



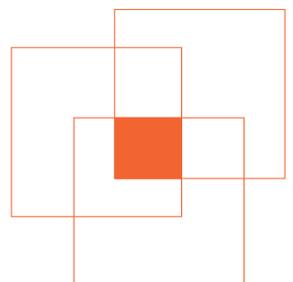
International
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Forced and compulsory labour in international human rights law

Lee Swepston

Paper presented at the Conference
“Shaping the Definition of Human Trafficking”,
held at Dickson Poon School of Law, King’s College London, May 2014

Working paper



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Foreword

In June 1998, the International Labour Conference (ILC) adopted a Declaration on Fundamental Principles and Rights at Work and its Follow-up that obligates member States to respect, promote and realize freedom of association and the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour and the elimination of discrimination in respect of employment and occupation. Those fundamental principles and rights at work are mutually reinforcing and are at the core of ILO's decent work agenda.

The Fundamental Principles and Rights at Work (FPRW) Branch is responsible for providing technical support and capacity building to ILO member States to assist them in fulfilling these obligations. It carries out technical cooperation activities and produces advocacy and knowledge tools – of which this Working Paper is an example. The Special Action Programme to combat Forced Labour (SAP-FL), which is located in the FPRW Branch, was established by the ILO Governing Body in 2001 as part of broader efforts to promote the 1998 Declaration and its Follow-Up.

This Working Paper was commissioned by SAP-FL in the context of ILO's recent standard setting process on forced labour. In March 2013, the Governing Body placed a standard-setting item on the agenda of the 103rd Session (2014) of the ILC, with a view to supplementing the Forced Labour Convention, 1930 (No. 29) and emphasizing prevention, protection and compensation measures. This decision followed the first recurrent discussion on fundamental principles and rights at work at the ILC in June 2012, and a Tripartite Meeting of Experts on Forced Labour and Trafficking for Labour Exploitation in February 2013. In June 2014, the ILC adopted a new legally binding Protocol to the Forced Labour Convention, 1930, supported by a Recommendation on Supplementary Measures for the Effective Suppression of Forced Labour (No. 203), to strengthen global efforts to eliminate forced labour. The new instruments bring the ILO's standards against forced labour into the twenty-first century to address effectively all forms of modern-day forced labour, including human trafficking. They complement existing international standards and aim to achieve greater policy coherence at national, regional and global levels.

The ILO's standard setting process on forced labour is part of a broader institutional effort to address unacceptable forms of work. Forced labour, human trafficking and slavery are among the worst forms of human exploitation found in today's labour markets. They are particularly pervasive in the informal economy but increasingly risk penetrating global supply chains. This series of Working Papers is meant to further stimulate discussion about the evolving concept of forced labour in international law and practice and its relationship with other unacceptable forms of work. Working Papers express the views of the author, which are not necessarily those of the ILO. As such, however, I hope that they will contribute to the on-going debate and stimulate further research in this area.

Corinne Vargha
Chief, Fundamental Principles and Rights Branch
Governance and Tripartism Department

Preface

Recent research by the ILO has shown the alarming scale and persistence of forced labour today, with an estimated 21 million people subjected to forced labour worldwide, generating an estimated US\$150 billion in annual profits. The staggering scale of forced labour and the huge profits that are generated on the backs of trafficked and enslaved people have called policy makers to action. All across the world, legislators, government representatives, workers, employers, business, NGOs and citizens have come together to discuss and implement laws and policies to prosecute perpetrators, to mitigate the risk of forced labour in business operations and to assist those who have been exploited.

The prohibition of slavery, forced labour, institutions and practices similar to slavery and trafficking in persons are enshrined in international law, however debates about the relationship between these concepts – and how they should be translated into domestic law – have at times led to confusion about how best to tackle the enormous challenges posed by contemporary forms of forced labour or what is often called “modern forms of slavery”.

Lee Swepston’s paper takes a historical approach to these questions, through a meticulous examination of how the understanding of the scope of slavery and forced and compulsory labour, as well as other forms of compelled labour, has evolved. Focusing in particular on the supervisory and monitoring mechanisms of the ILO and the UN, respectively, he shows how the legal concepts of slavery and forced and compulsory labour have converged over time. He concludes that at the national level, legal imprecision should be avoided to ensure that national legal prohibitions are clear and effective, and that action against compelled labour takes into account its different forms.

I am grateful to Amanda Aikman who managed the research project and to Caroline Chaigne-Hope who designed the layout of this working paper series.

Beate Andrees,
Head, Special Action Programme to Combat Forced Labour

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1

Introduction

The elimination of compelled labour is a central tenet of international human rights law today, but the concept has gone through a long and fairly complex evolution, and the dimensions of the mandates of different international mechanisms addressing aspects of it are not always clearly defined. Thus, while there are now more widespread efforts to attack various aspects of the broader problem, the terminology may sometimes get in the way of clarity. This paper will nevertheless argue that clarity in the legal definitions used at the national and international levels will facilitate attempts to eliminate or limit this kind of work. A historical approach to the development of current concerns may make this clearer, but will also indicate that attempting to draw hard distinctions among the various related concepts is not always productive.

2

Shared characteristics

All the organizations and mandates addressing aspects of the labour side of the problem agree on some basic ideas, however they may approach them.

- Compulsion to perform work is not acceptable in international, and most national, law, though there are some clearly defined exceptions.
- Consent is a key element in deciding whether there has been compulsion, but consent can be obtained fraudulently or made inoperative by intervening events.
- Some categories of persons – notably but not only children – are incapable of giving valid consent to their own exploitation.
- Some categories of persons are especially vulnerable to compulsion and exploitation, including children, migrants, domestic workers and indigenous and tribal peoples.
- Work may be compelled by either private or State action.
- Even when compelled by private action, it may be facilitated by State action or inaction.
- Apart from some long-standing exceptions to the prohibition of compelled labour (in particular those listed in Article 2 of the Forced Labour Convention, 1930 (No. 29), and in Article 8 of the International Covenant on Civil and Political Rights, 1966), State action to compel labour is a fading phenomenon – it still exists, but is now far rarer than when concerted action against it began almost 90 years ago.
- Changing social and political environments have spawned varieties of compelled labour that are adapted to changing realities.

The terms used are important, because different forms of the abuses of human rights that these represent have their own individual characteristics, and must be addressed differently in efforts to eliminate them. Using terms imprecisely may be useful for some purposes, but ultimately will be destructive. This paper will return to the importance of precision in understanding of terms in its concluding remarks.

3

Historical development of the concepts

There are two main historical tracks that have led to initially separate but converging concerns in this area – the slavery track and the forced and compulsory labour track. The International Labour Organization’s (ILO) attention to forced and compulsory labour grew in part out of the League of Nations’ attention to slavery, and its request to the ILO in 1926 to focus further attention on how to prevent forced or compulsory labour from developing into conditions analogous to slavery; but the ILO’s work also grew out of the ILO’s attention to abusive forms of labour in colonial situations. The concern with trafficking that has led to the Trafficking Protocol, and to much of the current attention to the problem is in many ways a continuation of one aspect of the slavery track, that concerning the slave trade, while adding some new elements. While the slavery track and the forced and compulsory labour track have in practice become almost indistinguishable except for the kinds of measures to be adopted to deal with them, the attention to the additional element of trafficking has created some confusion about definitions, responsibilities and the needed actions.

I. Slavery

The Slavery Convention of 1926 was a natural outgrowth of a little over 100 years of action against slavery, beginning at the international level with the adoption of measures at the Congress in Vienna in 1815 – the first intergovernmental agreement on any aspect of human rights. The 1926 Convention included a clear and simple definition of slavery and the slave trade in Article 1:

For the purpose of the present Convention, the following definitions are agreed upon:

- (1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.
- (2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

It also included provisions on forced and compulsory labour, which will be dealt with below.

The 1948 Universal Declaration of Human Rights provides at Article 4, that “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.” No mention was made of the concept of forced or compulsory labour.

When the United Nations (UN) adopted the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery in 1956, it supplemented the definition of slavery in the 1926 Convention by introducing the concept of “institutions and practices similar to slavery”, as it said in Article 1 “whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention”. These institutions and practices include:

- (a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonable assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;
- (b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;
- (c) Any institution or practice whereby:
 - (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or
 - (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
 - (iii) A woman on the death of her husband is liable to be inherited by another person;
- (d) Any institution or practice whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

The monitoring and developing understanding of these concepts is explored below.

II. Forced and compulsory labour

Having adopted the Slavery Convention, the League of Nations requested the ILO to adopt what became the Forced Labour Convention, 1930 (No. 29), on the premise that forced and compulsory labour in colonial situations was a possible precursor to slavery, though distinct from it. This had already been signalled clearly when in 1924 the Council of the League of Nations constituted the Temporary Slavery Commission, with the object, inter alia, of bringing about, “as soon as possible, the abolition of slavery in all its forms” and of taking “all necessary measures to prevent compulsory labour from developing into conditions analogous to slavery”.¹ The Slavery Convention states in its preamble “that it is necessary to prevent forced labour from developing into conditions analogous to slavery” and in Article 5 that:

The High Contracting Parties recognise that recourse to compulsory or forced labour may have grave consequences and undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery.

1. As quoted in the *Report of the Commission appointed under article 26 of the Constitution of the International Labour Organization to examine the complaint filed by the Government of Portugal concerning the Observance by the Government of Liberia of the Forced Labour Convention, 1930 (No. 29)* (ILO, *Official Bulletin*, Vol. XLVI, 1963, No. 2, Supplement II, para. 77).

It is clear from Article 5 of the Slavery Convention, as it would be under the ILO's own work on the subject, that Article 5 was intended by both organizations at the time to refer to forced and compulsory labour in a colonial situation, and that this was to be the concern of the ILO.² The ILO Committee of Experts' General Survey of 1968 on the application of the ILO's Forced Labour Conventions recalled the relationship between the efforts of the two organizations:

4. Forced labour was the first basic human rights subject within the Organisation's competence to be dealt with in ILO standards. Given the close historical and institutional relationship between slavery and forced labour, international action against the latter was seen as an extension of earlier measures aimed at the suppression of slavery, and indeed the steps which resulted in the drawing up of the Forced Labour Convention of 1930 were initiated as a result of discussions which took place in the League of Nations at the time of adoption of the Slavery Convention of 1926. While the elimination of slavery and slavery-like practices is receiving the continuing attention of the United Nations, the ending of all forms of forced labour remains a major preoccupation of the International Labour Organisation.³

Convention No. 29 adopted a definition of forced and compulsory labour, in Article 2, that makes no direct reference to slavery, and was directed principally towards the imposition of labour by government authorities, though its definition could be understood to cover forced labour imposed from any source:

1. For the purposes of this Convention the term "forced or compulsory labour" shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.

2. Nevertheless, for the purposes of this Convention, the term "forced or compulsory labour" shall not include:

(a) any work or service exacted in virtue of compulsory military service laws for work of a purely military character;

(b) any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;

(c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;

(d) any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;

(e) minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.

2. The situation in Liberia under both the Slavery Convention and the Forced Labour Convention is an interesting partial exception that may be described as a situation of domestic colonialism. It is not dealt with in detail here, but for historians of the subject the 1963 article 26 report on Liberia, *ibid.*, will make interesting reading. In the Liberian situation, as later in the Dominican Republic/Haiti case (see below), State action created a system allowing private employers to impose forced labour. There is of course a close resemblance to the situation of indigenous and tribal peoples in the Americas and Asia, which would arise more strongly under Convention No. 29 at a later date.

3. *Forced Labour*, Report III (Part III), General Survey on the Reports concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105), International Labour Conference, 52nd Session, 1968, para. 4 (hereinafter, the General Surveys of the Committee of Experts are referred to simply as, for example, the "1968 General Survey").

The standard-setting on this issue was supplemented in the ILO in the 1950s. In 1953, the report of a joint venture between the ILO and the UN, the *Ad Hoc* Committee on Forced Labour, was published.⁴ This Committee of eminent persons serving in their individual capacities had met from 1951 to 1953, inspired both by massive forced labour practices instituted during World War II and by the Soviet Gulags and related phenomena. There had also appeared extensive use of compulsion to work for the purposes of economic development in a number of independent countries, recalling colonial practices. As the *Ad Hoc* Committee described its mandate in its concluding report:

9. The Resolution of the Economic and Social Council requires the *Ad Hoc* Committee on Forced Labour:

To study the nature and extent of the problem raised by the existence in the world of systems of forced or “corrective” labour, which are employed as a means of political coercion or punishment for holding or expressing political views, and which are on such a scale as to constitute an important element in the economy of a given country, by examining the texts of laws and regulations and their application in the light of the principles referred to above, and, if the Committee thinks fit, by taking additional evidence into consideration.

10. At a very early stage of its deliberations, the Committee made a most careful examination and study of these terms of reference. They refer to systems of forced or “corrective” labour employed as a means of political coercion or punishment *and* which are on such a scale as to constitute an important element in the economy of a given country.⁵

The Preface to the final report also stated that when transmitting the report to the UN and to the ILO:

The Chairman emphasised that the Committee, in drawing its conclusions, had viewed with great concern not the repression of offences against the State, such as treason or sedition punishable in all countries, but those legislative systems which attempt to correct political opinions to suit the ideology of a particular Government.⁶

The efforts of the UN-ILO *Ad Hoc* Committee were followed up by an ILO Committee on Forced Labour.⁷

The major legislative outcome of these studies was the adoption by the ILO in 1957 of the Abolition of Forced Labour Convention (No. 105), which addressed precisely these kinds of forced and compulsory labour. Convention No. 105 does not redefine forced labour but takes as its basis the definition of forced and compulsory labour in Convention No. 29. It is a very specific instrument, banning the use of forced or compulsory labour for specified purposes instead of generally. Article 1, which contains the entire substance of this Convention, provides:

Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress and not to make use of any form of forced or compulsory labour:

- (a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
- (b) as a method of mobilising and using labour for purposes of economic development;

4. Issued jointly as UN and ILO: *Report of the Ad Hoc Committee on Forced Labour*, Supplement No. 13 in the Official Records of the Sixteenth Session of the Economic and Social Council and No. 36 in the Studies and Reports (New Series) of the International Labour Office (Geneva, 1953).

5. *Ibid.*, paras 9-10.

6. *Ibid.*, p. 1.

7. See *Report of the ILO Committee on Forced Labour (Geneva, 12-17 March 1956, 25 March-April 1957)* (ILO, *Official Bulletin*, Vol. XLII, 1959, No. 6, p. 269), and *Report of the ILO Committee on Forced Labour (Geneva, 16-24 March 1959)*, *ibid.*, p. 236.

- (c) as a means of labour discipline;
- (d) as a punishment for having participated in strikes;
- (e) as a means of racial, social, national or religious discrimination.

III. ILO understanding evolves through supervision

The ILO has a detailed and persistent supervisory mechanism, the principal component of which is the Committee of Experts on the Application of Conventions and Recommendations. This supervision is carried out by a dialogue based on regular and frequent reporting from ratifying States, supplemented by the right of employers' and workers' organizations to submit reports. The Committee of Experts makes comments – often quite detailed – in the form of published observations or unpublished direct requests. The observations are then submitted to the International Labour Conference in the Committee's annual report, where they may be discussed by the Conference Committee on the Application of Conventions and Recommendations.

In supervising the application of Convention No. 29, for many years the Committee of Experts was concerned exclusively with the imposition of forced and compulsory labour by governmental authorities.⁸ This meant essentially that it explored the limits of the exceptions to the definition of forced and compulsory labour provided for in Article 2 (quoted above). It dealt with systems of compulsory cultivation, prison labour, imposition of labour for “socially useful work” and as a penalty for vagrancy and the imposition of labour by local and tribal authorities. At the beginning of the supervisory process for Convention No. 29, which began around 1933, once the Convention had entered into force and national reports on its implementation began to be received and examined, most of the reports dealt with situations of colonial forced labour, that is, the labour imposed on “native” populations – to use the verbiage of the times – in colonies to compel “productive” activity. Some of the reports received during this period stated that there could be no forced labour under the jurisdiction of the ratifying State because they had no colonies, statements that for some years were not challenged by the ILO. For instance, the Committee of Experts reported in 1936 that “The Government of *Bulgaria* states that, as Bulgaria possesses no colonies, the Convention is inapplicable.”⁹ This attitude may have been reinforced by two factors. The first was the “transitional” provisions of Convention No. 29 (Article 1, paragraphs 2 and 3, and Articles 3 to 24), stating that forced and compulsory labour could continue to be used for both public and private purposes pending its complete abolition, under fairly stringent conditions;¹⁰ and the second was that between 1930 and 1939 the ILO adopted a series of instruments known collectively as the “Native Labour Code”, which was a collection of international instruments adopted to regulate different kinds of forced labour in colonial situations while eliminating it as quickly as possible.¹¹

8. This concern was manifested in its published observations – the references in some observations make it clear that direct requests contained some comments on private imposition of forced labour but the direct requests during these years were not made public, either at the time or later. As of 1985 both became visible on the ILO website.

9. ILO: *Summary of Annual Reports under article 22 of the Constitution of the International Labour Organisation*, International Labour Conference, 20th Session, 1936, p. 349.

10. These transitional provisions are no longer in force, and have now been deleted by Article 7 of the Protocol of 2014 to the Forced Labour Convention, 1930.

11. See the description of this practice in G. Rodgers, E. Lee, L. Swepston and J. van Daele, *The ILO and the Quest for Social Justice, 1919 – 2009* (Geneva, ILO, 2009) pp. 41 et seq. In their approach to elimination of forced labour progressively but as soon as possible, the ILO instruments, including Convention No. 29, were following the lead of the Slavery Convention, which took the same approach.

Gradually reports began to arrive from ratifying countries that forced labour was prohibited also at the *domestic* level, implying that it did not depend on a colonial setting. As late as 1947, however, the Committee of Experts stated in its report: “Detailed reports for the whole period (1939-1946) have been received only from the Government of the *United Kingdom*, among the States with territories where the provisions of the Convention are of direct practical importance.”¹²

Another of the supervisory mechanisms employed by the Committee of Experts is General Surveys, which are detailed examinations of the meaning of selected instruments and of their implementation by both ratifying and non-ratifying countries.¹³ The first of these surveys on the forced labour Conventions was carried out in 1962.¹⁴ These are mentioned in order to indicate that the ILO regularly examines in considerable detail how the forced labour (and other) Conventions are being applied, and their scope and meaning.

The first instance in which the Committee of Experts made an observation that indicated its concern with forced labour in the private sector was in an observation to Liberia in 1974 on the adequacy of the labour inspection services, particularly in agriculture. This followed up many years of comments relating to governmental concessions to foreign companies allowing them to impose forced labour on their employees, and was thus distinguishable in character from later comments on privately imposed forced labour. While this was essentially a practice similar to the colonial impositions of forced labour, though in an independent State, this comment at least opened the door to considering forced labour in the private sector.

4. Enforcement of the prohibition of forced or compulsory labour. The Committee has in previous observations stressed the need, in addition to the adoption of a legislative prohibition of forced labour (as mentioned in point 2 above), of ensuring the strict observance of such legislation, in accordance with Articles 24 and 25 of the Convention. In this connection, the Committee has had to note the insufficiency of labour inspection, particularly in the agricultural sector, where some of the major difficulties in the application of the Convention had occurred. It had requested the Government to provide information in future reports on the measures taken to ensure the observance of the Convention, including copies of the annual reports of the Ministry of Labour and Youth and the Ministry of Local Government, Rural Development and Urban Reconstruction.¹⁵

The first direct reference in an observation to privately imposed forced labour, in the form of bonded labour, was made to India in an observation on Convention No. 29 in 1976:

Bonded labour practices. In previous direct requests, the Committee had asked the Government to provide information on the action taken with a view to eliminating certain forms of forced or bonded labour for the benefit of private individuals, instances of which had been reported in certain states and territories despite the measures taken in some of them, through special legislation or by application of the Indian Penal Code, to abolish such practices. It had therefore requested the Government to ensure, as required by Articles 24 and 25 of the Convention, that adequate penalties were imposed by law, and strictly enforced, for all cases of illegal exaction of forced or compulsory labour. The Committee

12. ILO: Report IV (Appendix), Report of the Committee of Experts on the Application of Standards, International Labour Conference, 30th Session, 1947 (Geneva, 1947), p. 21.

13. For those more familiar with UN supervision, general observations or general comments by UN treaty bodies bear a resemblance to ILO General Surveys, but are usually less detailed and are more concerned with exploring the meaning of the UN Conventions than with examining their implementation at the national level.

14. This General Survey was followed by general surveys on forced labour in 1968, 1979 and 2007, as well as “Special Surveys” (less extensive but still comprehensive) in 1969 and 1997. Forced labour was also one of the subjects covered in a broader general survey on the ILO’s fundamental Conventions in 2012.

15. ILO: Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 59th Session, 1974 (Geneva, 1974), pp. 79-80.

notes with satisfaction that by virtue of the Bonded Labour System (Abolition) Ordinance, No. 17 of 1975 (which came into force on 25 October 1975, and is applicable to the whole of India) the bonded labour system shall stand abolished and every bonded labourer shall stand free and discharged from any obligation to render any bonded labour. The Committee further notes that special enforcement measures are prescribed, as well as penal sanctions, for infringement of the Ordinance.¹⁶

The same year the Committee noted, with regard to Pakistan, “allegations of recourse to coercion by certain labour recruiters”.¹⁷ These comments make it clear that the Committee of Experts had been raising the question of privately-imposed forced labour earlier in direct requests, which in those days were not published.

Nevertheless, though the Committee of Experts continued to raise similar questions with India, Liberia and Pakistan, it continued for some time after that to concentrate on systems of forced labour imposed by governments, rather than on forced labour imposed by individuals or employers. In the 1979 General Survey on forced labour, the Committee remarked in its conclusions: “The 1930 Convention concerns mainly labour imposed for economic purposes”,¹⁸ by which the Committee appears to have been referring to governmental imposition of labour for such matters as compulsory cultivation and to punish “idleness” and vagrancy.

In the early 1980s, the ILO supervisory bodies began to consider more regularly forms of forced labour other than those imposed by the State. In 1981 a group of workers’ delegates to the International Labour Conference filed complaints under article 26 of the ILO Constitution alleging violations of the ILO’s two forced labour Conventions, among others, occasioned by the massive recruitment of workers from Haiti into the Dominican Republic for the sugar cane harvest. A Commission of Inquiry was established, which issued its report in 1983.¹⁹ The Commission found a number of violations of Conventions Nos. 29 and 105, as well as of other Conventions, in a complex case that involved the governments of both countries, trafficking of migrants for exploitation, forced detention in labour camps, and other offenses of a kind that would become better known in later years. The results of the Commission of Inquiry were followed up for years afterwards by the Committee of Experts. This was something of a hybrid, with State complicity from both countries, in what was at least in part a scheme to put forced labourers in the hands of private employers.

In a 1982 observation to Mauritania, citing information submitted to the UN Working Group on Slavery of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Committee of Experts raised the existence of widespread slavery in the country and the fact that its abolition in law had had little effect in practice.²⁰ It raised these concerns, as it had for India, Liberia and Pakistan earlier, under Article 25 of Convention No. 29, under which the illegal exaction of forced or

16. ILO: Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 61st Session, 1976 (Geneva, 1976), p. 67.

17. *Ibid.* p. 76. The extent to which this refers to privately-imposed forced labour is actually somewhat confusing, since the labour recruiters were operating in the private sphere, but this reference was found in a paragraph relating to labour inspection and to Government-run labour camps.

18. 1979 General Survey, para. 151

19. *Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organisation to examine the observance of certain international labour Conventions by the Dominican Republic and Haiti with respect to the employment of Haitian workers on the sugar plantations of the Dominican Republic* (ILO, Official Bulletin, Vol. LXVI, 1983, Series B).

20. ILO: Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 68th Session, 1982 (Geneva, 1982), p. 74.

compulsory labour shall be punishable as a penal offence, and it continued to make similar observations for many years afterwards. For the Committee of Experts, from this time forward, slavery was to be considered as one of the forms of forced and compulsory labour.

Beginning in about 1985, the Committee of Experts began shifting its focus more toward forced labour imposed by employers and others without government intervention, in which the part played by governments was mostly failure to implement their own legislation. An observation in that year to Thailand concerning the sale and forced prostitution of children²¹ foreshadowed a much more intense concentration in later years on this broad field of inquiry. In 1987 the Committee received the first of many such comments to come under article 23 of the ILO Constitution,²² from trade unions in Brazil, alleging massive imposition of forced labour against agricultural workers, particularly Indians, in farms and plantations in that country.²³ In 1989 the Committee of Experts referred for the first time in an observation to raids by rebel groups in Sudan taking prisoners and imposing slavery on captured villagers.²⁴ In 1990 it began querying Haiti about forced domestic labour of children under the “restavek” system, in which children of rural origin are placed with wealthier families as domestic servants, often resulting in forced labour.²⁵

At the beginning of the 1990s the Iron Curtain collapsed, and recourse to forced labour as a means of mobilizing citizens for economic development began to crumble with the Berlin Wall. There was also a move away from such policies, as the governments of newly independent States in Africa in particular pursued their economic development through paths that began to differ from former colonial policies. With these events the concerns of ILO supervision on forced labour continued to shift. This can be measured most easily in the different concerns expressed in General Surveys on the forced labour instruments. In 1979 the General Survey made a passing mention of such practices as debt bondage and other forms of forced labour in the private sphere, but focused almost all its attention on government-imposed forced and compulsory labour. By the time the ILO carried out its next General Survey on the question, in 2007, it was obvious that the focus had changed drastically, as evidenced in the following passage from that Survey:

Nowadays, forced labour is present in some form on all continents, in almost all countries, and in every kind of economy. There are persistent cases of what may be termed “traditional” forms of forced labour. These include entrenched bonded labour systems in parts of South Asia, debt bondage affecting mainly indigenous peoples in parts of Latin America, and the residual slavery-related practices most evident today in certain parts of Africa. In numerous countries, domestic workers are trapped in situations of forced labour, and in many cases they are restrained from leaving the employers’ homes through threats or violence. Forced labour today also affects sizeable numbers of migrant workers who are transported away from their countries or communities of origin. In Europe and North America, an increasing number of women and children, but also men, are victims of trafficking for sexual and labour exploitation. There are also various forms of forced labour exacted by the State for either economic or political purposes, e.g. as a punishment for expressing one’s political views.²⁶

It will be evident from this that the ILO began in the 1980s, and continues today, to consider that the kinds of work

21. ILO: Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 71st Session, 1985 (Geneva, 1985), p. 88.

22. Article 23 of the ILO Constitution gives employers’ and workers’ organizations the right to receive governments’ reports on ratified Conventions, and to comment on them to the ILO supervisory bodies.

23. ILO: Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 73rd Session, 1987 (Geneva, 1987), pp. 88-89.

24. ILO: Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 76th Session, 1989 (Geneva, 1989), p. 92.

25. ILO: Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 77th Session, 1990 (Geneva, 1990), p. 93.

26. 2007 General Survey, para. 2.

covered by the 1926 Slavery Convention and the 1956 Supplementary Convention were also covered by ILO Convention No. 29. All kinds of compelled labour, whether expressed as slavery or through other mechanisms such as debt bondage, were thereafter considered by the ILO to be forced or compulsory labour under Convention No. 29. This did not touch on the definitions of slavery and similar practices in the UN Conventions, but examined the labour manifestations regardless of the mechanism by which people fell into such compulsion.

IV. Other ILO standards

The ILO has also adopted one Convention and two Recommendations that refer explicitly to slavery. The first of these Recommendations was the Social Policy in Dependent Territories Recommendation (No. 70), adopted in 1944 as the ILO began preparing for the post-World War II world, and is now almost entirely out of date. In Article 5 of its Annex, it listed as being among the minimum standards that should be adopted for dependent territories: “In pursuance of the objective of free labour in a free world, the principle is affirmed that the slave trade and slavery in all its forms shall be prohibited and effectively suppressed in all dependent territories.”

The Worst Forms of Child Labour Convention, 1999 (No. 182) – one of the ILO’s fundamental human rights Conventions – includes among the worst forms of child labour, in Article 1: “(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict.” The corresponding Recommendation (No. 190) states that:

12. Members should provide that the following worst forms of child labour are criminal offences:
 - (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; ...

While Recommendation No. 70 lists forced or compulsory labour separately from slavery, Recommendation No. 190 includes forced or compulsory labour as being among the forms of slavery and practices similar to slavery, thus demonstrating the convergence of the concepts in the ILO as the years passed.

In addition, other ILO standards prohibit forced and compulsory labour, or the supervision of their application has commented on this kind of labour imposed on them as a consequence of violations of those instruments, expressing this prohibition either directly or by implication. The Employment Policy Convention, 1964 (No. 122), one of the ILO’s priority Conventions, provides in Article 1(1) that Members “shall declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment”, with the term “freely chosen” referring to the right to be free from forced and compulsory labour, particularly when imposed by governments. The Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), in Article 1, requires ratifying States “to respect the basic human rights of all migrant workers”, which necessarily includes freedom from forced labour. The Domestic Workers Convention, 2011 (No. 189) provides in Article 3 that every Member take measures “to respect, promote and realize the fundamental principles and rights at work” for domestic workers, including the elimination of forced and compulsory labour. The Indigenous and Tribal Peoples

Convention, 1989 (No. 169) provides in Article 11 that “The exaction from members of the peoples concerned of compulsory personal services in any form, whether paid or unpaid, shall be prohibited and punishable by law, except in cases prescribed by law for all citizens.”

Article 3(1) of the Minimum Age Convention, 1973 (No. 138) requires ratifying States to prohibit “any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons” for children under 18 years of age, which implicitly includes forced and compulsory labour. (This prohibition was made more explicit in Convention No. 182, quoted above.)

There are also a number of other Conventions under which, whether or not they refer to forced labour explicitly, the ILO supervisory bodies have found instances of forced labour to be violations of the Conventions, or to indicate that they are not being correctly applied. These include, inter alia, the Labour Inspection Convention, 1949 (No. 81) and the Labour Inspection (Agriculture) Convention, 1969 (No. 129), the Protection of Wages Convention, 1949 (No. 95), and the Private Employment Agencies Convention, 1997 (No. 181) (which cites Convention No. 29 in its preamble).

V. The UN gathers in forced and compulsory labour

As the ILO moved to assume part of the UN’s concerns, the UN began to move in the direction of the ILO’s mandate as well.

As indicated above, for many years the mandates of the ILO and the UN remained on parallel but not converging tracks. The UN was dealing with slavery and practices akin to slavery, with the understanding that these were interpersonal crimes; while the ILO was responsible for systems of forced labour imposed by or allowed by States.

Until the end of the 1950s there was no convergence, and the attention of the two agencies remained entirely separate. The terms of reference of the UN-ILO Ad Hoc Committee on Forced Labour described above have already been cited. At the same time the ILO view was evolving as described above, however, the UN’s views were evolving with the adoption of new instruments and its monitoring of them.

In 1966, the UN adopted the two Covenants on human rights. The International Covenant on Economic, Social and Cultural Rights provides very little text on the subject of forced labour or of slavery, its Article 6(1) echoing closely the provisions of the Universal Declaration: “The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.”

The emphasis here is on the right to work and freedom of choice, not on the forced labour or slavery aspects of the problem, following the lead of ILO Convention No. 122 (see above) adopted two years earlier. While the Committee on Economic, Social and Cultural Rights, which monitors implementation of the Covenant by States parties, has occasionally ventured into forced and compulsory labour questions,²⁷ it almost always focuses its supervisory comments on discrimination and unemployment and on the effect of these phenomena on the right to work and access to employment.

27. In a certain number of cases the Committee has referred to compulsory labour in prisons, which curiously is not addressed in this Covenant but is in the International Covenant on Civil and Political Rights, whose supervisory body rarely turns its attention to this aspect.

The International Covenant on Civil and Political Rights, adopted at the same time, included a prohibition of slavery and servitude in Article 8, though it did not follow the 1956 Supplementary Convention very closely in that it did not include any reference to slavery-like practices. It did, however, include the following language, which in sub-paragraph 3 brought under the UN's mandate the ILO's concern with forced and compulsory labour, in language that closely resembled that of Convention No. 29, though with some differences:²⁸

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

It took ten years before the Covenants came into force in 1976, and it would take some time after that for the Human Rights Committee, which monitors implementation of the International Covenant on Civil and Political Rights, to begin examining these reports. In the first years of its supervision of the Covenant, there was only rarely any mention of Article 8, and of slavery and forced and compulsory labour. However, beginning in about 2000, the Human Rights Committee began to examine on a fairly thorough and systematic basis the information that came before it on slavery, forced labour and trafficking in States Parties.

The Human Rights Committee has not undertaken any detailed examination of the meaning and scope of slavery, servitude or forced and compulsory labour. It has examined the application of the relevant provisions in a pragmatic manner that does not extend or redefine these terms, and that does not occasion any question of conflict with the obligations under Convention No. 29. It appears, in fact, that the ILO machinery and the UN treaty body are pursuing the examination of these questions with a tacit understanding that the coverage of their standards is virtually identical in spite of minor variations in wording. Occasionally they refer to each others' comments on similar questions, but for the most part they appear each to note what has been brought up in other supervisory bodies and to follow it up as appropriate under their own instruments.

28. For instance, the inclusion of the language regarding "hard labour" in paragraph 3(b) may seem to set up a situation where the quality of the labour imposed on prisoners would have to be evaluated, as well as the fact of its existence as under the ILO standards. However, the Human Rights Committee appears not have raised this question.

The Committee on Economic, Social and Cultural Rights has for its part adopted General Comment No. 18 in 2005 exploring the meaning and implications of the right to work. Among its findings is the following:

9. The International Labour Organization defines forced labour as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”. The Committee reaffirms the need for States parties to abolish, forbid and counter all forms of forced labour as enunciated in article 4 of the Universal Declaration of Human Rights, article 5 of the Slavery Convention and article 8 of the ICCPR.²⁹

VI. Other UN standards

The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted in 1990, explicitly prohibits both slavery and forced labour, in Article 11:

1. No migrant worker or member of his or her family shall be held in slavery or servitude.
2. No migrant worker or member of his or her family shall be required to perform forced or compulsory labour.
3. Paragraph 2 of the present article shall not be held to preclude, in States where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court.
4. For the purpose of the present article the term “forced or compulsory labour” shall not include:
 - (a) Any work or service not referred to in paragraph 3 of the present article normally required of a person who is under detention in consequence of a lawful order of a court or of a person during conditional release from such detention;
 - (b) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
 - (c) Any work or service that forms part of normal civil obligations so far as it is imposed also on citizens of the State concerned.

The 2006 UN Convention on the Rights of Persons with Disabilities provides the same, though more briefly, in Article 27(2): “2. States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.”

The UN Convention on the Rights of the Child, adopted in 1989, does not refer directly to either forced labour or slavery, but it contains related language that is dealt with by the Committee on the Rights of the Child, its monitoring body, as falling within these concepts. Article 32 on economic exploitation states that: “1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.”

Article 34 goes on to provide:

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

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

29. Committee on Economic, Social and Cultural Rights (CESCR): General comment No. 18 (2005): The right to work, para. 9.

The Committee on the Rights of the Child has considered that such questions as slavery, forced labour, exploitation for prostitution and trafficking in children are forms of exploitation under these Articles,³⁰ and these practices have all been assimilated to the ILO's supervision of Conventions Nos. 29 and 182 as forms of forced and compulsory labour.

The UN Convention on the Elimination of All Forms of Discrimination against Women, adopted in 1979, also does not contain any direct reference to forced labour, slavery or related concepts, though Article 11 does contain provisions on the right to work and conditions of work. However, the body that monitors the Convention's implementation, the Committee on the Elimination of Discrimination against Women, has been raising issues related to them in its comments. For example, it has urged States to "strengthen mechanisms for the investigation, prosecution and punishment of traffickers and support services for victims of trafficking and forced prostitution as well as measures for witness protection".³¹ It has also expressed concern over other forms of forced labour imposed on women in relation to employment.³²

VII. UN monitoring of the slavery instruments

While the ILO was clarifying and extending its understanding of the meaning of forced and compulsory labour under its own instruments, various UN mechanisms were expanding, but not necessarily clarifying, the meaning of slavery under UN instruments.

There is no direct supervisory mechanism for the League/UN Slavery instruments. Treaty bodies – that is, bodies that receive governments' reports and compare them to the obligations under the conventions concerned – have been created for some UN human rights Conventions, as discussed above, but not for these instruments. Instead "expert bodies" or special rapporteurs created directly or indirectly by the UN Commission on Human Rights, and as of 2007 by the Human Rights Council, examine their implementation in a less systematic way, as they are not as closely bound to the specific instruments as are the treaty bodies.

The situation concerning the Slavery Conventions is nicely summarized in a recent book:

[I]t was in 1974 that the UN Sub-Commission ... recommended the establishment of a five-person Working Group on Slavery. It was here, within the Working Group on Slavery (and its later incarnation as the Working Group on Contemporary Forms of Slavery) that the legal regime of slavery and human exploitation gave way to the political; wherein the Working Group, at its very first session in 1975 made plain that it was not going to be bound by the definition of slavery established by the 1926 and 1956 conventions. Instead, while tentatively putting forward two possible broad definitions of slavery, the Working Group was in general agreement that "the definition should be flexible enough to apply to any form of slavery which might emerge in the future and not to limit the scope of investigation of all its possible manifestations."³³

30. See, e.g., Committee on the Rights of the Child, Fifty-seventh session (30 May – 17 June 2011), Concluding observations, Cambodia, UN Doc. CRC/C/KHM/CO/2-3, 3 August 2011, paras 67, 71, 73.

31. See, e.g., Committee on the Elimination of Discrimination against Women, Concluding observations on the combined initial and second periodic reports of Afghanistan, UN Doc. CEDAW/C/AFG/CO/1-2, 30 July 2013, para. 27(c).

32. See, e.g., Committee on the Elimination of Discrimination against Women, Concluding observations on the combined sixth and seventh periodic reports of the Dominican Republic, UN Doc. CEDAW/C/DOM/CO/6-7, 30 July 2013, para. 35(i).

33. J. Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Leiden, Nijhoff, 2013), p. 153. This passage goes on to state: 'With this in mind, the Working Group did not hesitate, despite the silence of the newly established Apartheid Conven-

In September 2007, the newly created Human Rights Council in Resolution 6/14 established a new mandate on Contemporary Forms of Slavery, including its causes and consequences, to take the place of the Working Groups established by the Commission on Human Rights. This mandate provided for a Special Rapporteur on Contemporary Forms of Slavery who would replace the Working Group on Contemporary Forms of Slavery in order to address the issue of contemporary forms of slavery within the UN system. Resolution 6/14 requests the Special Rapporteur to: “(a) Focus principally on aspects of contemporary forms of slavery which are not covered by existing mandates of the Human Rights Council; (b) Promote the effective application of relevant international norms and standards on slavery; ...”.³⁴

The website of the UN Office of the High Commissioner for Human Rights describes the mandate of this Special Rapporteur as follows: “The mandate on contemporary forms of slavery includes but is not limited to issues such as: debt bondage, serfdom, forced labour, child slavery, sexual slavery, forced or early marriages and the sale of wives.”³⁵

The July 2013 report of the Special Rapporteur describes the international legal framework covered by the mandate, which includes instruments dealing with: “A. Slavery ... B. Debt bondage and serfdom ... C. Servile marriage ... D. Child slavery ... E. Domestic servitude ... F. Forced labour.”³⁶ The same report nevertheless goes on to state: “Slavery and compulsory or forced labour are separate practices that are addressed independently in most international human rights documents.”³⁷ As indicated above, that had been true, but increasingly no longer was. In any case, the practice under these mandates has been to consider slavery and practices similar to slavery, and forced and compulsory labour, as closely related phenomena.

VIII. Regional standards

The concepts of prohibiting slavery and forced and compulsory labour are also deeply embedded in regional human rights standards, which follow closely the concepts enunciated in universal standards.

Europe. The Charter of Fundamental Rights of the European Union provides in Article 5:

Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. Trafficking in human beings is prohibited.

The European Convention on Human Rights develops these concepts in its Article 4, in terms that closely resemble the International Covenant on Civil and Political Rights, combining the concerns of the UN slavery instruments and Convention No. 29:

tion[,] to equate in direct terms apartheid and slavery ... “... since the whole population finds itself under the control of a few, through force”. With this as a starting point, some Members of the Working Group considered that apartheid and colonialism “were, in themselves, forms of slavery ...”. This a very different point not explored in detail here, but it does illustrate the lack of stringency in definitional criteria exercised by the Working Group.

34. Human Rights Council Res. 6/14, Special Rapporteur on contemporary forms of slavery (adopted without a vote, 21st meeting, 28 September 2007), para. 2.

35. See Special Rapporteur on Contemporary forms of slavery, UN Office of the High Commissioner for Human Rights, <http://www.ohchr.org/en/issues/slavery/srslavery/pages/srslaveryindex.aspx> (last visited 30 June 2014).

36. Special Rapporteur on contemporary forms of slavery, including its causes and consequences, G. Shahinian, *Thematic Report on challenges and lessons in combating contemporary forms of slavery*, Human Rights Council, 24th Session, UN Doc. A/HRC/24/43 (1 July 2013), p. 2.

37. *Ibid.*, para. 32.

Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this Article the term “forced or compulsory labour” shall not include:
 - (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
 - (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
 - (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
 - (d) any work or service which forms part of normal civic obligations.

The European Court of Human Rights has issued a number of decisions on forced labour, slavery and trafficking, in application of the European Convention.³⁸ These cover a variety of issues, including forced labour of domestic workers, trafficking and forced prostitution, work during detention, military service and substitute service. The cases on forced labour of domestic workers has helped focus attention, inside and outside Europe, on the invisibility of these workers from national labour law and even criminal law, as they often are not covered by labour codes and in far too many cases are not subject to labour inspection.

See, for instance, the case of *Siliadin v. France* (2005), in which a Togolese national having arrived in France in 1994 with the intention to study, was made to work instead as a domestic servant in a private household in Paris. Her passport was confiscated, and she worked without pay 15 hours a day, without a day off, for several years. The applicant complained about having been a domestic slave. In a useful distinction as to the meaning of these related concepts, the European Court of Human Rights found that the applicant had not been enslaved because her employers, although exercising control over her, had not had “a genuine right of legal ownership over her, thus reducing her to the status of an object”. It held, however, that the criminal law in force at the time had not protected her sufficiently, and that although the law had been changed subsequently, it had not been applicable to her situation. The Court concluded that the applicant had been held in servitude, in violation of Article 4 (prohibition of slavery, servitude, forced or compulsory labour) of the European Convention on Human Rights.

The Americas. The 1969 American Convention on Human Rights, in its Article 6, prohibits slavery and forced labour in detail, in terms closely resembling the International Covenant on Civil and Political Rights, Convention No. 29 and the European Convention:

1. No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.
2. No one shall be required to perform forced or compulsory labor. This provision shall not be interpreted to mean that, in those countries in which the penalty established for certain crimes is deprivation of liberty at forced labor, the carrying out of such a sentence imposed by a competent court is prohibited. Forced labor shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner.

³⁸ See European Court of Human Rights, Press Unit, Factsheet – Slavery, servitude, and forced labour (March 2014), http://www.echr.coe.int/Documents/FS_Forced_labour_ENG.pdf (last visited 30 June 2014), which summarizes a number of cases.

3. For the purposes of this article, the following do not constitute forced or compulsory labor:

- (a) Work or service normally required of a person imprisoned in execution of a sentence or formal decision passed by the competent judicial authority. Such work or service shall be carried out under the supervision and control of public authorities, and any persons performing such work or service shall not be placed at the disposal of any private party, company, or judicial person;
 - (b) Military service and, in countries in which conscientious objectors are recognized, national service that the law may provide for in lieu of military service;
 - (c) Service exacted in time of danger or calamity that threatens the existence or the well-being of the community;
- or
- (d) Work or service that forms part of normal civic obligations.

Africa. The African Charter on Human and Peoples' Rights contains only one brief provision on this subject, at Article 5:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Asia. Asia has not adopted a regional human rights convention, but the 2012 ASEAN Declaration on Human Rights contains the following provision: "13. No person shall be held in servitude or slavery in any of its forms, or be subject to human smuggling or trafficking in persons, including for the purpose of trafficking in human organs."

IX. The Trafficking Protocol

The adoption in 2000 of the UN Convention against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (the "Trafficking Protocol") has inadvertently introduced some confusion into the discussion.

The instruments adopted in 2000 were not the first on this subject. In 1949, immediately after the adoption of the Universal Declaration of Human Rights, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others was adopted by General Assembly Resolution 317(IV) on 2 December 1949. This Convention continued the line of instruments adopted over the years on the "white slave traffic", some of them even before the creation of the League of Nations: the International Agreement of 18 May 1904 for the Suppression of the White Slave Traffic; the International Convention of 4 May 1910 for the Suppression of the White Slave Traffic; the International Convention of 30 September 1921 for the Suppression of the Traffic in Women and Children; and the International Convention of 11 October 1933 for the Suppression of the Traffic in Women of Full Age.

The essence of the 1949 Convention is found in Article 1:

The Parties to the present Convention agree to punish any person who, to gratify the passions of another:

- (1) 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.

When the UN adopted the Trafficking Protocol, it was intended “To (a) prevent and combat trafficking in persons, ... (b) To protect and assist the victims of such trafficking ... ; and (3) To promote cooperation among States Parties to order to meet these objectives.” This instrument was adopted at a time when trafficking was perceived to have become a much more widely practiced phenomenon, particularly with the end of the Communist system in Europe resulting in the lowering of border restrictions, and the easing of transport.

In Article 3, the Protocol provides the first internationally agreed definition of trafficking in persons:

For the purposes of this Protocol:

- (a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or 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;
- (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;
- (c) The recruitment, transportation, transfer, harbouring 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;
- (d) “Child” shall mean any person under eighteen years of age.

The relationship between this instrument and others is somewhat difficult to define precisely.

However, as an ILO publication stated in 2005,

The ILO Conventions relevant to trafficking and the Protocol originate from different bodies in different contexts. They do not legally substitute for each other. Instead, they are complementary contributing to the common goal of tackling the problem of trafficking in persons.³⁹

It is also clear that the Trafficking Protocol does not alter the meaning of the terms used in the UN and ILO Conventions. The definition of trafficking neither replaces nor modifies the meaning of the terms in the other instruments examined here, but includes the practices they prohibit within its own coverage. The Protocol simply includes the practices prohibited under the slavery conventions and the forced labour conventions as forms of exploitation which make the recruitment, transportation, etc., of persons into trafficking. This is similar to the ways in which both the ILO and the UN have gradually expanded their range of action into the areas covered by the other organization – the ILO considers that slavery falls within its own mandate, as the UN has assumed a mandate over forced and compulsory labour. Neither interferes with the other, and the action of both organizations is enhanced by the broadened coverage so long as neither challenges the mandate of the other.

The act of trafficking in persons is covered by ILO standards as an aspect of clandestine labour migration, dealt with in the Migrant Workers (Supplementary Provisions) Convention, 1975. This instrument does

39. ILO: *Human Trafficking and Forced Labour Exploitation: Guidance for Legislation and Law Enforcement* (Geneva, 2005), p. 1.

not attempt to define trafficking, and indeed mentions it almost in passing in Article 5 of a long and complex instrument: ‘One of the purposes of the measures taken under Articles 3 and 4 of this Convention shall be that the authors of manpower trafficking can be prosecuted whatever the country from which they exercise their activities.’ Thus the ILO is concerned with it because of its potential to result in labour exploitation, and this is reflected in the standards adopted by the International Labour Conference in 2014. Trafficking may result in forced and compulsory labour when compulsion is used to secure and exploit labour. There are therefore abuses that result in trafficking that are within the ILO’s responsibilities, notably with regard to deceptive practices of labour recruitment for migrants and other workers, and the exploitation of children, inter alia. Thus a number of comments by the ILO Committee of Experts and other supervisory bodies under certain Conventions do refer to trafficking and urge that it be stopped.

The second point is that some of the aspects of trafficking in the Trafficking Protocol are clearly forced and compulsory labour, while others lie outside the ILO’s responsibility and the coverage of its standards. All the forms of exploitation detailed in the last sentence of subparagraph (a) of the definition are labour, with the exception of the removal of organs; forms of exploitation that may take another form may not be within the ILO’s responsibility, though it is somewhat difficult to imagine them. The exploitation of children covered in sub-paragraphs (c) and (d) is also well within the ILO’s responsibilities. What brings these practices within the reach of the forced labour and related standards is the means which are used to secure exploitation.

However, although this is not specified in the text of the Trafficking Protocol, it does not appear to apply to all the forms of forced and compulsory labour covered by ILO Conventions Nos. 29 and 105. In particular, it does not appear to relate to any of the State-imposed forms of forced labour such as compulsory military service, prison labour, or other exceptions from the coverage of “forced and compulsory labour” as defined in Article 2 of Convention No. 29. It would indeed be difficult to justify applying the Trafficking Protocol to a conviction in a court of law that involves labour as a part of the sentence, especially as this practice is explicitly allowed under ILO Convention No. 29 as long as certain conditions are respected. The definition of trafficking in the Trafficking Protocol therefore is not in conflict with the definition of forced and compulsory labour in Convention No. 29, but rather applies only to a part of the practices covered by that instrument.

The same conclusion applies in reverse to the coverage of the Protocol and Recommendation adopted by the International Labour Conference in 2014. These instruments make no attempt to define trafficking, but rather refer simply to forced and compulsory labour that may result from it and to phenomena that may lead to it. See in particular Article 1(3) of the new Protocol: “The definition of forced or compulsory labour contained in the Convention is reaffirmed, and therefore the measures referred to in this Protocol shall include specific action against trafficking in persons for the purposes of forced or compulsory labour.”

Therefore, in recommending action against trafficking, they supplement rather than conflict with the Trafficking Protocol, reinforcing the importance of that instrument in areas of particular concern to the ILO. The proposed ILO instruments would add some elements to the international action to prevent trafficking and to protect and compensate its victims in so far as they thereby become victims of forced and compulsory labour, without interfering in operations to suppress trafficking as such, while also adding some labour considerations to the treatment of trafficked persons. This is similar to the ways in which slavery continues to an object of the work of the UN, without any interference in the operation of the Trafficking Protocol.

4

Concluding remarks

The need for precision in definitions

It is important that international human rights law be clear in its understanding of the terms used in its instruments, and of the fields of action of each of the agencies that define and enforce human rights. As indicated above, the long history of the treatment of slavery and practices similar to slavery on the one hand, and of forced and compulsory labour on the other, has resulted in a convergence of concerns, with an understanding that all the kinds of slavery and slavery-like practices contemplated in the UN instruments are also covered by Convention No. 29. At the same time, UN standards and their supervision speak of both slavery and forced labour.

There are two main reasons to be concerned with precision in legal definitions. The first is that States need to be able to define exactly what conduct is prohibited and what is allowed in order to give certainty to the law enforcement and labour services. A simple prohibition of forced labour or of slavery is insufficient for the national authorities to act against these practices effectively. The national definitions adopted in application of the international standards need to spell out the exact content of these practices. For instance, a blanket prohibition of all forced labour, as is found in some national constitutions, does not take into account the permissible exceptions for such subjects as prison labour, compulsory military service, civic duties and the like, until the meaning of the constitutional prohibition is elaborated in law.

In the second place, a definition of the violation to be attacked may indicate the terms of response. Debt bondage must be addressed differently from classic slavery, though both fall under the broader definition of forced and compulsory labour. Exploitation of child labour for prostitution or other economic exploitation is a different concept from prohibitions on resignation from a post in the armed forces – and again, both fall under the reach of prohibited forced or compulsory labour, but they must be dealt with differently.

A similar conclusion may be reached with regard to action against trafficking. The kinds of exploitation which it prohibits must be addressed not only in order to combat trafficking as such, but also to address the abuses to which it gives rise.

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