Analysis of the definition of trafficking in human beings in the Palermo Protocol

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General introduction

This report is made on the request of UNDP Belarus.

The aim of this report is

- to analyse the definition of trafficking in human beings as contained in the Palermo Protocol, its universality and applicability in national law;
- to analyse its relation with related phenomena, in particular prostitution, smuggling of human beings and forced labour, slavery-like practices and servitude;
- to give recommendations for the application of the Palermo definition in the national criminal code of Belarus

PART I THE PALERMO PROTOCOL

1. Introduction

In this part some general issues will be discussed with regard to the definition of trafficking as contained in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention Against Transnational Organized Crime, as agreed upon in Palermo and adopted by the General Assembly of the UN at 15 November 2000 (also: Palermo Protocol).[1] In particular, attention will be paid to the relation between trafficking in human beings and prostitution, the issue of consent, the relation with smuggling and the relation between trafficking and its forced labour and slavery-like outcomes. Also the relation of the Protocol with its parent convention will be discussed. Only limited attention will be paid to the trafficking of children. Given their specific position and needs this would require a separate study.

This analysis will focus on the definition in the Palermo Protocol. The issue of victim protection and assistance is not discussed nor is the issue of sanctions. It should be noted, however, that there is broad spectrum of sanctions – criminal, administrative and civil/labour - that are relevant to prevent and combat trafficking. Guidelines for the use of these sanctions can be found in the ILO Guidance for Legislation and Law Enforcement on Human Trafficking and Forced Labour Exploitation (ILO, Human Trafficking and Forced Labour Exploitation 2005).[2]

2. Definition of trafficking in human beings in the Palermo Protocol

Art. 3 of the Palermo Protocol contains the following definition of trafficking in human beings:

(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*

[1] Together with the *Protocol against Smuggling of Migrants by Land, Sea and Air*. The parent convention came into force 29 September 2003; the Trafficking Protocol came into force 25 December 2003.

[2] Other relevant guidelines are the Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention against Transnational Organized Crime prepared by the UN Office on Drugs and Crime (UNODC, 2004), Recommended Principles and Guidelines on Human Rights and Human Trafficking issued by the UN High Commissioner for Human Rights (UN HCHR, 2002) and, in particular with regard to children, the UNICEF Guidelines for Protection of the Rights of Children Victims of Trafficking in South Eastern Europe (2003).

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)

(d) 'child' shall mean any person under eighteen years of age.

The Protocol applies to the offences defined as trafficking where they are transnational in nature and involve a criminal group (Art. 4), and obliges State Parties to penalise the conduct set forth in Art. 3 when committed intentionally (Art. 5, para 1) as well as to penalise attempting to commit, participating as an accomplice and organizing or directing other persons to commit an offence established in accordance with the first paragraph (Art. 5, para 2, sub a, b & c).

The definition thus contains three distinct, but interconnected elements:

- the "acts": the recruitment, transportation, transfer, harbouring or receipt of persons;
- the "means": 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 payments or benefits to achieve the consent of a person having control over another person;
- the "purposes": 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.

The Protocol is primarily a law enforcement instrument intended to promote cross border co-operation by governments and to ensure that all countries have adequate laws to address these crimes. Art. 2 states as purposes "to prevent and combat trafficking in persons, paying particular attention to women and children; to protect and assist the victims of such

trafficking, with full respect for their human rights; and to promote co-operation among States Parties in order to meet the above objectives".

3. Background

The Protocol, as all international treaties, is the result of political negotiations and thus a (political) compromise between different views. Points of debate during the negotiations of the definition were in particular the following issues:

- the relation between trafficking and prostitution;
- the issue of consent;
- the relation between trafficking and smuggling;
- the broadening of the definition of trafficking to include other purposes than (forced) prostitution;
- the broadening of the definition to include the trafficking of men and boys.

One of the consequences of the definition being a compromise is that some elements are not defined at all, e.g. the concept of sexual exploitation. For other concepts, like forced labour, one has to go back to other international treaties (see part III).

Especially undefined terms pose a problem when translating the Palermo definition into domestic criminal law in the light of the principle of legality, in particular the requirement of *lex certa* (clarity of the elements that constitute a crime) and *praevia lege* (non-retroactivity). Crimes must be defined as clearly and unequivocally as possible and it must be clear in advance which behaviour is punishable and which one is not.

The Protocol enjoys wide international support. This applies in particular to the definition. The preamble, for example, of the EU Framework Decision on combating trafficking in human beings[3] mentions the UN Protocol as a decisive step forwards towards international cooperation, and adopts a definition that heavily leans on the Protocol's definition. Also the OSCE Action Plan adopts the Protocols definition.[4]

4. The concept of exploitation

[3] Decision of 19 July 2002 (2002/629/JBZ), OJ 1.8.2002 L 203, coming into force the same day. The Framework Decision obliges Member States to criminalise trafficking as defined in the FD, and to adopt a minimum/maximum sanction of 8 yrs imprisonment if certain aggravating circumstances apply. Member States must comply to the FD before 1 August 2004. The purpose of Framework Decisions is to harmonise the legislation and regulations of the EU Member States. They are binding as to the result, but Member States are free to choose the forms and means by which they achieve this result.

Compared to the traditional concept of trafficking as limited to prostitution, the definition contains a number of new elements, in particular the broadening of the concept of trafficking to include all forms of forced labour and slavery-like exploitation. This poses important challenges for national governments and legislatures. While the vast majority of countries have ratified the major human rights treaties, including those on slavery and forced labour, many have not provided for the specific offences of forced labour, slavery, slavery-like practices and servitude in their criminal laws or failed to provide for appropriate penalties. As worded by the ILO:

> *"These developments thus pose conceptual challenges, as well as challenges for law enforcement. They introduce into international law the concept of exploitation – broken down broadly into labour and sexual exploitation – regarding which there has been limited juridical precedent. And they require States Parties, several of which have hitherto adopted anti-trafficking laws which cover only the sexual exploitation of women and children, to adopt and amend their laws in order to have a broader concept of trafficking and exploitation"* (ILO, Global Report 2005, p. 7)

In particular the concept of "exploitation of prostitution of others" and "sexual exploitation" is problematic. Both concepts are not defined in international law. This is different for the other forms of exploitation that are listed. Although it can be difficult to distinguish between "merely" illegal and/or extremely exploitative working conditions[5] and situations of forced labour, slavery etc., there is a wealth of history of international law, standards and interpretations of these concepts to rely on, which can provide sufficient certainty for criminal law and sanctions. Thus, although the Protocol does not give a definition of what should be "exploitation" for the purpose of the Protocol, one can go back to other international instruments to explain and interpret the meaning of the concepts of "forced labour or services", "slavery or practices similar to slavery" and "servitude". This will be done in Part III.

The concepts of "exploitation of the prostitution of others" and "sexual exploitation" will be separately dealt with in para II.4.

However, while the Protocol draws certain distinctions between trafficking for sexual exploitation on the one hand, and trafficking for labour or services (and also slavery, slavery-like practices and servitude) on the other, this does not imply that coercive sexual exploitation does not constitute forced labour. The ILO supervisory bodies have regularly dealt with forced prostitution and sexual exploitation under the forced labour conventions (ILO,

[4] Decision No. 557, OSCE Action Plan to Combat Trafficking in Human Beings (PC.DEC/557, 24 July 2003).

Global Report 2005, p. 7).

5. Relation between trafficking in human beings and prostitution

One of the issues during negotiations was the relation between trafficking and prostitution. One position held that (the exploitation of) prostitution per se constitutes trafficking, irrespective of the use of force or deceit. Others were of the opinion that a distinction needs to be made between prostitution as such and trafficking. Underlying are two points of debate:

- the validity of the distinction between "voluntary" and "forced" prostitution;
- the interpretation of the concept of "forced prostitution".

Some argued that prostitution is forced by definition because no person can voluntarily make the decision to engage in prostitution. From this point of view all (exploitation of) prostitution is slavery, irrespective questions of consent or coercion. It was argued that if a distinction would be made between voluntary/consensual and forced prostitution, this could be used to disqualify trafficking victims by arguing that it was their own choice (see for a more detailed discussion of this issue para. I.5.1 on "forced prostitution" and para. I.6 on "the issue of consent"). Others argued that individuals are capable of making an independent decision to engage in prostitution for various reasons and that the Protocol should only cover forced prostitution, as the core element of trafficking is the use of force or deceit and not the type of work or services that one is forced to perform.

Apart from this (in essence more philosophical) discussion about the issue of free choice (or in philosophical terms: free will) there was a more practical argument, notably the fact that States have very different legal regimes on prostitution, varying from criminalising the various parties involved to the legal recognition of prostitution as labour. If the Protocol were to be ratified by as many States as possible, it should accommodate all these different legal systems and not exclude some on forehand. Another argument was that the debate on whether prostitution could be a free choice or not was unproductive because unsolvable and that negotiations should concentrate on those areas in which consensus existed, notably the combat of forced prostitution.

Related to this issue is the confusion about the interpretation of the English word "exploitation". In principle this word can have both a neutral meaning in the sense of the extraction of labour or services (like in: the exploitation of a bookstore) and a pejorative meaning in the sense of abuse. Translated to the issue of prostitution the neutral meaning of

[5] E.g. very low wages, long hours or unsafe and unhealthy working conditions.

the word "exploitation" would refer to the organisation of prostitution of others on a consensual basis, whereas the pejorative meaning would refer to the organisation of the prostitution of others with the use of coercion or deceit.

The compromise that was agreed upon in the end held the use of the terms "exploitation of the prostitution of others" and "sexual exploitation" while intentionally leaving them undefined in order to allow all States, independent of their domestic policies on prostitution, to ratify the Protocol. This is reflected in the *Travaux Preparatoires*[6] which read that

> *"theProtocol addresses the exploitation of prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms 'exploitation of the prostitution of others' and 'sexual exploitation' are not defined in the Protocol, which is therefore without prejudice to how States Parties address prostitution in their respective domestic law"*(Para 64).

From this it must be concluded that the Protocol only addresses the exploitation of the prostitution of others and sexual exploitation in as far as the other elements of the definition are fulfilled: that is the presence of one of the acts and the use of one of the coercive or deceptive means. There is no duty under the Protocol to criminalise prostitution.

Against this background, different legal systems, whether decriminalising, legalising, regulating or tolerating (the exploitation of) adult, non-coerced prostitution comply with the Protocol. Consequently, the question of the definition of trafficking has to be distinguished from questions about the political and/or legal approach to prostitution that is followed or required in order to combat the trafficking in human beings (Report European Experts Group 2004, p. 51).

Although hardly discussed during the negotiations, a similar situation exists with regard to the purpose of the removal of organs. This too only falls under the scope of the Palermo Protocol if the other requirements – that is the presence of one of the acts and one of the means – are fulfilled. If those are not fulfilled the removal of organs can be completely legal. If this were different, the doctor who with the consent of the patient removes an organ for medical reasons would be punishable under the Protocols definition.

5.1 The concept of "forced prostitution": can prostitutes be trafficked?

[6] The Interpretative notes *(Travaux Preparatoires)* (A/55/383/Add.1) are to be found at http://www.odccp.org/crime-cicp-convention-documents.html.

A concept that gave and gives rise to confusion is the concept of "forced prostitution". For some this only refers to the use of coercion or deceit to force somebody *into* prostitution, leaving aside abuses taking place within prostitution (or wider: the sex industry). For others this not only covers force into prostitution, but also the use of coercion and deceit *within* prostitution, that is: forced labour or services within the sex industry as equivalent to forced labour or services within other industries (for instance domestic, agricultural or construction labour).

In particular the first position raises the question whether or not a prostitute can be trafficked. If "forced prostitution" is taken to refer only to forcing somebody to enter prostitution, the "innocence" of the victim becomes a determining factor. From this perspective, only "innocent" women - that is women[7] who (can prove that they) have not been engaged in prostitution before, were not aware they would be and never agreed to do so - would be entitled to protection against trafficking and its forced labour outcomes. In all other cases the abuse would be considered to be her own fault. The logical consequence of this position would be that prostitutes can be abused with impunity – solely on the basis of their being a prostitute - and are not entitled to protections against violence and abuse on an equal basis with other citizens. Such an interpretation would indeed feed the fears expressed during the negotiations that any distinction between consensual and forced prostitution would be used to disqualify victims of trafficking. However, such a position would clearly be in violation with international human rights law, in particular the principles of equal protection by the law and non-discrimination.[8] A fundamental rule of international human rights law holds that human rights are universal and apply to everybody without distinction of any kind. Art. 26 of the International Covenant on Civil and Political Rights, for example, reads:

> *"All persons are equal for the law and are entitled without any discrimination to the equ protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

This means that trafficked persons should not be subjected to discriminatory treatment in practice or law and that protections for trafficked persons are applied without discrimination,

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[7] or men.
[8] See *inter alia* Art. 2 and 7 UDHR, Art. 2 and 26 ICCPR and Art. 2 ICESR, but also the Statute of the International Criminal Court, Art. 21 (3).

particularly with respect to gender, ethnicity, immigration status, and/or the fact of a trafficked person's having been trafficked formerly or having participated in the sex industry.

For those taking the second position (forced prostitution as the equivalent of forced labour in the sex industry) it is not relevant whether the victim knew s/he would be working in prostitution, had been engaged in prostitution before or agreed to do so, as the core of the crime of trafficking is not prostitution per se, but the use of coercion and deceit, be it in relation to the recruitment process or in relation to the working conditions a person is subjected to.

With regard to the Palermo Protocol it must be concluded that the answer must be that also prostitutes can be trafficked: the fact whether or not a person was formerly engaged in prostitution or knew s/he would be so, is not relevant if all the elements of the definition are fulfilled, that is the presence of one of the acts, the use of one of the coercive or deceptive means and the purpose of exploitation of the prostitution of others or any other form of sexual exploitation (see also para. I.6 on "the issue of consent"). Any other conclusion would be in violation with international human rights law. The relevance of human rights law is underlined in the Preamble of the Palermo Protocol which under Art. 2 (b) lists as one of its purposes "to protect and assist the victims of such trafficking, with full respect of their human rights". Moreover it would be in violation with the intentions as expressed during the negotiations. Finally, the Protocol itself contains a non-discrimination clause. According to Art. 14.2, the interpretation and application of the measures set forth in the Protocol "shall be consistent with internationally recognized principles of non-discrimination".

Whether or not the forced labour or slavery-like exploitation itself falls under the Protocol will be dealt with in para. I.8 on "the relation between trafficking and its forced labour or slavery-like outcomes".

6. The issue of consent

An essential element of the Palermo definition is the presence of one of the coercive or deceptive means. It is important to note from the outset that the question of consent is irrelevant when it concerns children. Art. 3 (c) states: "the recruitment, transportation, transfer or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if it does not involve any of the means set forth in subparagraph (a) of this article". Therefore, in the case of children any of the acts listed in the definition with the purpose of the exploitation of the child must be considered trafficking.

In many cases the issue of consent can give rise to confusion when workers may have seemed to consent to what is actually forced labour or slavery-like practices. Some may argue that for that reason they cannot be victims of trafficking. It is therefore important to look closer at this issue.

With regard to the issue of consent two questions need to be addressed:

- Did the person concerned give his/her consent to the act?
- Was the consent valid?

In particular, the second question is relevant if the person concerned would not have given his/her consent if s/he had been informed about all relevant circumstances.
When considering actual or seeming consent the following considerations are imperative: Firstly, a free decision such as a freely given consent implies the realistic possibility of not giving the consent or, more precisely, of refusing any individual act the victim shall do or tolerate. The question, whether or not a decision was a free one, has to be asked and answered for each individual act. Secondly, the consent of the victim must have been given with respect to all relevant circumstances of an act. Real consent is only possible and legally recognizable, when all relevant factors are known and a person is free to consent or not. Thirdly, the reasons for which consent is refused cannot matter and it depends on the concerned person's decision whether or not she/he would like to share these reasons with somebody else (Report European Experts Group 2004, p. 50).

This is confirmed by the fact that the means listed in the Palermo definition explicitly include the use of fraud, deception and abuse of power or of a position of vulnerability, thus recognising that trafficking can take place without the use of overt (physical) violence. It is also reflected in the *Travaux Preparatoires* which state that:

> *"the reference to the abuse of a position of vulnerability must be understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved"* (para 63).

Moreover, it should be kept in mind that deception can relate both to the nature of the work or services to be performed and the ultimate conditions under which the person is forced to perform this work or services. A person can, for example, consent to work as a domestic worker, but this does not imply the person's consent to the forced labour or slavery-like conditions to which s/he subsequently is subjected.
Finally, the majority of the purposes listed in the Protocol, notably forced labour or services, slavery or practices similar to slavery and servitude, include lack of consent by definition: an individual cannot legally be deemed to have consented to them (see also para I.8).

It should thus be concluded that although a person can consent to migrate, to carry false papers, to participate in prostitution or to work illegally abroad, this does not imply that the person consents to work in conditions of forced labour, slavery or servitude, and therefore does not exclude that the person is a victim of trafficking.

7. Relation between trafficking in human beings and smuggling

A clear distinction is made in the Protocol between trafficking in human beings and the smuggling of human beings, which is addressed in another protocol, supplementing the parent convention.
Art. 3(a) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime, defines smuggling as:

> *"The procurement, in order to obtain, directly or indirectly, a financial or other material benefit of the illegal entry of a person into a State Party of which the person is not a national or permanent resident."*

The purpose of smuggling is the illegal crossing of borders, whereas the purpose of trafficking is the exploitation of the person concerned. Smuggling thus primarily concerns the protection of the territorial integrity or sovereignty of the State, whereas trafficking primarily concerns the protection of the person against human rights abuses. In other words: smuggling is primarily a crime against the State, trafficking in human beings is primarily a crime against the person. A distinguishing feature is therefore the existence of a victim, that is: a person whose (human) rights are violated. It is this violation of the persons human rights that give rise to duties by the State to treat that person as a victim of a crime and human rights violation.

This does not take away that a smuggled person subsequently may be exploited, or become victim of other human rights violations, such as the right to life,[9] but that is not necessarily the case. Trafficking in human beings, on the other hand, is in itself a serious violation of the rights and personal integrity of the person trafficked. It often involves cross-border movement, but this is not an essential feature. People may be trafficked within borders or may enter a country completely legally, for example as spouses, tourists, students or domestic workers. In the latter case they often only become irregular when they remove themselves from the power of their husbands or employers. Whereas illegal border crossing the defining element for smuggling is, the defining element for trafficking is the (purpose of) exploitation.

More problematic is the fact that at the time of the movement, transportation or border crossing, it is often unclear what the purpose of the movement is, that is: whether a person is smuggled or trafficked. It is only at the point of outcome, i.e. the exploitation, that it can be clear that a person is trafficked. Also, a person may be smuggled or have entered as irregular migrant and subsequently be trafficked or end up in forced labour or slavery-like conditions. It should therefore be kept in mind that in practice there are links between trafficking, smuggling and illegal migration and that an act that started as smuggling or illegal migration may very well change into trafficking in the course of the process.

8. Relation between trafficking and the forced labour or slavery-like outcomes of trafficking

A more fundamental comment, raised by the European Experts Group on Trafficking in Human Beings,[10] concerns the emphasis on the elements of movement and coercion in the definition - that is: the process through which people arrive in a situation of exploitation -, rather than on the exploitation itself, whereas it is precisely the forced labour or slavery-like outcomes that are the crucial element of the trafficking crime. In the words of the Experts Group:

> *"… raises the question as to the purpose of the Trafficking Protocol. Within the context of trafficking there is no need as such to criminalise recruitment, transportation, harbouring, receipt or transfer of a person. While these acts in themselves may be subject to other criminal sanctions (e.g. immigration violations), these tend to be violations against the State, rather than against the individual.*

[9] There are many examples of smuggled persons who suffocated in containers or drowned while crossing the sea, or who were killed by their smugglers to avoid detection.
[10] The Experts Group was set up by the European Commission as a consultative group (*OJ L* 79, 26.3.2003, p. 25). Its report can be downloaded from the Commission's website: http://europa.eu.int/comm/justice_home/doc_centre/crime/trafficking/doc/report_expert_group_1204_en.pdf.

Similarly, acts of coercion, force, deception, etc., by themselves, do not require criminalization within the trafficking context. Many acts of coercion will already be clearly defined as criminal acts in domestic law (for example rape, assault, theft, obtaining goods or services by deception). As individual offences, without the forced labour or slavery-like outcome, they add nothing to the trafficking context.
It is only when the purpose, or outcome of these two elements (i.e. movement and coercion, MW), the forced labour or slavery-like exploitation, including forced prostitution and other forced sexual services, is present that these elements of the Trafficking Protocol are relevant. Thus the key element to the Trafficking Protocol is the forced labour or slavery-like outcomes, encompassing forced labour and services, including forced prostitution and other forced sexual services, slavery, slavery-like practices and servitude. It is these human rights violations against the individual that the Trafficking Protocol seeks to redress." (Report Expert Group, p. 52):

For the majority of the purposes listed in the Protocol - that is: forced labour, slavery and servitude - the added element of coercion is unnecessary as they include coercion by definition. It is only with regard to the purposes of sexual exploitation and the removal of organs that the element of coercion in the definition is useful to distinguish that it is the coercive conditions that give rise to it falling under the Trafficking Protocol.
Also the element of movement is problematic. As already discussed, at the time of movement, it is often unclear whether a person is smuggled or trafficked. Moreover, people might have been smuggled into the country, entered as illegal immigrants or have legally crossed the border and only later become trafficked or end up in forced labour or slavery-like conditions. This makes clear that in practice these distinctions are utterly problematic when designing policies to prevent either trafficking or forced labour and services.

Another problem attached to the emphasis on the aspect of movement and coercion, rather than on the forced labour or slavery-like exploitation itself is that it can easily lead to an incorrect distinction between perceived "innocent" and "guilty" victims This problem is particularly visible in relation to trafficking for forced prostitution or other forms of sexual exploitation, but is relevant for many in forced labour conditions, who may be perceived to lack the "innocent victim" status as they may well have consented to illegal border crossing, smuggling, and to working in exploitative but not forced labour conditions (Report Expert Group, p. 51; see also para I.6 on "the issue of consent" and I.5.1 on "the concept of forced prostitution").

From a human rights perspective there is no reason to distinguish between forced labour and

slavery-like practices involving "illegal migrants", "smuggled persons", "victims of trafficking" or legal residents.[11] Neither is there reason to distinguish between forced labour and slavery-like practices depending on the industry in which they take place.[12] As stated in the report of the Experts Group:

> *"There is a serious deficiency in the concept of trafficking if it focuses solely on the process of bringing another person into a situation of exploitation and does not address the use of forced labour or services, including forced sexual services, slavery, practices similar to slavery or servitude as such, where this has not been preceded by the other elements of the definition (…)*
>
> *Thus to effectively counter trafficking, policy interventions should focus on the forced labour and services, including forced sexual services, slavery and slavery-like outcomes of trafficking – no matter how people arrive in such conditions – rather than (or in addition to) the mechanisms of trafficking itself. States should criminalise any exploitation of human beings under forced labour or slavery-like conditions, in line with the major human rights treaties"* (Report Expert Group, p. 53).

According to the ILO, this may potentially present law- and policymakers with an option:

> *"Are the abusive recruitment and employment practices to which migrant workers are particular vulnerable best dealt with through providing for the offence of forced labour or that of trafficking in domestic legislation?"* (ILO, Global report 2005, p. 7)

Although one can argue that on a legal interpretation of Art. 3(a) of the Protocol any transportation, harbouring or receipt (for example the transportation of a worker to the work place or the receipt or harbouring of a worker to exploit his or her forced labour) could be considered trafficking, thus making the separate criminalisation of forced labour and slavery-like practices unnecessary, in practice this seldom appears to happen.

It is therefore recommended that States legislate against any exploitation of human beings under forced and/or slavery-like conditions as a specific offence, no matter how people arrive in these conditions, that is: independent of the presence of any of the other acts and/or means of the definition of trafficking. This would be in line with the major human rights

[11] Indeed it could be said that the trafficking/smuggling distinction represents a gaping hole in any safety net for those whose human rights are violated in the process of migration. See e.g. A. Gallagher "Trafficking, smuggling and human rights: tricks and treaties", *Forced Migration Review* (12): 25-28.

treaties which clearly prohibit the use of forced labour, slavery, servitude and the like.

> *"If such policies were followed, then many of the current confusions of the trafficking definition – whether a case was smuggling or trafficking, whether a case was trafficking or forced labour, whether the victim had seemed to consent to elements of the forced labour or slavery-like outcome and whether a victim was perceived as 'innocent' or 'guilty' would become redundant. By policy makers concentrating primarily on the forced labour or slavery-like outcome, the Trafficking Protocol can overcome its current definitional and practical operational difficulties and has the potential of a tool to more effectively tackle the human rights violation of trafficking in human beings"* (Report Expert Group, p. 53).

This is for example the way that the Netherlands have followed. According to the Dutch Criminal Code any act of recruitment etc. with the use of one of the means listed in the Protocol for the purpose of exploitation as well as the actual exploitation and the profiting from such exploitation is punishable (see Annex 1 for the full text of the article concerned).

9. Relation with the parent Convention: the crossing of borders and the involvement of organised crime

The crossing of borders is not an element of the Protocols definition. However, the Protocol supplements the UN Convention against Transnational Organised Crime and must be interpreted together with its parent Convention (Art. 37.4 Convention and Art. 1 of the Protocol). That means the Protocol applies to the offences defined as trafficking where they are transnational in nature and involve a criminal group (Art. 4).
According to Art. 2(a) of the Convention, the term "organised criminal group" means

> *"A structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit".*
>
> *"Serious Crime' shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty;*

[12] This does not take away that the individual consequences of being submitted to forced labour or slavery-like practices can vary depending on the type of services one is forced to provide. In particular forced sexual services and the removal of organs can be considered to be an extreme violation of an individual's right to physical integrity.

> *"Structured group' shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure".*

According to Art. 3.2 of the Convention an offence is transnational in nature if:

- it is committed in more than one State;
- it is committed only in one State but a substantial part of its preparation, planning, direction or control take place in another State;
- it is committed only in one State but involves an organised criminal group that engages in criminal activities in more than one State; or
- it is committed in one State but has substantial effects in another State.

With regard to domestic legislation, Art. 34.2 of the Convention has to be taken into account. According to this provision, domestic law is required to establish offences in accordance with Articles 5 (belonging to an organised crime group), 6 (money laundering), 8 (corruption) and 23 (obstruction of justice) of the Convention "independently of the transnational nature or the involvement of an organised criminal group" (except for Art. 5 which, by nature, depends on the involvement of an organised criminal group). Arguably the same provision applies to the crime of trafficking to ensure that all traffickers can be prosecuted under domestic laws. According to Art. 1 of the Protocol, the provisions of the Convention apply to the Protocol unless otherwise provided. From this it derives that national laws should incorporate definitions of trafficking that depend neither on a cross-border setting of the crime nor on the involvement of an organised criminal group (Jordan 2002, p.13; ICMPD Draft Manual for judges and prosecutors 2003, p. 77). In line with this argument, the International Human Rights Law Group remarks:

> *"Domestic legislation should go further than the Trafficking Protocol and include all domestic and cross-border trafficking and should punish individual traffickers as well as organised criminal groups. Trafficking within some countries is as serious as, or more serious than, cross-border trafficking. Furthermore, from the perspective of the victims, the harm can be just as great no matter whether there are one or ten traffickers or whether the trafficking is cross-border or internal. So the punishments for the traffickers and the protections for the rights of trafficked persons should be the same regardless of whether the trafficking is internal or across borders and whether there are one or twenty traffickers"* (Jordan 2002, p. 13).

This is reinforced by the Council of Europe Convention on Action Against Trafficking in Human Beings (Council of Europe Treaty Series, No. 197), which obliges State Parties to criminalise all forms of trafficking in human beings, whether national or transnational, whether or not connected with organised crime (Art. 18 jo Art. 2 and Art. 4).

It can therefore be concluded that States are required to ensure the adequate criminalisation of trafficking (and the ensuing forced labour and slavery-like practices) irrespective of its domestic or transnational nature and irrespective of the involvement of a criminal group.

10. Intent, attempting, participating, organising and directing

Art. 5 of the Protocol obliges State parties to criminalise the conduct outlined in Art. 3, when committed intentionally. In addition, participating as an accomplice in such an offence, as well as organising or directing other persons to commit such an offence, have to be criminalised as well.
It has been noticed that, theoretically, Art. 5 para 2 could be misunderstood as giving a basis for prosecuting trafficked persons who could be accused of "participating" or "assisting" in trafficking, which is, of course, not the intention of the Protocol. The Protocol aims at punishing the traffickers, not the victims (Jordan 2002, p. 15).

It is recommended that domestic legislation clarifies that a trafficked person is never punishable in connection with her/his own trafficking or for the trafficking of persons moved together with her/him.

11. Definition of victim

There is no internationally agreed upon definition of the concept of victim. However, in this respect the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) can be helpful. According to the Declaration "victims" means:

> *"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 are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power (1).*
> *A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of*

the familial relationship between the perpetrator and the victim. The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization (2)".

PART II EXPLANATION OF THE ELEMENTS OF THE DEFINITION

1. Introduction

In this chapter the different elements of the Palermo definition will be discussed. With regard to the purposes only the purposes of the exploitation of the prostitution of others, sexual exploitation and the removal of organs will be discussed. The other exploitative purposes, notably forced labour or services, slavery or practices similar to slavery and servitude will be discussed in Part III.

2. The "acts"

The acts listed in the Protocol definition are:

"the recruitment, transportation, transfer, harbouring or receipt of persons."

The recruitment,[13] transportation, transfer, harbouring, and receipt of a person are not necessarily acts that have to be criminalised.[14] Details related to the definition of such acts shall therefore not be discussed in this report. The necessity of criminalising them only emanates firstly from the use of means which indicate that the act was committed against the will or through any form of distortion of the free will of the person concerned and secondly the exploitative purpose for which they are committed.

In this context, it should be kept in mind that the initial recruitment can be voluntary and that the coercive mechanisms to keep a person in an exploitative situation may come into play at a later stage.

Discussion can arise over the fact of "harbouring or receipt" can be used to also cover the situation of actual exploitation of the victim (as opposed to the process through which the victim arrives in a situation of exploitation). Even if on a legal interpretation of Art. 3(a) this question might be answered positive, this would be a rather indirect way and might fail to

[13] Recruitment can include job advertising, candidate canvassing, candidate selection, job brokerage, direct hiring or hiring by delegation. In general terms, recruitment can be defined as a free contractual agreement whereby one party commits itself to pay pre-determined remuneration in exchange of which the other party commits itself to perform pre-determined tasks in a pre-determined time. For a legal definition of recruitment in the context of migration see ILO Convention No. 97, Art. 2, Annex 1 (ILO, Human Trafficking and Forced Labour Exploitation 2005, p. 31).

[14] "Transportation", for example, may involve traffickers or may be carried out by airlines or other transport companies in good faith. Similarly, "harbouring" and "receipt" may be part of the crime of trafficking or may be done in good faith, depending on the knowledge of the accused person (ILO, Human Trafficking and Forced Labour Exploitation 2005, p. 10).

target all those who are involved in the actual exploitation of the victim[15] and profit from this exploitation. Moreover, it would not cover those forced labour and slavery-like situations in which the other elements of the Protocol's definition (movement and coercion) are not present.

It is therefore recommended to separately criminalise the actual forced labour or slavery-like exploitation and the profiting thereof (see para I.4, I.8 and Part III).

3. The "means"

The means used to achieve control over the victim are one of the central elements of the offence (except where children are concerned). The means listed in the Protocol definition are:

> *"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."*

The common element is the distortion of the free will of the person. This may be achieved forcibly through abduction, but is more commonly conducted on the basis of complete or partial deception to either the nature of the work or services that the trafficked person will engage in or to the conditions under which s/he will be forced to perform this work or services, or both.

The inclusion of fraud, deception and the abuse of power or of a position of vulnerability recognises that trafficking can occur without any use of (physical) force. According to the *Travaux Preparatoires* reference to the abuse of a position of vulnerability must be understood to refer to

> *"any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved"* (para 63*).*

This can for example be the case if the victim does not speak the language, if her/his identity papers are taken away, if s/he does not know where s/he is, is prohibited from having contacts with friends, family or the outside world or is threatened with reprisals against

[15] It is, for example, not uncommon that there is a certain division of tasks in organised groups that engage in trafficking in human beings, e.g. a

her/himself, children or other family members.[16] In this way the victim is brought in a situation of total dependency on the traffickers or others who control her with no real and acceptable alternative than to submit.

Commonly the means that – along with deception and fraud - are used to have the victim submit to the intended or actual exploitation include debt bondage, isolation, removal of identification or travel documents, the threat or use of force or other forms of (psychological coercion) and/or the use or threat of reprisals against the victim's family. These can all be brought under one of the means listed in the Protocol. They can be used during all phases of trafficking, from the initial recruitment, transportation or transfer of the victim through to the harbouring or receipt of the victim and his/her actual exploitation.

The following examples of means used are taken from the Draft Training Module for Judges and Prosecutors, developed by the ICMPD (2003) and the ILO Global Report 2005.

Debt bondage

The victim is required to repay the exaggerated costs allegedly incurred for bringing her into the destination country. Exorbitant and cumulative interest rates are usually attached to these costs which are then supplemented by the requirement to pay vastly inflated prices for accommodation, transportation, food, clothing, et cetera, all of which adds to an ever-mounting debt bond that becomes effectively impossible to pay off. An example of how debt bondage operates through recruitment agencies is given by the ILO in its Global Report 2005. The example concerns east European workers imported by a gang for illegal factory work:

> *"They were originally promised work permits, but were given false passports en route. They then attempted to escape the gang's control, but were subjected to such serious threats that they were forced to continue. On arrival they were informed of their conditions. They would work seven days a week, to repay the cost of both their transport to the UK and their food and accommodations while in that country. Once the debts had been cleared, they would be required to work for at least one year, for either no pay or at best a few pounds of "pocket money" per week. Salaries were paid into a gang member's bank account. The workers were watched carefully, moved from house to house and kept in isolation. Any breach of conditions, including work absences as a result of sickness, was added to their debt or deducted from their*

person who continuously controls the movements of the victim, one who threatens her/him, one who collects the money, et cetera.

[16] These examples are taken from Dutch jurisprudence. One of the means listed in the trafficking article in the Dutch Criminal Code is "*abuse of authority ensuing from actual relations*", which is very comparable with "*abuse of power or of a position of vulnerability*" as used in the Protocol. Judges have interpreted this to mean "bringing a person in a situation of dependency", for example because the victim does not speak the language, has no legal residence permit, has no identity papers, is not allowed to dispose over her earnings, et cetera.

pocket money. Control was maintained through beatings and threats of assault on workers and their families back home" (ILO, Global Report 2005, p. 54).

Isolation & removal of the identification and/or travel documents

The identification and/or travel documents of the victim are confiscated during the transport of the victim or immediately after arrival in the final destination country. This robs the victim of his/her official identity, confirms his/her illegal entry status and makes it impossible for him/her to seek help or to escape to another country or destination. Because many victims originate from countries where the police are viewed as a force of oppression, rather than a means of assistance, most victims are naturally unwilling to contact the police for help. This can be reinforced by telling the victim that any contact with the police will only result is his/her immediate deportation, that there is no point in seeking police assistance because they are corrupted and in the pay of the traffickers and/or that reprisals will be taken when s/he gets back to her/his origin country.

The threat or use of force or other forms of coercion

Victims are frequently beaten and raped, confined, kept in long periods of isolation, deprived of food and water, drugged or tortured with knives and cigarettes in order to maintain obedience. These abuses may be inflicted as punishment for some form of disobedient transgression or may be designed to serve as a warning to the victims to ensure that they are fully aware of what the consequences of transgression will be. In cases of sexual exploitation, shame is additional powerful mechanism of control. The trafficker may for example threaten to reveal to the victim's family that she is working as a prostitute. Sometimes photographs are taken while the victim is being raped and used to blackmail her.

Also culturally specific forms of psychological coercion can be used. With West African (i.e. Nigerian) victims Voodoo-like rituals, for example, can impose fear and control over the victim. Another example is the added impact that – in the case of trafficking for sexual exploitation - exposure as a prostitute is likely to have on a Muslim trafficked victim, where she may eventually suffer greater physical risk from her own family than from her trafficker.

The use or threat of reprisals against the victim's family

One of the most effective threats is the threat of violent reprisals against the loved ones of the victim back in the country of origin, as the victim will not want or dare to take risks with the life and safety of her/his loved ones. Often, the traffickers will therefore ensure that they know a range of details of the victim's family circumstances.

It is recommended that the definition of the means in national law mirrors (where possible) existent criminal law, for instance with regard to "threat" or "coercion", rather than seeking to establish new and different definitions applicable only to this category of crime. Reliance on pre-existing criminal law definitions will facilitate the work of the prosecutor and allow existing case law to provide guidance to law enforcement and judicial instances (ILO, Human Trafficking and Forced Labour Exploitation 2005, p. 15).

3.1 The issue of consent

With regard to the issue of consent, Art. 3(b) of the Protocol stipulates that the consent of the victim shall be irrelevant where any of the coercive or deceptive means listed in the definition are used. From this provision three conclusions can be drawn:

1. Trafficking in human beings is a violation of the victims' will and right of self-determination. The (valid) consent of the victim excludes such violation.
2. The use of specific means irrefutably indicates that the victim did not give his or her consent.
3. Where none of these means has been used, the consent of the victim is relevant.

The fact that consent is irrelevant when one of the stipulated means does not take away the right of the accused to raise all defences, as explicitly stated in the *Travaux preparatoires* which indicate that

> *"subparagraph (b) should not be interpreted as imposing any restriction on the right of the accused to a full defence and to the presumption of innocence. They should also indicate that it should not be interpreted as imposing on the victim the burden of proof. As in any criminal case, the burden of proof is on the State or public prosecutor, in accordance with domestic law. Further, the travaux preparatoires will refer to article 11, paragraph 6, of the Convention, which preserves applicable legal defences and other related principles of the domestic law of States Parties"* (para 68).

However, once the elements of the crime of trafficking are proven, any allegation that the trafficked person "consented" is irrelevant.[17]

It might be good to reiterate here that (also) with regard to trafficking for sexual exploitation it is not relevant whether or not the victim has been working in prostitution before or

[17] *See also The Annotated Guide to the complete UN Trafficking Protocol*, Ann D. Jordan, International Human Rights Law Group, 2002, www.globalrights.org.

consented to do so under non-coerced conditions. If any of the coercive means listed in Art. 3(a) of the definition has been used, the consent of the victim to the intended exploitation is no longer relevant.

4. The "purposes"

According to art. 3(a) of the Protocol the purpose of trafficking is 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."*

First it is important to note that the Protocol does not require that the intended exploitation has actually taken place. It is sufficient that (one of) the acts and (one of) the means have been employed "*for the purpose* of exploitation" (Italics MW). The intention to subject another person to one of the forms of exploitation therefore suffices.

Secondly, of all the elements in the definition, the concept of 'exploitation" is the most problematic, in particular the concept of "exploitation of prostitution and "sexual exploitation". Both concepts are not defined in international law. This is different for the other forms of exploitation that are listed, for which one can go back to other international instruments to understand their meaning. This will be done in Part III. This section will deal with the concepts of "exploitation of the prostitution of others" and "sexual exploitation" and close with a few remarks on the purpose of the removal of organs.

4.1 Exploitation of the prostitution of others and sexual exploitation

These are the only concepts in the definition that are intentionally left undefined and that are not defined anywhere else in international law. Also the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others merely lists a number of practices that should be prohibited but does not give a definition of the "exploitation of the prostitution of others", nor of "trafficking". In fact it seems to totally conflate the two.

The use of vague, ambiguous and undefined terms poses a problem when translating the Protocol's definition into domestic criminal law, in particular with an eye to the principle of

legality. This is one of the reasons why several parties advocated not to use these terms, and in particular the term "sexual exploitation", during the negotiations.

The International Labour Organization (ILO), for instance, suggested abolishing the term sexual exploitation, as it is a "rather undefined term which is subject to different explanations".[18] Identical were the remarks of the UN-Special Rapporteur on Violence Against Women, who pointed out that the term is "problematic because it is subject to a wide range of divergent interpretations, according to whether all activities in the sex industry constitute 'sexual exploitation' per se, or whether only sex work under exploitative or slavery-like conditions could qualify as 'sexual exploitation'". She continues: "In order to highlight the commonality between the different purposes for which people are trafficked, the focus of the Protocol should be on the forced, exploitative, or slavery-like conditions of the work or relationship and whether those conditions were freely and knowingly consented to by the person".[19] Last but not least, the comments of the former High Commissioner on Human Rights, Mary Robinson, during the negotiations on the definition in the framework of the UN Trafficking Protocol deserve attention: "A preferable and more accurate description of purposes would include reference to forced labour and/or bonded labour and/or servitude. (…) Such a reference would be consistent with existing international law (…). It would also serve to avoid the implementation difficulties inherently associated with undefined, imprecise and emotive terms such as 'sexual exploitation' when used in connection with adults".[20]

For these reasons and because forced sexual services, either in prostitution or in other settings (e.g. pornography) are fully covered by the other forms of exploitation listed in the Protocol, it is recommended to omit these concepts in domestic criminal law.[21]

However, if they are included than they should be defined. A proposal for a definition can be found in the Annotated Guide to the Trafficking Protocol of the International Human Rights Law Group (Jordan, 2002). As definitions are proposed:
"Sexual exploitation" shall mean "the participation by a person in prostitution, sexual servitude or the production of pornographic materials as a result of being subjected to a threat, coercion, abduction, force abuse of authority, debt bondage or fraud.
"Exploitation of the prostitution of another person" shall mean: "the obtaining by a person of any financial or other benefit from the sexual exploitation of another person."

[18] The ILO in their note with respect to the Protocol (A/AC.254/CRP.14).
[19] Radhika Coomaraswamy, Position Paper on the UN Protocol (A/AC.254/CRP.13) , p. 10 & 17.
[20] Informal note UNHCHR (A/AC.254/16), p. 3, sub 8.
[21] See also Ann Jordan, Annotated Guide to the Trafficking Protocol, p. 9.

4.2 Removal of organs

Similar to the purpose of exploitation of prostitution and sexual exploitation, also with regard to the removal of organs it is the coercive conditions that give rise to its falling under the definition of trafficking. Since for children the use of one of the means is no requirement, the *Travaux preparatoires* state that:

> *"the removal of organs from children with the consent of a parent or guardian for legitimate or therapeutic reasons should not be considered exploitation".*

Although included in the Protocol, the trade and forced removal of organs represent a distinct problem with its own complications, different from the other forms of exploitation listed.

It might therefore be recommended to deal with this issue in a separate provision in criminal law. This is also the way that the EU has chosen to take. Different from the Palermo Protocol, the Framework Decision on the trafficking in human beings does not deal with the trafficking in organs. A separate Framework Decision on this issue is currently in preparation.

4.3 Illegal adoption

Finally, it deserves mention that, according to the *Travaux Preparatoires*, illegal adoption where it "amounts to a practice similar to slavery as defined in Art. 1, paragraph (d) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery", will also fall within the scope of the Protocol.

Part III. Interpreting the Protocol: meaning and interpretation of the various prohibitions on forced labour, slavery and related practices

1. Introduction

Art. 14 of the Protocol takes note of the existence of other international instruments in interpreting the Protocol. Forced labour, slavery and servitude are concepts which are elaborated in a number of existing treaties and conventions, which should guide the implementation and interpretation of the Protocol.

In the following part the meaning and interpretation of the concepts of forced labour, slavery, slavery-like practices and servitude will be examined as they are used in the relevant international instruments. To this aim these instruments are discussed one by one, looking at their drafting history, their actual wording, their relationship with other treaties and the way in which the concepts at hand have developed in the ongoing praxis of the relevant UN bodies. In particular the concept of "forced labour", as contained in the relevant ILO conventions, is still highly topical and has been interpreted extensively through the work of the ILO Committee of Experts on the Application of Conventions and Recommendations.

The chapter will conclude with a summary of the definitions of the concepts of forced labour, slavery, slavery-like practices and servitude as they developed in the relevant international instruments, along with a number of conclusions and recommendations.
Only very limited attention is paid to children. This would require a separate study.

2. Universal Declaration on Human Rights, 1948

The Universal Declaration explicitly prohibits slavery and servitude, however, without giving a definition. Art. 4 States:

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

During the drafting process, proposals to replace 'servitude' with 'involuntary servitude' were rejected on the argument that the word 'involuntary' might provide an escape clause, as slave owners would try to evade it by saying that their slaves had entered into servitude voluntarily. Moreover, it was Stated that servitude should be abolished whether voluntarily or not, as it

should not be possible for any person to contract himself or herself into debt bondage. In relation to art. 4, it was furthermore explained that slavery was meant to cover traffic in women and children.

Not surprisingly, during the drafting debates frequent references were made to Nazi practices amounting to slavery and the slave trade. One of the members of the drafting committee explained the use of the word servitude to cover such 'practices as the way in which the Nazis had treated their prisoners of war and the traffic in women and children'. In this context, reports were made that as part of Nazi slave labour policies a miniature white-slave trade was, in fact, being conducted by officials and Wehrmacht officers returning from the East. They were told to bring attractive girls to serve as housekeepers and to be given away as presents to friends (Morsink, p. 41).
Furthermore, it should be noted that art. 4 is closely related to art. 6 and 7, which recognize that everyone has the right to recognition and equality before the law (Lassen, p. 90).

3. Slavery Convention, 1926, amended by Protocol, 1953

The definition of slavery in this convention stands model for the slavery prohibitions in other conventions. Art. 1 defines slavery and the slave trade as:

> *"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".*

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.
Slavery is therefore not only the status or condition of a person over whom *all* of the powers attaching to the right of ownership are exercised, but also exists when *any* of those powers are exercised. In the international praxis, slavery is not only understood to mean the exercise of any or all powers attached to ownership, but also the actual de-facto destruction of the legal personality of a person (Tretter, p. 562). Nonetheless, the concept of slavery as defined in the Slavery Convention, clearly refers to slavery in the 'classic' sense, thus limiting the interpretation of the concept of slavery to slavery in its classic form.

4. UN Supplementary Convention on the Abolition of Slavery, the Slave Trade and Practices similar to Slavery, 1956

The 1956 Convention broadens the definition of slavery to include slavery-like practices such as debt bondage, serfdom, servile forms of marriage and the exploitation of children and adolescents. State parties commit themselves to take all necessary measures to abolish the following practices and institutions, whether or not they are covered by the definition of slavery of the 1926 Convention (Art. 1):

> *"(a) debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or 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 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 eighteen years is delivered by either or both of his natural parents or 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".*

Furthermore the Convention reiterates the definition of slavery as contained in the 1926 Slavery Convention and defines a person of servile status as a person in the condition or status resulting from any of the institutions or practices mentioned above (Art. 7).

The Convention itself does not contain a definition of the concept of slavery-like practices. According to Tretter, the two following common criteria, however, can be derived from the practices and institutions listed.

Firstly, all listed practices or institutions constitute an infringement of the legal status of the persons concerned. In order to qualify one's status as slavery-like, the infringements involved must result in a serious restriction of one's fundamental civil rights, such as one's legal capacity/competency. In order to judge whether or not such infringement has taken place, the criterion is not only the formal legal status of the person concerned, but also – and equally important – the actual situation of the person, that is to say, the extent to which he/she is in the condition to actually exercise his or her fundamental civil rights:

> *"Because in the majority of cases, the described slavery-like dependencies are based upon traditional cultural or social codes, upon abuse of economic power or upon direct physical or psychological coercion, the criterion of the actual, de facto, restriction of one's rights gains importance over the criterion of formal restriction. However, it is not easy to draw the line when one can speak of a slavery-like dependency on the basis of actual conditions and, in the end, such judgement can only be made on the basis of the individual circumstances of the case. Criteria that may play a role are: the nature and intensity of the dependency-relation, the strains it takes to free oneself from the dependency-relation, and the seriousness of the to-be-expected consequences of such an action"* (Tretter, p. 547, translation MW).

Secondly, all listed practices and institutions have as a common characteristic the one-sided economic exploitation of a person through the abuse of long-term relations of dependency.

> *"Doubts can be raised as to art. 1c, where the element of economic exploitation seems to lack. However, if one realises that art.1c refers to practices where women* and their labour *are made subject of civil agreements - like purchase, exchange and inheritance –, here too the aspect of economic exploitation becomes visible"* (Tretter, p. 548, translation MW).

Slavery-like practices are thus characterised by a serious and far-reaching deprivation of fundamental civil rights, in combination with the one-sided economic exploitation of the person through the abuse of long-term relations of dependency. A slavery-like status can be said to be attained if the required qualifying elements of economic exploitation on the basis of an actual relationship of dependency or coercion are fulfilled.

In the context of slavery-like practices Tretter pays specific attention to trafficking in migrants and their exploitation:

> *"The flow of migrants and the restrictive immigration policies of many countries, especially in Western Europe, create the conditions for the development of a new form of exploitation: the recruitment of cheap workers, who under a false representation of the facts and with false promises (especially pertaining to the possibility of legal working and residence permits) are lured to a foreign country, in order to be employed there illegally and under inhuman conditions against wages that are far below the national standards. In many cases, a slavery-like status is attained, when the migrant first has to pay back the costs of transport and illegal entry, and he/she cannot leave the job, because of the threat of being discovered and punished by the authorities when found on his/her own and without documents (often passports are taken away by the traffickers or the employers). In addition, accommodation is generally inadequate, medical care and social security is lacking, outside contacts are prohibited, etc. For the time of their stay, the concerned migrants find themselves in a situation of at least a relative deprivation of rights, coupled with an exploitative and oppressive labour relationship"* (Tretter, p. 554, translation MW).

Tretter considers the traffic in persons, including the traffic in migrants, to fall within the scope of the protection of the slavery prohibitions as contained by the discussed human rights conventions:

> *"However, in this context a distinction must be made between the slave-trade - in the sense of the slavery conventions, which is characterized by the exercise of any or all of the powers attaching to the right of ownership -, and the concept of traffic in human beings. Traffic in human beings, as a rule, concerns the recruitment or mediation (Tretter: 'Vermittlung') of persons, who either already find themselves in a situation of slave-like dependency or are brought into such a dependency, in order to exploit their labour for economic gain"* (Tretter, p. 568, translation MW).

According to Tretter, prostitution can be an indication for slavery or slavery-like practices, but does not constitute a slavery-like practice in itself, as suggested by Benjamin Whittaker in his 1984 report on Slavery to the Human Rights Commission (Whitttaker, 1984). Only if the required qualifying elements of economic exploitation (Tretter: "Ausbeuting") on the basis of an actual relationship of dependency or coercion are fulfilled, a slavery-like status can be attained.

Traffic in women, on the other hand, is characterized by the exercise of the powers of disposal (Tretter: "der Ausubung eines Verfugungsrechte"), or by the actual use of violence or coercion, with the aim of economic exploitation of the prostitute:

> *"These practices represent, irrespective whether or not a girl or woman has entered prostitution voluntarily, a slavery-like practice - or even slavery – if the qualifying elements are fulfilled"(*Tretter, p. 559, translation MW).

He then cites Whittaker, who defines sexual slavery as the exploitation of prostitution, in so far as a woman or a child is placed in the ownership of another person and is unable to change this situation or is forced to perform certain acts.

5. International Covenant on Civil and Political Rights (ICCPR), 1966

Also the ICCPR contains a prohibition on slavery and servitude. Art. 8 States:

> *8.1 No one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited*
> *8.2 No one shall be held in servitude*
> *8.3(a) No one shall be required to perform forced or compulsory labour*

(followed in art. 8.3(b) by a number of exceptions in line with the ILO conventions.)

During the drafting process, the prohibition on slavery and servitude were set forth in two different articles (in contrast to e.g. the UDHR) to emphasize the fundamental differences between these two forms of exploitation. According to the *Travaux Preparatoires* slavery and the slave-trade are to be defined in the sense of art.1 of the 1926 Slavery Convention – thus limiting them to slavery and the slave trade in their classic sense - , whereas servitude was to be applicable to all conceivable forms of dominance and degradation of human beings by human beings. Slavery, thus, was considered a relatively limited and technical notion, which implied the destruction of the legal personality of the victim, whereas servitude refers to a more general idea, covering all possible forms of one person's dominance over another person (UN doc. A/2929, VI, Z. 18; Lassen, p. 93; Tretter, p. 563). Attempts to broaden slavery and slavery-like practices to include the traffic in human beings in general were explicitly rejected. A US motion to prohibit only "involuntary" forms of servitude was defeated by the reasoning that "it should not be made possible for any person to contract himself into debt bondage" (Nowak, p. 148).

In contrast to the prohibition of forced labour – which is primarily directed at States -, the prohibition of slavery and servitude has primary horizontal effect, "as slavery functions as a means of economic oppression exclusively for the benefit of private interests" (Nowak, p. 145).

Under the ICCPR, States are committed to take positive measures to ensure its realisation, i.e. to prohibit by law all forms of slavery, servitude, debt bondage and other types of slavery-like practices, and to adopt effective judicial, administrative and other measures to enforce these prohibitions. In contrast to the prohibition of forced labour, the prohibition of slavery and servitude is recognized without exceptions and is non-derogable.

According to Nowak, in the light of the historical background as well as art. 1 of the 1956 Supplementary Convention, servitude (art. 8.2) can be understood as referring to slavery-like practices, which "in addition to serfdom and debt bondage include all forms of the traffic in women and children, the compulsory betrothal of women – or their bequeathing – to the brother of the deceased husband, and such practices as child labour or prostitution. In other words, victims of slavery-like practices are not merely economically exploited; for a variety of reasons (…), they may be totally dependent on other individuals" (Nowak, p. 148).

The fundamental element of forced labour is the involuntariness, whereas slavery and servitude are also prohibited in the event of voluntariness. The term forced labour may be understood broadly: "In addition to the subjective element of involuntariness, the term's objective requirements are satisfied when the State or a private party orders personal work or service, and punishment or a comparable sanction is threatened if this order is not obeyed" (Nowak, p. 150). See for the aspect of the involuntary nature of labour also the discussion of the ECHR.

Though the prohibition is primarily directed at States, this does not mean that when private persons resort to forms of forced labour that fail to qualify as slavery or slavery-like practices, State Parties are not obligated to prevent such practices (Nowak, p. 150).

The borders between slavery and servitude and other forms of forced or compulsory labour are not hard and fast. However, according to Nowak (p.146): "since exceptions are permitted for forced labour, a precise delineation between the terms is necessary: Even though a case for an exception may be made out under Article 8(3)(c), the act may still represent a form of servitude or even slavery".

6. ILO Conventions on Forced Labour No. 29, 1930, and No. 105, 1957[22]

Art. 2.1 of the 1930 Forced Labour Convention (No. 29) defines the term forced or compulsory labour to 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".*

Art. 4.1 states that

> *"State parties which ratify the Convention shall not permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations".*

This means that States not only have an obligation to suppress forced or compulsory labour in the relation State-individual (vertical effect), but also in the "private domain" between individuals (horizontal effect).

Forced labour is, in particular since 1945, generally considered as falling within the scope of the protection of human rights (Betten, p.129). One result was the 1957 ILO Abolition of Forced Labour Convention, No. 105, supplementary to No. 29, which declares forced or compulsory labour to be a violation of human rights (preamble). As such, forced labour cannot be equated simply with low wages or poor working conditions, nor "does it cover situations of pure economic necessity, as when a worker feels unable to leave a job because of the real or perceived absence of employment alternatives" (ILO, Global Report 2005, p. 5). For example, "the failure to pay a worker the statutory minimum wage does not constitute forced labour. However, action to prevent a worker from leaving the workplace will normally come within the ambit of forced labour" (ILO, Human Trafficking and Forced Labour Exploitation 2005, p. 19). This does not take away that the line dividing forced labour in the strict legal sense of the term from extremely poor working conditions can at times be very difficult to distinguish (ILO, Global Report 2005, p. 8).

[22] Other relevant ILO conventions are the Worst Forms of Child Labour Convention, 1999 (No. 182), the Migration for Employment Convention (revised), 1949 (No. 97), the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) and the Private Employment Agencies Convention, 1997 (No. 181).

The definition of forced labour contains two basic elements: the work or service is exacted under the menace of a penalty and it is undertaken involuntarily. Both elements are clarified in the case law of the ILO supervisory bodies over the last 75 years.

According to ILO case law, the penalty does not need to be a form of penal sanction, but may also take the form of a loss of rights or privileges. Moreover, the menace of a penalty can take multiple forms, ranging from physical violence or restraint, or even death threats to the victim or his/her relatives, to more subtle forms of menace, sometimes of a psychological nature. These can include threats to denounce victims to the police or immigration authorities when their employment or residence status is illegal, or denunciation to village elders or family members in the case of girls or women forced to prostitute themselves. Other penalties can be of a financial nature, including economic penalties linked to debts, the non-payment of wages, or the loss of wages accompanied by threats of dismissal if workers refuse to do overtime beyond the scope of their contract or national law. Employers can also require workers to hand over their identity papers or may use the threat of confiscation of these documents to exact forced labour (ILO, Global report 2005, p. 5-6).

With regard to the freedom of choice, different aspects must be taken into consideration, e.g. the form and subject matter of consent, the role of external restraints or indirect coercion and the possibility of revoking freely given consent. Also here, there can be many subtle forms of coercion:

> *"Many victims enter forced labour situations initially of their own accord, albeit through fraud and deception, only to discover later that they are not free to withdraw their labour. They are subsequently unable to leave their work owing to legal, physical or psychological coercion. Initial consent may be considered irrelevant when deception or fraud has been used to obtain it"* (ILO, Global Report 2005, p.6).

This means that also in cases where an employment relationship is originally the result of a freely concluded agreement, the worker's right to free choice of employment remains inalienable, that is, a restriction on leaving a job, even when the worker freely agreed to enter it, can be considered forced labour.

It is important to note that a forced labour situation is determined by the nature of the relationship between a person and an "employer", and not by the type of activity performed. Nor is the legality or illegality under national law of the activity relevant to determine whether or not the work is forced. Similarly, an activity does not need to be recognised as an

"economic activity" for it to fall potentially within the ambit of "forced labour" (ILO, Global Report 2005, p. 6). Forced labour, thus, applies as much to, for example, construction or factory labour as to prostitution (also when illegal) or begging when performed under coerced conditions.[23] This should be kept in mind when interpreting and applying the elements of forced labour as elaborated below.

Child prostitution and pornography always constitutes forced labour and is one of the worst forms of child labour under Convention No. 182: "Children are not considered to be capable of making a voluntary decision to engage in such work" (ILO, Human Trafficking and Forced Labour Exploitation 2005, p. 25).

In its Global Report 2005 (p. 6), the ILO gives the following elements or characteristics to identify forced labour situations in practice:

[23] Forced labour is also one of the worst forms of child labour, as defined in the 1999 ILO Worst Forms of Child Labour Convention (No. 182).

Identifying forced labour	
Lack of consent to (involuntary nature of) work (the "route into" forced labour)	**Menace of penalty (the means of keeping someone in forced labour)**
Birth/descent into "slave" or bonded labour • Physical abduction or kidnapping • Sale of person into the ownership of another • Physical confinement in the work location – in prison or in private detention • Psychological compulsion, i.e. an order to work, backed up by a credible threat of a penalty for non-compliance • Induced indebtedness (by falsification of accounts, inflated prices, reduced value of goods or services produced, excessive interest charges, etc.) • Deception or false promises about types and terms of work • Withholding or non-payment of wages • Retention of identity documents or other valuable personal possessions	• Physical violence against the worker or family or close associates • Sexual violence • (Threat of) supernatural retaliation • Imprisonment or other physical confinement • Financial penalties • Denunciation to the authorities (police, immigration, etc.) and deportation • Dismissal from current employment • Exclusion from future employment • Exclusion from community and social life • Removal or rights or privileges • Deprivation of food, shelter or other necessities • Shift to even worse working conditions • Loss of social status

In its guidelines on human trafficking and forced labour exploitation, the ILO elaborates six major elements that point to a forced labour situation. Evidently, not all of the elements need to be present to speak of a forced labour situation. Usually two or more of the elements are imposed in a combined fashion. Furthermore, it is noted that each of these acts, when committed intentionally or knowingly, is likely to be a criminal offence within existing criminal of most countries (ILO Human Trafficking and Forced Labour Exploitation 2005, p. 20-21).

- *"Physical or sexual violence: Forced labour is frequently exacted from workers by the threat and application of physical or sexual violence. Violence against the individual will come within the scope of the criminal offence of assault. In many*

jurisdictions, assault is defined as any act which is committed intentionally or recklessly, which leads another person to fear immediate and unlawful personal violence. The severity of the act of violence can place it in a the category of aggravated assault with more severe penalties on conviction;

- *Restriction of movement of the worker: A common means by which labour is extracted by duress from workers is through their confinement. The workers are locked into the workplace or their movement is restricted to a very limited area, often with the objectives of preventing contact with the host community, and extracting the maximum amount of labour from the individuals. Restriction of movement corresponds to the common law offence of false imprisonment, which is any restraint of liberty of one person under the custody of another.*
- *Debt bondage/bonded labour: Occurs when a person becomes a security against a debt or loan. It is a situation that lies on the borderline between forced labour and slavery. The individual works partly or exclusively to pay off the debt which has been incurred. In most cases the debt is perpetuated because on the one hand, the work or services provided are undervalued and on the other hand, the employer may provide food and accommodation at such inflated prices that it is extremely difficult for the worker to escape from debt. Debt may also be incurred during the process of recruitment and transportation, which affects the degree of freedom of the employment relationship at the final stage. The key to the hold of the employer over the employee is the appearance of lawfulness of the contract. So long as the contract is unlawful, which in many jurisdictions will be the case either as a result of the unlawfulness of the taking of a human beings as security for a debt or the unfair contract terms of the agreement regarding food and accommodation, the hold of the employer over the worker is the result of deception as to the rights of the worker. This falls under the offence of obtaining pecuniary advantage or services by deception which is unlawful in virtually all countries.*
- *Withholding wages or refusing to pay the worker at all: Workers are found in situations where they work in the expectation of payment but the employer either has no intention of paying the individual for the work performed or intends to withhold, unreasonably and without just cause, substantial sums from the worker's wages. The withholding of wages – where a person dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it – is theft in criminal law. The fact that the property is in the form of wages due does not remove it from the scope of the offence, even if withholding of wages may form other offences under labour law.*

- *Retention of passports and identity documents: It is not uncommon in particular in the case of migrant workers, that the employer takes the worker's identity documents and/or passport, often on the excuse of arranging some immigration matter and refuses to return them to the individual unless he or she continues to work for the employer. The inability to prove identity or indeed even nationality often creates sufficient fear that the workers feel they are obliged to submit to the employer.*
- *Threat of denunciation to the authorities: This is a form of menace or penalty that applies primarily to irregular migrant workers. While it may, depending on the circumstances of the work, also apply to nationals of a State, this is less frequent. The threat of denunciation to the authorities comes within the legal definition of blackmail in many jurisdictions. The standard definition is that a person is guilty of blackmail if, with a view to gain for him or herself, or another or with the intent to cause loss to another, he or she makes any unwarranted demand with menaces. A demand with menaces is unwarranted unless the person making it does so in the belief that he or she has reasonable grounds for making the demand and that the use of menaces is a proper means of reinforcing the demand. For the offence to be committed it may be immaterial that the menace relate to action to be taken by the person making the demand."*

Bonded labour or debt bondage – in more informal terminology: the system by which workers are kept in bondage, simply by making it impossible for them to pay off their (real, imposed or imagined) debts (Betten, p. 136) – falls under several prohibitions. It is considered a form of forced labour (see e.g. the case law of the ILO Committee of Experts) as well as a slavery-like practice (Art. 1, 1956 Supplementary Slavery Convention).

7. Convention on the Rights of the Child, 1989

In the case of children, the UN Convention on the Rights of the Child provides for further specification of the concept of exploitation in Art. 32:

> *"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".*

Also, ILO Convention no. 182 Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour (1999) provides for further specification.

8. Statute of the International Criminal Court (ICC), 1998

Art. 7 of the Statute includes among the crimes against humanity the crime of enslavement, which is defined as

> *"the exercise of any or all of the powers attaching to the right of ownership over a person" including "the exercise of such power in the course of trafficking in persons, in particular women and children".*

In the same context the crimes of "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other forms of sexual violence of comparable gravity" are mentioned.
To qualify as a crime against humanity within the scope of the statute of the ICC , the acts mentioned in Art. 7, including enslavement and therefore trafficking, must be committed as a part of a widespread or systematic attack directed against any civilian population, with the perpetrators knowledge of the attack.
The same crimes are qualified by Art. 8 as war crimes, both with reference to internal and international conflicts (Art. 8(d)).

9. Regional instruments

Also instruments on the regional level, such as the European Convention on Human Rights (1950), the American Convention on Human Rights (1969) and the African Charter on Human and Peoples' Rights (1981) contain prohibitions on slavery and slavery-related practices.

9.1 European Convention on Human Rights (ECHR, 1950)

Art. 4 of the European Convention on Human Rights states:

> 4.1 *No one shall be held in slavery or servitude*
>
> 4.2 *No one shall be required to perform forced or compulsory labour*

(followed in Art. 4.3 by a number of exceptions in accordance with the ILO conventions)

According to Dijk & van Hoof (p. 334), slavery and servitude may be taken to refer to the entire status or situation of the person concerned, whereby slavery indicates that the person concerned is wholly in the legal ownership of another person, while servitude "concerns less far-reaching forms of restraint and refers, for instance, to the total of the labour conditions

and/or obligations to work or to render services from which the person in question cannot escape and which he cannot change". Forced labour and compulsory labour, on the other hand, "do not refer to the entire situation of the person concerned, but exclusively to the involuntary character of the work and services to be performed by him, which may, and usually will, also have a temporary or incidental character" (ibid.). The same distinction is made by Fawcett (p.55):

> *"Slavery and servitude both appear primarily to refer to the status of an individual or the condition of his life, while forced labour may characterize rather the kind of work or service, often incidental or temporary, which he performs. Slavery, on the other hand, is in essence the condition of being wholly in the legal ownership of another person, while servitude is, it seems, broader and in common with forced or compulsory labour can cover conditions of work or service, which the individual cannot change or from which he cannot escape".*

As to the case law of the European Commission and Court on Human Rights, three cases are of importance. In the *Van Droogenbroeck Case against Belgium*, the applicant alleged that he was in a State of servitude because of being detained in a penal colony in which he was required to work and which he was not allowed to leave without permission granted at the discretion of the executive. The Commission took the view that there was no question of servitude, because the measure was one of limited duration only, was subject to judicial review and did not affect the legal status of the person in question (Report of 9 July, 1980 of the European Commission on Human Rights in the *Van Droogenbroeck case*, Case 7906/77). As the Commission pointed out in its Decision about the admissibility of this case, the concept of servitude is not further defined; the text contains no explanation of the difference between this concept and that of forced labour. However, it may be considered that in addition to the obligation to provide another with certain services the concept of servitude includes the obligation on the part of the "serf" to live on another's property and the impossibility of changing his condition. For the interpretation of the term servitude the Commission refers in particular to Art. 1 of the 1956 Supplementary Convention, without giving an own interpretation or definition.

Up till now Commission and Court have refrained from giving a definition of forced or compulsory labour. However, both bodies have made references to the ILO Conventions. Elements of the concept forced or compulsory labour mentioned by the Commission are: "first that the work or service is performed by the worker against his will and, secondly, that

the requirement that the work or service be performed is unjust or oppressive or the work or service itself involve avoidable hardship".[24]
With respect to the first requirement - the involuntary nature – the Commission so far has taken the view that consent, once given, deprives the work or service of its compulsory character. According to van Dijk & van Hoof, such an interpretation is too restrictive: "Even if a person has voluntarily entered into a labour contract or has agreed to perform certain services, the circumstances may change in such a way or the objections to the work in question, especially in engagements of long duration, may become so far-reaching that holding the person unqualifiedly to his consent may indeed bring in issue Article 4 (2)" (Dijk & van Hoof, p. 336). This view was confirmed by the Court in the *Van der Mussele Case*, where the Court did not hold the issue of consent to be decisive.
As to the second criterion, van Dijk & van Hoof are of the opinion that it should be applied as an alternative requirement rather than a cumulative one, in the sense that "even work or a service to which the person concerned has previously consented may assume a compulsory character for him if the obligations resulting there from involve such unjustified or avoidable hardship that they can no longer be deemed to be covered by his consent" (p. 336). This is supported by the Commission in its report in the *Van Mussele Case*, where the Commission speaks of a subsidiary "argument" in connection with the second criterion (Report of 3 March 1982, B.55 (1987), p. 33).

An interesting and very recent judgment of the Court concerned the case of a child from Togo who during 4 years (from the age of 15 till 19) was held in domestic slavery by a French couple without any remuneration after promises of schooling and arranging for a legal residence permit (*Siliadin vs. France*, Case nr. 73316/01, 26 July 2005). [25] The Court unanimously condemned France for not providing adequate protection in its criminal law against this modern form of slavery, thus violating its obligations under Art. 4 ECHR to "criminalise and suppress every act aimed at keeping a person in a situation which is in violation with Art. 4". In its judgement the Court specified for the first time the concept of 'servitude' as contained in Article 4 of the European Convention on Human Rights. According to the Court, servitude should be defined as 'an obligation to provide one's services that is imposed by the use of coercion, and is to be linked to the concept of slavery'. In this case the coercion consisted, among others, in the fact that she had no independent financial means and found herself in an extremely vulnerable and isolated position because her employers had taken away her documents and, despite their promises, never regulated her immigration status.

[24] Appl. 4653/70, *X v. Federal Republic of Germany*, Yearbook XVII (1974), p.148 (172).

9.2 American Convention on Human Rights, 1969

Art. 6 States:

> *6.1 No one shall be subject to slavery or involuntary servitude, which are prohibited in all its forms, as are the slave trade and traffic in women*
> *6.2 No one shall be required to perform forced or compulsory labour [....]*

(followed by a number of exceptions in Art. 6.3).

Involuntary servitude is understood to denote the condition of a person, who with the use of violence, coercion or deprivation of freedom, against his/her will, is kept to perform paid or unpaid labour for another person (Tretter, p. 564).

9.3 African Charter on Human and Peoples' Rights, 1981

Art. 5 of the African Charter on Human and Peoples' Rights States:

> *"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".*

10. Summary and conclusions

10.1 Summary

Based on the analysis of the relevant international instrument, the following can be concluded with regard to the meaning and interpretation of the concepts at hand.

Slavery and the slave trade
Slavery is (a/o) prohibited by the 1926 League of Nations Slavery Convention, the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Practices similar to Slavery, the 1948 Universal Declaration on Human Rights, the ICCPR, the European Convention on Human Rights, the American Convention on Human Rights and the African Charter on Human and People's Rights.

[25] *Siliadin v. France*, ECrtHR, application no. 73316/01, 26 July 2005, http://www.echr.coe.int.

The1926 League of Nations 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".*

The slave-trade is defined as to include:

> *"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".*

Slavery indicates that the person is in the legal ownership of another person, although it should be noted that slavery not only refers to the status of condition of a person over whom *all* of the powers attached to the right of ownership are exercised, but also exists when *any* of those powers are exercised. In the international praxis, slavery is not only understood to mean the exercise of all or any powers attached to ownership, but also the actual de-facto destruction of the legal personality of a person. Nonetheless, the concept of slavery is generally interpreted as to refer to slavery in its "true" sense, that is involving the absolute control of one person over another. Slavery can be said to be a form of forced labour. However, although a person in a situation of slavery will certainly be forced to work, this is not the only defining feature. Moreover, the situation is a permanent one, rather than a temporary.
The definition of slavery as given in the 1926 Convention stands model for the slavery prohibitions in the other conventions, thus limiting the interpretation of the concept of slavery to slavery its classic form.

Slavery-like practices
Slavery-like practices are prohibited by the 1956 UN Supplementary Convention on the Abolition of Slavery, the Slave Trade and Practices similar to Slavery. The Convention itself does not contain a definition of slavery-like practices, but merely lists a number of practices and institutions that constitute slavery-like practices, i.e. debt bondage, serfdom, servile forms of marriage and the exploitation of children and adolescents.
However, two common criteria can be derived from the listed practices and institutions, on the basis of which slavery-like practices can be defined as characterised by:

- an infringement of the formal or de-facto legal status of a person, resulting in a serious and far-reaching deprivation of fundamental civil rights, in combination with
- the one-sided economic exploitation of a person through the abuse of long-term relations of dependency.

A slavery-like status can be said to be attained if the required qualifying elements of economic exploitation on the basis of an actual relationship of dependency or coercion are fulfilled.
Accordingly, slavery-like conditions can be characterized by economic exploitation on the basis of an actual relationship of dependency or coercion, in combination with the deprivation of fundamental civil rights. There thus exists an evident overlap between forced labour situations and slavery-like practices. Debt bondage or "debt slavery" is a particularly prominent feature of contemporary forced labour situations (ILO, Global Report 2005, p. 8).

In general, slavery-like practices are understood to refer to modern forms of slavery, in which the person is not literally 'owned' - as in the classic sense of loosing his or her legal status/ personality -, but in which the actual effects on the person concerned amount to - or are equal with - slavery in its classic form.

Servitude
Servitude is prohibited by the Universal Declaration on Human Rights, the ICCPR and the European Convention on Human Rights (ECHR). The American Convention on Human Rights prohibits involuntary servitude.

None of the above mentioned conventions contains an explicit definition of servitude. However, on the basis of an interpretation of the conventions listed, servitude can be defined as:

> *"the total of the labour conditions and/or the obligation to work or to render services from which the person in question cannot escape and which he/she cannot change".*

According to the American Convention involuntary servitude must be understood to denote:

"the condition of a person, who with the use of violence, coercion or deprivation of freedom, against his/her will, is kept to perform paid or unpaid labour for another person".

The clearest distinction between the different concepts of slavery, servitude and forced labour, can be found in the context of (the interpretation of) the European Convention on Human Rights. In the light of the ECHR and its case law, slavery and servitude can be understood as both referring to the status of an individual or the conditions of life, whereas forced labour may characterize rather the kind of work or service, often incidental or temporary, which the person performs. Slavery then, is in essence the condition of being wholly in the legal ownership of another person, while servitude concerns less far-reaching forms of constraint and represents a broader concept, covering conditions of work or service which the individual cannot change or from which he/she cannot escape. According to the European Court of Human Rights servitude can be defined as 'an obligation to provide one's services that is imposed by the use of coercion, and is to be linked to the concept of slavery'. (*Siliadin vs. France*, Case nr. 73316/01, 26 July 2005).
This is in line with the *Travaux Preparatoires* of the ICCPR, in which slavery is considered a relatively limited and technical notion which implies the destruction of the legal personality of the victim, whereas servitude refers to a more general idea, covering all possible forms of one person's dominance over another person.

The description of servitude seems to indicate a broader understanding than contained in the concepts of debt bondage and serfdom in the 1956 Supplementary Convention. It is, however, - in the light of the continuing and ongoing development of the concept of servitude in human rights law praxis, and in particular by the concerned UN bodies -, to be questioned whether or not it is permissible to equate servitude with slavery-like practices as used in the 1956 Convention (Tretter, p.564).

While the definition of slavery in the sense of the Human Rights Conventions only allows for a limited on-going development of this concept, the prohibition on servitude, on the other hand, has a more open character, and allows for a more dynamic interpretation process with regard to the setting of standards in the field of slavery-like practices that goes beyond the slavery-like practices mentioned in the 1956 Convention (Tretter, p. 568). Both the notions of slavery-like practices and servitude appear to be in a process of ongoing interpretation in response to new developments and new forms of slavery-like practices. However, in particular, the concept of servitude – as it represents a more open standard as compared to

the concept of slavery - can be considered 'dynamic', thus allowing international human rights law to anticipate and counteract concrete and relatively new forms of threats to freedom.

Forced labour and compulsory labour

Forced labour or compulsory labour is prohibited by the 1930 Forced Labour Convention No. 29, the 1957 Abolition of Forced Labour Convention No. 105, the ICCPR, the ECHR and the American Convention on Human Rights.

The Forced Labour Convention No. 29 defines forced labour and compulsory 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".*

Different from slavery, forced and compulsory labour or services do not to refer to the total situation of the person concerned, but exclusively to the involuntary character of the work and services to be performed by him/her, which may, and usually will, also have a temporary incidental character.

As to the involuntary nature, it may be concluded from the case law of the ECrtHR that, even if a person has voluntarily entered into a labour contract or has agreed to perform certain services, the circumstances may change in such a way or the objections to the work in question may become so far-reaching that holding the person unqualifiedly to his/her consent may bring into play the prohibition on forced labour. Moreover, even work or a service to which the person concerned has previously consented may assume a compulsory character if the obligation resulting therefrom involves such unjustified or avoidable hardship that they can no longer be deemed to be covered by his/her consent.

A forced labour situation is determined by the nature of the relationship between a person and an "employer", and not by the type of activity performed, its legality or illegality under national law or its recognition as an "economic activity". Forced labour thus includes forced sexual services as well as, for example, forced begging.

Bonded labour or debt bondage is considered to constitute a form of forced labour (see e.g. case law ILO Committee of Experts) as well as a slavery-like practice (see below). This is particular important in the case of trafficking in human beings, where the use of debt bondage is prominent. With regard to the Palermo Protocol this means that any recruitment etc. with

the use of deception or coercion for the purpose of bonded labour/with the purpose to hold a person in debt bondage must be considered to constitute trafficking.

In its recent guidelines on human trafficking and forced labour exploitation, the ILO identifies six elements that indicate a forced labour situation: the treat and/or application of physical or sexual violence, restriction of movement of the worker, debt bondage/bonded labour, the withholding of wages or refusal to pay the worker at all, retention of passports and identity documents and the threat of denunciation to the authorities (ILO, Human Trafficking and Forced Labour Exploitation 2005). However, the line between forced labour and extremely poor working conditions can at times be difficult to draw.

Bonded labour or debt bondage

Bonded labour or debt bondage - the system by which workers are kept in bondage, simply by making it impossible for them to pay off their (real, imposed or imagined) debts – is considered a form of forced labour as well as a slavery-like practice (1956 Supplementary Slavery Convention).

The 1956 Supplementary Convention defines debt-bondage as:

> *"the status or 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 as reasonable assessed is not applied towards the liquidation of the debt or the length of those services are not respectively limited and defined".*

10.2 Conclusions

On the basis of the above analysis, it must be concluded that, although there is some overlap, all the discussed concepts – that is: forced labour or services, slavery or practices similar to slavery and servitude – have their own meaning and are needed in order to cover all contemporary purposes of trafficking.

Secondly, it must be concluded that there is no need to separately include the purpose of "the exploitation of prostitution of others" or "sexual exploitation", as these are covered by the other concepts, including the concept of forced labour or services.

Thirdly, it can be concluded that the concept of trafficking is mostly understood as the process through which people arrive in a situation of forced labour, slavery or servitude or to trade people when they are already in such situation. There is therefore a need for laws

against both forced labour or services, slavery or practices similar to slavery and servitude, and trafficking in order to cover both the process through which people are brought in a situation of exploitation and the actual exploitation itself. This is underlined through the recent judgement of the ECrtHR in the case *Siliadin vs. France*.

Finally, in particular the concepts of servitude and slavery-like practices have a relatively open and dynamic character and are still in a process of ongoing interpretation. This allows adaptation to new developments and to anticipate and counteract concrete and new forms of the practices at hand. The concept of slavery, on the other hand, seems to be too limited to adequately describe the new forms of this old practice. The most elaborated concept is that of forced labour, in particular through the ongoing work of the ILO and its Committee of Experts.

General conclusions and recommendations

The Protocol only addresses the exploitation of the prostitution of others and sexual exploitation in as far as the other elements of the definition are fulfilled: that is the presence of one of the acts and the use of one of the coercive or deceptive means. There is no duty under the Protocol to criminalise prostitution.

Also prostitutes can be trafficked: the fact whether or not a person was formerly engaged in prostitution or knew s/he would be so, is not relevant if all the elements of the definition are fulfilled, that is the presence of one of the acts, the use of one of the coercive or deceptive means and the purpose of exploitation of the prostitution of others or any other form of sexual exploitation

Although a person can consent to migrate, to carry false papers, to participate in prostitution or to work illegally abroad, this does not imply that the person consents to work in conditions of forced labour, slavery or servitude, and therefore does not exclude that the person is a victim of trafficking.

States are required to ensure the adequate criminalisation of trafficking, irrespective of its domestic or transnational nature and irrespective of the involvement of a criminal group.

As the concept of trafficking is commonly understood as the process through which people arrive in a situation of forced labour, slavery or servitude, it is recommended that States separately criminalise any exploitation of human beings under forced labour and/or slavery-like conditions (including the profiting of such exploitation) as a specific offence, no matter how people arrive in such conditions, that is: independent of the presence of any of the other acts and/or means of the definition of trafficking. Such criminalisation should cover all forms of forced labour or slavery-like exploitation, irrespective the industry in which such exploitation takes place or the type of labour or services to be performed by the victim, and include forced sexual services.

Given their vague and undefined character, it is recommended not to separately include the purpose of “exploitation of prostitution of others” and “sexual exploitation” in domestic criminal law, as forced sexual services, either in prostitution or in other settings (e.g. pornography) are fully covered by the other forms of exploitation listed in the Protocol, among which the concept of forced labour or services. However, trafficking for the purpose of

forced sexual services could count as an aggravating circumstance, given the particular serious violation of the person's physical and sexual integrity.

Domestic legislation should clarify that a trafficked person is never punishable in connection with her/his own trafficking or for the trafficking of persons moved together with her/him.

The definition of the "means" in national law should, to the extent possible, mirror existent criminal law rather than seeking to establish new and different definitions applicable only to this category of crime.

Given the specific character and complications of trafficking for the purpose of the removal of organs, it might be recommended to deal with this issue in a separate provision in criminal law.

Annex 1

Article 273a Criminal Code: trafficking in human beings, since 1 January 2005 (non-official, English translation of 1 January 2005)

1. Any person who:
(a) by force, violence or another act, by the threat of violence or another act, by extortion, fraud, deception or the abuse of authority ensuing from actual relations, by the abuse of a vulnerable position or by giving or receiving remuneration or benefits in order to obtain the consent of a person who has control over this other person recruits, transports, moves, accommodates or shelters another person, with the intention of exploiting this other person or removing his or her organs;
(b) recruits, transports, moves, accommodates or shelters a person with the intention of exploiting that other person or removing his or her organs, when that person has not yet reached the age of eighteen years;
(c) recruits, takes with him or abducts a person with the intention of inducing that person to make himself/herself available for performing sexual acts with or for a third party for remuneration in another country;
(d) forces or induces another person by the means referred to under (a) to make himself/herself available for performing work or services or making his/her organs available or takes any action in the circumstances referred to under (a) which he knows or may reasonably be expected to know will result in that other person making himself/herself available for performing labour or services or making his/her organs available;
(e) induces another person to make himself/herself available for performing sexual acts with or for a third party for remuneration or to make his/her organs available for remuneration or takes any action towards another person which he knows or may reasonably be expected to know that this will result in that other person making himself/herself available for performing these acts or making his/her organs available for remuneration, when that other person has not yet reached the age of eighteen years;
(f) wilfully profits from the exploitation of another person;
(g) wilfully profits from the removal of organs from another person, while he knows or may reasonably be expected to know that the organs of that person have been removed under the circumstances referred to under (a);
(h) wilfully profits from the sexual acts of another person with or for a third party for remuneration or the removal of that person's organs for remuneration, when this other person has not yet reached the age of eighteen years;

(i) forces or induces another person by the means referred to under (a) to provide him with the proceeds of that person's sexual acts with or for a third party or of the removal of that person's organs;

shall be guilty of trafficking in human beings and as such liable to a term of imprisonment not exceeding six years and a fifth category fine*, or either of these penalties:

2. Exploitation comprises at least the exploitation of another person in prostitution, other forms of sexual exploitation, forced or compulsory labour or services, slavery, slavery like practices or servitude.

3. The following offences shall be punishable with a term of imprisonment not exceeding eight years and a fifth category fine*, or either of these penalties:
(a) offences as described in the first paragraph if they are committed by two or more persons acting in concert;
(b) offences as described in the first paragraph if such offences are committed in respect of a person who is under the age of sixteen.

4. The offences as described in the first paragraph, committed by two or more persons acting in concert under the circumstance referred to in paragraph 3 under (b), shall be punishable with a term of imprisonment not exceeding ten years and a fifth category fine*, or either of these penalties.

5. If one of the offences described in the first paragraph results in serious physical injury or threatens the life of another person, it shall be punishable with a term of imprisonment not exceeding twelve years and a fifth category fine*, or either of these penalties.

6. If one of the offences referred to in the first paragraph results in death, it shall be punishable with a term of imprisonment not exceeding fifteen years and a fifth category fine*, or either of these penalties.

7. Article 251 is applicable mutatis mutandis.

* A fifth category fine is a fine of maximum € 45,000,-.

Literature

Ann D. Jordan, *The Annotated Guide to the complete UN Trafficking Protocol*, Washington: International Human Rights Law Group 2002 (www.globalrights.org).

Gallagher, Ann, "Trafficking, smuggling and human rights: tricks and treaties", in: *Forced Migration Review* (12): 25-28.

A.

Betten, Lammy, *International Labour Law, selected issues*, Deventer, Boston: Kluwer 1993.

Coomaraswamy, Radhika, *Report of the Special Rapporteur on violence against women, its causes and consequences*, United Nations Economic and Social Council, Commission on Human Rights, E/CN.4/1997/47.

Coomaraswamy, Radhika, *Position Paper on the draft Protocol to Prevent, Suppress and Punish Trafficking in Women and Children*, A/AC.254/CRP.13, 20 May 1999.

Crime Prevention and Criminal Justice, report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh session, Addendum, *Interpretative notes for the official records (Travaux Preparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, UN General Assembly, 3 November 2000 (A/55/383/Add.1) (http://www.odccp.org/crime-cicp-convention-documents.html).

Dijk, P. van, and G.J.Hoof, *Theory and Practice of the European Convention on Human Rights*, The Hague/ London/ Boston: SIM/Kluwer Law International 1990.

Expert Group on Trafficking in Human Beings, *Report of the Expert Group on Trafficking in Human Beings,* 22 December 2004, Brussels: European Commission, Directorate-General Justice, Freedom and Security 2004.

Fawcett, J.E.S., *The Application of the European Convention on Human Rights*, Oxford: Clarendon Press 1987.

Fernand-Laurent, Jean, *Report of Mr. Jean Fernand-Laurent, Special Rapporteur on the suppression of the traffic in persons and the exploitation of prostitution*, (E/1983/7), 17 March 1983.

ICMPD, *Draft Training Module for Judges and Prosecutors*, Vienna: International Centre for Migration Policy Development (ICMPD) 2003.

ICMPD, *Regional Best Practice Guidelines for the Development and Implementation of a Comprehensive National Anti-trafficking Response,* Vienna: ICMPD 2005.

ILO, *Note on the additional legal instrument against trafficking in women and children*, A/AC.254/CRP.14, 16 June 1999.

ILO, *Human Trafficking and Forced Labour Exploitation, Guidance for legislation and Law Enforcement*, Geneve: ILO 2005.

ILO, *A global alliance against forced labour, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 2005*, International Labour Conference, 93rd Session 2005, Report of the Director-General, Geneva: ILO 2005.

Kempees, Peter, *A systematic guide to the case-law of the European Court of Human Rights, 1960-1994,* Volume 1, The Hague/ Boston/ London: Martinus Nijhoff Publishers.

Lassen, Nina, "Article 4", in: *The Universal Declaration of Human Rights: A Commentary*, edited by Ashbjorn Eide, Gudmundur Alfredsson, Goran Melander, Lars Adam Rehof and Allan Rosas, with the co-operation of Theresa Swinehart, Scandinavian University Press.

Morsink, Johannes, *The Universal Declaration of Human Rights, Origins, Drafting and Intent,* Philadelphia: University of Pennsylvania Press.

Nowak, Manfred, *UN Covenant on Civil and Political Rights, CCPR Commentary*, Kehl am Rhein/ Strasbourg/ Arlington: N.P. Engel Publisher 1988.

National Rapporteur on Trafficking in Human Beings, *Trafficking in Human Beings*, *Third report of the Dutch National Rapporteur*, The Hague: Bureau NRM 2005.

OSCE Action Plan to Combat Trafficking in Human Beings Decision No. 557 (PC.DEC/557, 24 July 2003).

Tretter, Hannes, "Entwicklung und gegenwartigen Bedeutung der internationalen Sklavereiverbote", in: *Fortschritt im Bewusstsein der Grund-und Menschenrechte/ Progress in the Spirit of Human Rights* (Festschrift fur Felix Ermacora) 527, Nowak, Steurer, Tretter (Eds.), Kehl an Rhein/ Strassbourg/ Arlington: N.P. Engel Verlag 1988.

United Nations High Commissioner for Human Rights, *Informal Note*, A/AC.254/16, 1 June 1999.

UN High Commissioner for Human Rights, UN Children's Fund and the International Organisation for Migration, *Note on the draft protocols concerning migrant smuggling and trafficking in persons*, A/AC.254/27, 8 February 2000.

United Nations Convention Against Transnational Organized Crime, UN 2000.

United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, UN 2000.

United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly Resolution 40/34, adopted 29 November 1985.

UN HCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, New York/Geneva: UN HCHR, 2002.

Whittaker, Benjamin, *Report on Slavery*, E/CN.4/Sub.2/1982/20/Rev.1, UN Sales No. E.84.XIV.1.

Wijers, Marjan & Lin Lap-Chew, *Trafficking in women, forced labour and slavery-like practices in marriage, domestic labour and prostitution*, Utrecht: STV/GAATW 1997, reprint 2000.

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