state obligation to investigate the offenses and punish the perpetrators is to ensure victims' direct access to justice and participation in the investigation and judicial process against traffickers.

C. *Obligation to Provide Remedies to the Victims*

In the context of trafficking, "[s]tates have a responsibility to provide protections to trafficked persons pursuant to the Universal Declaration of Human Rights (UDHR) and through ratification or accession to numerous international and regional instruments,"¹⁵⁸ rules of *opinio juris*, and customary international law.

The duty to ensure the rights of the victims of trafficking is an international obligation of *erga omnes* character.¹⁵⁹ "To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy" is the primary purpose of international human rights, and consequently, criminal law.¹⁶⁰ International law grants victims the right to justice and it is the responsibility of each state to ensure this right by *inter alia* allowing for adequate, meaningful and direct participation in relevant judicial proceedings, providing for representation, protection and physical and psychological rehabilitation and assistance.¹⁶¹

Protection of victims as an obligation to provide psychological assistance, educational and vocational training, temporary or permanent residence permits is explicit in the Trafficking Protocol as well as regional Conventions and measures adopted against trafficking.¹⁶² Since the initial act of trafficking is the direct result of states' failure to protect citizens from human rights violations, international law demands states to ensure that the adequate compensation is paid to the victims.¹⁶³

157. See, e.g., Prevent Trafficking, *supra* note 28, art. 9-11 (enumerating responsibilities of State Parties to further the goals of investigation, prosecution, and punishment of offenders).

158. GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN ET AL., HUMAN RIGHTS STANDARDS FOR THE TREATMENT OF TRAFFICKED PERSONS I, (1999). Such protections are found in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Slavery Convention, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, and International Labour Organization Conventions No. 29 concerning Forced Labour and No. 105 concerning the Abolition of Forced Labour. *Id.* at 1, n.1.

159. The U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, defines victims as "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights." Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/30, 96th plen. mtg., U.N. Doc. A/RES/40/34, Annex 1 (Nov. 29, 1985) [hereinafter Justice].

160. ICCPR, *supra* note 38, art. 2(2)(a).

161. Justice, *supra* note 159, Annex, ¶ 6 (a)-(e).

162. Prevent Trafficking, *supra* note 28, arts. 2(b), 6-7.

163. See Velásquez-Rodríguez v. Honduras, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988); X, Y and Z v. United Kingdom, App. No. 21830/93, 24 Eur. H.R. Rep. 143 (1997); Draft Articles, *supra* note 140, art. 34.

However, trafficking involves extremely sensitive issues. Its victims are often subjected to psychological and physical abuse as well as xenophobia and persecution in the host countries.¹⁶⁴ By taking away their documents and identities, and restricting their freedom of movement, traffickers deter or prevent the victims' attempts to report their situations to local authorities.¹⁶⁵ The victims are often afraid of the measures that the local authorities may take against them as illegal migrants; afraid of possible retaliation by the traffickers in response to their testimonies; and significantly damaged psychologically and physically to become active participants in the trials against traffickers.¹⁶⁶ In cases of trafficking for marriage, for example, women victims of domestic violence and marital rape are unable to seek assistance of police or the judiciary as such publicity would make them subject to immediate deportation.¹⁶⁷

Therefore, their access to justice and remedies has to be tailored by recognition of their special needs and must involve a somewhat different set of provisions of criminal, human rights and refugee law. The states where victims are rescued or apprehended have a special duty to ensure their safety, protection and rehabilitation inherent in the principle of *non-refoulement*.¹⁶⁸

D. Principle of Non-Refoulement

This Principle has traditionally been applied to persons outside their countries who qualified for the status of refugees under the Refugee Convention of 1951.¹⁶⁹ According to the Convention and customary international law, a refugee is a person who is outside the country of his nationality or, "in the case of a person having no nationality, is outside any state in which he last habitually resided, and is unable or unwilling to return to, and is unable or unwilling to avail himself of, the protection of that country, because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership of a particular social group, or political opinion."¹⁷⁰ In situations where such well-founded fear of persecution exists, the states have accepted the obligation to retain the victim on their territory.¹⁷¹ This obligation supersedes state sovereignty, the basic premise of

164.OBOKATA, *supra* note 77, at 126.

165.Potts, *supra* note 37, at 229-230.

166.OBOKATA, *supra* note 77, at 126.

167.Ryszard Piotrowicz, *Victims of People Trafficking and Entitlement to International Protection*, 24 AUSTL. Y.B. OF INT'L L. 159, 162, 164, n.27 (2005).

168.Convention Relating to the Status of Refugees art. 33, July 28, 1951, 1989 U.N.T.S. 150.

169.*Id.*

170.Anton Katz, *Refugees*, in 3 INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE (John Dugard ed., 2005).

171.*Sec'y of State for the Home Dep't v. Lyudmyla Dzhygun*, App. No. CC-50627-99(00TH00728), April 13, 2000 (Immigration App. Trib. 2000). Immigration Appeal Tribunal recognized that the respondent belonged to a particular social group under the definition of a refugee; *see also* Convention Relating to the Status of Refugees, *supra* note 168, art. 1. The Chamber ruled that in case of the woman trafficked for prostitution to the UK from Ukraine, the government of the Ukraine failed to protect her and made it more likely for her to be persecuted by traffickers if she was returned to the Ukraine.

international law, and allows for the domination of international human rights norms over national sovereignty.¹⁷²

Applicable also in cases of founded fear of torture or in response to perpetrated inhuman or degrading treatment,¹⁷³ *non-refoulement* has been incorporated in the national legislations of Belgium, Italy, the Netherlands, and the US, and has been widely applied in various international anti-trafficking conventions.¹⁷⁴ The EU Framework Decision and relevant Directives, require the EU members to issue temporary residence permits in exchange for victims' cooperation with law enforcement authorities to investigate, prosecute and punish traffickers.¹⁷⁵ The Trafficking Protocol only recommends that similar measures are established.¹⁷⁶ Article 14 of the Protocol provides that the provisions on repatriation of trafficking victims must not be applied without due regard for the victims' entitlement to *non-refoulement* under the refugee law or other existing international standards.¹⁷⁷

The option of voluntary repatriation derives from the right of the individual to freely return to his or her state of origin enshrined in international human rights instruments of ICCPR,¹⁷⁸ ACHR,¹⁷⁹ CERD,¹⁸⁰ and Migrant Workers' Convention.¹⁸¹ If the victims wish to return, their repatriation must be facilitated by all the states involved. Moreover, once returned the states of origin must ensure that the victims are reintegrated into their society through programs of physical and psychological support, education and training, and protection from retaliation by traffickers.¹⁸²

172. *But see* Nishimura Ekiu v. United States, 142 U.S. 651 (1892); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889); Naidenov v. Minister of Home Affairs, [1995] (7) BCLR 891 (T) (S. Afr.) (providing examples of courts not meeting the proposed obligation).

173. *Bensaid v. United Kingdom*, App. No. 44599/98, 33 Eur. H.R. Rep. 10, 34 (2001); *Mohammed Lemine Ould Barar v. Sweden*, App. No. 42367/98, Eur. Ct. H.R. Jan. 19, 1999 (unreported); *Asylum Applicant on Grounds of Non-state Sanctioned Slavery*, Case Comment, 3 EUR. HUM. RTS. L. REV. 330 (1999).

174. *Victims*, *supra* note 29, § 107.

175. Council Framework Decision on Combating Trafficking in Human Beings (EC) No. 2002/629/JHA of July 19, 2002 O.J. (L 203) 1.

176. *Prevent Trafficking*, *supra* note 28, arts. 5-6.

177. Joan Fitzpatrick, *Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking*, 24 MICH. J. INT'L L. 1143, 1152 (2003). *See also* *Prevent Trafficking*, *supra* note 28, art. 14.

178. ICCPR, *supra* note 38, art. 12.

179. American Convention on Human Rights, *supra* note 56, art. 22(5).

180. Compilation of General Comments and General Recommendations Adopted By Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 211 (May 12, 2003).

181. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, at 263, 96th plen. mtg., U.N. Doc. A/RES/45/158 (Dec. 18, 1990).

182. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report of the Special Rapporteur*, ¶ 10, U.N. Doc. E/CN.4/2000/62/Annex (Jan. 18, 2000) (prepared by M. Cherif Bassiouni).

VI. COMMON BUT DIFFERENTIATED RESPONSIBILITIES: SOLUTIONS TO THE RIDDLE OF HUMAN TRAFFICKING

As noted above, trafficking sequence involves two distinct but interdependent phases: that of the act of trafficking and the subsequent exploitation such act aspires. Both phases of the sequence involve grave violations of human rights that evoke various obligations of the states in accordance with international customary and treaty law, as well as general principles. Although the violations occurring during each of the steps often overlap, they involve different sets of actors and therefore remain distinctly different from each other.

The act of trafficking itself is the moment when coercion, deceit or use of force is applied by the trafficker on a person in order to lure him or her into trafficking. The actors at this stage are the trafficker or criminal enterprise of traffickers, their victim, as well as the authorities of the state of origin, where the 'seduction' occurs. This stage is characterized by a set of legal obligations that the state holds to (a) prevent the act of trafficking from occurring; (b) protect the most vulnerable population by relieving the root-causes of trafficking such as poverty and discrimination; and (c) ensure criminal responsibility of the perpetrators. The states of potential destination also have a responsibility at this stage to assist the source states in accomplishing their responsibilities to prevent the crime of trafficking. They are also under an international obligation to ensure cooperation on criminal matters that would ensure all persons involved in criminal trafficking enterprise not to escape justice.

The remaining two stages of the trafficking sequence: (1) the transit of the victims from the state of origin (2) through transit states (3) to the state of destination, involve the same main actors: the trafficker and the victim.¹⁸³ The sequence as such is, however, aided by the (a) participation of corrupt officials in source, transit and destination states who facilitate the process of trafficking through necessary legal and immigration papers; (b) networks of potential 'employers' who either buy the traffickers' victims for exploitation or facilitate their distribution; (c) the authorities of the state of transit and destination.¹⁸⁴ In the respect to the victims of trafficking, the second stage of the trafficking sequence has traditionally focused on the criminal aspects of the states' obligations.¹⁸⁵ The states authorities have equated the trafficking victims with illegal migrants, and punished them as such, while ignoring the traffickers' crimes and granting them complete impunity.¹⁸⁶

In order for anti-trafficking campaigns and programs to become effective, the states' response to victims at the transit and final stages must shift from criminal to human rights and victims' protection provided on the basis of already existent obligations inherent in international human rights, criminal and refugee law. In

183. OBOKATA, *supra* note 77, at 124-125 (describing the various methods and processes of trafficking).

184. *Id.* at 124-126.

185. *Id.* at 148.

186. *Id.* at 22-23.

other words, successful anti-trafficking strategy must be based on the differentiated notions of states responsibilities and obligations, applicable in accordance with the phases of trafficking process. Such responsibilities include obligations under the human rights, criminal and refugee branches of international law.

A. Application of Refugee Law

“International law does not recognize a general category of forced or involuntary migrant,” but a fairly elaborate regime has been established for the international protection of refugees and for victims of torture.¹⁸⁷ Under the 1984 Torture Convention, states commit themselves not to return a person to the country of origin in cases where “there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹⁸⁸ ICCPR Article 7 also contains an implicit *non-refoulement* obligation for the persons facing torture or cruel, inhuman, or degrading treatment or punishment.¹⁸⁹ Similarly, the European Human Rights Convention has been interpreted to prohibit the return of a person to a state in cases when the real risk of torture and inhuman and degrading treatment and punishment exists.¹⁹⁰ Allowing for the principle of *non-refoulement* to become a part of the institutionalized response to human trafficking would promote the victims to come forward and instigate proceedings against their traffickers without fearing persecution by the local authorities for their non-documented illegal status.

The Additional Protocol on Human Trafficking contains specific provisions discussing the possibility of assigning a refugee status and consequent possible naturalization of the victims of trafficking by the recipient states.¹⁹¹ It requires parties to adopt measures to assist the victims, including, possibly, permitting them to remain on their territory.¹⁹² By allowing for the possibility of non-repatriation, the Protocol recognizes that there may be no option for the victim to return to the state of origin, parallel to the provisions of the Convention Relating to the Status of Refugees of 1951.¹⁹³ Similar to the Refugee Convention, the Trafficking Protocol is based on the premise that victims’ protection must be provided by the state of nationality or legal residence of the victims. Only unavailability of such protection leads to the state obligation to consider granting victims asylum.¹⁹⁴

187.T. Alexander Aleinikoff, *International Legal Norms and Migration: a Report*, in MIGRATION AND INTERNATIONAL LEGAL NORMS, 10 (T. Alexander Aleinikoff & Vincent Chetail eds., T.M.C. Asser 2003).

188.Torture, *supra* note 45, art. 3 (containing an absolute prohibition of refoulement).

189.ICCPR, *supra* note 38, art. 7.

190.*Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 90-91 (1989); *Chahal v. United Kingdom*, 11 Eur. Ct. H.R. 413, 454-55 (1996).

191.Prevent Trafficking, *supra* note 28, art. 14.

192.*Id.* art. 7.

193.*Id.* art. 8; *see also* Convention Relating to the Status of Refugees, *supra* note 168, arts. 7-8.

194.Piotrowicz, *supra* note 167, at 162.

According to Article 1A(2) of the Refugee Convention a refugee is someone who:

owing to a *well-founded fear* of being persecuted for reasons of race, religion, nationality, *membership of a particular social group* or political opinion, is *outside the country of his nationality* and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹⁹⁵

For the purposes of trafficking, the elements of well-founded fear, membership of a particular social group and location outside the country of nationality or permanent residence are especially pertinent. For returning victims of trafficking with their past known to the society, the “fear of rejection or ostracism may well amount to a fear of persecution, depending on the society from which he or she originates.”¹⁹⁶ The triggering of the Refugee Convention in these cases will solely depend on the severity and well-foundedness of their fear of persecution derived from the victim’s trafficking experience.¹⁹⁷

Additionally, the Refugee Convention may apply to the victims of trafficking through their membership of a particular social or political group: “A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, and which sets them apart. The characteristic will ordinarily be one that is *innate, unchangeable or which is otherwise fundamental to human dignity*....”¹⁹⁸

It may be argued that trafficked persons, especially those trafficked for the purposes of sexual exploitation, form a special social group ostracized by the communities of their home states. This view has been supported by multiple cases ruling that former sex trade workers constituted a particular social group on the basis of them having been trafficked for social exploitation from a one given state.¹⁹⁹

Some of the victims have become trafficked due to the widespread discrimination against them on the basis of their race, religion, or nationality. In cases where the applicant for international protection is a woman, “account shall be taken of the fact that persecution, within the meaning of the Geneva

195. Convention Relating to the Status of Refugees, *supra* note 168, art. 1(A)(2) (emphasis added).

196. Piotrowicz, *supra* note 167, at 167 (noting that upon her return, a victim of sex trafficking may be ostracized by her family or community as the result of her involvement in sex trade).

197. *Id.*

198. United Nations High Commissioner for Refugees, *Summary Conclusions: Membership of a Particular Social Group*, in REFUGEE PROTECTION IN INTERNATIONAL LAW, 312-14 (Erika Feller et al. eds., 2003) (emphasis added).

199. *Islam v. Sec’y of State for the Home Dep’t and Ex Parte Shah*, 2. A.C. 629, 652 (H.L. 1999) (appeals taken from Court of Appeal); Immigration and Refugee Board Case, [1999] T98-06186 (Can.); *Sec’y of State for the Home Dep’t v. Lyudmyla Dzhygun*, App. No. CC-50627-99(00TH00728), April 13, 2000 (Immigration App. Trib. 2000); *Appellant v. Sec’y of State for the Home Dep’t*, Case No. UKIAT 00023, 14 (July 7, 2003) (Immigration App. Trib. 2003); *Petition of Olga Shimkova*, Home Department Letter of June 13, 2002, 62 (Outer House, Court of Session, Dec. 23, 2003).

Convention, may be effected through sexual violence or other gender-specific means.²⁰⁰ In such situations, where women as a group are persecuted against, the persecution ground “‘membership of a particular social group’ could apply,” triggering the application of the Refugee Convention.²⁰¹

The identity of the trafficked persons, their gender and conditions under which they have been trafficked and abused represent unchangeable facts that lead to a strong possibility of their further persecution if returned home. Furthermore, the membership of these women in the given social group of forcefully trafficked for sexual exploitation women is not resulting from their voluntary decisions. Their involuntary status is an innate and unchangeable condition that according to UNHCR standards calls to the international responsibility for protection and non-repatriation.

B. International Criminal Law Implications

Trafficking weakens the territorial integrity of states through violations of criminal and immigration laws. It also undermines the rule of law and political foundations through widespread violence and corruption employed by trafficking groups. The Trafficking Protocol, its Framework Convention, as well as the European Union, OSCE initiatives—and virtually all of the recently passed anti-trafficking laws and directives—seek to strengthen the criminal justice response through tighter crime and immigration control enhanced by larger states’ cooperation.²⁰²

Availability and implementation of adequate laws to identify trafficking as a criminal offence and prescribe realistic penalties is a necessary step towards the establishment of workable anti-trafficking policies. Policy-makers concerned with the immigration side of trafficking exclusively limit their anti-trafficking work to amplification of repressive laws, while disregarding the necessity to instigate preventative and protective measures and thereby failing to stop the proliferation and spread of slavery and forced labor. Although strategies for communication and co-operation between law-enforcement agencies of various countries are important tools in combating trafficking, foreign assistance to the source countries must involve more than exchanges among police agencies. It must, *inter alia*, entail development strategies and substantial financial assistance for programs that emphasize educational opportunities for girls and economic security for men and women.

Furthermore, the work of international criminal tribunals may serve as an additional deterrent for continuous spread of trafficking. Enslavement of persons is a punishable criminal offense that evokes both individual and group criminal liability under the statutes and jurisprudence of Rwanda and Yugoslavia Tribunals

200. *Commission Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection*, at 15-16, COM (2001) 510 final (Sept. 12, 2001).

201. *Id.*

202. Tom Obokata, *Trafficking of Human Beings as a Crime Against Humanity: Some Implications for the International Community*, 54 INT’L & COMP. L.Q. 445, 445 (2005).

and the International Criminal Court. Moreover, it may also constitute a crime against humanity.²⁰³ However, in order to qualify as such, enslavement must not only entail an ability to buy, sell or trade people.²⁰⁴ It is the continuous “duration of the suspected exercise of powers attaching to the right of ownership”²⁰⁵ as well as evidence of “widespread and systematic”²⁰⁶ abuse that play a major role in determining whether a particular case of enslavement can be regarded as a crime against humanity and be consequently considered as a gravest punishable offense under the international criminal law. In accordance with these parameters, the act of trafficking may only be regarded as a crime against humanity if the traffickers themselves directly exercise subsequent ownership of the victims; and if their practices involve an organized widespread criminal enterprise specifically aimed at ‘multiplicity of victims’ who are members of civilian population.²⁰⁷ Although, the threshold of gravity imposed by the ICC only permits the most atrocious situations of human trafficking to potentially fall under its jurisdiction, such possibility (i) confirms that trafficking is an international crime of atrocious proportions; (ii) elevates the standing of the crime of trafficking vis-à-vis other human rights violations; (iii) attracts attention of international community, assigning the anti-trafficking strategies a primary role within national policy-making; and (iv) serves as a deterrent for future perpetrators.

The threshold of gravity established by the international criminal tribunals is indeed high and probably unreachable by the crimes of traffickers. The Trafficking Protocol and Council of Europe Trafficking Convention establish much lower criminal thresholds that allow the smaller scale perpetrators, who may not necessarily be a part of larger criminal enterprises and networks, to be tried by national and international human rights courts.²⁰⁸ Their threshold is based on the identification of criminal intent of the perpetrators to facilitate the exploitation. The criminal intent element triggers the applicability of the Protocol and Convention and is sufficient proof necessary to sustain criminal liability.²⁰⁹

However, in the absence of special judicial bodies created by the Protocol and the CoE Convention to adjudicate on the violations of human trafficking, this role

203. See, e.g., *Prosecutor v. Kunarac*, Indictment IT-96-23, Decision on Motion for Acquittal, ¶ 542 (Feb. 22, 2001).

204. *Id.*

205. *Id.*

206. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15-July 17, 1998, *Rome Statute of the International Criminal Court*, art. 7(2)(c) U.N. Doc A/CONF.183/9 (July 17, 1998) (“Enslavement means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.”).

207. See *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment and Opinion, ¶ 648 (May 7, 1997); *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgment, ¶ 206 (Mar. 3, 2000); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 580 (Sept. 2, 1998); International Law Commission [ILC], *Report of the International Law Commission on the Work of its Forty-Eighth Session*, ¶ 17-22, U.N. Doc. A/51/10(Supp) (May 6-July 26, 1996) (illustrating that isolated acts committed by perpetrators do not qualify as crimes against humanity).

208. See *Prevent Trafficking*, *supra* note 28; Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report arts. 18-26, May 16, 2005, C.E.T.S. 197.

209. See *Prevent Trafficking*, *supra* note 28; Council of Europe, *supra* note 208.

is delegated directly to the states. Under this obligation, the States Parties are required to ensure full access to justice for victims of trafficking violations, appropriate legislative reforms to ensure full accountability and transparency of the trials, adequate charges and penalties, and cooperation and mainstreaming of judicial procedures in trafficking cases. In fact, the progress achieved by implementation of these measures is evident in documented substantial increases in the numbers of alleged offenders facing trial.²¹⁰ The Special Monitoring Group that will be created by the CoE Convention upon its entry into force may play an important role in ensuring the comprehensiveness and effectiveness of states policies in this regard.

VII. CONCLUSION

Trafficking in human beings is one of the most brutal violations of various branches of international and national laws of various countries. Its tentacles embrace the globe from every side. It is a truly international side effect of globalization, which in turn demands a universal policy program, capable of overturning the rate of ever-growing numbers of its victims.

Strikingly similar to the practice of slavery, trafficking requires international measures similar to those once applied to eliminate the practice of slavery. Elimination of legal justification of slavery by itself was an essential precursor to further practical measures to prevent the future slavery-like practices. The failure of the states to provide the rehabilitative measures to ensure the avoidance of future perpetual dependence of the former slaves on their 'masters' left the victims of slavery in limbo of dependence and resentment.²¹¹ Therefore, the measures to prevent such situation in case of modern forms of slavery need to include specific provisions on: (a) the methods and the procedure for the actual release of the enslaved; (b) sufficient economic autonomy of the liberated slaves; and (c) their reintegration in the society as equal citizens.

"Only when comprehensive human rights background to trafficking is fully understood, and states commit themselves to tackle human rights violations occurring along the entire spectrum of the traffic chain, will we begin to see a diminution in human trafficking."²¹² In order to be successful, the international response to trafficking needs to recognize the victims and their rights, and be more reflective of the views of those most affected. Preventing and punishing trafficking requires a multinational multi-level coordinated legal norm development, aided by communication on criminal matters, mutual assistance in law enforcement, provision of social services to the victims, harmonization of labour, immigration and refugee laws, and economic development and women empowerment programs.²¹³ Such norm development has to be based on shared but differentiated responsibilities of all the states of the world, derived from their

210. TIP REPORT, *supra* note 7, at 8.

211. David Ould, *Trafficking and International Law*, in *THE POLITICAL ECONOMY OF NEW SLAVERY* 55, 72-73 (Christien van den Anker ed., 2003).

212. Joan Fitzpatrick, *Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking*, 24 MICH. J. INT'L L. 1143, 1165 (2003).

213. *Id.* at 1145.

international and regional human rights obligations and determined on the basis of the role of each of the given states in the sequence of trafficking.

The human rights victims-centered approach must be complemented by the measures of criminal law striving to achieve accountability for traffickers. Intensified governmental cooperation in law enforcement, non-discriminative immigration laws, substantial guarantees of non-impunity for traffickers, and establishment of workable criteria distinguishing the victims of trafficking from other migrants would give teeth to the human rights framework and ensure its justiciability by assigning responsibility on all states to implement pertinent legislative measures serving as both guarantee of human rights and deterrent for future violations.

The integration of the *non-refoulement* principle of refugee law as the deportation relief for the victims of trafficking would also allow for additional transparency and willingness of the victims to seek justice with the authorities of the recipient and transit states. Cooperation with law authorities, however, should not be a prerequisite for the application of the principle, as its focus should remain not with criminalization but with relief of threat and hardship facing the victim upon return. It may also result in subsequent adjustment of the traits of behavior of traffickers and illegal migrants and may lead to undesired consequences of increased rates of trafficking and smuggling. To respond to this danger, specifically tailored immigration policies need to establish criteria necessary to minimize such consequences.

The Trafficking Protocol is a symbolic tool that embodies the direction that the international community has taken in its fight against trafficking. It represents the first fully international legal instrument that involved not only representatives of governments and diplomats, but members of civil society, specialized agencies of the United Nations and NGOs, whose presence allowed for a larger emphasis to the human rights norms evident in its text. The Protocol, however lacks universality in ratifications,²¹⁴ and has a number of limitations such as addressing trafficking only as a transnational offence,²¹⁵ which slow its effectiveness down. A valuable alternative to the Protocol is offered by the Council of Europe Convention against Trafficking. A truly comprehensive international, albeit non-universal, strategy encompassing all of the existent frameworks of criminal, human rights, immigration and labor law, as well as elements of refugee protection and victims' rights, represents the way forward for the international community in its fight against trafficking. States-signatories of the Convention must ensure its rapid entry into force and extended scope of application as the new strategy against trafficking.

214. See Prevent Trafficking, *supra* note 28 (acknowledging that the Protocol currently has 113 state-parties with China, India, Indonesia, Iran, Ireland, Israel, Japan, Kazakhstan, Morocco, Pakistan, Saudi Arabia, Sierra Leone, Singapore, Sri Lanka, Syria, Thailand, Uganda, Uzbekistan, Vietnam, Yemen, Zimbabwe still non-parties to the Protocol. For more information on ratification see: <http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>).

215. Prevent Trafficking, *supra* note 28, art. 3(2) (recognizing that the definition of 'transnational' in the Protocol is fairly wide).