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## United Nations Against Slavery: Unravelling Concepts, Institutions and Obligations

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## ARTICLES

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*Vladislava Stoyanova\**

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#### INTRODUCTION

2016 marked ninety years since the adoption of the Slavery Convention, the first multilateral treaty which provides a definition of slavery in international law and which obliges its state parties to bring about the abolition of slavery.<sup>1</sup> The latter obligation was not immediate since abolition had to be achieved only “progressively and as soon possible[.]”<sup>2</sup> This qualifier testified to the overall ambivalent position of states towards abolition at that time. 2016 also marked fifty years since the adoption of the International Covenant on Civil and Political Rights (ICCPR or the Covenant). With its comprehensive territorial scope amounting to a total of 169 state parties,<sup>3</sup> the ICCPR is “the pre-eminent U.N. human rights instrument setting standards for the world at large. . . .”<sup>4</sup> The Covenant, and particularly Article 8, entrenches the unqualified right not to be held in slavery or servitude and not to be required to perform forced or compulsory labor.<sup>5</sup> With the adoption of the Covenant in 1966, international law for the first

1. Slavery Convention, Mar. 9, 1927, 60 L.N.T.S. 253.

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

3. See *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg\\_no=IV-4&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-4&chapter=4&clang=_en) (last visited Oct. 23, 2017).

4. David Harris, *The International Covenant on Civil and Political Rights and the United Kingdom: An Introduction*, in *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND UNITED KINGDOM LAW* 1, 65 (David Harris & Sarah Joseph eds., 1995).

5. International Covenant on Civil and Political Rights art. 8, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

time conferred such an individual legal entitlement. This entitlement has been widely perceived as the core of human rights law.<sup>6</sup> The struggle against slavery and the slave trade in the late eighteenth century is thus usually referred to as one of the most important antecedents of international human rights law.<sup>7</sup> The fight against slavery is also widely referred to as one of the first human rights campaigns.<sup>8</sup>

What has international human rights law achieved in terms of addressing slavery ninety years after the adoption of the Slavery Convention and fifty years after the adoption of the ICCPR? A clarification as to my focus is immediately due, lest there be charges down the line that I have missed some points that arise out of this difficult question. Achievements will be measured in two respects. First, how have the rights enshrined in Article 8 of the ICCPR been interpreted and how has their meaning been developed so that they can be applied considering the contemporary circumstances? The second benchmark for measuring achievements relates to the institutional mechanisms established at the U.N. level for monitoring whether and how states ensure the right not to be held in slavery, servitude, or forced labor. It is important to assess these two aspects, i.e. the development of the international human rights law norms concerning slavery and the role of institutions for ensuring compliance, because of the above-mentioned anniversaries which, indeed, prompt us to reflect upon the accomplishments in this area of international law. Similarly, it merits emphasis that there has been a scarcity of scholarly engagement with Article 8 of the ICCPR<sup>9</sup> and with the question how this provision provides a basis for holding states internationally responsible for their failures to ensure the rights enshrined therein. The examination of slavery, servitude, and forced labor within the international law paradigm of state responsibility has remained a blind spot.<sup>10</sup> This gap has led to inadequate under-

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6. The ECtHR refers to Article 4 of the ECHR as a provision that 'enshrines one of the fundamental values of democratic societies'. *L.E. v. Greece*, App. No. 71545/12, ¶ 64 (2016), <http://hudoc.echr.coe.int/eng?i=001-160218>.

7. LOUIS HENKIN, *THE AGE OF RIGHTS* 15 (1990); Nina Lassen, *Article 4*, in *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 87, 103 (Gudmundur Alfredsson & Asbjørn Eide eds., 1999); JENNY MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* 149–50 (2012) (contemporary human rights law has its origins in the early nineteenth-century movement in Great Britain to abolish the transatlantic slave trade); MANFRED NOWAK, *U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY* 196–97 (2d rev. ed. 2005).

8. SARAH JOSEPH & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY* 330 (2013); Jenny Martinez, *Human Rights and History*, 126 *HARV. L.J.* 221, 223 (2012).

9. The existing literature either focuses on human trafficking, *see, e.g.*, ANN GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* (2010); Janie Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 *AM. J. INT'L L.* 609 (2014), or on the slavery and forced labor conventions from general international law *see, e.g.*, JEAN ALLAIN, *SLAVERY IN INTERNATIONAL LAW: OF HUMAN EXPLOITATION AND TRAFFICKING* (2013).

10. The existing literature rather focuses on individual criminal responsibility in the context of national criminal law, *see, e.g.*, Jean Allain, *The Definition of Slavery in Interna-*

standing of the significance of the right not to be held in slavery, servitude, and forced labor in terms of required interventions.<sup>11</sup> On a related point, it is not likely that states directly incur international responsibility by enslaving individuals.<sup>12</sup> Rather, states might incur international responsibility for their failure to *ensure* the rights protected by Article 8 of the ICCPR.<sup>13</sup> There have been no reflections on the affirmative obligations imposed by this provision, which is a significant gap because, from the contemporary perspective, it is usually private actors who subject individuals to abuses intended to be captured by the scope of Article 8 of the Covenant. Thus, the issue is what affirmative measures states are obliged to undertake to address these situations. Furthermore, it is necessary to undertake a sensible examination of the limits of these positive obligations.

Finally, the work of the U.N. Special Rapporteur on Contemporary Forms of Slavery (the U.N. Special Rapporteur) has not been an object of a scholarly review.<sup>14</sup> This is an important omission because, as I discuss below, the rapporteur is the only actor at the U.N. level specifically man-

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*tional Law*, 52 *HOW. L. J.* 239 (2009); see also Stephen Tully, *Sex, Slavery and the High Court of Australia: The Contribution of R v. Tang to International Jurisprudence*, 10 *INT'L CRIM. L. REV.* 403 (2010); Bellagio—Harvard Guidelines on the Legal Parameters of Slavery (Mar. 3, 2012), <http://www.qub.ac.uk/schools/SchoolofLaw/Research/HumanRightsCentre/Resources/Bellagio-HarvardGuidelinesontheLegalParametersofSlavery/>, or international criminal law, see, e.g., M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 *N.Y.U. J. INT'L L. & POL.* 445 (1991); Iris Haenen, *The Parameters of Enslavement and the Act of Forced Marriage*, 13 *INT'L CRIM. L. REV.* 895 (2013); Valerie Ossterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 *MICH. J. INT'L L.* 631 (2004).

11. Janie Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 *AM. J. INT'L L.* 609, 629, 636 (2014) (“On the one hand, the move toward the slavery extreme fuels an understanding of the problems of trafficking and forced labor as rooted in the deviant behaviour of individual actors. That approach suggests, in turn, that interventions should focus on ex post accountability and victim protection.”) This article offers a different perspective.

12. International responsibility in the sense of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts. *Int'l Law Comm'n, Report on the Work of Its Fifty-Third Session*, 56 *U.N. GAOR Supp. No. 10*, at 43–51, *U.N. Doc. A/56/10* (2001), reprinted in [2001] 2 *Y.B. INT'L L. COMM'N* 26, *U.N. Doc. A/CN.4/SER.A/2001/Add.1*.

13. See ICCPR art. 2(1), which obliges each State Party not only to respect, but also “to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”

14. In contrast to the U.N. Special Rapporteur on Contemporary Forms of Slavery, the older body mandated to monitor issues of slavery at the U.N. level, namely the U.N. Working Group on Contemporary Forms of Slavery, has been recently an object of scholarly analysis. See Jean Allain, *The Legal Definition of Slavery into the Twenty-First Century*, in *THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY* 200 (Jean Allain ed., 2012); *infra*, Part II.C; see also Urmila Bhoola & Kari Panaccione, *Slavery Crimes and the Mandate of the United Nations Special Rapporteur on Contemporary Forms of Slavery*, 14 *J. INT'L CRIM. JUST.* 363 (2016) (discussing whether there is role for international criminal justice in the work of the special rapporteur or whether she should rather focus on domestic criminal arrangements).

dated to examine and report on slavery. The mandate of the Rapporteur needs to be distinguished from the functions of the U.N. Human Rights Committee (the HRC or the Committee), which is the treaty body established under the ICCPR to monitor states' compliance with the Covenant.<sup>15</sup> The efforts of the HRC in terms of delineating the definitions of slavery, servitude, and forced labor, and identifying the corresponding duties and duty-bearers, have also remained a blind spot of scholarly assessment.<sup>16</sup> Since norms are anchored in institutions at the international level, the work of both the Special Rapporteur and the HRC needs to be seriously examined.

Further clarifications as to the scope of the forthcoming analysis must be offered. There are various actors at both global and regional levels whose mandates somehow cover issues related to slavery, servitude, and forced labor. Within the U.N. family itself, there is a cohort of treaty bodies<sup>17</sup> and there is no centralized institution with global and hierarchical reach over human rights matters.<sup>18</sup> Various instruments from the core human rights treaties at the U.N. level contain provisions similar to Article 8 of the ICCPR and have their own monitoring mechanisms.<sup>19</sup> To achieve my objectives in a workable fashion, I will focus on one instrument, the ICCPR (including its supervisory body), and on the U.N.'s special mechanism mandated to address issues of contemporary slavery, the U.N. Special Rapporteur. Since the forthcoming analysis is not only descriptive but also normative, the above limitation will not prevent me from drawing useful parallels with other human rights institutions, such as the European Court of Human Rights (the ECtHR), the Inter-American Court of Human Rights (IACtHR) and the International Labor Organization (ILO), which have proposed analytical frameworks for defining the right

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15. See generally MICHAEL O'FLAHERTY, *HUMAN RIGHTS AND THE UN: PRACTICE BEFORE THE TREATY BODIES* (2d ed. 2002).

16. I use the terms "obligations" and "duties" interchangeably.

17. YOGESH TYAGI, *THE U.N. HUMAN RIGHTS COMMITTEE* 35 (2011).

18. Eric Tistounet, *The Problem of Overlapping Among Different Treaty Bodies*, in *THE FUTURE OF THE U.N. HUMAN RIGHTS TREATY MONITORING* 383 (Philip Alston & James Crawford eds., 2000); Rachael Lorna Johnstone, *Cynical Savings or Reasonable Reform? Reflections on a Single Unified U.N. Human Rights Treaty Body*, 7 *HUM. RTS. L. REV.* 173, 173 (2007).

19. See, e.g., G.A. RES. 45/158, annex, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 11 (Dec. 18, 1990); G.A. RES. 44/25, annex, Convention on the Rights of the Child, art. 19 (Nov. 20, 1989); G.A. RES. 34/180, Convention on the Elimination of All Forms of Discrimination against Women, art. 6 (Dec. 18, 1979); G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social and Cultural Rights, art. 7 (Dec. 13, 1966). The bodies mandated to monitor these treaties are yet to engage with issues of slavery and human trafficking. See, though, *Zhen Zhen Zheng v. the Netherlands*, Communication No. 15/2007, U.N. Doc. CEDAW/C/42/D/15/2007 (Nov. 14, 2008) (The author claimed that the Netherlands was in violation of Article 6 of the CEDAW since she *inter alia* had not been informed about the possibility to apply for a special residence permit as a victim of human trafficking. The CEDAW Committee found the application inadmissible since local remedies had not been exhausted. Three members of the Committee dissented).

not to be subjected to slavery, servitude, and forced labor, and the corresponding obligations upon states.

The article starts with a section containing a historical description (Part I). The turn to broader historical accounts is apposite since the engagement of international law with slavery, servitude, and forced labor predates the emergence of international human rights law. It is also important to clarify whether there is any continuity between these earlier engagements of international law and Article 8 of the ICCPR. When it comes to slavery, it is important to consider the practices to which this label was attached and how this still influences the contemporary understanding of the term. Notably, the terminological fragmentation between slavery and forced labor was established prior to the birth of human rights law, which also demands a turn to history so that the division and the differences between these terms can be better explained.

Part II proceeds to examine the U.N. era and distinguishes three important developments. First, the adoption of the Universal Declaration on Human Rights (UDHR) proclaimed a right not to be subjected to slavery and servitude.<sup>20</sup> Second, the non-binding character of the declaration and the uncertain prospects for the adoption of a binding human rights law instrument at that time, prompted the U.N. to adopt in 1956 a separate treaty addressing “institutions and practices similar to slavery,” which led to an additional conceptual fragmentation. Finally, the mechanisms for monitoring states’ efforts to address slavery were very weak; I argue that this weakness was not remedied with the establishment and functioning of the U.N. Working Group on Contemporary Forms of Slavery.

Part III seeks to examine the improvements introduced with the 2007 mandate of the U.N. Special Rapporteur on Contemporary Forms of Slavery. It shows that the work of the rapporteur has enhanced the understanding of the U.N. and the international community of the problem in different regions in the world, but it also emphasizes that her mandate is not strictly legal. The HRC is tasked with setting legal standards at the U.N. level. Part IV contains an account of the work of the Committee in this area. It shows that overall, the HRC has failed to furnish useful clarifications as to the scope of the rights enshrined in Article 8 of the ICCPR. Considering this underdevelopment, Part V raises salient issues that must be considered to elevate Article 8 of the ICCPR from an abstract provision into an effectively applicable legal standard. The efforts to bring some definitional clarity, however, would be almost inconsequential without consideration of the obligations imposed upon states once factual circumstances are deemed to constitute slavery, servitude, or forced labor. Part VI, therefore, points to some challenges brought about by these positive obligations.

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20. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 4 (Dec. 10, 1948).

## I. THE HISTORICAL ACCOUNT

Historically, international law served to authorize and justify slavery. It was central to the slavery enterprise, which displaced millions of Africans; in fact, legal theorists from the sixteenth and seventeenth centuries agreed that the law of nations sanctioned slavery.<sup>21</sup> The large-scale enslavement and transportation of the African population to the Caribbean Islands, North America, and South America, which lasted from the beginning of the sixteenth century into the nineteenth century,<sup>22</sup> were perceived as legitimate.<sup>23</sup> The precise point at which slavery and slave trade became outlawed in international law is difficult to fix.<sup>24</sup> It has been observed that there was no defining moment, but rather “an accumulation of treaties throughout the nineteenth century and a gradual abandonment by the Great Powers of their toleration of the practice, marked in turn by military offensives against traders [. . .] and by domestic court declarations that freed any slave brought within the jurisdiction.”<sup>25</sup>

The United Kingdom was at the forefront of the abolition of the slave trade: by 1807 it passed the Act for the Abolition of the Slave Trade.<sup>26</sup> British subjects were prohibited from participating in the trade and from importing slaves into the British colonial empire. Britain also internationalized its campaign against the slave trade. A treaty arising from the Congress of Vienna in 1815 condemned the slave trade as “repugnant to the principles of humanity and universal morality.”<sup>27</sup> Soon after that, Britain entered into a series of bilateral treaties.<sup>28</sup> This network of treaties allowed mutual rights of search to the signatories and led to the establishment of so-called “mixed commissions,” which determined whether seized

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21. DAVID B. DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* 114–20 (1966); Seymour Drescher & Paul Finkelman, *Slavery*, in *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* 890, 890, 897 (Bardo Fassbender & Anne Peters eds., 2012).

22. SEYMOUR DRESCHER, *ABOLITION: A HISTORY OF SLAVERY AND ANTISLAVERY* 206 (2009).

23. OPPENHEIM'S *INTERNATIONAL LAW* 979 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); U. O. Umozurike, *The African Slave Trade and the Attitudes of International Law Towards it*, 16 *HOW. L.J.* 334, 341 (1971).

24. E.g., Max du Plessis, *Historical Injustice and International Law: An Exploratory Discussion of Reparation for Slavery*, 25 *HUM. RTS. Q.* 625, 635 (2003).

25. GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* 209 (Penguin Books 2d ed. 2002) (1999) (Highlighting that “even the universal suppression of the slave-trade and slavery in municipal law does not automatically make either institution illegal in international law”). For an analysis of the discrepancies between the standards of municipal and the standards of international law, see Hugo Fischer, *The Suppression of Slavery in International Law*, 3 *INT'L L.Q.* 28 (1950).

26. Drescher & Finkelman, *supra* note 21, at 902.

27. General Treaty of the Vienna Congress, act XV Feb. 8, 1815, 63 *CONSOL T.S.* 473 (Declaration of the Eight Courts (Austria, France, Great Britain, Portugal, Prussia, Russia, Spain, and Sweden) relative to the Universal Abolition of the Slave Trade).

28. See generally Jean Allain, *Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade*, 78 *BRIT. Y.B. INT'L L.* 342 (2008); Fischer, *supra* note 25.

ships were engaged in slave trade.<sup>29</sup> These commissions were an innovative feature in international law and have been hailed as a precursor of international courts of twentieth century and of human rights law more generally.<sup>30</sup> At the same time, this laudatory assessment of the “mixed commissions” has been questioned.<sup>31</sup> Any direct and simplistic lines of continuity between these early anti-slavery efforts and contemporary norms have thus been challenged.

By the 1850s, all European and New World societies had prohibited the slave trade.<sup>32</sup> In fact, with the ending of the transatlantic slave trade and the beginning of the “Scramble for Africa” in the 1880s,<sup>33</sup> the Western civilization wanted to be perceived as an empire of anti-slavery. As a consequence, slavery became a label meant to designate the “backwardness” of the societies in Africa, which in turn could be used to justify the need for their “development” through colonization, including migration and trade. As Martti Koskenniemi has observed, “For international lawyers of 1870s and 1880s, freedom became an object of protection for international law. This freedom was linked with personal rights of migration and trade. These rights were perceived to be “under the collective juridical guarantee of all civilized States.”<sup>34</sup> The 1884 Berlin Conference was the first international conference on Africa, convened to minimize conflicts over claims to sovereignty and to regulate colonization and trade.<sup>35</sup> Importantly, it ended with the adoption of the Berlin Act, which declared the slave trade “forbidden in conformity with the principles of international law.”<sup>36</sup> No mech-

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29. Lauren Benton, *Abolition and Imperial Law, 1790–1820*, 39 J. IMPERIAL & COMMONWEALTH HIST. 355 (2011); Tara Helfman, *The Court of Vice Admiralty at Sierra Leone and the Abolition of the West African Slave Trade*, 115 YALE L.J. 1122, 1149–50 (2006). For the composition of the mixed commissions and the way they functioned, see Leslie Bethell, *The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century*, 7J. AFR. HIST. 79, 80–81 (1966).

30. Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L.J. 550, 550, 579, 632 (2008).

31. Philip Alston, *Does the Past Matter? On the Origins of Human Rights Law*, 126 HARV. L. REV. 2043 (2013) (reviewing MARTINEZ, *supra* note 7).

32. Drescher & Finkelman, *supra* note 21, at 907. For the prohibition of the African slave trade in the United States see Paul Finkelman, *Slavery in the United States: Persons or Property?*, in THE LEGAL UNDERSTANDING OF SLAVERY: FROM HISTORICAL TO THE CONTEMPORARY (Jean Allain ed., 2012) 105, 120–22.

33. See generally MARTIN EWANS, EUROPEAN ATROCITIES, AFRICAN CATASTROPHE: LEOPOLD II, CONGO FREE STATE AND ITS AFTERMATH (2002); THOMAS PAKENHAM, SCRAMBLE FOR AFRICA: 1876–1912 (1991).

34. MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960, 54–56 (2001).

35. Matthew Craven, *Between Law and History: The Berlin Conference of 1884–1885 and the Logic of Free Trade*, 3 LONDON REV. INT'L L. 31, 31–32 (2015).

36. General Act of the Berlin Conference on West Africa art. 5, Feb. 26, 1895, 165 Consol T.S. 485.

anism, however, was established to implement this declaration.<sup>37</sup> As Suzanne Miers has explained, under the banner of their civilizing mission, abolitionists refocused from the trans-Atlantic slave trade to the African slave trade and African slavery. This was done under the assumption that African slavery was necessary identical to “the highly oppressive system practices by Europeans in the New World.”<sup>38</sup> The late-nineteenth-century anti-slavery commitment thus provided the colonial powers with a moral justification for the conquest of Africa.<sup>39</sup> As Joel Quirk has explained,

[S]lavery would come to be construed as both an emblem of the “backward” state of the continent and an affliction to be exorcised by European civilization. This did not lead inexorably to conquest, but instead helped to further rationalize decisions that were primarily taken for other reasons, thereby imbuing colonial expansion with a degree of coherence and conviction.

However, Quirk has also warned that

[I]t is important not to reduce anti-slavery to little more than “window dressing” for strategic interests. [. . .] there were certainly cases which fit this mould, such as King Leopold’s activities in the Congo, or the Italian invasion of Abyssinia, but it is not tenable as a blanket characterization. Anti-slavery would regularly create costs and complications that could otherwise have been avoided. . . .<sup>40</sup>

The anti-slavery campaign culminated in the Brussels Conference in 1889, where representatives signed the first multilateral treaty directed specifically against the African slave trade. The General Act of the Brussels Conference was a very comprehensive treaty against the slave-trade.<sup>41</sup> But, as Miers and Roberts explain, the Act cloaked the entire conquest of

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37. Ronald Robinson, *The Conference in Berlin and the Future in Africa, 1884-1885*, in *BISMARCK, EUROPE, AND AFRICA: THE BERLIN AFRICA CONFERENCE 1884-1885 AND THE ONSET OF PARTITION* 1, 23 (Stig Förster et al. eds., 1988).

38. Richard Roberts & Suzanne Miers, *The End of Slavery in Africa*, in *THE END OF SLAVERY IN AFRICA* 3, 16, 48 (Suzanne Miers & Richard Roberts eds., 1988); For terminological problems in relation to using the label of slavery for designating practices exercised by Africans see Richard Rathbone, Book Review, 53 *BULL. SCH. ORIENTAL & AFRI. STUD.* 400 (1990).

39. Onuma Yasuaki, *When Was the Law of International Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective*, 2 *J. HIST. INT’L L.* 1, 43-44 (2000).

40. Joel Quirk, *Ending Slavery in All Its Forms: Legal Abolition and Effective Emancipation in Historical Perspective*, 12 *INT’L J. HUM. RTS.* 529, 539 (2008).

41. General Act of the Brussels Conference Relative to the African Slave Trade, July 2, 1890, 173 *CONSOL T.S.* 293. The Act provided for military and economic measures such as the establishment of military stations and the improvements of communications, and for criminal legislation. There were provisions dealing with the liberation of escaped slaves and with the prevention of the introduction of arms and ammunitions to districts infested with slave-raiders. See Fischer, *supra* note 25, at 49.

Africa in a humanitarian guise by presenting European rule and capitalist enterprise, including the employment of freed slaves, as anti-slavery measures. Thus the ideology of the anti-slavery movement became part and parcel of the European mission to civilize Africa.<sup>42</sup> As a consequence, the empires of slavery became empires of anti-slavery.<sup>43</sup> This is reflected in the General Act of the Brussels Conference, which declared in its preamble that the participating states are “[e]qually animated by the firm intention of putting an end to the crimes and devastations engendered by the traffic in African slaves, of effectively protecting the aboriginal populations of Africa, and of assuring to that vast continent the benefits of peace and civilization.” Enforcement, however, was left to national courts, and the actual fulfillment of many of its provision was qualified by the statement “as far as possible.”

Paradoxically, the campaign of ending slavery in Africa resulted in the entrenchment of another form of exploitation, i.e. forced labor, which was slavery in all but name.<sup>44</sup> The Brussels Act in no way limited the massive mobilization of coerced native labor for the economic “development” of Africa. This “development” was ensured through forced labor, a mechanism of labor exploitation introduced by the colonial powers. Forced labor was a prominent aspect of the entrenchment of the colonial economy in Africa since the colonial mode of production incorporated coercion to recruit African labor and to maintain it at the point of production. Private capital undertook its own policing and coercion. Historical accounts depict unrestrained, brutal recourse to forced labor by colonial powers or private companies.<sup>45</sup> Forced labor in these instances was distinguished from slavery, which referred to traditional practices in African societies.

In 1924, against this historical background, the League of Nations appointed a commission to enquire into the issue of slavery.<sup>46</sup> The work of the Temporary Slavery Commission resulted in a 1925 report,<sup>47</sup> which clarified that, first, “[t]he legality of the status of slavery is not recognized in

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42. Roberts & Miers, *supra* note 38, at 16–17.

43. Drescher & Finkelman, *supra* note 21, at 915.

44. See Nicholas Lawrence McGeehan, *Misunderstood and Neglected: The Marginalization of Slavery in International Law*, 16(3) INT’L J. HUM. RTS. 436 (2012).

45. Michael Mason, *Working on the Railway: Forced Labor in Northern Nigeria, 1907–1912*, in AFRICAN LABOR HISTORY 56 (Peter C.W. Gutkind et al. eds., 1978); W. Rodney, *The Colonial Economy*, in 7 GENERAL HISTORY OF AFRICA: AFRICA UNDER COLONIAL DOMINATION 1880–1935 332, 337 (A. Adu Boahen ed., 1985); David Killingray & James Mathews, *Beasts of Burden: British West African Carriers in the First World War*, 1 CAN. J. AFR. STUD. 6 (1979); see also Int’l Labor Org. [ILO], *Forced Labor: Report and Draft Questionnaire*, ILO Doc. 341.2506N. (1929) [hereinafter the Grey Report].

46. The inquiry was based on the information submitted by Members of the League of Nations “on the existing situation as regards the matter of slavery which they possessed and which they might see fit to communicate to it [the League of Nations].” See *The Question of Slavery: Memorandum by the Secretary General*, League of Nations Doc. 38385/A/25/1924(1924) (document on file with the author).

47. *Report of the Temporary Slavery Commission*, League of Nations Doc. A.19.1925. VI., 3 (25 July 1925) [hereinafter *The 1925 Temporary Slavery Commission Report*] (document on file with the author). The forthcoming analysis of the report is based on VLADIS-

any Christian State (mother-country, colonial dependencies and mandated territories) except Abyssinia” and that “[t]he great independent States of the Far East have enacted laws forbidding or abolishing slavery.”<sup>48</sup> However, “[t]he status of slavery is to day recognized by law only in certain Asiatic countries, such as Tibet and Nepal, and in most of the Mohammedan States of the East, such as Afghanistan, the Hedjaz and other Arabic States.”<sup>49</sup> The report praised the European Powers for their “important sacrifices in the work of emancipation” because their efforts to suppress slavery in their colonies “have often caused serious political and economic disturbances.”<sup>50</sup> Second, the members of the Temporary Slavery Commission could not determine precisely what “domestic or predial slavery” meant. It was agreed that it could cover diverse native practices and customs in Africa involving different levels and forms of domination in different regions, including a type of social organization rather than “a form of slavery as the latter term is currently used.”<sup>51</sup>

Third, the issue of forced labor preoccupied a substantial portion of the time of the Temporary Slavery Commission. The Commission recognized that the system of forced labor “often gave rise to the most intolerable abuses.”<sup>52</sup> Its members all agreed that the colonial states would not consent to labor regulations in their colonies and that labor of “natives” by colonial states and private enterprises was a domestic matter within the reserved sovereignty domain of each colonial power. In addition, the Temporary Slavery Commission acknowledged that “[s]tates remain free to define what they understand by ‘compulsory labour.’”<sup>53</sup> The Commission’s report suggests that the envisioned way out of slavery and forced labor was voluntary waged labor for the industries in the colonies. However, the “backward races” were regarded as naturally indolent, which, in the opinion of the Commission, ultimately made resort to forced labor necessary.<sup>54</sup>

The Slavery Convention was signed in 1926.<sup>55</sup> It obliges its state parties to prevent and suppress the slave trade and to “bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms.”<sup>56</sup> It defines the slave trade as:

[ . . . ] all acts involved in the capture, acquisition or disposal of a person with the intent to reduce him to slavery; all acts involved in

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LAVA STOYANOVA, HUMAN TRAFFICKING AND SLAVERY RECONSIDERED. CONCEPTUAL LIMITS AND STATES’ POSITIVE OBLIGATIONS IN EUROPEAN LAW 193 (2017).

48. 1925 *Temporary Slavery Commission Report*, *supra* note 47, at 3.

49. *Id.*

50. *Id.*

51. *Id.* at 10.

52. Temporary Slavery Commission, *Minutes of the Second Session Held at Geneva from July 13th to 25th*, League of Nations Doc. C.426.M.157.1925. VI, at 72 (1925).

53. *The 1925 Temporary Slavery Commission Report*, *supra* note 47, at 13.

54. *Id.* at 13–14.

55. Slavery Convention, *supra* note 1.

56. *Id.* art. 2.

the acquisition of a slave with a view of selling or exchanging him; all acts of disposal by sale or exchange of a slave acquitted with a view of being sold or exchanged, and, in general, every act of trade or transportation in slaves.<sup>57</sup>

Slavery is defined as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”<sup>58</sup> This remains the only legal definition of slavery in international law; its relevance will be examined in Part V. Here, it is important to observe that the 1926 Slavery Convention distinguished between the condition of slavery and processes involving commercial acts, i.e. the slave trade, which also attach a right of ownership.

The 1926 Slavery Convention lacked machinery for supervision and enforcement.<sup>59</sup> Instead, a body called Advisory Committee of Experts on Slavery, which received reports from the colonial powers, was established. In their reports, the states celebrated their own national histories of combating slavery and lauded their imperial achievements in overcoming hurdles of native ignorance, laziness, and cultural backwardness.<sup>60</sup> The Advisory Committee of Experts on Slavery did not have any enforcement power, nor was it permitted to review questions of forced labor.<sup>61</sup> It only examined the reports received from states and made corresponding suggestions.<sup>62</sup>

Very soon after the adoption of the Slavery Convention, the matter of forced labor was taken up by the International Labor Organization (ILO), which in 1930 adopted the ILO Forced Labor Convention.<sup>63</sup> Preceding the adoption of the convention was a comprehensive study of colonies' laws and practices regarding forced labor.<sup>64</sup> The study exposed the nature of the abusive practices undertaken by the colonial governments and by private companies in the colonies. As it was framed, the ILO Forced Labor Convention was intended to apply to the territories of both the sovereign

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57. *Id.* art 1 ¶ 2.

58. *Id.* art. 1(1).

59. J. J. Lador-Lederer, *An “International Human Rights Committee for Slavery”?*, 3 *ISR. L. REV.* 245, 246 (1968).

60. Drescher & Finkelman, *supra* note 21, at 912.

61. Kathryn Zoglin, *United Nations Action Against Slavery: A Critical Evaluation*, 8 *HUM. RTS. Q.* 306, 309–10 (1986).

62. *Report of the Advisory Committee of Experts on Slavery provided for by the Assembly Resolution of September 25th, 1931*, League of Nations Doc. C.618.1932.VI, (1932); *Report of the Advisory Committee of Experts*, League of Nations Doc. C.159.1935.VI, (1935).

63. Convention Concerning Forced or Compulsory Labor (ILO No. 29), adopted June 28, 1930, 29 *U.N.T.S.* 55. For an overview of the drafting of the ILO Forced Labor Convention see *The Fourteenth Session of the International Labor Conference*, 22 *INT'L LAB. REV.* 265 (1930).

64. The Grey Report, *supra* note 45.

states and the colonies; however, in practice it was perceived as a colonial instrument intended to regulate forced labor in the colonies.<sup>65</sup>

The ILO Forced Labor Convention defines forced labor 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 voluntary.”<sup>66</sup> The convention does not prohibit forced labor; the state parties instead adopted the obligation to “suppress the use of forced or compulsory labour in all its forms within the shortest possible period.”<sup>67</sup> It regulated the circumstances in which forced labor could be used. For example, Article 11 stipulates that “[only] adult able-bodied males who of an apparent age of not less than 18 and not more than 45 may be called upon for forced or compulsory labour.” Article 11(2) outlines the necessary considerations involved in fixing the proportion of resident adult able-bodied males who could be taken at any one time for forced labor. Article 12(1) regulates the maximum period during which “any person may be taken for forced or compulsory labour.” Article 12(2) requires that a certificate be issued indicating the periods of forced or compulsory labor completed. In effect, the Forced Labor Convention sanctioned and legitimized the usage of forced labor.<sup>68</sup>

In the wake of the Second World War, forced labor gained a new dimension with massive usage in the Soviet Union and in Nazi Europe.<sup>69</sup> These horrific abuses reappeared at the heart of Europe; this time, however, the forum for responding was international criminal law. The Nuremberg Charter included enslavement as a crime against humanity and deportation of slave labor as a war crime<sup>70</sup> and several defendants were convicted for these crimes by the Nuremberg Tribunal.<sup>71</sup> Interestingly, the conceptual boundaries between slavery and forced labor were not viewed

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65. This conclusion can be drawn from the information submitted by the state parties to the ILO as to how they apply the ILO Forced Labor Convention. See ILO, Rep. on the Forced Labor, ILO Doc. 30B09/5 (Mar. 10, 1930), (for example, the Government of Bulgaria stated that ‘as Bulgaria possessed no colonies, the Convention is inapplicable’); ILO, Summary of Annual Repts. Under Article 408 (1932); ILO, Repts. On the Application of Conventions (Article 22 of the Constitution), at 206–16 (May 1949).

66. Convention Concerning Forced or Compulsory Labor, *supra* note 63, art. 2 ¶ 1.

67. *Id.* art. 1 ¶ 1.

68. See McGeehan, *supra* note 44, at 445–48.

69. See EDWARD HOMZE, FOREIGN LABOR IN NAZI GERMANY (2016); Panikos Panaya, *Exploitation, Criminality, Resistance. The Everyday Life of Foreign Workers and Prisoners of War in the German Town of Osnabrück, 1939-49*, 40(3) J. COTEMP. HIST. 483 (2005).

70. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal art. 6, 58 Stat. 1544, 1547, 82 U.N.T.S. 279, 288 (1945).

71. CHRISTOPHER K. HALL & CARSTEN STAHN, *Crimes Against Humanity, in ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 189 (Otto Triffterer & Kai Ambos eds., 3d. rev. ed. 2016); Henry T. King, Jr., *The Judgments and Legacy of Nuremberg*, 22 YALE J. INT’L L. 213, 217 (1997).

as material in this context,<sup>72</sup> a view which is also reflected in the International Law Commission Draft Code of Crimes Against the Peace and Security of Mankind adopted in 1996. In particular, in the commentary to Article 18(d) of the Draft Code, which lists enslavement as a crime against humanity, the International Law Commission explains that “[e]nslavement means establishment or maintaining over persons a status of slavery, servitude, or forced labour contrary to well-established and widely recognized standards of international law.”<sup>73</sup> International criminal law continues to be highly relevant today and, as I will show in Part V, it is the area of international law which has made significant advances in clarifying, and actually applying, the definition of slavery. As to the distinctions between slavery, servitude, and forced labor, international criminal law as reflected in the relevant contemporary instruments<sup>74</sup> has maintained only one concept, which is enslavement. In contrast, human rights law (including Article 8 of the ICCPR) enumerates several concepts (slavery, servitude, and forced labor), which implies some level of hierarchy among them—and an invitation to human rights monitoring bodies to carefully approach definitional differences among them. Such an invitation could imply a more rigid interpretation of the most serious one, slavery.<sup>75</sup>

In conclusion, as Alston has observed, “the path from 1807 to the modern conception of slavery and the slave trade was . . . very rocky.”<sup>76</sup> The movement to abolish slavery had many setbacks. First, it was utilized to justify other forms of abuses. This was facilitated by the differentiation between different concepts, i.e. slavery and forced labor. As I will explain, confusion as to how the two relate to each other continues to haunt human rights law. The label of slavery was used only in relation to some traditional practices, which, as I will demonstrate, continues to influence the contemporary usage of the term. Another setback is the absence of effective international enforcement mechanisms for dealing with slavery, a problem which as it will later become clear, persists.

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72. In the *Control Council Law No. 10* trials, the crime of enslavement was described in the following way: “We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery—compulsory uncompensated labor—would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.” HALL & STAHN, *supra* note 71, at 189.

73. *Report of the International Law Commission on the Work of Its Forty-Eighth Session*, 51 U.N. GAOR Supp. No. 10, at 48, U.N. Doc. A/51/10 (1996), reprinted in 2 Y.B. Int’l L. Comm’n 48, U.N. Doc. 10A/CN.4/SER.A/1996/Add.1.

74. See *infra* Part V.A.6.

75. Harmen van der Wilt, *Trafficking in Human Beings, Enslavement, Crimes against Humanity: Unravelling the Concepts*, 13 CHINESE J. INT’L L. 297, 310 (2014).

76. Alston, *supra* note 31, at 2055.

## II. THE UNITED NATIONS ERA

### A. *The Universal Declaration of Human Rights*

The atrocities of the Second World War provided the immediate background for the adoption in 1948 of the Universal Declaration of Human Rights (UDHR),<sup>77</sup> which, despite its non-binding character<sup>78</sup> is a source of inspiration and direction for standard-setting and monitoring activities at the U.N. in the field of human rights.<sup>79</sup> Article 4 of the UDHR stipulates that “[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”<sup>80</sup> During the drafting process, the adoption and the formulation of Article 4 met no major disagreements.<sup>81</sup> Yet, two points related to the formulation of this provision deserve closer scrutiny. First, the exclusion of any reference to forced labor in Article 4 distinguishes the UDHR from Article 8 of the ICCPR. Perhaps the drafters of the UDHR were not particularly concerned with fine definitional distinctions, since the Declaration was not binding in the first place and was only intended to spell out general principles.<sup>82</sup> It may be also contended that the drafters of the UDHR considered systems of forced labor to be a form of slavery covered by Article 4 of the Declaration.<sup>83</sup> Such an understanding would be in conformity with the way the crime of slavery was applied during the Nuremberg trials.<sup>84</sup>

The second point concerning the formulation of Article 4 of the UDHR relates to the statement at the time of its drafting that “slavery” was also meant to cover trafficking of women and children.<sup>85</sup> As I will clarify, similar inclusion was, in fact, rejected when Article 8 of the ICCPR was drafted.<sup>86</sup> The perception that Article 4 of the UDHR encompasses

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77. CHRISTIAN TOMUSCHAT, *HUMAN RIGHTS. BETWEEN IDEALISM AND REALISM* 27 (3d. ed. 2014).

78. Hersch Lauterpacht, *The Universal Declaration of Human Rights*, 25 *BRIT. Y.B. INT'L L.* 354, 369 (1948); Josef L. Kunz, *The United Nations Declaration of Human Rights*, 43 *AM. J. INT'L L.* 316, 321 (1949).

79. Asbjørn Eide & Gudmundur Alfredsson, Introduction, in *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS*, *supra* note 7, at xxv, xxx.

80. G.A. Res. 217 (III) A, *supra* note 20, at 71.

81. Lassen, *supra* note 7, at 103, 106.

82. Comm'n on Human Rights, Summary Rec. of the Thirty-Sixth Meeting, U.N. Doc. E/CN.4/AC.1/SR.36, at 3 (May 17, 1948); Comm'n on Human Right, Summary Rec. of the Fifty-Third Meeting, U.N. Doc. E/CN.4/SR.53, at 4 (June 1, 1948).

83. Comm'n on Human Rights, Summary Record of the Seventh Meeting, U.N. Doc. E/CN.4/AC.3/SR/7 (Dec. 9, 1947); *see also* Comm'n on Human Rights, Summary Record of the Fifty-Third Meeting, U.N. Doc. E/CN.4/SR.53 (June 4, 1948); Comm'n on Human Rights, Summary Record of the Thirty-Seventh Meeting, U.N. Doc. E/CN.4/SR.37 (Dec. 13, 1947).

84. *See supra* Part I.

85. Comm'n on Human Rights, Rep. of the Working Group on the Decl. on Human Rights, U.N. Doc. E/CN.4/57 (1947); Comm'n on Human Rights, Summary Record of the Hundred and Ninth Meeting, U.N. Doc. A/C.3/SR.109 (Oct. 21, 1948); Comm. on Human Rights, Summary Record of the Hundred and Tenth Meeting, U.N. Doc. A/C.3/SR.110 (1948).

86. *See infra* Part V.A.1.

trafficking of women and children can be justified with the understanding, already mentioned above, that the UDHR was envisioned as a non-binding document articulating general principles. The implicit inclusion of trafficking of women under Article 4 can thus be explained by the drafters' preference to include only vague formulations, so that controversial issues could be avoided.<sup>87</sup>

However, a separate track of international law developments, dating back to the beginning of the twentieth century, includes a whole corpus of international treaties dealing with the so-called "white slavery" (a term later replaced with the term "trafficking in women").<sup>88</sup> These treaties<sup>89</sup> have little to do with those addressing slavery and slave trade, outlined in the previous section. The anti-trafficking treaties, rather, concerned sexual "purity" of "white women," were fueled by conservative attitudes towards women's sexuality and grew out of the anti-prostitution movement.<sup>90</sup> The term "slavery" was used in this context as a catchword "to promote the vision of women held in bondage against their will . . . forced into prostitution and vice."<sup>91</sup>

In more recent years, the issue of human trafficking has again risen to prominence,<sup>92</sup> particularly since the adoption of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children in 2001 (the U.N. Trafficking Protocol).<sup>93</sup> This Protocol updated the international law definition of human trafficking from the aforementioned treaties. It is worth citing the updated definition in full since I will continue to refer to this term throughout the article:

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87. Åshild Samnøy, *The Origins of the Universal Declaration of Human Rights*, in *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS*, *supra* note 7, at 3, 15.

88. Elizabeth M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 *STAN. J. INT'L L.* 1 (2004); Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 *INT'L ORG.* 479 (1990).

89. International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83; International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 3 L.N.T.S. 278; International Convention for the Suppression of the Traffic in Women and Children, Sept 30, 1921, 9 L.N.T.S. 415; International Convention for the Suppression of the Traffic in Women of Full Age, Oct 11, 1933, 150 L.N.T.S. 431.

90. Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 *U. PA. L. REV.* 1655, 1666 (2010).

91. Marlene D. Beckman, Note, *The White Slave Traffic Act: The Historical Impact of a Criminal Law Policy on Women*, 72 *GEO. L.J.* 1111, 1111 (1984). For a history of the "white slavery" terminology see Nora V. Demleitner *Forced Prostitution. Naming an International Offence*, 18 *FORDHAM INT'L L.J.* 163, 165-69 (1994).

92. For a description of the U.N. actions on trafficking in the 1970s, see Laura Reanda, *Prostitution as Human Rights Question: Problems and Prospects of the United Nations Action*, 13 *HUM. RTS. Q.* 202 (1991); see also ANN T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* (2010).

93. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, adopted Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter U.N. Trafficking Protocol].

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs.<sup>94</sup>

Since the adoption of this definition, debates about contemporary slavery have been dominated by references to and discussions about human trafficking.<sup>95</sup> The reports of the U.N. Special Rapporteur on Contemporary Forms of Slavery (see Part III) testify to this shift and try to place more spotlight on slavery, servitude, and forced labor.<sup>96</sup> In contrast, in its Concluding Observations, the HRC has reshaped Article 8 of the ICCPR as a provision mainly concerned with human trafficking without any indication of how widely the latter is to be interpreted (see Part IV).<sup>97</sup> There has thus been a tendency to label all sorts of abuses, including abuses which do not involve deceptive or coercive transportation processes (as required by the definition of human trafficking), as trafficking.<sup>98</sup> Slavery, servitude, and forced labor are often rebranded as “human trafficking,” which creates conceptual confusion and impedes the determination of the definitional thresholds under Article 8 of the ICCPR. Other disturbing influences of the concept of human trafficking will continue to emerge at various points in the forthcoming analysis.

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94. *Id.* art. 3(a).

95. See James C. Hathaway, *The Human Rights Quagmire of ‘Human Trafficking,’* 49 VA. J. INT’L L. 1, 4–5 (2008).

96. At the level of the U.N. human rights system there is a separate mechanism designed to address the issue of human trafficking. This is the U.N. Special Rapporteur on Trafficking in Persons, especially Women and Children. See G.A. Res. 26/8 (July 17, 2014). The existence of this separate mechanism testifies that although human trafficking is a related issue, it does not encompass slavery, servitude, and forced labor.

97. The above quoted definition of human trafficking can be subject to various interpretations. See Gregor Noll, *The Insecurity of Trafficking in International Law*, in 2 GLOBALIZATION, MIGRATION, AND HUMAN RIGHTS: INTERNATIONAL LAW UNDER REVIEW 343, 356 (Vincent Chetail ed., 2007); Jean Allain, *No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol*, 7 ALB. GOV’T L. REV. 111 (2014).

98. Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT’L L. 789, 814 (2009) ([I]t is difficult to identify a “contemporary form of slavery” that would not fall within its [the definition of human trafficking] generous parameters. Because the definition encompasses both the bringing of a person into exploitation as well as the maintenance of that person in a situation of exploitation, it is equally difficult to identify an exploiter who would not be caught within its scope . . .).

### B. *The Supplementary Slavery Convention*

Even though the UDHR was the first instrument enshrining a right not to be subjected to slavery and servitude at international level, its non-binding character was a significant weakness. The adoption of a binding human rights law instrument was still not in clear sight in 1950s. Thus, very soon after the adoption of the UDHR, the U.N. resorted to a mechanism outside the realm of human rights law to address slavery. In particular, the U.N. General Assembly specifically requested that the Economic and Social Council study the problem of slavery.<sup>99</sup> To execute this task, the Council instructed the formation of an ad hoc Committee on Slavery,<sup>100</sup> which was to address the following issues: 1) whether the definitions of slavery and slavery trade in the 1926 Slavery Convention were adequate, and 2) whether the adoption of a new international instrument in this area was necessary. The ad hoc Committee recommended that the definitions in the 1926 Slavery Convention “should continue to be accepted as accurate and adequate international definition of these terms.”<sup>101</sup> However, it also noted that:

it was questionable whether these definitions embraced all the types of servile status the abolition of which, in its opinion, should be promoted by the U.N. It took note of information received from many sources which indicated that other forms of servitude, in addition to slavery and the slave trade, existed to a considerable extent in many portions of the world. When it attempted to define these forms of servitude, it discovered that a great deal of confusion had arisen because different names were applied to these practices, in different regions of the world and even in different countries. It therefore discarded the existing nomenclature for the time being, and instead attempted to describe these forms of servitude by reference to their particular characteristics.<sup>102</sup>

The Committee on Slavery gave the following examples of servile statuses: debt bondage; serfdom; servile marriages (which referred to various practices in which women are given in marriage); and the transfer of children by their parents under conditions permitting their exploitation.<sup>103</sup> The Committee reported that it was not possible to conclusively determine whether these practices fell within the definition of slavery as stipulated in the 1926 Slavery Convention and therefore recommended the adoption of an additional international treaty. This recommendation was shared by the

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99. GA Res 278 (III) (May 13, 1949).

100. Economic and Social Council Res 238 (IX) (July 20, 1949); see VLADISLAVA STOYANOVA, HUMAN TRAFFICKING AND SLAVERY RECONSIDERED: CONCEPTUAL LIMITS AND STATES' POSITIVE OBLIGATIONS IN EUROPEAN LAW 202 (2017).

101. Economic and Social Council, Rep. of the Ad Hoc Committee on Slavery (Second Session), U.N. Doc. E/1988, at 19 (May 4, 1951) (Recommendation A.1).

102. *Id.* ¶ 13.

103. *Id.* ¶¶ 14–19.

U.N. Secretary General, who agreed that the servile statuses above could be designated as slavery provided that “any or all of the powers attaching to the right of ownership are exercised”; however, since it could not be conclusively determined based on the factual information received from states whether these were indeed covered by the definition of slavery, adopting an additional convention was advisable.<sup>104</sup> This led to the 1956 Supplementary Convention on the Abolition of Slavery.<sup>105</sup> Notably, this convention reaffirms the definition of slavery from the 1926 Slavery Convention.<sup>106</sup> In fact, its drafting process opened an opportunity to more profoundly deliberate this definition. That deliberation can be found in the U.N. Secretary General report, which outlines the following characteristics of the various powers attaching to the right of ownership:

- i. the individual of servile status may be made the object of a purchase;
- ii. the master may use the individual of servile status, and in particular his capacity to work, in an absolute manner, without any restriction other than which might be expressly provided by law;
- iii. the products of labour of the individual of servile status become the property of the master without any compensation commensurate to the value of the labour;
- iv. the ownership of the individual of servile status can be transferred to another person;
- v. the servile status is permanent, that is to say, it cannot be terminated by the will of the individual subject to it;
- vi. the servile status is transmitted *ipso facto* to descendants of the individual having such status.

The 1956 Supplementary Convention is also noteworthy for incorporating definitions of debt bondage, serfdom, servile marriages and transfer of children for the purposes of their exploitation.<sup>107</sup> However, in terms of measures that must be taken by states to address these servile statuses, the Convention is not only disappointing but also openly in variance with Article 4 of the UDHR. As already explained, the Declaration embodies an individual right not to be subjected to slavery and servitude, and commits

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104. Rep. of the U.N. Sec’y Gen. on Slavery, the Slave Trade, and Other Forms of Servitude, ¶¶ 36–37, U.N. Doc. E/2357 (January 27, 1953).

105. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 3 [hereinafter The 1956 Supplementary Slavery Convention]. See also Protocol Amending the Slavery Convention, Dec. 7, 1953, 182 U.N.T.S. 51 (in which the United Nations assumed the functions of the League of Nations under the 1926 Slavery Convention).

106. The 1956 Supplementary Slavery Convention, *supra* note 105, art. 7(a).

107. *Id.* art 1.

states to take immediate measures against such abuses. In contrast, Article 1 of the 1956 Supplementary Convention goes only so far as to oblige its state parties to “take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolishing and abandonment” of the servile statuses.<sup>108</sup> Here, there is no obligation to take immediate measures: under the terms of this convention, progressive measures suffice.

However, immediate measures were required in one respect. In particular, the state parties were required to criminalize several acts: the act of conveying or attempting to convey slaves from one country to another;<sup>109</sup> the act of mutilating, branding or otherwise marking a slave or a person of a servile status in order to indicate his status, or as a punishment, or for any other reason;<sup>110</sup> and the act of enslaving.<sup>111</sup> The Supplementary Convention did not establish any enforcement mechanism; all that it required was that the state parties cooperate with each other and with the United Nations to give effect to its provisions and that they communicate to the U.N. copies of laws, regulations and measures enacted to give effect to the convention.<sup>112</sup>

Under the Supplementary Convention, the state parties agreed to send information about implementation measures to the U.N. Secretary General, who in turn communicated such information to the Economic and Social Council “with a view to making further recommendations for the abolition of slavery.”<sup>113</sup> It has been observed that the Economic and Social Council did not pursue this role actively.<sup>114</sup>

More concrete actions were taken in 1955 when the United Nations published a report (the Engen Report) that surveyed the extent to which slavery and practices resembling slavery existed in the world.<sup>115</sup> The report is a simple compilation of replies by governments without any evaluations or verifications of the authenticity of submitted replies. States used it as an opportunity to praise their anti-slavery actions. For example, the Belgian government replied that “[o]ur colonization deprived slavery of its strength by refusing to recognize it and by putting an end to its sources,

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108. See Jean Allain, *On the Curious Disappearance of Human Servitude from General International Law*, 11 J. HIST. INT'L L. 303, 312 (2009) (“States negotiating the 1956 Supplementary Convention were unwilling to go as far as the 1948 Universal Declaration of Human Rights which stated that ‘no one shall be held in servitude[.]’” and for this reason chose to adopt a convention addressing four specific practices labelled as “‘institutions and practices similar to slavery[.]’”).

109. The 1956 Supplementary Convention, *supra* note 105, art. 3(1).

110. *Id.* art. 5.

111. *Id.* art. 6 ¶ 1.

112. *Id.* art. 8 ¶¶ 1–2.

113. *Id.* art. 8.

114. Michael Dottridge & David Weissbrodt, *Review of the Implementation of and Follow-up to the Conventions on Slavery*, 42 GER. Y.B. INT'L L. 242, 286 (1999).

115. Concise Summ. of the Info. Supplied in Accordance with Resols. 238 (IX), 276 (X), 388 (XIII), 475 (XV), and 525 A (XVII), U.N. Doc. E/2673 (Feb. 9, 1955).

and it has practically disappeared.”<sup>116</sup> The result was similar in 1963 when the Economic and Social Council appointed a special rapporteur on slavery to update the Engen Report by collecting information from states, specialized agencies and non-governmental organizations with consultative status.<sup>117</sup> The report suffered from the same deficiencies as the Engen Report. In particular, it depended on replies by governments without any critical evaluation and verification of their authenticity.<sup>118</sup> In the years that followed, slavery was an issue within the responsibility of the Sub-Commission for the Promotion and Protection of Human Rights, a subsidiary organ of the Commission of Human Rights.<sup>119</sup> As Kathryn Zoglin has observed, slavery had hardly any visibility in the work of the Sub-Commission.<sup>120</sup>

The prominence of the issue, however, reemerged with the establishment in 1974 of the Working Group on Slavery (later renamed as Working Group on Contemporary Forms of Slavery).<sup>121</sup> Prior to discussing this, however, a short clarification as to the ICCPR is due. The Covenant was adopted in 1966 and contains not only a specific provision addressing slavery, servitude, and forced labor but also a monitoring mechanism. My historical account will, however, proceed with the U.N. Working Group on Slavery, since it took ten years until the ICCPR entered into force; how the Covenant and its monitoring mechanism have addressed slavery will reappear later in Part IV.

### C. *The United Nations Working Group on Contemporary Forms of Slavery*

The U.N. Working Group on Contemporary Forms of Slavery belonged to the so called “special procedure” mandates within the U.N. system<sup>122</sup> and was tasked

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116. *Id.* at 13.

117. Economic and Social Council Res. 960 (XXXVI) (July 12, 1963).

118. Economic and Social Council, Rep. on Slavery, U.N. Doc E/4168/Rev.1 (1966).

119. The Commission on Human Rights was created by the U.N. Economic and Social Council (ECOSOC) (E/RES/9(II), 21 June 1946) acting under Article 68 of the U.N. Charter. The Sub-Commission for the Promotion and Protection of Human Rights assisted the work of the Commission on Human Rights. The Commission on Human Rights was replaced by the Human Rights Council in 2006, which became a subsidiary organ of the U.N. GA. *See* G.A. Res. 60/251 (Mar. 15, 2006). *See generally* Philip Alston, *The Commission on Human Rights, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 126 (Philip Alston ed., 1992) (discussing the evolution of responsibilities of the Commission).

120. *See* Zoglin, *supra* note 61, at 314.

121. Economic and Social Council Dec.16 (LVI), U.N. Doc. E/5544, at 25 (May 17, 1974); Sub-Commission on the Promotion and Protection of Human Rights Res. 11 (XXVII) (August 21, 1974).

122. The term “special procedures” has been developed to describe a diverse range of procedures established within the U.N. to promote and to protect human rights in relation to specific themes or issues, or to examine the situation in specific countries. *See generally* INGRDI NIFOSI, *THE U.N. SPECIAL PROCEDURES IN THE FIELD OF HUMAN RIGHTS* (2005) (examining relevant aspects of the UN Commission on Human Rights Special Procedures);

to review developments in the field of slavery and the slave trade in all their practices and manifestations, including the slavery-like practices of *apartheid* and colonialism, the traffic in persons and the exploitation of the prostitution of others as they are defined in the Slavery Convention of 1926, the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956, and the Convention for the Suppression of the Trafficking in Persons and of the Exploitation of the Prostitution of Others of 1949.<sup>123</sup>

The Working Group operated with a large flexibility and received information from states and non-governmental organizations.<sup>124</sup> It perceived its mandate to be very open and, as a consequence, covered a wide range of topics: slavery and slave trade, sale of children and exploitation of child labor, debt bondage, trafficking in persons and the exploitation and prostitution of others, and slavery-like practices such as *apartheid* and colonialism.<sup>125</sup> The Working Group did not distinguish between voluntary and coerced prostitution and held the position that prostitution was incompatible with human dignity and self-worth.<sup>126</sup> It also covered issues of violence against women and female circumcision, as well as illegal adoptions, traffic in human organs and tissues and the rights of migrant workers.<sup>127</sup> “New” forms of forced labor perceived as “forced labor based on trafficking” were also given priority attention.<sup>128</sup> In addition to submitting reports, the

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Jeroen Gutter, *Thematic Procedures of the U.N. Commission on Human Rights and International Law: in Search of a Sense of Community* (2006).

123. Economic and Social Council Dec.16 (LVI), *supra* note 121, at 25.

124. Dottridge & Weissbrodt, *supra* note 114, at 289 (1999).

125. For a critical perspective on the inclusion of *apartheid* and colonialism as forms of slavery, see Allain, *supra* note 14, at 199, 209–13.

126. Sub-Comm’n on the Promotion & Prot. of Human Rights, Rep. of the Working Group on Contemporary Forms of Slavery on Its Thirty-First Session ¶ 16, U.N. Doc. A/HRC/Sub.1/58/25 (August 22, 2006).

127. Sub-Comm’n on the Promotion & Prot. of Human Rights, Rep. of the Working Group on Contemporary Forms of Slavery on Its Twenty-First Session, E/CN.4/Sub.2/1996/24 (July 19, 1996); Sub-Comm’n on the Promotion & Prot. of Human Rights, Rep. of the Working Group on Contemporary Forms of Slavery on Its Twenty-Third Session, U.N. Doc. E/CN.4/Sub.2/1998/14 (July 6, 1998); Sub-Comm’n on the Promotion & Prot. of Human Rights, Rep. of the Working Group on Contemporary Forms of Slavery on Its Twenty-Fifth Session, U.N. Doc. E/CN.4/Sub.2/2000/23 (July 21, 2000); Sub-Comm’n on the Promotion & Prot. of Human Rights, Rep. of the Working Group on Contemporary Forms of Slavery on Its Twenty-Sixth Session, U.N. Doc. E/CN.4/Sub.2/2001/30 (July 16, 2001); Sub-Comm’n on the Promotion & Prot. of Human Rights, Rep. of the Working Group on Contemporary Forms of Slavery on Its Twenty-Seventh Session, U.N. Doc. E/CN.4/Sub.2/2002/33 (June 17, 2002); Sub-Comm’n on the Promotion & Prot. of Human Rights, Rep. of the Working Group on Contemporary Forms of Slavery on Its Twenty-Eighth Session, U.N. Doc. E/CN.4/Sub.2/2003/31 (June 27, 2003).

128. Sub-Comm’n on the Promotion & Prot. of Human Rights, Rep. of the Working Group on Contemporary Forms of Slavery on Its Twenty-Ninth Session, ¶¶ 12–22, U.N. Doc. E/CN.4/Sub.2/2004/36 (July 20, 2004) (“new manifestations of forced labor were directly con-

Working Group initiated studies,<sup>129</sup> which contained conclusions and recommendations that have since been assessed as “unhelpful and unimaginative generalities.”<sup>130</sup> There was also a failure to follow up on these recommendations.<sup>131</sup> Additionally, the Working Group was criticized for exceeding its terms of reference by including topics which are only marginally related to slavery.<sup>132</sup> Zoglin has also suggested that the Working Group was the most marginal of the Sub-Commission’s subsidiary groups.<sup>133</sup>

### III. THE UNITED NATIONS SPECIAL RAPPORTEUR ON SLAVERY

The demise of the Working Group in 2006 has to be contextualized in the restructuring of the human rights monitoring mechanisms at the U.N. level.<sup>134</sup> The “special procedures”<sup>135</sup> were transferred from the Human Rights Commission to the Human Rights Council,<sup>136</sup> which succeeded its

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connected to the increased movement of people and goods across borders and that this movement had given rise to a new form of forced labor based on trafficking”).

129. Mark J. Bossuyt (Expert of the Sub-Commission), *Slavery and Slavery-Like Practices*, U.N. Doc. E/CN.4/Sub.2/1984/23 (July 2, 1984); Abdelwahab Bouhdiba (Special Rapporteur on Child Labor), *Exploitation of Child Labor: Final Report*, U.N. Doc. E/CN.4/Sub.2/479/ Rev.1 (July 8, 1981); Benjamin Whitaker (Special Rapporteur), *Updating of the Rep. on Slavery Submitted to the Sub-Comm’n in 1966*, U.N. Doc. E/CN.4/Sub.2/1982/20/Add.1 (1982).

130. Zoglin, *supra* note 61, at 323.

131. *Id.*

132. *See generally id.* at 336.

133. *Id.* at 338.

134. *See* G.A. Res. 60/251, *supra* note 119, at ¶ 6; Human Rights Council Res. 5/1, U.N. Doc. A/HRC/RES/5/1, at ¶ 84 (June 18, 2007).

135. After the restructuring of the U.N. human rights monitoring mechanisms, the ‘special procedures’ were retained. Now, these comprise of special rapporteurs, independent experts or working groups, who have thematic mandates (e.g. the Special Rapporteur on Contemporary Forms of Slavery, Special Rapporteur on the Human Rights of Migrants; Special Rapporteur on the Right to Food; Working Group on Enforced or Involuntary Disappearances etc.) or country specific mandates. Pursuant to the criteria established by the Human Rights Council, these experts are selected based on their expertise, experience in the field of human rights, independence, impartiality, personal integrity and objectivity. *See* Human Rights Council Res. 5/1, *supra* note 134; *see also* Manual of Operations of the Special Procedures of the Human Rights Council (Aug. 2008), [www.ohchr.org/Documents/HRBodies/SP/Manual\\_August\\_2008.doc](http://www.ohchr.org/Documents/HRBodies/SP/Manual_August_2008.doc). There are currently 41 thematic and 14 country mandates. For an overview of the special procedures, see Mireille Fanon-Mendes-France (Rapporteur on Special Procs. Sys.), *Rep. of the Twenty-First Ann. Meeting of Special Rapporteurs/Representatives, Indep. Experts and Working Groups of Special Procs. of the Human Rights Council, Including Updated Info. on the Special Procs.*, U.N. Doc. A/HRC/28/41 (Jan. 29, 2015). *See also* Surey Subedi, *Human Rights experts in the United Nations: a Review of the Role of the United Nations Special Procedures*, in *THE ROLE OF “EXPERT” IN INTERNATIONAL AND EUROPEAN DECISION-MAKING PROCESSES* 241 (Monika Ambrus, Karin Arts, Ellen Hey and Helena Raulus eds., 2014).

136. Philip Alston, *Reconceiving the U.N. Human Rights System: Challenging Confronting the New Human Rights Council*, 7 MELB. J. INT’L L. 185, 185 (2007); Nazila Ghanea, *From U.N. Commission on Human Rights to U.N. Human Rights Council: One Step Forward and Two Steps Sideways*, 55(3) INT’L & COMP. L. Q. 695, 695 (2006); Jeroen Gutter, *Special*

predecessor's role as the primary human rights standard-setting body at the U.N.<sup>137</sup> In 2007 the Human Rights Council appointed a Special Rapporteur on contemporary forms of slavery to replace the Working Group.<sup>138</sup> This appointment was reasoned to “give greater prominence and priority” to issues of contemporary forms of slavery.<sup>139</sup> The mandate of the Rapporteur, who is an independent expert acting in her personal capacity, is to

examine and report on all contemporary forms of slavery and slavery-like practices, but in particular those defined in the Slavery Convention of 1926, and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956, as well as other issues covered by the Working Group on Contemporary Forms of Slavery including forced prostitution and its human rights dimensions.<sup>140</sup>

The latest update of the mandate by the Human Rights Council does not contain references to “forced prostitution and its human rights dimension.”<sup>141</sup> Interestingly, the mandate does not refer to Article 8 of the ICCPR. It does refer, though, to the UDHR. This relates to the position of the Special Rapporteur as a “special procedure” and a thematic mechanism created outside of the framework of human rights treaty law.<sup>142</sup> Consequently, it is not within her mandate to monitor how states comply with their obligations under the ICCPR. In Part IV I will further examine the relationship between the Special Rapporteur, on the one hand, and the ICCPR standards and monitoring mechanism, on the other, to compare their mandates and to show how each body is expected to make a distinct contribution.

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*Procedures and the Human Rights Council: Achievements and Challenges*, 7 HUM. RTS. L. REV. 93, 94 (2007); Hurst Hannum, *Reforming the Special Procedures and Mechanisms of the Commission on Human Rights*, 7 HUM. RTS. L. REV. 73, 73 (2007); Helen Upton, *The Human Rights Council: First Impressions and Future Challenges*, 7 HUM. RTS. L. REV. 29, 35 (2007).

137. See G.A. Res. 60/251, *supra* note 119, at ¶ 5(c); Patrizia Scannella & Peter Splinter, *The United Nations Human Rights Council: A Promise to be Fulfilled*, 7 HUM. RTS. L. REV. 41, 48 (2007).

138. Human Rights Council Res. 6/14, U.N. Doc. A/HRC/RES/6/14, at ¶ 1 (Sept. 28, 2007). The mandate of the Special Rapporteur has been updated. See Human Rights Council Res. 15/2, U.N. Doc. A/HRC/RES/15/2 (Oct 5, 2010).

139. Human Rights Council Res. 6/14, *supra* note 138.

140. Human Rights Council Res. 6/14, U.N. Doc. A/HRC/RES/ 6/14, ¶ 2. The Human Rights Council extended the mandate with resolutions Human Rights Council Res. 15/2, U.N. Doc. A/HRC/RES/15/2 and Human Rights Council Res. 24/3, U.N. Doc. A/HRC/RES/ 24/3.

141. See Human Rights Council Res. 33/L.2, ¶ 5 (Sept. 26, 2016); Human Rights Council Res. 24/3, *supra* note 140, ¶ 4; Human Rights Council Res. 15/2, *supra* note 138, ¶ 4.

142. Beate Rudolf, *The Thematic Rapporteurs and Working Groups of the United Nations Commission on Human Rights*, 4 MAX PLANCK Y.B. U. N. L., 289, 292 (2000).

The Special Rapporteur has brought the ILO legal framework within the ambit of its monitoring. In particular, the ILO Forced Labor Convention and the ILO Convention No. 189<sup>143</sup> and Recommendation No. 201<sup>144</sup> concerning decent work for domestic workers have been invoked as standards against which the Special Rapporteur assesses state conduct.<sup>145</sup> Similarly, the recently adopted Protocol to the ILO Forced Labor Convention has also been used as a benchmark.<sup>146</sup> Whether states have actually ratified these conventions is not a strong material consideration when the rapporteur executes her monitoring and reporting functions.

The Special Rapporteur discharges her mandate by promoting the effective application of relevant international norms and standards on slavery; requesting, receiving and exchanging of information; and recommending measures for elimination of slavery practices. These tasks materialize in the three ways: thematic reports on specific issues; country visits, which result in country reports; and communications sent to states upon reliable information about cases of contemporary forms of slavery.

#### A. Thematic Reports

The examination of the thematic reports must begin with the clarification that they are not intended to provide guidance as to the meaning of different terms from a formal legal perspective. They are rather meant to gather better understanding of a problem, to explore cross-linkages between issues and to suggest possible solutions.<sup>147</sup> However, issues concerning the definitional underpinnings of forced labor and slavery do emerge from these reports. Although the Special Rapporteur herself does not profoundly dissect these issues, some of the definitional challenges exposed in the reports are of significance and must be seriously considered.

The thematic work of the first appointed special rapporteur, Gulnara Shahinian (2008 - 2014), focused on bonded labor, domestic servitude and child labor.<sup>148</sup> Respectively, she published reports on each one of these issues. The first thematic report addressed bonded labor which was framed

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143. Convention Concerning Decent Work for Domestic Workers (ILO No. 189), adopted June 16, 2011, PRNo.15A.

144. Recommendation Concerning Decent Work for Domestic Workers (ILO No. 201), adopted June 16, 2011, [http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_ILO\\_CODE:R201](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:R201).

145. Urmila Bhoola (Special Rapporteur on Contemporary Forms of Slavery), *Rep. of the Spec. Rapporteur on Contemporary Forms of Slavery, including its causes and consequences*, ¶ 17, U.N. Doc. A/HRC/27/53 (July 22, 2014).

146. Protocol of 2014 to the Forced Labor Convention, 1930 (ILO No. P029), adopted June 11, 2014, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:P029](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:P029).

147. Meghna Abraham, *New Chapter for Human Rights: A Handbook on Issues of Transition from the Commission on Human Rights to the Human Rights Council*, 35, INT'L SERV. FOR HUM. RTS. (June 2006), <http://library.fes.de/pdf-files/bueros/genf/04375.pdf>.

148. Gulnara Shahinian (Special Rapporteur on Contemporary Forms of Slavery), *Rep. of the Spec. Rapporteur on Contemporary Forms of Slavery, including its causes and consequences*, U.N. Doc. A/HRC/9/20 (July 28, 2008).

as “one of the most traditional and widespread forms of forced labour.”<sup>149</sup> The report is confusing as to whether bonded labor can be also conceptualized as slavery. It is, however, clear that bonded labor is perceived not only as forced labor, but also as a form of “servile status” in the sense of the 1956 Supplementary Convention. The report offered the following clarification as to the definition of “bonded labour”:

[it] occurs when a person offers his/her labour services in exchange for the repayment of a debt. However, in order for this sort of arrangement to be considered bonded labour, some supplementary conditions must apply. The person has to lose control over his/her work conditions, the length of the arrangement, and the equivalent in terms of labour of the amount of money owned.<sup>150</sup>

The Special Rapporteur drew attention to the fact that unlike human trafficking, the issue of bonded labor has not received sufficient consideration at national and international level.<sup>151</sup> This provided her the basis to conclude that “[u]nlike that attention devoted to trafficking, the international efforts to sign, ratify, enforce and monitor the slavery conventions pale in comparison.”<sup>152</sup> She recommended much greater focus on forced labor and, in particular, on bonded labor.

Another important insight from the thematic report on forced and bonded labor concerns the definition of forced labor. The Special Rapporteur noted that:

Many countries, in defining forced labour, used labour coercion as a determining factor and did not include labour conditions. Exploitation as such is not clearly defined in international law and different approaches can be taken to defining it. Exploitation can be understood as a series of labour conditions that alone or together can be considered as “exploitative.” These conditions can affect the number of hours worked during the day, the wages, the duration of the contract, etc. under this definition, the concept of exploitation can vary from one context to another and depend strongly on economic and social factors. However, the responses to the questionnaire would indicate *that most countries seem to have based their definition of exploitation not on the conditions of work, but on whether an element of coercion exists, coercion being understood as fear for the safety of oneself or the safety of others. Therefore, if there is no coercion, it can be implied that there is no labour exploitation, the working conditions notwithstanding.*<sup>153</sup>

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149. *Id.* ¶ 28.

150. *Id.* ¶ 41.

151. *Id.* ¶ 67.

152. *Id.* ¶ 95.

153. *Id.* ¶ 84 (emphasis added).

With this observation, the Special Rapporteur drew attention to a problem inherent in the international law definition of forced labor which requires menace of penalty and involuntariness as constitutive elements.<sup>154</sup> More specifically, the absence of consent which implies use of coercion/force appears to be the determinative feature. This feature is formative irrespective of whether the working conditions are exploitative. Therefore, a person can be held in forced labor even in excellent working conditions. At the other end of the spectrum, a person working in severely exploitative working conditions to which he/she has consented, appears not to be held in forced labor under the terms of the definition. In Part V.C. below, I will discuss how the human rights monitoring bodies have responded to this definitional challenge. The analytical framework proposed by the ECtHR will be distinguished since it has rejected the simply binary between forced and voluntary labor.

In her second thematic report, the Special Rapporteur focused on the manifestations and causes of domestic servitude. She offered clarifications as to the distinction between slavery and servitude:

Slavery and servitude have in common that the victim is economically exploited, totally dependent on other individuals and cannot end the relationship at his or her own volition. In cases of slavery, as classically defined in the [1926 Slavery Convention], the perpetrator puts forward a claim to “own” the victim that is sustained by custom, social practice or domestic law, even though it violates international law. In servitude and slavery like practices, no such claim to formal ownership exists.<sup>155</sup>

To sustain the above understanding, the Special Rapporteur drew from the ECtHR judgment of *Siliadin v. France*, where the ECtHR held that slavery implies the exercise of “a genuine right of legal ownership.”<sup>156</sup> In this way, the rapporteur together with the ECtHR maintained a restrictive meaning of slavery in continuation of the term’s historical usage, as outlined in Part I above. The Special Rapporteur’s report reveals a tendency to limit the meaning of slavery to traditional practices (e.g. practices in the countries of the Sahel region of Western Africa). She has also observed that slavery still exists in certain sectors of the society in Mauritania and Niger and has added that “the specific nature of slavery manifest itself by the fact that the victim and her children are the master’s property and can be rented out, loaned or given as gifts to others.”<sup>157</sup> In Part V.A. below, this restrictive understanding of the term will be challenged and an alter-

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154. Forced Labor Convention, *supra* note 66, at Art. 2(1).

155. Gulnara Shahinian (Special Rapporteur on Contemporary Forms of Slavery), *Rep. of the Spec. Rapporteur on Contemporary Forms of Slavery, including its causes and consequences*, ¶ 25, U.N. Doc. A/HRC/15/20, June 18, 2010 (emphasis added).

156. *Siliadin v. France*, (No. 73316/01), 2005-VII Eur. Ct. H.R. ¶ 122; *see discussion infra* Part V.A.4.

157. Shahinian, *supra* note 155, ¶¶ 28-29.

native proposed. The concept of slavery was again invoked by the Special Rapporteur in her report on servile marriages, where she insisted that these are a form of slavery since the woman is “reduced to a commodity over whom any or all of the powers of ownership are attached.”<sup>158</sup> In her view, this reaffirmation is important “as it provides an understanding of the violations that victims endure and the kind of interventions required to prevent, monitor and prosecute servile marriage.”<sup>159</sup>

Interestingly and, in fact, contrary to the general perception,<sup>160</sup> the Special Rapporteur maintained the position that in terms of severity of harm there is no distinction between slavery and servitude: “This [the above quoted classic meaning of slavery] does not mean that servitude is the lesser human rights violation; the humiliation, exploitation and suffering can be of equal or more intense severity depending on the nature of the individual case.”<sup>161</sup> This position sits at odds with the escalating continuum envisioned by Article 8 of the ICCPR, which will be explained in Part V below.

Many of the issues falling within the mandate of the Special Rapporteur are manifestation of deep structural issues such as poverty, lack of education and discrimination. These could be easily linked to the prevalence of child labor in the artisanal mining and quarrying sector, which were under review in her third thematic report published in 2011.<sup>162</sup> Similarly, structural problems such as poverty, gender inequality, cultural and religious practices were spotlighted in the 2012 report on servile marriages.<sup>163</sup> Another key area for the Special Rapporteur has been the role of businesses, in particular, transnational companies, in promoting and using forced labor in their global supply chains. The first report of Urmila Bhoola, who after the expiration of the six year mandate of Gulnara Shahinian was appointed as a Special Rapporteur, constituted a “thematic study on enforcing the accountability of States and businesses for preventing, mitigating and redressing contemporary forms of slavery in supply chains.”<sup>164</sup> The report provides a useful outline of the sectors where contemporary forms of slavery are prevalent and of good practices by states at a national level in terms of ensuring that businesses can be held accounta-

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158. Gulnara Shahinian (Special Rapporteur on Contemporary Forms of Slavery), *Thematic rep. on servile marriage*, 1, U.N. Doc. A/HRC/21/41 (July 10, 2012).

159. *Id.* ¶ 19.

160. See Allain, *supra* note 108, at 304 ([s]ervitude should be understood as human exploitation falling short of slavery. That is to say, such exploitation which does not manifest powers which would normally be associated with ownership, whether *de jure* or *de facto*.).

161. Shahinian, *supra* note 155, ¶ 25.

162. Gulnara Shahinian (Special Rapporteur on Contemporary Forms of Slavery), *Rep. of the Spec. Rapporteur on Contemporary Forms of Slavery, including its causes and consequences, on her visit to Peru*, U.N. Doc. A/HRC/18/30 (July 4, 2011).

163. Shahinian, *supra* note 158, ¶¶ 42–62.

164. Urmila Bhoola (Special Rapporteur on Contemporary Forms of Slavery), *Rep. of the Spec. Rapporteur on Contemporary Forms of Slavery, including its causes and consequences*, U.N. Doc. A/HRC/30/35 (July 8, 2015).

ble for ending contemporary forms of slavery in supply chains.<sup>165</sup> The rapporteur has also reported on the global and regional trends in the prevalence of debt bondage.<sup>166</sup>

As an overall assessment, the thematic reports provide a good overview of the prevalence of the problem and the different forms of its manifestation at global level.<sup>167</sup> Although, the Special Rapporteur uses the relevant international law instruments as benchmarks and raises some challenging legal issues, the focus of the reports is not on the legal analysis of the respective definitions and legal duties incumbent upon states. Emphasis is placed on the description of the factual reality. Thus, the thematic reports contribute to the overall body of knowledge in the field and to the understanding of certain phenomenon. They raise awareness of particular problems, of the existing international law standards and of national responses.

### B. Country Reports

In addition to thematic reports, which are general and not targeted at specific countries, the Special Rapporteur also issues country reports. These are drafted after on-site missions in different countries and constitute valuable sources of information on the existing national legislation, institutional mechanisms, programs and activities for addressing contemporary forms of slavery at national level. The main objective of the on-site missions and the ensuing reports is engaging the state in a dialog with a view to identifying challenges.<sup>168</sup> The countries visited by the Special Rapporteur are from different geographical areas and the resulting reports focus on specific issues identified by the rapporteur as deserving her attention in relation to the country. These visits allow “direct access to civil society and permit an immersion into the historical, constitutional, legal and operational framework” of the problem.<sup>169</sup>

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165. See *id.* ¶¶ 23–27, 31–34. An example of a good practice is the adoption by the United Kingdom of the 2015 Modern Slavery Act, which includes provisions on transparency in supply chains and imposes obligations on businesses to disclose the steps, if any, they are taking to address contemporary forms of slavery in supply chains. See *id.* ¶ 31. The adoption of the 2010 California Transparency in Supply Chains Act and the drafting of the so-called ‘dirty list’ by the Brazilian Ministry of Labor were also highlighted as good practices. See *id.* ¶¶ 33–34.

166. Urmila Bhoola (Special Rapporteur on Contemporary Forms of Slavery), *Rep. of the Spec. Rapporteur on Contemporary Forms of Slavery, including its causes and consequences*, U.N. Doc. A/HRC/33/46 (July 4, 2016).

167. See generally Gulnara Shahinian (Special Rapporteur on Contemporary Forms of Slavery) *Rep. of the Spec. Rapporteur on Contemporary Forms of Slavery, including its causes and consequences*, U.N. Doc. A/HRC/24/43 (July 1, 2013).

168. See Human Rights Council Res. 5/2 (June 18, 2007) (where Article 11 explains that the Special Rapporteur organizes a country visit only with the consent or at the invitation of the country concerned).

169. Nigel Rodley, *The United Nations Human Rights Council, Its Special Procedures, and Its Relationship with the Treaty Bodies: Complementarity or Competition*, in *NEW INSTITUTIONS FOR HUMAN RIGHTS PROTECTION* 49, 62 (Kevin Boyle ed., 2009).

For example, the report on Haiti focused on *restavèk* children (children who are given by their families to more affluent families in the hope that they will be provided with food, shelter, schooling in return for domestic labor).<sup>170</sup> Children were also in the focus in the reports on Romania,<sup>171</sup> Kazakhstan,<sup>172</sup> and Madagascar.<sup>173</sup> The report on Brazil contained the finding that forced labor is prevalent in rural areas, in particular in the cattle ranching industry and agricultural industry, where the victims are predominantly boys and men aged 15 years and older. Forced labor was also found to feature in the garment industry. The Special Rapporteur commended Brazil for its efforts in combating forced labor. On the other hand, however, it also warned that progress is threatened by the “impunity enjoyed by landowners, local and international companies and intermediaries, such as *gatos*.”<sup>174</sup> Similar problems were exposed in Peru, where forced labor was reported to be prevalent in the logging and mining sector.<sup>175</sup>

Another cluster of reports draw attention to traditional forms of slavery. For example, in 2010 the Special Rapporteur reported on Mauritania where she was very confident in her determination that slavery still exists in this country.<sup>176</sup> The 2015 report on Niger highlighted as major issues of concern the existence of descent-based slavery,<sup>177</sup> the practice of *wahaya*

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170. Gulnara Shahinian (Special Rapporteur on Contemporary Forms of Slavery) *Rep. of the Spec. Rapporteur on Contemporary Forms of Slavery, including its causes and consequences, Gulnara Shahinian, Mission to Haiti*, U.N. Doc. A/HRC/12/21/Add.1 (Sept. 4, 2009).

171. Gulnara Shahinian (Special Rapporteur on Contemporary Forms of Slavery), *Rep. of the Spec. Rapporteur on Contemporary Forms of Slavery, including its causes and consequences, Gulnara Shahinian, Mission to Romania*, U.N. Doc. A/HRC/18/30/Add.1 (June 30, 2011).

172. Gulnara Shahinian (Special Rapporteur on Contemporary Forms of Slavery), *Rep. of the Spec. Rapporteur on Contemporary Forms of Slavery, including its causes and consequences, Gulnara Shahinian, Mission to Kazakhstan*, U.N. Doc. A/HRC/24/43/Add.1 (June 27, 2013).

173. Gulnara Shahinian (Special Rapporteur on Contemporary Forms of Slavery), *Rep. of the Spec. Rapporteur on Contemporary Forms of Slavery, including its causes and consequences, Gulnara Shahinian, Mission to Madagascar (10 to 19 December 2012)*, U.N. Doc. A/HRC/24/43/Add.2 (July 24, 2013).

174. Gulnara Shahinian (Special Rapporteur on Contemporary Forms of Slavery), *Rep. of the Spec. Rapporteur on Contemporary Forms of Slavery, including its causes and consequences*, U.N. Doc. A/HRC/15/20/Add.4 (Aug. 30, 2010).

175. Gulnara Shahinian (Special Rapporteur on Contemporary Forms of Slavery), *Rep. of the Spec. Rapporteur on Contemporary Forms of Slavery, including its causes and consequences*, ¶ 8, U.N. Doc. A/HRC/18/20/Add.2 (Aug. 15, 2011).

176. Gulnara Shahinian (Special Rapporteur on Contemporary Forms of Slavery), *Rep. of the Spec. Rapporteur on Contemporary Forms of Slavery, including its causes and consequences*, N. Doc. A/HRC/15/20/Add.2 (Aug. 24, 2010).

177. Urmila Bhoola (Special Rapporteur on Contemporary Forms of Slavery), *Rep. of the Spec. Rapporteur on Contemporary Forms of Slavery, including its causes and consequences*, ¶ 33, U.N. Doc. A/HRC/30/35/Add.1 (July 30, 2015) (“[S]lavery continued to exist in some ethnic communities in the Niger, where people were born into slavery, resulting in generations being owned by, and at the entire disposal of, their masters.”).

(the purchase of one or more girls under the guise of a fifth wife), child marriage and child labor.<sup>178</sup>

As an overall assessment, the country reports are a very valuable source of empirical evidence. An example to this effect is the 2014 report on Ghana where the Special Rapporteur described in detail the existence of child labor in the fishing sector after visiting fishing communities in remote areas of the country and the practice of kayayee (girls and women who work as a head porter carrying loads in baskets on their heads for a fee).<sup>179</sup> The country reports are important for obtaining direct and first-hand information. They reflect direct observations of the human rights situation in the country, which have been obtained during the country visit and contact with victims, witnesses, national authorities, NGOs and officials of international organizations present in the country concerned.

At the same time, it is difficult to desegregate the contemporary manifestation of slavery from broader problems of extreme poverty, discrimination, inequality and underdevelopment. The report on Madagascar concludes with the recognition that “[t]he fight against poverty is at the heart of the fight against slavery in Madagascar.”<sup>180</sup> Thus, many of the recommendations directed to the states are of very general nature. It is questionable whether some of them are, in fact, required by the relevant legal standards.<sup>181</sup>

Still, the country reports are not only a valuable source of empirical evidence; they also expose some concrete problems. For example, a recurring issue emerging from these reports is the lack of specific criminalization of slavery, servitude, and forced labor at national level. In the report on Peru, the Special Rapporteur expressed the view that “the lack of a qualification of forced labor in the penal code in line with Article 25 of the ILO Convention No. 29 prevents cases from being reported; and even when a case is reported, it prevents the prosecutor from investigating it under the proper offence.”<sup>182</sup> The 2015 report on Belgium exposed a similar gap in the national legislation:

Belgium legislation does not contain specific provisions criminalizing slavery and the institutions and practices similar to slavery as

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178. *Id.* ¶¶ 48, 23.

179. Gulnara Shahinian (Special Rapporteur on Contemporary Forms of Slavery), *Rep. of the Spec. Rapporteur on Contemporary Forms of Slavery, including its causes and consequences*, U.N. Doc. A/HRC/27/53/Add.3 (Oct 1, 2014).

180. Bhoola, *supra* note 177, ¶ 161A/HRC/24/43/Add.2, 24 July 2013, ¶ 161; *see also* Gulnara Shahinian (Special Rapporteur on Contemporary Forms of Slavery), *Rep. of the Spec. Rapporteur on Contemporary Forms of Slavery, including its causes and consequences*, U.N. Doc. A/HRC/15/20/Add.3 (July 5, 2010) (asserting that contemporary forms of slavery are correlated with poverty, discrimination, impunity and weak implementation capacity of the state).

181. *See* Bhoola, *supra* note 177, ¶ 99 (where the Special Rapporteur directs recommendations for enactment of national legislation to give effect to the ILO Domestic Workers Convention, 2011 (No.189), even to states which are not formally bound by this convention).

182. Shahinian, *supra* note 175, ¶ 61.

defined in the 1956 Supplementary Convention, with the exception of forced marriage, nor does it contain explicit provisions on the prohibition of forced labour, in accordance with the international instruments ratified by Belgium. The approach taken by the authorities in the development of the legislative framework, which was from the outset very much linked to migrants and their residency status, was not to enshrine separate criminal offences but to link them to the criminal offence of human trafficking.<sup>183</sup>

The Special Rapporteur's position is that if this gap is not addressed, no clear and disaggregated data can be made available on contemporary forms of slavery to assist with policymaking.<sup>184</sup> A similar problem is identified in the report on El Salvador, where the rapporteur notes that the country has "robust legal provisions relating to human trafficking, migration, child protection, violence against women, gender equality and protection against forced labor, but emphasis on contemporary slavery is weak".<sup>185</sup> Consequently, she recommended that the state "consider developing a multi-stakeholder initiative similar to that it has set up on trafficking, or broadening the scope of the national anti-trafficking initiatives to include contemporary forms of slavery".<sup>186</sup>

Other reports also contain concrete recommendations as to what changes must be made in the national legislation. For example, the Special Rapporteur recommended that Niger amend Article 102 of its Criminal Code by adding an explicit reference to the prohibition of descent-based discrimination.<sup>187</sup> She also recommended that Niger adopt the regulatory part of the Labor Code.<sup>188</sup> The report on Lebanon is also specific about what should be changed in the national legislation, e.g. abolishment of the *kafala* system, provision of work permits to migrant domestic workers not linked to employers, development of a salary threshold for migrant domestic workers not lower than the minimum national salary, abolishment of live-in requirements etc.<sup>189</sup>

What is the significance of these recommendations and is there any mechanism to assess whether states have considered them? Some states seriously engage with the reports, as it is evident from the comments by

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183. Urmila Bhoola (Special Rapporteur on Contemporary Forms of Slavery), *Rep. of the Spec. Rapporteur on Contemporary Forms of Slavery, including its causes and consequences*, ¶ 14, U.N. Doc. A/HRC/30/35/Add.2 (July 6, 2015).

184. *Id.* ¶ 75(g).

185. Urmila Bhoola (Special Rapporteur on Contemporary Forms of Slavery) *Rep. of the Spec. Rapporteur on Contemporary Forms of Slavery*, ¶ 8, U.N. Doc. A/HRC/33/46/Add.1 (Aug. 3, 2016).

186. *Id.* ¶ 61(a).

187. Bhoola, *supra* note 177, at ¶ 99(b).

188. *Id.* ¶ 99(d).

189. Gulnara Shahinian (Special Rapporteur on Contemporary Forms of Slavery), *Rep. of the Spec. Rapporteur on Contemporary Forms of Slavery, including its causes and consequences, on her mission to Leb. (10–17 October 2011)*, ¶¶ 137(b-d), U.N. Doc. A/HRC/21/41/Add.1 (July 4, 2012).

Kazakhstan<sup>190</sup> and Lebanon<sup>191</sup> on the reports of the Special Rapporteur. In addition, the Special Rapporteur herself can conduct follow up visits and issue follow up country reports. Such reports have been issued on Kazakhstan and Mauritania.<sup>192</sup> The follow-up reports, on the one hand, commend the state for some progress already made, and on the other hand, outline the same or new problems. They are intended to foster a spirit of cooperation and conclude with similar or new recommendations. Overall, however, they are a weak form of monitoring and ensuring compliance.

### C. *Communications (Letters of Allegation)*

In addition to thematic and country reports, the Special Rapporteur can receive information from the public about concrete cases of contemporary forms of slavery. She is mandated to act upon this information by sending communications (called letters of allegation) to respective governments asking for factual clarifications and measures already taken or to be taken. Per the Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council, communications for special procedures should be based on information:

[. . .] submitted by a person or group of persons claiming to be a victim of violations or by a person or a group of persons, including non-governmental organizations, acting in good faith in accordance with principles of human rights, and free from politically motivated stands or contrary to, the provisions of the Charter of the United Nations, and claiming to have direct or reliable knowledge of those violations substantiated with clear information.

The communication should not be exclusively based on reports disseminated by mass media.<sup>193</sup>

Since there is no formalized procedure for recording the requests submitted by persons or groups of persons requesting interventions by the Spe-

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190. See Comments of the Republic of Kaz. on the rep. of the Spec. Rapporteur on contemporary forms of slavery, its causes and consequences following her mission to Kaz., U.N. Doc. A/HRC/24/43/Add.3 (Sept. 13, 2013).

191. See Comments by Leb. on the rep. of the Spec. Rapporteur on contemporary forms of slavery, its causes and consequences following her mission to Leb., U.N. Doc. A/HRC/21/41/Add.2 (Sept. 11, 2012).

192. See Gulnara Shahinian (Special Rapporteur on Contemporary Slavery), *Rep. of the Spec. Rapporteur on Contemporary Forms of Slavery, including its causes and consequences on her follow-up mission to Kaz.*, U.N. Doc. A/HRC/27/53/Add.2 (Aug. 26, 2014); Gulnara Shahinian (Special Rapporteur on Contemporary Forms of Slavery), *Rep. of the Special Rapporteur on Contemporary Forms of Slavery, including its causes and consequences, on her follow-up mission to Mauritania*, U.N. Doc. A/HRC/27/53/Add.1, Aug. 26, 2014.

193. Human Rights Council Res. 5/1, U.N. Doc. A/HRC/RES/5/2, at Art. 9(d-e) (June 18, 2007). In addition to communications, the Special Rapporteur can also resort to urgent appeals “in cases where the alleged violations are time-sensitive in terms of involving loss of life, life-threatening situations or either imminent or ongoing damage of a very grave nature to victims.” *Id.* at Article 10.

cial Rapporteur, it is not possible to assess whether the communication mechanisms are underutilized.<sup>194</sup> In addition, the Special Rapporteur has the discretion to decide which allegations to act upon. Therefore, it is impossible to review all of the issues that have been raised before the Special Rapporteur and the number of such appeals.<sup>195</sup> If the Special Rapporteur decides to act, she can transmit a communication to the respective government. Most of the letters are sent jointly with other special rapporteurs (e.g. the U.N. Special Rapporteur on Human Trafficking, the U.N. Special Rapporteur on the Human Rights of Migrants). The Human Rights Council periodically publishes information as to the number of the communications sent to governments, brief description of the problems addressed in these communications, and whether the governments have responded. It has been thus recorded that since its establishment in 2007 till the end of 2015, the Special Rapporteur has sent 36 communications to governments and 20 of these have been replied to.<sup>196</sup>

Many of the communications concern an individual whose name may be kept confidential due to security concerns. An example to this effect is the communication sent to Lebanon regarding allegations of repeated physical and sexual abuse of an Ethiopian migrant domestic worker, Alem Dechasa, which led to suicide.<sup>197</sup> In 2014, a communication was sent to India regarding allegations that the hands of Mr. Nilambar Dhangada Majhi and Mr. Jialu Nial, laborers from the Kalahandi district, were cut off by a labor contractor after they tried to escape.<sup>198</sup>

The communications can also concern a group of persons or some communities. For example, a communication was sent to India regarding alleged trafficking of four girls who were raped and forced into prostitution.<sup>199</sup> A communication was sent to Thailand regarding the alleged trafficking of Mr. X. from Cambodia to Thailand. The factual substratum of the communication is described as follows: Mr. X. came to Thailand through a broker, CDM Trading Manpower Co Ltd, based in Cambodia. He entered a contract with CDM to work at Phatthana Frozen Food Factory in Thailand. It was reported that his salary was less than what the contract stipulated and that part of his salary and his passport were with-

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194. See Shahinian, *supra* note 155, ¶ 88 (where the Special Rapporteur observes herself that the mechanisms is underutilized).

195. This is a general characteristic of all special procedures at the U.N. level. See Ted Piccone, *The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms*, 15 INT'L J. HUM. RTS. 206, 218 (2011) (there is no formalized procedure "for cataloguing correspondence received from parties requesting intervention by the special procedures").

196. Human Rights Council, Communications Rep. of Spec. Procedures, at 8, U.N. Doc. A/HRC/31/79 (Feb. 19, 2016).

197. Human Rights Council, Communications Rep. of Spec. Procedures, at 79, U.N. Doc. A/HRC/23/51 (May 22, 2013).

198. Human Rights Council, Communications Rep. of Spec. Procedures, at 43, U.N. Doc. A/HRC/26/21 (June 2, 2014).

199. Human Rights Council, Communications Rep. of Spec. Procedures, at 177, U.N. Doc. A/HRC/22/67 (Feb. 20, 2013).

held by the employer to prevent him from leaving until his debts are settled.<sup>200</sup> The Special Rapporteur sent communications to both Uzbekistan and Kazakhstan concerning the case of a boy allegedly trafficked from Uzbekistan to Kazakhstan.<sup>201</sup> A communication has been also sent to the United Kingdom concerning the case of a women threatened with deportation to Iran, who left her country of origin to escape a forced marriage.<sup>202</sup>

Another group of communications concern problematic situations in specific countries. An example is the communication sent to Iraq regarding allegations that Yezidi girls and women sold to, abused, sexually exploited and enslaved by the fighters of the so-called Islamic State.<sup>203</sup> Additionally, repeated communications have been sent to Thailand concerning alleged trafficking of migrant workers for the purpose of labor exploitation and debt bondage at Vita Food Factory and Natural Fruit Factory.<sup>204</sup> The Special Rapporteur also sent a communication to India concerning 70,000 bonded child laborers from Nepal and Bangladesh who work in the so-called “rat mines” of Jaintia Hills, Meghalaya State, India.<sup>205</sup> Similar communications regarding children working in “rat mines” have been also sent to Bangladesh and Nepal.<sup>206</sup> A communication was also sent to Kuwait in relation to exploitation of migrant domestic workers.<sup>207</sup>

There is a cluster of communications that draw attention to problematic national legislation or problematic amendment proposals in national legislation. An example to this effect is the joint communication sent by the Special Rapporteur together with other U.N. special mandates to Bangladesh upon receiving information about ongoing reform in the national legislation allowing exceptions to the minimum age of marriage.<sup>208</sup> In their efforts to make the government aware of the international law standards, the authors of the communication outline in great detail the applicable human rights law instruments concerning marriage of children.<sup>209</sup> A simi-

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200. Human Rights Council, Communications Rep. of Spec. Procedures, at 42, U.N. Doc. A/HRC/21/49 (Sept. 7, 2012).

201. Gulnara Shahinian (Special Rapporteur on Contemporary Slavery), *Rep. of the Spec. Rapporteur on Contemporary Forms of Slavery, including its causes and consequences, Gulnara Shahinian, Communications to and from Governments (From 1 July 2009 to 2 August 2010)*, ¶ 7, U.N. Doc. A/HRC/15/20/Add.1 (Aug. 26, 2010).

202. *Id.* ¶ 49. The United Kingdom has not replied to the Special Rapporteur’s letter about the case of the Iranian woman. *Id.* ¶ 63.

203. Human Rights Council, Communications Rep. of Spec. Procedures, at 44, U.N. Doc. A/HRC/30/27 (Sept. 4, 2015).

204. Human Rights Council, Communications Rep. of Spec. Procedures, at 35, U.N. Doc. A/HRC/27/72 (Aug. 20, 2014).

205. Human Rights Council, Communication Rep. of Spec. Procedures at 73, U.N. Doc. A/HRC/23/51 (May 22, 2013).

206. Human Rights Council, Communications Rep. of Spec. Procedures, at 147-148, U.N. Doc. A/HRC/18/51 (Sept. 5, 2011).

207. *Id.* at 138.

208. Human Rights Council, *supra* note 196, at 26.

209. *Id.*

lar concern, namely child marriages, has been raised in communications sent to Yemen, Afghanistan, Pakistan<sup>210</sup> and Iran.<sup>211</sup>

The Special Rapporteur sent a communication to Brazil concerning legislative developments regarding the concept of slave labor and the register of employers caught using slave labor (i.e. “dirty list”). The communication to Brazil acknowledged “the exemplary programs and policies that the government has put in place to combat contemporary forms of slavery”; however, at the same time, it also called upon Brazil to uphold the standards it has set, “including by not reducing the current legal definition of slave labor and by re-publishing the ‘dirty list.’”<sup>212</sup> The proposed changes in the Overseas Domestic Workers visa system in the United Kingdom were also an object to letter by the Special Rapporteur and the proposed removal of the option of domestic workers to change their employers.<sup>213</sup>

Upon receiving information about a case, the Special Rapporteur decides whether to act upon by sending a letter to the respective government. The letter contains a description of the alleged facts and an outline of relevant human rights law standards. Some communications can be commented for their comprehensive elaboration of the application human rights law standards on the issue raised. For this purpose, they contain not only reference to binding international law treaties, but also recommendations and General Comments by treaty bodies and GA resolutions.<sup>214</sup>

It is essential to clarify that the communications do not imply any kind of value judgment on the part of the Special Rapporteur and are not intended to be accusatory. They cannot be a substitute for judicial or other proceedings at the national or international level. Their main purpose is to obtain “clarification in response to allegations of violations and to promote measures designed to protect human rights.”<sup>215</sup> Accordingly, the primary request directed towards the addressed government is to verify the accuracy of the facts alleged in the communication. The Special Rapporteur can also ask the government to provide details and, if available, results of any national investigation, or judicial or other inquires which might have been carried out in relation to the case.<sup>216</sup> For example, in relation to the above mentioned Alem Dechasa’s case, the Lebanese government was also requested to indicate whether compensation would be provided to the family of the victim, what measures Lebanon had taken or

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210. Human Rights Council, Communications Rep. of Spec. Procedures, at 40, U.N. Doc. A/HRC/28/85 (Feb. 19, 2015). *Id.* at 107, 109.

211. Human Rights Council, *supra* note 198, at 100.

212. Human Rights Council, *supra* note 196, at 78.

213. Human Rights Council, Communications Rep. of Spec. Procedures, at 26, U.N. Doc. A/HRC/20/30 (June 15, 2012).

214. See Letter from Office of the United Nations High Commissioner for Human Rights to Lebanon, at 2-5 (Apr. 2, 2012), [https://spdb.ohchr.org/hrdb/21st/public\\_-\\_AL\\_Liban\\_02.04.12\\_\(2.2012\).pdf](https://spdb.ohchr.org/hrdb/21st/public_-_AL_Liban_02.04.12_(2.2012).pdf).

215. Human Rights Council, *supra* note 135, ¶ 30.

216. See Shahinian, *supra* note 201, ¶¶ 12-13.

intended to take to sanction the illegal recruitment agency which was involved in the victim's case and to provide information on what measures had been taken to prevent the occurrence of similar cases.<sup>217</sup> In relation to the above mentioned case of Mr. X, who came to work in Thailand through an agency, the government was asked whether labor inspectors were involved in the identification of victims of trafficking and debt bondage, particularly with regards to the Phatthana Frozen Food factory in Thailand.<sup>218</sup>

Many communications remain unaddressed and thus ignored by the states.<sup>219</sup> Even if responses from governments are received, they are not necessarily made public. An example to this effect is the response by Kuwait submitted in 2011 to the communication sent jointly by the Special Rapporteur on Contemporary Forms of Slavery and the Special Rapporteur on the Human Rights of Migrants concerning “[. . .] more than 660,000 migrant domestic workers in Kuwait, mostly from Asia and Africa, of whom the majority are women.”<sup>220</sup> As reported, “[o]nce in Kuwait, these workers find themselves vulnerable to abuse in a system that leaves them with almost no effective legal protection.”<sup>221</sup>

In the replies that have been made public, governments dispute the factual substratum underlying the communication. For example, in relation to the above mentioned bonded child laborers from Nepal and Bangladesh who worked in the “rat mines” of Jaintia Hills, Meghalaya State, India responded that the facts alleged in the communication were inaccurate.<sup>222</sup> In relation to the above mentioned communication regarding the trafficking of four girls in India, the government also responded that the allegations were factually inaccurate; the government rather represented the cases as one of love affairs where the girls had left on their own accord.<sup>223</sup> The response by the government of Thailand in relation to the above mentioned abusive requirement practices by Phatthana Frozen Food Factory, was that after a thorough investigation, it was concluded that no crimes had been committed; rather, the case concerned labor disputes and violations of the labor protection law. The government con-

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217. Letter from Office of the United Nations High Commissioner for Human Rights to Lebanon, *supra* note 214, at 6.

218. Letter from Office of the United Nations High Commissioner for Human Rights to Thailand, at 4 (May 14, 2012), [https://spdb.ohchr.org/hrdb/21st/AL\\_Thailand\\_14.05.12\\_\(2012\).pdf](https://spdb.ohchr.org/hrdb/21st/AL_Thailand_14.05.12_(2012).pdf).

219. See Abraham, *supra* note 147 (Stating that it has been a general problem that states often do not respond to communications sent by special rapporteurs or they send standard or inadequate responses).

220. Human Rights Council, *supra* note 206, at 138.

221. *Id.*

222. Permanent Mission of India to the U.N., Letter to the Office of the High Commissioner for Human Rights (Aug. 8, 2012), [https://spdb.ohchr.org/hrdb/22nd/Inde\\_08.08.12\\_\(15.2010\).pdf](https://spdb.ohchr.org/hrdb/22nd/Inde_08.08.12_(15.2010).pdf).

223. Permanent Mission of India to the U.N., Letter to the Office of the High Commissioner for Human Rights (Aug. 8, 2012), [https://spdb.ohchr.org/hrdb/22nd/Inde\\_08.08.12\\_\(2012\)\\_Pro.pdf](https://spdb.ohchr.org/hrdb/22nd/Inde_08.08.12_(2012)_Pro.pdf).

firmed that the factory has been deducting the workers' wages as part of "service fees"; however, after the intervention by the authorities, these deductions had been terminated. Thailand, however, disputed the accuracy of the information regarding the retention of migrants' passports; it rather clarified that migrant workers could "deposit their passports with the company on a voluntary basis in order to prevent the loss of their passports and to facilitate the process whereby migrant workers have to report to the immigration office every 90 days."<sup>224</sup>

Some replies by governments are very general and barely contain any information relevant to the victim. For example, the Lebanese government's response to the communication concerning the Alem Dechasa case, was that "it takes stringent measures against employers who in any way assault or ill-treat their female domestic workers."<sup>225</sup>

In some of their replies, governments simply disagree with the position taken in the communication. For example, in its reply in relation to the letter where the Special Rapporteur expressed concerns that removal of the right of overseas domestic workers to change employers may facilitate contemporary forms of slavery, the UK took that stance that

[a]lthough the Government accepts that ODWs can be vulnerable to abuse, we believe that if the route is retained, the right to change employer is not the only way to provide protection. There has been no convincing evidence that the changes proposed to the ODW routes would lead to an increase in trafficking, [. . .] we consider that the best way to minimize the possibility of abusive situations being brought to the UK is to require that there is an established employment relationship. This is why ODWs must have worked for their employer for 12 months prior to coming here.<sup>226</sup>

The response offered by the UK illustrates that states might choose different avenues for preventing abuses of migrant workers. The chosen avenue might not necessarily imply extending rights to migrant domestic workers once they have arrived in the country.

Once having received a reply from the respective government, in principle, it is for the Special Rapporteur to determine how to proceed considering the information received from the government in relation to the communication and the information received from other sources. This might include the initiation of "further inquiries, the elaboration of recommendations or observations to be published in the relevant reports, or

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224. Permanent Mission of Thailand, Letter to the Office of the High Commissioner for Human Rights, at 3-4 (July 30, 2012), [https://spdb.ohchr.org/hrdb/21st/Thailand\\_30.07.2012\\_\(2.2012\).pdf](https://spdb.ohchr.org/hrdb/21st/Thailand_30.07.2012_(2.2012).pdf).

225. Abbas Ibrahim (Director-General of Public Security, Lebanon), Reply to Letter to Office of the High Commissioner for Human Rights (May 20, 2012), [https://spdb.ohchr.org/hrdb/21st/Lebanon\\_06.06.2012\\_\(2.2012\)\\_Trans.pdf](https://spdb.ohchr.org/hrdb/21st/Lebanon_06.06.2012_(2.2012)_Trans.pdf).

226. UK Mission to Geneva, Communication on UK Overseas Domestic Worker Visa, at 3 (Feb. 3, 2012), [https://spdb.ohchr.org/hrdb/20th/United\\_Kingdom\\_23.02.12\\_\(7.2011\).pdf](https://spdb.ohchr.org/hrdb/20th/United_Kingdom_23.02.12_(7.2011).pdf).

other appropriate steps designed to achieve the objectives of the mandate.”<sup>227</sup> It is difficult to assess the actions taken once replies from governments are received, since there is no available information as to the course of action pursued by the Special Rapporteur. For example, in relation to the above-mentioned communication concerning a boy trafficked from Uzbekistan to Kazakhstan, the Special Rapporteur has observed that she

regrets [. . .] that the reply [by the government] did not include sufficient information concerning any actions against the citizens of Kazakhstan who were potentially implicated in the disappearance and trafficking of B.I. The Special Rapporteur continues to monitor the situation in the country, particularly the steps taken by to Government to combat and prevent forced labour.<sup>228</sup>

In conclusion, the letters of allegation can be a useful tool for prompting states to undertake actions in concrete cases. As with thematic and the country reports, they can contain valuable analysis and insights into country situations, draw attention to problems and make constructive and action-oriented proposals. The work of the Special Rapporteur enhances the overall understanding of the problems and can be used as an important reference point in other contexts. For example, it can feed into the review process conducted by the Human Rights Council.<sup>229</sup> Notably, the work of the Special Rapporteur features her political mandate. Setting legal standards and using them for the establishment of state responsibility is not within her realm. These tasks are rather conferred to the Human Rights Committee, the body mandated to monitor the ICCPR, to which we now turn.

#### IV. THE HUMAN RIGHTS COMMITTEE AND ARTICLE 8 OF THE ICCPR

The drafting of the ICCPR was completed in 1954, though its approval by the U.N. General Assembly was secured only in 1966.<sup>230</sup> It took another ten years for the instrument to enter into force. With the entry into force of the ICCPR, international law conferred for the first time an individual right not to be subjected to slavery, servitude, or forced labor. This right is embodied in Article 8 of the ICCPR. The latter is a complex provision, which necessitates its citation in full:

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

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227. Human Rights Council, *supra* note 135, ¶ 36.

228. Shahinian, *supra* note 201, at 7.

229. *See generally* Human Rights Council, Rep. of the Twenty-First Annual Meeting of Special Rapporteurs/Representatives, Independent Experts and Working Groups of the Special Procedures of the Human Rights Council, at 84, U.N. Doc. A/HRC/28/41 (Jan 29, 2015) (Stating that the Human Rights Council attaches “great importance to recommendations made in the thematic and country visit reports of special procedures, given that they gave States more information and helped decision-making.”).

230. ICCPR, annex, *supra* note 5.

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

The conferral of rights under Article 8 of the ICCPR is of huge significance: as Louis Henkin has explained, with the entry into force of the ICCPR, antislavery is not anymore only policy reflected in “states’ willingness to assume international obligations to *abolish* the practice.” Rather

[f]reedom from slavery is a right, an entitlement for every individual, one of an array of individual rights that in their sum reflect a conception of the minimum implications and needs of human dignity that states have come to recognize and to which *they are obliged to give effect* [emphasis added].<sup>231</sup>

This follows from Article 2(1) of the ICCPR, which stipulates that the state parties must not only to respect but also *ensure* to all individuals within their jurisdictions the rights recognized in the Covenant. The latter implies that states undertake affirmative obligations to ensure that individuals are not subjected to slavery, servitude, or forced labor. The scope of these obligations will be examined in Part VI. The focus of this and the next sections will be rather on the material scope of Article 8; namely, on the definitional boundaries of the terms. To assess these boundaries, it must be highlighted that the ICCPR is also equipped with a mechanism for

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231. Henkin, *supra* note 7, at 19-20.

supervising how states respect and ensure the right not to be subjected to slavery, servitude and forced labor. The Human Rights Committee is the treaty body assigned with the supervision of the state parties' compliance with the Covenant and its implementation.<sup>232</sup> In the process of this supervision, the HRC elaborates on the meaning of the different provisions of the ICCPR in this way offering clarifications on the scope of the rights protected and the types of obligations undertaken by states.<sup>233</sup> In particular, the HRC performs three principle activities: (i) reviewing state reports and responding to them through Concluding Observations; (ii) issuing General Comments directed at all state parties that interpret the substantive provisions of the ICCPR and clarify states' obligations; and (iii) handling individual communications. The last process results in the issuance of Views intended to respond to the question whether the respondent state party is in violation of the ICCPR.<sup>234</sup>

How has the HRC dealt with the material scope of Article 8 of the ICCPR in each one of these three documents (Concluding Observations, General Comments and Views)?

#### A. *Article 8 in the Concluding Observations*

The HRC studies the reports which the state parties to the ICCPR must submit; they report on national-level measures for giving effect to the rights protected in the ICCPR.<sup>235</sup> Based on these reports, the HRC issues Concluding Observations,<sup>236</sup> which are country-specific documents analyzing state practices under the Covenant and identifying both positive and concerning aspects of implementation.<sup>237</sup> The Concluding Observations, which are the mainstay of the HRC work, assess the human rights situation in the country in light of the information provided in the state report, the answers to the questions posed by the members of the HRC during the examination of the report, and other sources of information available to

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232. ICCPR, annex, *supra* note 5, at 28.

233. See generally MICHAEL K. ADDO, *THE LEGAL NATURE OF INTERNATIONAL HUMAN RIGHTS* (2010).

234. See Henry Steiner, *Individuals Claims in a World of Massive Violations: What Role for the Human Rights Committee*, in *THE FUTURE OF THE U.N. HUMAN RIGHTS TREATY MONITORING* 15, 21 (Philip Alston & James Crawford eds., 2000).

235. ICCPR annex, *supra* note 5, at 40; see generally INEKE BOEREFJIN, *THE REPORTING PROCEDURES UNDER THE COVENANT ON CIVIL AND POLITICAL RIGHTS* (1999); Walter Kälin, *Examination of State Reports*, in *U.N. HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY* 16 (Helen Keller & Geir Ulfstein eds., 2015).

236. THE REPORTING MECHANISM BEFORE THE HRC HAS TO BE DISTINGUISHED FROM THE UNIVERSAL PERIODIC REVIEW BEFORE THE HUMAN RIGHTS COUNCIL. See G.A. Res. 60/251, *supra* note 119, ¶ 5(e) (stating that the Universal Periodic Review is “a cooperative mechanism, based on an interactive dialogue” and that it “shall complement and not duplicate the work of treaty bodies.”).

237. See generally TYAGI, *supra* note 17, at 270; Michael O’Flaherty, *The Concluding Observations of the United Nations Human Rights Treaty Bodies*, 6(1) *HUM. RTS. L. R.* 27 (2006).

the Committee members.<sup>238</sup> The Concluding Observations direct recommendations to states on how to perform better.

A brief remark on the legal significance of the Concluding Observations is relevant at this point. Buergenthal, a former member of the Committee, has assessed them as “authoritative pronouncements on whether a particular state has or has not complied with its obligations under the Covenant.”<sup>239</sup> If his view is endorsed, it has to be acknowledged that the observations while not legally binding have legal importance.<sup>240</sup> Seibert-Fohr has shared this position since she has observed that while country specific, the observations give insights as to the exigencies under the Covenant and to the specific meaning of single provisions.<sup>241</sup> To bulwark Buergenthal’s and Seibert-Fohr’s positions, it is important to also clarify that the HRC is very systematic and careful in linking all the concerns expressed in the Concluding Observations to specific guarantees under the ICCPR. In other words, the observations specifically mention the relevant right protected by the ICCPR under whose scope the concern is expressed. This makes it possible to identify what concerns are perceived by the HRC as falling within the ambit of the rights enshrined in Article 8 of the ICCPR. An additional argument in favor of denoting legal significance to the Concluding Observations is that they are issued by an expert body.<sup>242</sup>

Since its establishment, the HRC has issued a wealth of Concluding Observations and it will not be manageable to review all of them. Rather, I will focus on those issued in 2014, 2015 and 2016. These observations can be grouped into four categories depending on how they address Article 8 of the ICCPR.<sup>243</sup> Most them reflect concerns only with human trafficking and ignore the concepts specifically provided for in the text of Article 8 of the ICCPR (these observations are issued to Cambodia,<sup>244</sup> Austria,<sup>245</sup> Su-

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238. Thomas Buergenthal, *The U.N. Human Rights Committee*, 5 MAX PLANCK Y.B. U.N. L., 341, 350 (2001).

239. *Id.* at 351.

240. See Martin Scheinin, *Impact on the Law of Treaties*, in THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW 23, 33 (Menno Kammina & Martin Scheinin eds., 2009).

241. Anja Seibert-Fohr, *The Fight against Impunity under the International Covenant on Civil and Political Rights*, 6 MAX PLANCK Y.B. U.N. L. 301, 308 (2002).

242. See Rodley, *supra* note 169, at 56.

243. There is an additional group of Concluding Observations which do not raise any issues under Article 8 of the ICCPR. See ICCPR, annex, *supra* note 5, at 8.

244. Human Rights Comm., Concluding Observations on the Second Periodic Rep. of Cambodia, ¶ 18, U.N. Doc. CCPR/C/KHM/CO/2 (Apr. 27, 2015).

245. Human Rights Comm., Concluding Observations on the Fifth Periodic Rep. of Austria, ¶¶ 25–26, U.N. Doc. CCPR/C/AUT/CO/5 (Dec. 3, 2015).

riname,<sup>246</sup> Spain,<sup>247</sup> Macedonia,<sup>248</sup> Croatia,<sup>249</sup> Sri Lanka,<sup>250</sup> Montenegro,<sup>251</sup> Latvia,<sup>252</sup> Ireland,<sup>253</sup> Burundi,<sup>254</sup> Kyrgyzstan,<sup>255</sup> Malta,<sup>256</sup> Sudan,<sup>257</sup> Sierra Leone,<sup>258</sup> Sweden,<sup>259</sup> Costa Rica,<sup>260</sup> Slovenia,<sup>261</sup> Denmark,<sup>262</sup> Columbia,<sup>263</sup> Moldova,<sup>264</sup> Jamaica<sup>265</sup>). A second group of Concluding Observations reflects concerns with both human trafficking *and*

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246. Human Rights Comm., Concluding Observations on the Third Periodic Rep. of Suriname, ¶¶ 29–30, U.N. Doc. CCPR/C/SUR/CO/3 (3 Dec. 3, 2015).

247. Human Rights Comm., Concluding Observations on the Sixth Periodic Rep. of Spain, ¶ 22, U.N. Doc. CCPR/C/ESP/CO/6 (Aug. 14, 2015).

248. Human Rights Comm., Concluding Observations on the Third Periodic Rep. of the former Yugoslav Republic of Macedonia, ¶ 15, U.N. Doc. CCPR/C/MKD/CO/3 (Aug. 17, 2015).

249. Human Rights Comm., Concluding observation on the Third Periodic Rep. of Croatia, ¶ 17, U.N. Doc. CCPR/C/HVR/CO/3 (Apr. 30, 2015).

250. Human Rights Comm., Concluding Observations on the Fifth Periodic Rep. of Sri Lanka, ¶ 20, U.N. Doc. CCPR/C/LKA/CO/5 (Nov. 21, 2014).

251. Human Rights Comm., Concluding Observations on the Initial Periodic Rep. of Montenegro, ¶ 14, U.N. Doc. CCPR/C/MNE/CO/1 (Nov. 21, 2014).

252. Human Rights Comm., Concluding Observations on the Third Periodic Rep. of Latvia, ¶ 8, U.N. Doc. CCPR/C/LV/CO/3 (Apr. 11, 2014).

253. Human Rights Comm., Concluding Observations on the Fourth Periodic Rep. of Ireland, ¶ 20, U.N. Doc. CCPR/C/IRL/CO/4 (Aug. 19, 2014).

254. Human Rights Comm., Concluding Observations on the Second Periodic Rep. of Burundi, ¶ 16, U.N. Doc. CCPR/C/BDI/CO/2 (Nov. 21, 2014).

255. Human Rights Comm., Concluding Observations on the Second Periodic Rep. on Kyrgyzstan, ¶ 12, U.N. Doc. CCPR/C/KGZ/CO/2 (Apr. 23, 2014).

256. Human Rights Comm., Concluding Observations on the Second Periodic Rep. on Malta, ¶ 15, U.N. Doc. CCPR/C/MLT/CO/2 (Nov. 21, 2014).

257. Human Rights Comm., Concluding Observations on the Fourth Periodic Rep. of the Sudan, ¶ 15, U.N. Doc. CCPR/C/SDN/CO/4 (Aug. 19, 2014).

258. Human Rights Comm., Concluding Observations on the Initial Rep. of Sierra Leone, ¶ 24, U.N. Doc. CCPR/C/SLE/CO/1 (Apr. 17, 2014).

259. Human Rights Comm., Concluding Observations on the Seventh Periodic Rep. of Sweden, ¶¶ 30–31, U.N. Doc. CCPR/C/SWE/CO/7 (Apr. 28, 2016).

260. Human Rights Comm., Concluding Observations on the Sixth Periodic Rep. of Costa Rica, ¶¶ 23–24, U.N. Doc. CCPR/C/CRI/CO/6 (Apr. 21, 2016).

261. Human Rights Comm., Concluding Observations on the Third Periodic Rep. of Slovenia, ¶¶ 19–20, U.N. Doc. CCPR/C/SVN/CO/3 (Apr. 21, 2016).

262. Human Rights Comm., Concluding Observations on the Sixth Periodic Rep. of Denmark, ¶¶ 29–30, U.N. Doc. CCPR/C/DNK/CO/6 (Aug. 15, 2016).

263. Human Rights Comm., Concluding Observations on the Seventh Periodic Rep. of Colombia, ¶¶ 26–27, U.N. Doc. CCPR/C/COL/CO/7 (Nov. 17, 2016).

264. Human Rights Comm., Concluding Observations on the Third Periodic Rep. of the Republic of Moldova, ¶¶ 19–20, U.N. Doc. CCPR/C/MDA/CO/3 (Nov. 18, 2016).

265. Human Rights Comm., Concluding Observations on the Fourth Periodic Rep. of Jamaica, ¶¶ 37–38, U.N. Doc. CCPR/C/JAM/CO/4 (Nov. 22, 2016).

forced labor (these observations are addressed to Korea,<sup>266</sup> Greece,<sup>267</sup> Iraq,<sup>268</sup> Benin,<sup>269</sup> USA,<sup>270</sup> Chile,<sup>271</sup> Japan,<sup>272</sup> Nepal<sup>273</sup>, Namibia,<sup>274</sup> Kazakhstan,<sup>275</sup> South Africa,<sup>276</sup> Kuwait<sup>277</sup>). A third cluster of Concluding Observations is concerned with trafficking and child labor (Côte d'Ivoire,<sup>278</sup> Benin<sup>279</sup>, Burkina Faso<sup>280</sup>). Finally, a fourth group reflects the HRC concern with problems framed as slavery and servitude (Haiti<sup>281</sup>). Within this final group, the concluding observation concerning Poland needs to be specifically mentioned since it contains a section framed as "Elimination of Slavery and Servitude"; however, substantively the observation refers to "human trafficking" and "forced labor".<sup>282</sup> There is thus a discrepancy between the title of the relevant section and the substantive issues addressed. The overview reveals a tendency in favor of framing only

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266. Human Rights Comm., Concluding Observations on the Fourth Periodic Rep. of the Republic of Korea, ¶¶ 40–41, U.N. Doc. CCPR/C/KOR/CO/4 (Dec. 3, 2015).

267. Human Rights Comm., Concluding Observations on the Second Periodic Rep. of Greece, ¶¶ 21–22, U.N. Doc. CCPR/C/GRC/CO/2 (Dec. 3, 2015).

268. Human Rights Comm., Concluding Observations on the Fifth Periodic Rep. of Iraq, ¶¶ 31–32, U.N. Doc. CCPR/C/IRQ/CO/5 (Dec. 3, 2015).

269. Human Rights Comm., Concluding Observations on the Second Periodic Rep. of Benin, ¶¶ 14–15, U.N. Doc. CCPR/C/BEN/CO/2 (Nov. 23, 2015).

270. Human Rights Comm., Concluding Observations on the Fourth Periodic Rep. of the United States of America, ¶ 14, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014).

271. Human Rights Comm., Concluding Observations on the Sixth Periodic Rep. of Chile, ¶ 20, U.N. Doc. CCPR/C/CHL/CO/6 (Aug. 13, 2014).

272. Human Rights Comm., Concluding Observations on the Sixth Periodic Rep. on Japan, ¶ 15, U.N. Doc. CCPR/C/JPN/CO/6 (Aug. 20, 2014).

273. Human Rights Comm., Concluding Observations on the Second Periodic Rep. of Nepal, ¶ 18, U.N. Doc. CCPR/C/NPL/CO/2 (Apr. 15, 2014).

274. Human Rights Comm., Concluding Observations on the Second Rep. of Namibia, ¶¶ 25–26, U.N. Doc. CCPR/C/NAM/CO/2 (Apr. 22, 2016).

275. Human Rights Comm., Concluding Observations on the Second Periodic Rep. of Kazakhstan, ¶¶ 33–34, U.N. Doc. CCPR/C/KAZ/CO/2 (Aug. 9, 2016) (The observation concerning Kazakhstan is entitled as "Trafficking in human beings, slavery, forced and bonded labor"; the actual observation, however, focuses only on human trafficking.).

276. Human Rights Comm., Concluding Observations on the Initial Rep. of South Africa, ¶¶ 32–33, U.N. Doc. CCPR/C/ZAF/CO/1 (Apr. 27, 2016) (As opposed to the observations concerning other countries, the observation concerning South African under Article 8 of the ICCPR is framed as "human trafficking and labor exploitation.").

277. Human Rights Comm., Concluding Observations on the Third Periodic Rep. of Kuwait, ¶ 34, U.N. Doc. CCPR/C/KWT/CO/3 (Aug. 11, 2016).

278. Human Rights Comm., Concluding Observations on the first Periodic Rep. of Côte d'Ivoire, ¶ 17, U.N. Doc. CCPR/C/CIV/CO/1 (Apr. 28, 2015).

279. Human Rights Comm., Concluding Observations on the Second Periodic Rep. of Benin, ¶¶ 14–15, U.N. Doc. CCPR/C/BEN/CO/2 (Nov. 23, 2015).

280. Human Rights Comm., Concluding Observations on the Initial Rep. of Burkina Faso, ¶¶ 35–36, U.N. Doc. CCPR/C/BFA/CO/1 (Oct. 17, 2016).

281. Human Rights Comm., Concluding Observations on the Initial Rep. of Haiti, ¶ 14, U.N. Doc. CCPR/C/HTI/CO/1 (Nov. 21, 2014).

282. Human Rights Comm., Concluding Observations on the Seventh Rep. of Poland, ¶ 27, U.N. Doc. CCPR/C/POL/CO/7 (Nov. 23, 2016).

traditional practices as slavery and servitude and a resistance to using these labels to contemporary forms of abuses. Perhaps the only exception is the concluding observation on New Zealand, where under the heading “Trafficking in persons, and other slavery-like practices”, the HRC expressed its concern about “economic exploitation and forced labor in foreign-chartered vessels operating in New Zealand waters and in other labor sectors.”<sup>283</sup> The overview also demonstrates that human trafficking has been added within the conceptual limits of Article 8 of the ICCPR.

The Concluding Observations contain no explanations as to the framing of the concerns raised. This deficiency prompts me to outline an alternative view as to their legal value. In contrast to Buergethal and Seibert-Fohr, who as mentioned above, attribute some legal importance to the observations, Alston has described these documents as being of marginal and exceptional jurisprudential impact.<sup>284</sup> In similar vein, Steiner has stated that the Committee is not expounding the ICCPR in significant ways though the Concluding Observations.<sup>285</sup> Most importantly, the observations do not contain argumentation and rarely raise any difficult issues of interpretation,<sup>286</sup> which clearly diminishes their legal significance. In addition, they are bedeviled with inconsistencies. For example, it is hard to understand why an observation was directed to Austria raising concerns as to how human trafficking is addressed in this country,<sup>287</sup> while no observation under Article 8 of the ICCPR was directed towards France during the same review period.<sup>288</sup> It is questionable that France has a better record in this regard.<sup>289</sup> This omission is also puzzling in light of the fact that France was initially requested to provide information in its progress achieved in preventing trafficking and assisting victims of trafficking.<sup>290</sup>

In sum, it is debatable whether and to what extent the Concluding Observations are useful for clarifying the normative content of Article 8 of

283. Human Rights Comm., Concluding observation on the Sixth Periodic Rep. of New Zealand, ¶ 39, U.N. Doc. CCPR/C/NZL/CO/6 (Apr. 28, 2016).

284. Philip Alston, *The Historical Origins of the Concept of ‘General Comments’ in Human Rights Law*, in *THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY* 763, 769 (Laurence Boisson de Chazournes & Vera Gowlland-Debbas eds., 2001).

285. Henry J. Steiner, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING*, *supra* note 18, at 15, 51.

286. *Id.*

287. Human Rights Comm., *supra* note 245, ¶¶ 25–26.

288. Human Rights Comm., Concluding Observations on the Fifth Periodic Report of France, U.N. Doc. CCPR/C/FRA/CO/5 (Aug. 17, 2015).

289. *See, e.g.*, Group of Experts on Action Against Trafficking in Human Beings, *Report concerning the Implementation of the Council of Europe Convention on Action Against Trafficking in Human Beings by France*, GRETA (2012) 16 (Jan. 28, 2013), [http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Reports/GRETA\\_2012\\_16\\_FGR\\_FRA\\_publication\\_en.pdf](http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Reports/GRETA_2012_16_FGR_FRA_publication_en.pdf).

290. Human Rights Comm., List of Issues in Relation to the Fifth Periodic Report of France, U.N. Doc. CCPR/C/FRA/Q/5, ¶ 13 (Aug. 18, 2014).

the ICCPR. Accordingly, they are no different in this respect from the reports issued by U.N. Special Rapporteur on Contemporary Forms of Slavery which also direct recommendations to states (see Part III.B. above).

### B. *Article 8 in the General Comments*

The work of the HRC also includes issuing General Comments, which are documents intended to elaborate on states' obligations under specific articles of the Covenant. In the words of Alston, the General Comments are the

means by which a U.N. human rights expert committee distills its considered views on an issue which arises out of the provisions of the treaty whose implementation it supervises and presents those views in the context of a formal statement of its understanding to which it attaches major importance. In essence the aim is to spell out and make more accessible the “jurisprudence” emerging from its work.<sup>291</sup>

The General Comments have been also described as “authoritative interpretative instruments, which give rise to a normative consensus on the meaning and scope of particular human rights.”<sup>292</sup> These comments set out “legal tests and factors” for determining a violation of the ICCPR and advance the density of the international understanding of the Covenant.<sup>293</sup> They “add detail to the rights and obligations” contained in the ICCPR.<sup>294</sup> The General Comments also assist states in better fulfilling their reporting obligations,<sup>295</sup> because their legal analytical content enables the HRC to develop “objective standards for monitoring compliance with the Covenant” and to promote “compliance with the Covenant by fleshing out the scope and the content of the vaguely articulated rights therein.”<sup>296</sup>

The HRC has issued thirty-five comments touching upon different issues emerging from the ICCPR,<sup>297</sup> including issues cutting across different

291. Alston, *supra* note 284, at 764.

292. Conway Blake, *Normative Instruments in International Human Rights Law: Locating the General Comment 3* (N.Y.U. L. Sch. Ctr. for Hum. Rts. and Global Just., Working Paper No. 17, 2008), <http://chrgj.org/wp-content/uploads/2012/07/blake.pdf>.

293. Helen Keller & Leena Grover, *General Comments of Human Rights Committee and their Legitimacy*, in U.N. HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY, *supra* note 235, at 116, 124.

294. Dinah Shelton, *Commentary and Conclusion*, in COMMITMENT AND COMPLIANCE. THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 449, 451 (Dinah Shelton ed., 2000).

295. Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VAND. J. TRANSNAT'L L. 905, 927 (2009).

296. Keller & Grover, *supra* note 293, at 126.

297. For a list, see Human Rights Comm., General Comments (last modified Dec. 15, 2014), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11).

rights.<sup>298</sup> Most of the substantive provisions in the ICCPR have been an object of General Comments, which enhances the determinacy and facilitates the application of the rights enshrined therein.<sup>299</sup> There are some notable exceptions, though. One of them is Article 8 of the ICCPR in relation to which the HRC has not issued a General Comment.<sup>300</sup> This is, on the one hand, unfortunate because General Comments are of major significance for the betterment of our understanding of the rights enshrined in the ICCPR. On the other hand, this absence is to a certain extent understandable since the HRC issues General Comments to *consolidate* its experience gathered in the examination of state reports and individual communications.<sup>301</sup> In relation to Article 8 of the ICCPR there is not much experience to consolidate. As noted in Part IV.A. above, the Concluding Observations issued under Article 8 of the ICCPR are of questionable quality. As it will become clear in Part IV.C. below, no views on individual communications have been issued to examine whether certain factual circumstances legally qualify as slavery or servitude.

General Comment No. 28 on Gender Equality adopted in 2000 is the only comment in which the HRC has made specific references to Article 8 of the ICCPR:

Having regard to their obligations under article 8, State parties should inform the Committee of measures taken *to eliminate trafficking of women and children*, within the country or across borders, and forced prostitution. They must also provide information on measures taken to protect women and children, including foreign women and children, from slavery, disguised, inter alia, as domestic or other kinds of personal service. State parties where women and children are recruited, and from which they are taken, and State parties where they are received should provide information on measures, national or international, which have been taken in order to prevent the violation of women's and children's rights.<sup>302</sup>

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298. See, e.g., Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

299. General Comments are of great significance in light of the fact that human rights are “notoriously, but unavoidably, vague or open-ended.” Alston, *supra* note 284, at 767.

300. Other substantive provisions from the ICCPR which have not been an object of General Comments are Article 4 (derogation in time of public emergency); Article 5 (destruction of rights); Article 11 (prohibition on imprisonment on the ground of inability to fulfill a contractual obligation); Article 13 (expulsion of aliens); Article 15 (no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it was committed); Article 16 (recognition of a person before the law); Article 21 (the right of peaceful assembly); Article 22 (the right to freedom of association). Human Rights Comm., *supra* note 297; ICCPR, *supra* note 5.

301. Keller & Grover, *supra* note 293, at 130.

302. Human Rights Comm., General Comment No. 28 on Article 3: Equality of Rights between Men and Women, ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000).

The implication from the above is that the HRC has brought trafficking of women and children within the scope of Article 8 of the ICCPR. As shown above, this is an inclusion which has been also confirmed in the Concluding Observations. The insertion of human trafficking within the material scope of Article 8 of the ICCPR has not received an explanation in either General Comment No. 28 or in the Concluding Observations. Such explanation can be viewed as necessary considering the preparatory works of the ICCPR. As I will show below, the drafters of the ICCPR explicitly rejected the inclusion of human trafficking within the parameters of Article 8. Even if we were to accept that human trafficking is covered by the latter provision, it is far from clear how the HRC defines it.<sup>303</sup> If it endorses the definition in the U.N. Trafficking Protocol, it is an open question how narrowly or expansively that definition should be interpreted to fall within the ambit of Article 8 of the ICCPR.<sup>304</sup>

### C. Article 8 in the Views

Finally, the treaty monitoring body of the ICCPR exercises quasi-judicial function by considering communications submitted by individuals who claim to be victims of a violation by a State Party of a right set forth in the Covenant. This individual petition system is optional and can be invoked only against a state which has specifically agreed to be an object of review by signing an Optional Protocol.<sup>305</sup> Pursuant to the Optional Protocol, the HRC has competence to consider the complaint, which is referred to in the Protocol as a “communication” and to “forward its views” about whether there has been a violation of the Convention in the particular case.<sup>306</sup> In these views, the HRC interprets and gives life to the rights enshrined in the ICCPR. It confronts the treaty’s ambiguities and indeterminacy and gives meaning to its grand terms.<sup>307</sup>

The use of the word “views” in Article 5(4) of the Optional Protocol indicates that these documents are “advisory rather than obligatory in character.”<sup>308</sup> Yet, the Views cannot be denied significance; to the contrary, they have to be perceived as authoritative interpretation of the ICCPR.<sup>309</sup> Attaching weight to the interpretations advanced in the Views

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303. General Comment No. 28 was adopted in 2000 before the adoption of the U.N. Trafficking Protocol. *Id.*; G.A. Res. 55/25 (Nov. 15, 2000).

304. Chuang, *supra* note 9, at 609 (“[T]he anti-trafficking field is a striking ‘rigor-free zone’ when it comes to defining the concept’s legal parameters.”).

305. G.A. res. 2200A (XXI), at 59 (Dec. 16, 1966). Articles 41 and 42 of the ICCPR establish an optional State-to-State dispute settlement mechanism before the HRC. ICCPR *supra* note 5, at 182.

306. Buergenthal, *supra* note 238, at 397.

307. Steiner, *supra* note 285, at 39.

308. Buergenthal, *supra* note 238, at 397; *See also*, Geir Ulfstein, *Individual Complaints, in U.N. HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY*, *supra* note 235, at 73, 74.

309. In its General Comment No.33 on “The Obligations of state parties under the Optional Protocol to the ICCPR,” the HRC states that its Views exhibit “some important characteristics of a judicial decision.” Human Rights Comm., General Comment No. 33, ¶ 11, U.N. Doc. CCPR/C/GC/33 (Nov. 5, 2008). The International Court of Justice has acknowl-

is further supported by the position of the HRC as the only body mandated to interpret the Covenant, which consists of independent experts serving “in their individual capacity” and functioning “impartially and conscientiously.”<sup>310</sup>

Despite the wide recognition of the legal significance of the Views, it must be immediately noted that they suffer from weaknesses. There are no oral proceedings, and individual communications are considered in closed sessions.<sup>311</sup> The follow-up mechanisms are very weak.<sup>312</sup> Most importantly, as observed by Schlütter, the legal reasoning justifying the Views is far from satisfactory.<sup>313</sup> Other commentators have been softer in their critiques by assessing the Views as not reasoned in great detail, but still sufficient “to explain the Committee’s understanding and application of the Covenant.”<sup>314</sup> As Buergenthal has noted, the Committee has to invest more efforts to substantiate the Views with more robust legal reasoning, because it is precisely the strictly legal character of its work that distinguishes it from other U.N. human rights bodies with more political mandates,<sup>315</sup> including the U.N. Special Rapporteur on Contemporary forms of Slavery. In any case, the Views contain legal reasoning, which distinguishes them from the Concluding Observations.

Have the rights protected by Article 8 of the ICCPR been invoked in individual communications and addressed in Views by the HRC? The record is clear that since the setting into motion of the individual complaints procedure through the Optional Protocol, the rights not to be held in slavery and servitude have never been an object of a View by the HRC. There have been, though, important developments here concerning the right not

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edged in the *Diallo* case that it “should ascribe *great weight* to the interpretation adopted by this independent body [the HRC] that was established specifically to supervise the application of that treaty [emphasis added].” Ahmadou Sadio Diallo (*Guinea v. Dem. Rep. Congo*), Judgment, 2010 I.C.J. 639, ¶ 66 (Nov. 30, 2010) (emphasis added); see also Geir Ulfstein, *The Legal Status of Views Adopted by the Human Rights Committee – from Genesis to Adoption of General Comment No. 33*, in MAKING PEOPLES HEARD: ESSAYS IN HONOUR OF GUDMUNDUR ALFREDSSON 159, 159 (Asbjorn Eide, Jakob T. Möller & Ineta Ziemele eds., 2011).

310. ICCPR, *supra* note 5, at 179, 181; The treaty bodies have been framed as “‘legal’ bod[ies]” and their members have characterized their work as “legal examinations”. Steiner, *supra* note 285, at 49; Rosalyn Higgins, *Ten Years on the U.N. Human Rights Committee: Some Thoughts Upon Parting*, 6 EUR. HUM. RTS. L. REV. 570, 580 (1996).

311. Steiner, *supra* note 285, at 29.

312. Markus Schmidt, *Follow-Up Mechanisms Before UN Human Rights Treaty Bodies and the U.N. Mechanisms and Beyond*, in THE U.N. HUMAN RIGHTS TREATY SYSTEM IN THE 21ST CENTURY 233, 233 (Anne F. Bayefsky ed., 2000).

313. The views issued by the HRC are dominated by a factual assessment, i.e. whether the facts give rise to a violation of the ICCPR. There is little analysis on the applicable law and how this law is interpreted. Birgit Schlütter, *Aspects of Human Rights Interpretation by the U.N. Treaty Bodies*, in U.N. HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY, *supra* note 235, at 261, 273.

314. Torkel Opsahl, *The Human Rights Committee*, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL, *supra* note 119, at 369, 427.

315. Buergenthal, *supra* note 238, at 395.

to be required to perform forced or compulsory labor under Article 8 which has instigated Views. However, all of these cover situations of state-demanded labor and will be reviewed in greater detail in Part V.C. below. There have been, however, no Views concerning forced labor in the context of private harm which might give the HRC the opportunity to clarify the definition of this term in this context. Overall, the HRC has so far largely failed to establish the normative content of the rights enshrined in Article 8 of the ICCPR and to give them a concrete meaning. This is failure with an impact not only on the state parties to the treaty, but also with general consequence since it also affects the promotion of the general understanding of the rights at national and international level.

D. *Human Rights Committee versus the Special Rapporteur on Slavery*

The latter observation prompts an enquiry into how the two systems mandated at U.N. level to address issues of slavery (the U.N. Special Rapporteur on Contemporary Forms of Slavery and the HRC) compare with and complement each other. If, as suggested above, the HRC has failed as the legal body, is the Special Rapporteur, as the body with more political mandate, the better forum?

A brief outline as to how the mandate of the HRC differs from that of the U.N. Special Rapporteur on Slavery is due. The mandates under which these two bodies function are of importance for understanding their definitional approaches and to their assessment of state conduct. The common feature of both mandates is that they are experts acting in their individual capacity,<sup>316</sup> which creates the expectation that their work is not politically marred and follows certain legal standards. The Special Rapporteur, however, is not a guardian of Article 8 of the ICCPR; rather, it bases itself on general international law or other normative standards, including soft law. In contrast, the focus of the HRC is to promote respect for the human rights enshrined in the ICCPR. The HRC as a treaty-based organ contributes to the development of “the normative understanding of the relevant rights.” In contrast, the Special Rapporteur as a special mechanism and a charter-based organ, relies “more heavily upon NGO inputs” and “pays less attention to normative issues *per se*.”<sup>317</sup> The main focus of the Special Rapporteur is fact-elucidation in order to “provide the whole U.N. membership with [a] comparative and global understanding of the human rights problem in question, as well as with guidance on how to deal with it.”<sup>318</sup> In comparison, the HRC does not conduct on-the-spot visits. Rodley has aptly summarized the difference between the treaty bodies and the special

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316. The election process, however, differs. The members of the HRC are elected by the state parties to the ICCPR. The special procedures mandate-holders are appointed by the Human Rights Council.

317. PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS* 693 (2d rev. ed. 2012).

318. Nigel S. Rodley, *United Nations Human Rights Treaty Bodies and Special Procedures of the Commission on Human Rights – Complementarity or Competition?*, 25 *HUM. RTS. Q.* 882, 906 (2003).

procedures in the following way: “[i]n general, the activities of the treaty bodies reflect the formality of the solemn legal instruments that gave birth to them; those of the special procedures have the flexibility appropriate to their genesis in a U.N. political body.”<sup>319</sup>

Despite Rodley’s conclusion, it must be immediately noted that the HRC is not isolated from the open-ended approaches of the Charter-based bodies, as it was in fact noted in the above section where the Concluding Observations issued by the HRC were reviewed. As a consequence, Ado has rather qualified the U.N. treaty bodies, including the HRC, as bodies with an approach to treaty interpretation and application that is informed by their position situated “between the open-ended approach of the Charter-based organs on the one hand and the relatively structured approach of the judicial institutions on the other.”<sup>320</sup> He has also added that these bodies draw inspiration from both “the political approaches of inter-governmental entities as well as the strictly legal approaches of the judicial institutions.”<sup>321</sup> The HRC thus does operate with flexibility,<sup>322</sup> as evidenced from its Concluding Observations. On the other hand, however, it also has a legal mandate. The legal character of the HRC is reflected in the application of strict judicial standards in the consideration of individual communications.

In contrast, the Special Rapporteur is not a quasi-judicial mechanism. True, she can send communications to states in relation to specific cases; however, unlike the requirements of the communication procedures established under the ICCPR, communications may be sent by the Special Rapporteur even if local remedies in the country concerned have not been exhausted.<sup>323</sup> The latter is a necessary requirement so that communications can be reviewed by the HRC. In addition, the admissibility of the communications sent to the HRC is subject to an outstanding number of formal conditions, which further signifies the judicial mandate of the Committee.<sup>324</sup> An example to this effect is the requirement that the same matter, which is an object of the communication, “is not being examined under another procedure of international investigation or settlement.”<sup>325</sup> Finally, when the HRC considers individual cases, it formulates views as to

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319. *Id.* at 907.

320. ADDO, *supra* note 233, at 217.

321. *Id.* at 218.

322. Michael Addo, *Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights*, 32(3) HUMAN RIGHTS QUARTERLY 601, 615 (2010).

323. On the issue of exhaustion of domestic remedies before the HRC see OLIVER DE SCHUTTER, *INTERNATIONAL HUMAN RIGHTS LAW* 819–25 (2d ed. 2010).

324. The author of the communication must be a “victim” of the violation he/she denounces; the communication may not be anonymous, nor may it constitute an abuse of the right to communication; As to the victim requirement, the HRC has held that it cannot examine *in abstracto* the compatibility with the Covenant with the laws and practice of a State. Human Rights Comm., *Leo Hertzberg v. Finland*, ¶ 9.3 (Communication No. 61/1979).

325. G.A. Res. 2200A (XXI), Optional Protocol to the ICCPR, at 303 (Dec. 16, 1966).

whether or not there has been a violation. In contrast, the Special Rapporteur does not formulate judgmental conclusions.

In sum, the two mandates complement each other. However, against the backdrop of scarcity of judicial engagement by the HRC with Article 8 in Views, the legal mandate embodied in the Committee has not been particularly effective. This has hampered the development of legal standards when it comes to the obligation of ensuring the right not to be subjected to slavery, servitude, or forced labor.

## V. INTERPRETING ARTICLE 8 OF THE ICCPR

Against the backdrop of the above depicted gap in the work of the HRC which exposed *inter alia* that clarity as to the meaning of the terms used in Article 8 of the ICCPR is not easily forthcoming, the question which emerges is how to draw the definitional parameters of the concepts embodied therein. As any other provision from an international treaty, Article 8 needs to be subjected to the interpretative methodology of the Vienna Convention on the Law of Treaties (VCLT).<sup>326</sup> Article 31(1) of the VCLT codifies the rule that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>327</sup> Despite the common interpretative methodology set out in the Vienna Convention, one cannot lose sight of the distinctiveness of human rights law, which tilts the interpretative exercise towards teleological interpretation in favor of effective and dynamic interpretation.<sup>328</sup> The interpretation of Article 8 of the ICCPR must thus seek to promote its effectiveness. On a related point, the interpretation must ensure that Article 8 can function within the contemporary social reality, which prompts progressive interpretation. The character of the ICCPR as a living instrument has been emphasized by the HRC itself: “The Committee considers that the Covenant should be interpreted as a living instrument and the rights protected

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326. In fact, the HRC itself is under the obligation to apply the rules of treaty interpretation outlined in Articles 31 and 32 of the VCLT. See generally Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VAND. J. TRANSNAT'L L. 905 (2009).

327. There is no hierarchy between the different rules of interpretation contained in Article 31 of the VCLT. Rather Article 31 of the VCLT has to be applied in a “single combined operation.” 1966 U.N. Y.B. 2, U.N. Doc. A/CN.4/SER.A/1966/Add.1, at 219–20; Jean-Marc Sorel & Valerie Bore-Eveno, *Article 31 (General rule of interpretation)*, in THE VIENNA CONVENTION ON THE LAW OF TREATIES 804 (Olivier Corten & Pierre Klein eds., 2011).

328. There is a debate whether the general rules of treaty interpretation as outlined in the VCLT need to be modified when applied to human rights treaties due to the latter special nature. Birgit Schlütter, *supra* note 313, at 245–65. It has been also observed that the special approaches to treaty interpretation which favor the principle of effectiveness and the principle of dynamic interpretation actually fit within the general principles of treaty interpretation of the VCLT. Jonas Christoffersen, *Impact on General Principles of Treaty Interpretation*, in THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW, *supra* note 240, at 37, 43, 50.

under it should be applied in context and in the light of present-day conditions.”<sup>329</sup>

Article 31(3)(b) of the VCLT further requires that “[t]here shall be taken into account, together with the context [. . .] any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” Although not without valid objections,<sup>330</sup> the General Comments and the Views issued by the HRC can be perceived as examples of international practice after the conclusion of the ICCPR.<sup>331</sup> The case law of other international human rights law courts, i.e. the ECtHR and the IACtHR, can be also viewed as subsequent practice. It should be, however, kept in mind that there are “no formal lines of authority and pattern of deference” among organs established by different universal and regional human rights treaties.<sup>332</sup> Despite this caveat, it has been widely acknowledged that there is cross fertilization and influences between different international courts and tribunals.<sup>333</sup> This implies that when interpreting Article 8 of the ICCPR inspiration can be drawn from the practice of other international and national courts, including international criminal law courts and tribunals<sup>334</sup> and other bodies formally mandated to examine compliance with relevant international treaties (e.g. the ILO Committee of Experts).<sup>335</sup>

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329. Human Rights Comm., *Judge v. Canada*, ¶ 10.3 (Communication No. 829/1998).

330. The General Comments and the Views issued by the HRC might not be viewed as an agreement between the state parties with regard to the interpretation of the ICCPR. The General Comments and the Views are not binding and are, thus, not accepted as hard law by the state parties. In addition, these documents reflect an agreement between the members of the HRC, that is, the body mandated to supervise the ICCPR, but they do not necessary reflect an agreement among the state parties. See Birgit Schlütter, *supra* note 313, at 289, 292.

331. In the context of human rights law, it might be problematic if “subsequent practice”, the term used in Article 31(3)(b) of the VCLT, is perceived as practice limited to state practice. It has been convincingly argued that state practice should have limited relevance when interpreting human rights law treaties.

If courts and tribunals rely on the subsequent state practice of the state parties to reinterpret a human rights treaty over time, it may become very difficult to separate violations from actions intended to narrow the interpretation of certain provision (especially in light of silence/acquiescence on the part of other parties). [. . .] To the extent that such practice may be relied upon at all for the interpretation of human rights treaties/provisions, it should be carefully distinguished from violations and heavily weighted against the object and purpose of the treaty which, I would suggest, should always be given precedence over state practice in the context of integral norms.

Julian Arato, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences*, 9 L. AND PRACTICE OF INT’L COURTS AND TRIBUNAL 443, 487 (2010).

332. Steiner, *supra* note 285, at 40.

333. See generally PHILIPPA WEBB, INTERNATIONAL JUDICIAL INTEGRATION AND FRAGMENTATION (2013).

334. See relevant references on international criminal law *infra* Part V.A.6.

335. The ILO Committee of Experts examines the application of the international labor standards, including the standards set by the ILO Forced Labor Convention and its addi-

Article 31(1)(c) of the VCLT authorizes reliance on “[a]ny relevant rules of international law applicable in the relations between the parties.”<sup>336</sup> This is of importance since there are treaties from general international law which address slavery and forced labor, i.e. the 1926 Slavery Convention, the 1956 Supplementary Slavery Convention and the 1929 ILO Forced Labor Convention. These can be considered in the interpretation of Article 8 of the ICCPR.

Article 32 of the VCLT also refers to the preparatory works of the treaty and the circumstances of its conclusion as a supplementary means of treaty interpretation. This tool can be used to confirm the meaning resulting from the application of Article 31 of the VCLT or to determine the meaning when the interpretation per Article 31 leaves the meaning ambiguous, obscure, or leads to a result that is manifestly absurd or unreasonable. A reference to the preparatory works of Article 8 of the ICCPR is thus apposite.

In what follows, the terms in Article 8 of the ICCPR will be subjected to interpretation in accordance with the above outlined rules of the VCLT.

### A. Slavery

#### 1. The Preparatory Works of the ICCPR

The drafters of the ICCPR observed that slavery “implied the destruction of the juridical personality.”<sup>337</sup> They also observed that “[s]lavery was a relatively limited and technical notion.”<sup>338</sup> In the same vein, the drafters wanted to ensure that slavery and servitude are clearly distinguished and, as a consequence, they framed the right not to be held in slavery and the right not to be held in servitude in two separate paragraphs within Article 8 (see Article 8(1) and Article 8(2) of the ICCPR).<sup>339</sup> The preparatory works of Article 8 of the ICCPR do not point to a particular definition of slavery. Nor was there any reference to the 1926 Slavery Convention and the definition therein. The only revelation offered by the drafting process of the ICCPR is that since slavery was associated with “destruction of the juridical personality” and was thought to be “relatively limited and technical notion,”<sup>340</sup> it can be implied that it was conceptualized as practices sanctioned by the law. However, this limited conceptualization was not viewed as problematic, and the drafters did not ponder much on the mean-

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tional protocol. *See generally* ERIC GRAVEL AND CHLOE CHARBONNEAUS-JOBIN, THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS: ITS DYNAMIC AND IMPACT (2003).

336. *See generally* Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT’L & COMP. L. Q. 279 (2005).

337. U.N., Econ. & Soc. Council, Summary Record of the Hundred and Forty-Second Meeting ¶ 74, U.N. Doc. E/CN.4/SR.142 (1950).

338. *Id.* ¶ 79.

339. MARC J. BOSSUYT, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 164 (1987).

340. Comm’n on Human Rights, 6th Sess., Summary Record of the Hundred and Forty-Second Meeting ¶ 79, U.N. Doc. E/CN.4/SR.142 (1950).

ing of slavery since they included the concept of servitude. In the opinion of the drafters, servitude was meant to encompass a broader scope of abuses of domination.<sup>341</sup>

Additional indication that at the time of drafting slavery was perceived to be limited to a status recognized by the law was the proposal to replace the words “the slave trade” in Article 8(1) of the ICCPR with the words “the trade in human beings so that the paragraph could cover traffic in women *who were not slaves in law*.”<sup>342</sup> This proposal was rejected since it was pointed out that “the first paragraph dealt solely with the slave trade as such.”<sup>343</sup>

The above revelations from the drafting history are not very helpful for applying slavery in the contemporary social reality. Disturbingly, if slavery continues to be perceived as a “limited and technical notion,” it will be rendered a defunct right under international human rights law. This will be contrary to the above-mentioned principle of effectiveness and the requirement that human rights law must be interpreted in light of present-day conditions.<sup>344</sup>

## 2. Destruction of Juridical Personality

Still, it might be possible to draw some useful understandings from the ICCPR drafting history. At first sight, the reference to “destruction of juridical personality” from the *travaux* is not very illuminating. Generally, human rights law has failed to flesh out the meaning of the right to juridical personality as protected by Article 16 of the ICCPR.<sup>345</sup> It has been simply explained that the right to juridical personality “guarantees the individual access to the legal system in order to have these [civil] rights and obligations enforced.”<sup>346</sup> It has been added that Article 16 of the ICCPR guarantees that “the individual is bearer of rights and duties.”<sup>347</sup> This refers to *de jure* possibilities of exercising rights and recognition of rights by the legal system; however, it can be also interpreted as *de facto* possibilities for exercising rights and having practical access to the rights to which

341. VLADISLAVA STOYANOVA, HUMAN TRAFFICKING AND SLAVERY RECONSIDERED. CONCEPTUAL LIMITS AND STATES’ POSITIVE OBLIGATIONS IN EUROPEAN LAW 208 (2017).

342. Emphasis added.

343. U.N., Econ. & Soc. Council, Summary Record of the Hundred and Ninetieth Meeting, U.N. Doc. E/CN.4/SR.199 (1950); *see also* BOSSUYT, *supra* note 337, at 165.

344. The principle of progressive interpretation of human rights law has been extensively developed in the case law of the ECtHR. *See* GEORGE LETSAS, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 66–67 (2007).

345. Article 16 of the ICCPR stipulates that “Everyone shall have the right to recognition everywhere as a person before the law.” Juridical personality, an expression not present in the text of the ICCPR, and “recognition as a person before the law” are expressions which have the same meaning and can be used interchangeably. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR Commentary 284 (1993). Article 16 of the ICCPR has not been an object of frequent invocations.

346. Michael Bogdan and Birgitte K. Olsen, *Article 6*, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, *supra* note 7, at 147, 148.

347. NOWAK, *supra* note 345, at 282.

one is *de jure* entitled.<sup>348</sup> Such an interpretation will be more progressive and open the possibility for aligning the drafters' perception of slavery with the contemporary social reality. Interestingly, the Human Rights Committee in its General Comment No.28 on Equality of Rights between Men and Women has made the following observation:

This right [Article 16 of the ICCPR] implies that the capacity of women to own property, to enter into a contract or to exercise other civil rights may not be restricted on the basis of marital status or any other discriminatory ground. It also implies that *women may not be treated as objects to be given together with the property of the deceased husband to his family.*<sup>349</sup>

This paragraph from the HRC General Comment No. 28 holds transformative potential because it links destruction of juridical personality with slavery and implies that treating a person as an object affects her juridical personality. Notably, the quotation is neutral as to whether the law treats the person as an object or whether she is *de facto* treated as an object.

As clarified in Part IV.A. above, in some of its Concluding Observations, the HRC has used the label of slavery not necessary in relation circumstances when the law recognizes the possibility of one human being to own another. Additional examples include the Concluding Observation on Sudan, where the abduction of women and children was considered to constitute slavery,<sup>350</sup> and the Concluding Observation on Mali where the state was urged to “conduct a careful study of the relations between the descendants of slaves and the descendants of slave-owners in the north of the country, with a view of determining whether slavery-like practices and heredity servitude still continue.”<sup>351</sup> Although slavery seems to be used beyond circumstances when the legal system acknowledges the possibility of one person to exercise powers attaching to the right of ownership over another, its usage is restricted to traditional practices. Contemporary forms of abuses are not framed as slavery by the HRC in the Concluding Observations. It suffices to mention the Conclusion observation on the

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348. See, for example, the Inter-American Court of Human Rights has interpreted Article 3 (right to juridical personality) of the American Convention on Human Rights as implying “placing the person outside the protection of the law” in legal uncertainty that prevents him or her from *inter alia* effectively exercising his or her rights in general. *Anzaldo Castro v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶¶ 90, 101 (Sept. 22, 2009).

349. Human Rights Comm., General Comment 28: Equality of Rights between Men and Women (Article 3), ¶19, U.N. Doc. CCPR/C/21/REV.1/ADD.10 (Mar. 29, 2000) (emphasis added).

350. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Sudan, ¶ 18, U.N. Doc. CCPR/C/SDN/CO/3 (Aug. 29, 2007).

351. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Mali, ¶ 16, U.N. Doc. CCPR/CO/77/MLI (Apr. 16, 2003).

Middle Eastern countries.<sup>352</sup> It has been widely reported that these countries create conditions in which migrant workers are subjected to severe exploitative conditions amounting to slavery.<sup>353</sup> However, the HRC has refrained from using the label of slavery in this context.

One could argue that the national legislation of these countries structures migrants' presence and working conditions in such a way that migrants are impeded from accessing proper rights and protections.<sup>354</sup> For example, the above-mentioned report by the Special Rapporteur on Lebanon reveals a situation demonstrative of the destruction of migrants' juridical personality (e.g., no option for changing employers, and no rights under the national employment legislation).<sup>355</sup>

### 3. *Koraou* Judgment by the ECOWAS Court

*Hadijatou Mani Koraou v. Republic of Niger* is one of the few examples where a court has held a state internationally responsible for violating the right not to be held in slavery;<sup>356</sup> here, specifically in regard to traditional practices in Africa, the boundary between *de facto* and *de jure* slavery seem to be blurred. *Hadijatou Mani Koraou v. Republic of Niger* was decided by the Economic Community of West Africa States Community Court of Justice<sup>357</sup> in 2008 and relates to Niger's practice of *wahiya* whereby "a young girl, generally a slave [is acquired] to work as a servant as well as a concubine."<sup>358</sup> The applicant in the case was Hadijatou Mani Koraou who at age of 12 was sold to a 46-year-old tribal chef to be his *sadaka* (a "fifth wife" who cannot be acknowledged as a wife under Islam law). She was forced to have sexual relationship with the chef and "was

352. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Kuwait, ¶¶ 17–18, U.N. Doc. CCPR/C/KWT/CO/2 (Nov. 18, 2011).

353. *Kuwait: New Law a Breakthrough for Domestic Workers*, HUMAN RIGHTS WATCH (Jun. 30, 2015, 11:55 PM), <https://www.hrw.org/news/2015/06/30/kuwait-new-law-breakthrough-domestic-workers>.

354. See Karen E. Bravo, *Interrogating the State's Roles in Human Trafficking*, 25 IND. INT'L & COMP. L. REV. 9 (2015) ("Through the state's power to legislate, it defines and re-defines reality – it is the creator and enforcer of paradigms of subordination and exploitation that normalize the exploitation of the individuals and groups it makes vulnerable.").

355. Gulnara Shahinian (Special Rapporteur on Contemporary Forms of Slavery), *Report of the Special Rapporteur on Contemporary Forms of Slavery, Including Its Causes and Consequences*, ¶¶ 47, 55, U.N. Doc. A/HRC/21/41/Add.1 (Jul. 4, 2012).

356. *Koraou v. Niger*, No. ECW/CCJ/JUD/06/08, Judgement, Economic Community of West African States Community Court of Justice, ¶¶ 77, 80 (Oct. 27, 2008).

357. For the competence of this court to hear human rights law cases, see Solomon T Ebobrah, *A Rights-Protection Goldmine or a Waiting Volcanic Eruption? Competence of, and Access to, the Human Rights Jurisdiction of the ECOWAS Community Court of Justice*, 7 AFR. HUM. RTS. L. J. 307, 314 (2007).

358. An unofficial translation into English is available at <http://www.refworld.org/docid/496b41fa2.html>. *Koraou*, No. ECW/CCJ/JUD/06/08, ¶ 9 (Oct. 27, 2008). For commentary, see Jean Allain, *Hadijatou Mani Koraou v. Republic of Niger*, 103 AM. J. INT'L L. 311 (2009); Horace S. Adjolohoun, *The ECOWAS Court as a Human Rights Promoter? Assessing Five Years' Impact of the Koraou Slavery Judgment*, 31 NETH. Q. HUM. RTS. 342 (2013).

often the victim of acts of violence on the part of her master.”<sup>359</sup> Almost a decade later, the woman was manumitted by her master, who also issued a “liberation certificate from slavery” however, he refused to allow her to leave his home. The woman filed a complaint before a tribunal seeking to have “her desire to be totally free and live her life elsewhere” recognized. The tribunal ruled in her favor, but this was subsequently quashed on appeal by the Court of First Instance of Konni. The latter ruling was reversed by the Supreme Court, which without pronouncing on her slave status remitted the case back to the Court of First Instance. In the meantime, Mani Koraou married; in response, the tribal chef filed a successful criminal complaint against her and members of her family for bigamy. As a reaction, the woman filed a submission before the Economic Community of West Africa States Community Court of Justice against Niger claiming *inter alia* that Niger was in violation of Article 5 of the African Charter of Human and Peoples’ Rights. The latter provision enshrines a prohibition against slavery.<sup>360</sup> The African court concluded that the national judge in effect recognized the slavery status of the woman:

[T]he national judge, having to rule on Mrs. Hadijatou Mani Koraou’s application against Mr. Eli Hadj Souleymane Naroua, instead of denouncing the applicant’s slavery status with its own motion as being a violation of [. . .] the Nigerien criminal code [. . .], stated that “the marriage of a free man with a slave woman is lawful, as long as he cannot afford to marry a free woman and if he fears to fall into fornication . . .”<sup>361</sup>

The circumstances of Hadijatou Mani Koraou reveal a case of *de jure* slavery, in which the slave owner sought to vindicate his right of property in the woman before the national courts and, as it happened, the national judge recognized this right.

#### 4. The European Court of Human Rights

The ECtHR has also joined the conversation as to the meaning of slavery in human rights law but has not yet applied the concept in a progressive way. In this sense, *Siliadin v. France* was a missed opportunity.<sup>362</sup> There, a girl from Togo who arrived in France to work for a family under the promise that her immigration status would be regularized. In practice, she became a domestic servant and was subjected to very abusive conditions. The family was prosecuted in the French courts; however, the pro-

359. Koraou, No. ECW/CCJ/JUD/06/08, ¶¶ 8–11 (Oct. 27, 2008).

360. African Charter on Human and Peoples’ Rights, art. 5, Jun. 27, 1981, 21 I.L.M. 58.

361. Koraou, No. ECW/CCJ/JUD/06/08, ¶ 83 (Oct. 27, 2008).

362. *Siliadin v. France*, App. No. 73316/01, (2005), <http://www.echr.coe.int>. For commentaries on the case see Holly Cullen, *Siliadin v. France: Positive Obligations under Article 4 of the European Convention on Human Rights*, 6 HUMAN RIGHTS L. REV. 585, 590 (2006); Andrea Nicholson, *Reflections on Siliadin v. France: Slavery and Legal Definition*, 14 INT’L J. HUMAN RIGHTS 705, 708 (2010).

ceedings ended with acquittals, which gave the basis for filing an application to the ECtHR claiming a violation of Article 4 of the European Convention on Human Rights. Siliadin claimed that the French government had failed to comply with its positive obligation under the ECtHR to set adequate criminal-law provisions to prevent and punish the perpetrators.<sup>363</sup> The ECtHR held that

the Court notes at the outset that, according to the 1927 Slavery Convention, “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.”

It notes that this definition corresponds to the “classic” meaning of slavery as it was practiced for centuries. Although the applicant was, in the instant case, clearly deprived of her personal autonomy, the evidence does not suggest that she was held in slavery in the proper sense, in other words that Mr[.] and Mrs[.] B. exercised a genuine right of legal ownership over her, thus reducing her to the status of an “object”.<sup>364</sup>

This begs two comments. First, the reference to the definition of slavery in the 1926 Slavery Convention is welcoming. This reference is justified with one of the often used means of interpretation by the ECtHR, namely reference to external sources.<sup>365</sup> ECtHR has stressed that it could not take the ECHR as the sole framework of reference when considering the object and purpose of the ECHR provisions. Instead, the ECtHR takes “into account any relevant rules and principles of international law, applicable in relations between the Contracting Parties.”<sup>366</sup> The ECtHR thus often refers to other international treaties to interpret the ECHR. Similarly, the HRC has also drawn from external sources, such as other international treaties, to interpret the ICCPR; however, it does so with much greater restraint than the ECtHR.<sup>367</sup> Still, defining slavery under Article 8 of the ICCPR means that the HRC will also resort to Article 1 of the 1926 Slavery Convention, which contains the only legal definition of slavery in international law. This methodology will follow the rules of interpretation expounded in VCLT.

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363. For further elaboration on position obligations see Part VI below.

364. Siliadin, App. No. 73316/01, at ¶ 122 (2005) (emphasis added).

365. Casare Pitea, *Interpretation and Application of the European Convention on Human Rights in the Broader Context of International Law: Myth or Reality?*, in HUMAN RIGHTS AND CIVIL LIBERTIES IN THE 21ST CENTURY 1, 1–2 (Yves Haeck & Eva Brems eds., 2014).

366. Demir v. Turkey, App. No. 34503/97, 2008 Eur. Ct. H.R. 1345, ¶ 67; see also Ragnar Nordeide, *European Convention on Human Rights-Right to Form a Trade Union-Right to Bargain Collectively-Interpretation of Convention in Light of Other International Law*, 103 AM. J. INT’L. L. 567, 569 (2009).

367. Schlütter, *supra* note 313, at 280.

Second, and less positively, the ECtHR seems to interpret the definition of slavery as requiring ownership that is also sanctioned by a legal system.<sup>368</sup> This interpretation is at odds with the text of the slavery definition itself, which refers not only to status, but also to condition. In addition, this definition frames slavery not simply as powers of ownerships, but as “powers attach[ing] to the right of ownership.”<sup>369</sup> If human rights law is to be interpreted in light of the principle of effectiveness, the right not to be held in slavery cannot be limited to circumstances of “legal ownership.” The ECtHR reference in *Siliadin v. France* to the “‘classic’ meaning of slavery” is suggestive of the current practice of the HRC and the U.N. Special Rapporteur on Slavery that, as mentioned above, seems to reserve the label of slavery only for traditional practices derivative of old slavery.

More than a decade has passed since *Siliadin v. France* was decided; despite the absence of any definitive pronouncement by the ECtHR that factual circumstances amount to slavery, there are some indications that the ECtHR may change its course. Such indications can be gathered from *Rantsev v. Cyprus and Russia*<sup>370</sup> and *M. and Others v. Italy and Bulgaria*.<sup>371</sup> *Rantsev* involved a woman who was allegedly trafficked from Russia to Cyprus. The ECtHR held that

trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere.<sup>372</sup>

This excerpt implies that powers attaching to the right of ownership—the definition of slavery in international law—may be exercised against a human being without the formal legal acknowledgment. This allows the application of the concept to contemporary forms of abuses. And yet, the ECtHR refused to use the label “slavery”; instead, it framed the case as one involving “human trafficking”.<sup>373</sup>

Further indications that the ECtHR has modified the conservative position articulated in *Siliadin v. France* may be found in *M. and Others v. Italy and Bulgaria*. There, the court referred to slavery not as a “genuine

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368. For this reason, *Siliadin v. France* has been criticized. See Ryszard Piotrowicz, *States’ Positive Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations*, 24(2) INT’L J. REFUGEE L. 181, 189 (2012).

369. Jean Allain, *The Definition of Slavery in International Law*, 52 HOW. L.J. 239, 258 (2009).

370. *Rantsev v. Cyprus*, App. No. 25965/04, 51 Eur. H.R. Rep. 1 (2010).

371. *M. v. Italy*, App. No. 40020/03 (2012).

372. *Rantsev*, App.No.25965/04, 7 Jan. 2010, ¶ 281.

373. For a critique of the ECtHR approach, see Vladislava Stoyanova, *Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case*, 30 NETH. Q. HUM. RTS. 163 (2012).

right of *legal* ownership,” but simply as a “genuine right of ownership.”<sup>374</sup> Yet, the court did not apply this definition since the allegations by the applicants under Article 4 of the ECHR were evidentiary ill-substantiated and thus this part of the complaint was dismissed.

### 5. The Inter-American Court of Human Rights

The other influential regional human rights court, the Inter-American Court of Human Rights, did not eschew the label of slavery in its so far single judgment that addresses the issue delivered at the end of 2016.<sup>375</sup> *Brasil Verde v. Brasil* concerned workers recruited from poor communities and lured to work at a large farm. They were not paid, worked in deplorable conditions under constant supervision without freedom to leave.<sup>376</sup> These conditions were found to qualify as slavery. The Court observed that the concept of slavery has evolved and it is not limited to legal ownership of a person.<sup>377</sup> It rather involves control of one person over another; the level of control implies loss of one’s own will or a considerable reduction of personal autonomy. The Court clarified that “powers attaching to the right of ownership”

must be understood in the present day as the control exercised over a person that significantly restricts or deprives him of his individual liberty with intent to exploit through the use, management, profit, transfer or disposal of a person. This control is usually obtained and maintained through means such as the violence, deception and/or coercion.<sup>378</sup>

The Inter-American Court also added that “a situation of slavery represents a substantial restriction of the legal personality of the human being”.<sup>379</sup> In this way the court affirmed the connection between slavery and destruction of juridical personality as discussed in Section V.A.2 above. This connection was also established by the International Criminal Tribunal for the Former Yugoslavia,<sup>380</sup> to which we now turn.

374. M., App.No.40020/03, at ¶ 149 (2012).

375. The right not to be subjected to slavery and servitude was invoked before the Inter-American Commission on Human Rights in *José Pereira v. Brazil*, but the parties ultimately settled. *Pereira v. Brazil*, Friendly Statement, Report No. 95/03 (Oct. 24, 2003).

376. *Brasil Verde v. Brazil*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 318, ¶ 20 (Oct. 20, 2016). For further discussion see Rebecca Scott, Leonardo Barbosa and Carlos H.B. Haddad, *How Does the Law Put a Historical Analogy to Work?: Defining the Imposition of “Condition Analogous to that of a Slave” in Modern Brazil*, 13 DUKE J. CONST. L. & POL’Y. 1, 39 (2017); Carlos H.B. Haddad, *The Definition of Slave Labor for Criminal Enforcement and the Experience of Adjudication: The Case of Brazil*, 38 MICH. J. INT’L L. (2017).

377. *Id.* ¶¶ 269–70.

378. *Id.* ¶ 271 (translation by the author).

379. *Id.* ¶ 273 (translation by the author).

380. *Prosecutor v. Kunarac*, Case No IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, ¶ 117 (Int’l Crim. Trib. For Former Yugoslavia Jun. 12, 2002). 12 June 2002, para.117.

## 6. International Criminal Law

Tribunals applying international criminal law have made important advances in developing the meaning of slavery and applying it to contemporary circumstances. A brief outline of the relevant norms is due here. Enslavement<sup>381</sup> is defined as a crime under the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>382</sup> Enslavement and sexual slavery are also qualified as crimes under the Statute of the International Criminal Court (ICC) and defined in accordance with the 1926 slavery definition.<sup>383</sup> The Special Court for Sierra Leone whose statute also qualifies enslavement and sexual slavery as crimes has also made important contributions in this field of international law.<sup>384</sup>

Prior to expounding further on the contribution of these courts, it has to be noted that the transplantation of interpretations and case law from international criminal law to human rights law should not be endorsed uncritically. A reservation in this respect is warranted because, as Robinson has explained, criminal law and human rights law are based on “contradictory assumptions and methods of reasoning.”<sup>385</sup> Perhaps, most importantly, criminal law is subject to the principle of legality, which bans expansive interpretations; in contrast, human rights law celebrates progressive interpretations of concepts. This is intimately related to its objective, i.e. finding the responsibility of a collective, the state, for its failures to ensure rights of individuals.<sup>386</sup> In contrast, the objective of criminal law is determining the responsibility of a single individual.

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381. Although the term used in the context of international criminal law is “enslavement”, it can be argued that there is no material difference between “slavery” and “enslavement”. “Enslavement” is defined in accordance with the international law definition of slavery in international law. In addition, the separate crime of sexual slavery is also defined in accordance with the same definition. For further elaboration see VLADISLAVA STOYANOVA, HUMAN TRAFFICKING AND SLAVERY RECONSIDERED. CONCEPTUAL LIMITS AND STATES’ POSITIVE OBLIGATIONS IN EUROPEAN LAW 222 (2017).

382. S.C. Res. 827, Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 5(c) (May 25, 1993).

383. Rome Statute of the International Criminal Court art. 7(1)(c), 7(2)(c), 7(1)(g) and 8(2)(b)(xxii), July 17, 1998, 2187 U.N.T.S. 3. See also Rep. of the Preparatory Comm. for Int’l Crim. Ct.-Addendum: Part II-Finalized Draft Text of the Elements of the Crime, U.N. Doc. PCNICC/2000/1/Add.2, art. 7(1)(c), 7(1)(g)(2) (2000) (providing the elements of the crimes of enslavement and sexual slavery).

384. Statute of the Special Court of Sierra Leone art. 2, Jan. 16, 2002, 2178 U.N.T.S. 138.

385. Darryl Robinson, *The Identity Crises of International Criminal Law*, 21 LEIDEN J. INT’L L. 925 (2008); Carsten Stahn & Larissa van den Herik, ‘Fragmentation,’ *Diversification and ‘3D’ Legal Pluralism: International Criminal Law as the Jack-in-the-Box?*, in THE DIVERSIFICATION AND FRAGMENTATION OF INTERNATIONAL CRIMINAL LAW 21, 47–55 (Larissa van den Herik & Carsten Stahn eds., 2012).

386. For a detailed analysis, see Vladislava Stoyanova, *Article 4 of the ECHR and the Obligation of Criminalizing Slavery, Servitude, Forced Labour and Human Trafficking*, 3(2) CAMBRIDGE J. INT’L & COMP. L. 407 (2014).

Despite these differences, there *is* judicial conversation between these bodies of international law.<sup>387</sup> In this sense, and without ignoring its specificities, human rights law can benefit from important developments of international criminal law.<sup>388</sup> The ECtHR and the Inter-American Court of Human Rights themselves have looked to international criminal law as an informative tool.<sup>389</sup>

The ICTY judgment of *Kunarac et al* offers an important example of how an international criminal court has interpreted and applied the definition of slavery.<sup>390</sup> The factual circumstances of the case involve women and girls from the Foca region (Bosnia and Herzegovina) who were detained, raped, and “rented” to soldiers over the course of months.<sup>391</sup> The ICTY held that “enslavement as a crime against humanity in customary international law consist[s] of the exercise of any or all of the powers attaching to the right of ownership over a person.”<sup>392</sup> Under this definition, the tribunal enumerated as indicators of enslavement

elements of control and ownership; the restriction or control of an individual’s autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim’s position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessary, involving physical hardship; sex; prostitution and human trafficking. [. . .] The “acquisition” or “disposal” of someone for monetary or other compensation, is not a requirement for enslavement. Doing so, however, is a prime example of the exercise of the right of ownership over someone.<sup>393</sup>

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387. See William Schabas, *Synergy or Fragmentation? International Criminal Law and the European Convention of Human Rights*, 9 J. INT’L CRIM. JUST. 609 (2011); William Burke-White, *International Legal Pluralism*, 25 MICH. J. INT’L L. 963 (2004).

388. See Schabas, *supra* note 387.

389. See e.g., *M.C. v. Bulgaria*, App. No.39272/98, 2003-XII Eur. Ct. H.R. 1, ¶¶ 88–107 (2003) (referencing to relevant practice from national and international criminal law); *Brasil Verde*, *supra* note 376, ¶ 259.

390. See *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgment (Feb. 22, 2001); *Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment (Jun. 12, 2002).

391. *Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgment, ¶¶ 35–39 (2001).

392. *Id.* ¶ 539.

393. *Id.* ¶ 542.

This list may appear expansive; however, the ultimate measure of whether enslavement exists is one's exercise of powers attaching to the right of ownership over another. As observed above, the court started its analysis by citing the 1926 slavery definition, which circumscribes any expansive interpretation of the list.

The ICTY Appeals Chamber agreed with the list and added that enslavement often involves "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour."<sup>394</sup> The Appeals Chamber explicitly rejected the need to prove lack of consent as an element of the crime:

[E]nslavement flows from claimed rights of ownership; accordingly, lack of consent does not have to be proven by the Prosecutor as an element of the crime. However, consent may be relevant from an evidential point of view as going to the question whether the Prosecutor has established the element of the crime relating to the exercise by the accused of any or all of the powers attaching to the right of ownership.<sup>395</sup>

The ICC has also contributed to the discussion. The Trial Chamber in *Katanga and Ngudjolo Chui* clarified that

[p]owers attaching to the right of ownership must be construed as the use, enjoyment and disposal of a person who is regarded as property, by placing him or her in a situation of dependence which entails his or her deprivation of any form of autonomy.<sup>396</sup>

The ICC Trial Chamber has added that the powers attaching to the right of ownership can take different forms. But, as later clarified in *Ntaganda*, various factors must be considered before making this determination.<sup>397</sup> Such powers can be shown by a

combination of factors such as, the detention or captivity in which the victim was held and its duration, the limitations to the victim's free movement, measures taken to prevent or deter escape, the use of force, threat of force or coercion, and the personal circumstances of the victim, including his/her vulnerability.<sup>398</sup>

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394. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, ¶ 119 (2002).

395. *Id.* ¶ 120.

396. Prosecutor v. Katanga, ICC-01/04-01/07, Judgment, ¶ 975 (Mar. 7, 2014); see also, Carsten Stahn, *Justice Delivered or Justice Denied: The Legacy of the Katanga Judgment*, 12 J. INT'L CRIM. JUST. 809 (2014).

397. Prosecutor v. Ntaganda, ICC-01/04-02/06-309, Pre-Trial Chamber II Decision, ¶ 53 (Jun. 9, 2014).

398. *Id.* at 78 n. 209.

The Special Court for Sierra Leone has also provided an important insight. In *Charles Taylor*, that court found that forced marriages taking place during the Sierra Leonean Civil War involved a specific form of sexual slavery that can be best described as ‘conjugal slavery’.<sup>399</sup> It held that there is no requirement of “payment or exchange in order to establish the exercise of ownership.”<sup>400</sup> Notably, it held, slavery can exist even when “the victims may not have been physically confined, but were otherwise unable to leave the perpetrator’s custody as they would have nowhere else to go and feared for their lives.”<sup>401</sup>

In sum, international criminal law has made important contributions in developing and applying the legal construct of slavery, which may inform future developments in human rights law.<sup>402</sup> It could be even argued that international criminal law has expanded the definition of slavery too much. This tendency can be related to the existence of only one concept, namely slavery, in the statutes of the above-mentioned criminal courts. In contrast, Article 8 of the ICCPR and the regional human rights instruments contain three concepts, slavery, servitude, and forced labor; this may invite their respective monitoring bodies to interpret slavery more restrictively, so that the distinctive normative content of other two concepts is preserved.

## B. Servitude

### 1. The Preparatory Works of the ICCPR

When Article 8 of the ICCPR was drafted, “servitude” was perceived to be “broader and less specific” than “slavery.”<sup>403</sup> The drafters of the Covenant observed that these concepts were intended to deal with “two different levels of domination of man by man.” In particular, servitude was intended to deal with “more general forms of such domination.”<sup>404</sup> This is apparent from the position expressed at the time of drafting in favor of preserving the word “servitude” “for the sake of eliminating all forms of

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399. Prosecutor v. Taylor, SCSL-03-01-T, Trial Chamber II Judgement, ¶ 428 (May 18, 2012). For a comprehensive analysis, see Iris Haenen, *The Parameters of Enslavement and the Act of Forced Marriage*, 13 INT’L CRIM. L. REV. 895 (2013). In *Prosecutor v. Brima, Kamara and Kanu* (“AFRC”), Trial Chamber II held that forced marriages amounted to sexual slavery. Prosecutor v. Brima, SCSL-04-16-T, Trial Chamber II Judgement, ¶711 (June 20, 2007). The Appeals Chamber, however, reversed this conclusion and held that forced marriages should be rather qualified as “other inhumane act.” Prosecutor v. Brima, SCSL-04-16-A, Appeals Chamber Judgement, ¶¶ 195, 202 (Feb. 22, 2008). The later qualification was followed in *Prosecutor v. Sesay*, SCSL-04-15-T, Trial Chamber I Judgement, ¶ 2307 (Mar. 2, 2009) and in *Prosecutor v. Sesay*, SCSL-04-15-A, Appeals Chamber Judgement, ¶ 735 (Oct. 26, 2009).

400. Taylor, SCSL-03-01-T ¶ 420.

401. *Id.*

402. National criminal law could be also an important point of reference. See the Australian cases *The Queen v. Tang* (2008) 237 CLR 1 (Austl.), *Ho v. The Queen*; *Leech v. The Queen* (2011) 219 A Crim R 74 (Austl.), *Ho v. The Queen* [2012] HCATrans 199 (Austl.).

403. U.N. ESCOR, 6th Sess., 142d mtg. at ¶¶ 41–42, E/CN.4/SR.142 (Apr. 10, 1950).

404. *Id.* ¶ 53.

domination contrary to the dignity of man.”<sup>405</sup> The French representative stated during the drafting process that

although servitude and slavery were frequently confused, there was a clear distinction in law: slavery implied the destruction of the juridical personality, whereas servitude, in the strict meaning of the word, implied only a state of complete personal dependence.<sup>406</sup>

Similarly, the representative from Lebanon explained that

Slavery was a relatively limited and technical notion, whereas servitude was a more general idea covering all possible forms of man’s domination by men.<sup>407</sup>

The drafting documents also reveal that a proposal was put forward to insert the adjective “involuntary” before the word “servitude” “in order to make it clear that the clause dealt with compulsory servitude and did not apply to normal contractual obligations between persons competent to enter into such obligations.”<sup>408</sup> This proposal was rejected, however, because “servitude in any form, whether involuntary or not, should be prohibited.” Additionally, “[i]t should not be possible for any person to contract himself into bondage.”<sup>409</sup>

These *travaux préparatoires* are revealing in that they provide benchmarks against which “servitude” may be given some normative content, i.e. a form of personal dependence and a form of domination over a man that is less severe than slavery. This can provide a good starting point for the HRC, which, as demonstrated in Part IV, has not come forward with any interpretation of “servitude” under the ICCPR.

## 2. The European Court of Human Rights

In contrast to the HRC, the ECtHR has developed the meaning of servitude; its approach is in line with the revelations emerging from the preparatory works of the Covenant. In *Siliadin v. France*, the ECtHR described servitude in the following way:

With regard to the concept of “servitude,” what is prohibited is a “particularly serious form of denial of freedom.” It includes, “in addition to the obligation to *perform certain services* for others . . . the obligation for the ‘serf’ to *live on another person’s property and the impossibility of altering his condition.*” In this connection, in examining a complaint under this paragraph of Article 4, the

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405. *Id.* ¶ 54.

406. *Id.* ¶ 74.

407. *Id.* ¶ 79.

408. U.N. ESCOR, 5th Sess., 94th mtg. at 10, E/CN.4/SR.94 (May 20, 1949); *see also* BOSSUYT, *supra* note 339, at 167.

409. BOSSUYT, *supra* note 339, at 167.

Commission paid particular attention to the Abolition of Slavery Convention [the 1957 Supplementary Convention].

It follows in the light of the case law on this issue that for Convention purposes “servitude” means an obligation to provide one’s services that is imposed by the use of coercion, and is to be linked with the concept of “slavery” described above.<sup>410</sup>

And, in *C.N. and V. v. France*,<sup>411</sup> the ECtHR further clarified that

servitude corresponds to a special type of forced or compulsory labour or, in other words, “*aggravated forced or compulsory labour*”. As a matter of fact, the fundamental distinguishing feature between servitude and forced labour or compulsory labour within the meaning of Article 4 of the Convention lies in the *victim’s feeling that their condition is permanent and that the situation is unlikely to change*. It is sufficient that this feeling be based on the above mentioned objective criteria or brought about or kept alive by those responsible for the situation.<sup>412</sup>

The same definition of servitude was reaffirmed in *Chowdury and Others v. Greece*. The court held “the applicants could not feel such a feeling [that their condition is permanent and that the situation is unlikely to change] since they were all seasonal workers recruited for the harvesting of strawberries.”<sup>413</sup> The third judgment which breathes life into the meaning of servitude is *C.N. v. the United Kingdom*.<sup>414</sup> Without deciding whether the applicant in that case had been kept in servitude,<sup>415</sup> the court offered the following insight:

[D]omestic servitude is a specific offense, distinct from trafficking and exploitation, which involves a complex set of dynamics, involving both overt and more subtle forms of coercion, to force compliance. A thorough investigation into complaints of such conduct therefore requires an understanding of the many subtle ways an individual can fall under the control of another.<sup>416</sup>

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410. *Siliadin v France*, 2005-VII Eur. Ct. H.R. ¶¶ 123–24 (emphasis added).

411. *C.N. v. France*, App. No. 67724/09 (2012).

412. *C.N. v. France*, App. No. 67724/09 ¶ 91 (2012).

413. *Chowdury v. Greece*, App.No.21884/15 ¶ 99 (2017). For further analysis of the case see Vladislava Stoyanova, *Sweet Taste with Bitter Roots. Forced Labour and Chowdury and Others v Greece* EUR. HUM. RTS. L. REV. (forthcoming).

414. *C.N. v. United Kingdom*, App. No. 4239/08 ¶ 80 (2012).

415. The core of the case was the question of whether the respondent state had failed to fulfill its positive obligation to conduct effective criminal investigation. This obligation is triggered upon “a credible suspicion that an individual’s rights under that Article [Article 4 of the ECHR] have been violated.” *Id.* ¶ 69.

416. *Id.* ¶ 80.

The court thus emphasized that servitude includes subtle forms of exercising control. This is of particular relevance in the context of abuses against migrant workers, who often seemingly agree to abusive working conditions.<sup>417</sup> The ECtHR also highlighted that servitude is distinct from human trafficking, whereas there is little sensitivity to the distinctions between human trafficking, slavery, servitude, and forced labor at the HRC level.<sup>418</sup> The ECtHR itself has also contributed to this conceptual confusion by conflating trafficking with slavery in *Rantsev v. Cyprus and Russia*.<sup>419</sup> In contrast, *C.N. v. the United Kingdom* makes it quite clear that human trafficking and servitude are distinctive concepts. More specifically, the national investigation into the circumstances of C.N., a woman from Uganda who had the physically and emotionally demanding work as a live-in care-taker for which she was never paid, focused exclusively on whether she was a victim of human trafficking. This focus meant that the investigation was limited to the circumstances under which she entered the country: was she coerced or deceived into entering the United Kingdom. In contrast, the national investigation did not look into the actual exploitative conditions under which she had to labor. The ECtHR found that this omission was related to the absence of a specific national legislation criminalizing domestic servitude.<sup>420</sup>

### 3. Relationship with the 1956 Supplementary Convention

One final issue concerning the meaning of servitude in human rights law must be subjected to closer scrutiny: the relationship between servitude and the servile statuses (debt bondage, serfdom, servile marriages and transfer of children for the purposes of their exploitation) referenced in the 1956 Supplementary Convention.<sup>421</sup> This issue merits attention for various reasons. First, the ECtHR has referred to the 1956 Supplementary Convention in its own effort to define servitude. In *Van Droogenbroeck v. Belgium*, the European monitoring mechanism stated that when interpreting servitude, it “is chiefly guided by Article 1 of the Supplementary Convention on the abolition of slavery, the slave trade and institutions and practices similar to slavery of 30 April 1956 [emphasis added].”<sup>422</sup> In *Siliadin v. France*, the ECtHR also referred to the practice of transfer of children as defined in 1956 Supplementary Convention in order to inform

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417. See Eur. Union Agency for Fundamental Rts., *Severe Labor Exploitation: Workers Moving within or into the European Union*, EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, 39-40 (2015), <http://fra.europa.eu/en/publication/2015/severe-labour-exploitation-workers-moving-within-or-european-union> (reporting the “absence of a clear understanding of the exploitation of the unforced labor of workers”).

418. See Part IV *supra*.

419. See Part V.A.4. *supra*.

420. C.N., App.No.4239/08 ¶ 70-82 (2012).

421. See Part II.B *supra*.

422. *Van Droogenbroeck v. Belgium*, App. No.7906/77, 13 Eur. H.R. Rep 546, at 71 (emphasis added).

its approach to the meaning of servitude.<sup>423</sup> This utilization of the 1956 Supplementary Convention as an external source for facilitating the interpretation of servitude in human rights law is understandable. As argued by Allain, the latter convention was intended to be about servitude; however, eventually the drafters decided to limit the treaty to four specific institutions and practices labelled as “institutions and practices like slavery.”<sup>424</sup>

In addition, when Article 8 of the ICCPR was drafted, delegates proposed including a specific reference to the 1956 Supplementary Convention. It was argued that this inclusion would “strengthen and improve the text of the article, which was drafted in general terms.”<sup>425</sup> Although an explicit reference to the convention was eventually omitted,<sup>426</sup> there was no opposition to the substance of the proposal.

Contrary to what Jean Allain has advanced,<sup>427</sup> however, the concept of servitude in human rights law cannot be limited to the four practices defined in the 1956 Supplementary Convention. When the ICCPR was drafted, some delegates expressed concern that explicit references to the 1956 Supplementary Convention might weaken the scope of the article.<sup>428</sup> In addition, as is evident from ECtHR case law, while the 1956 Supplementary Convention is a source of inspiration, it is not conclusively determinative; rather, the court has developed a distinct definition of servitude. The core of this is that servitude is an aggravated form of forced labor whereby the aggravation originates from the victims’ “feeling that their condition is permanent and that the situation is unlikely to change.”<sup>429</sup> The Inter-American Court of Human Rights has endorsed the ECtHR’s approach:

the Court agrees with the definition of the European Court of Human Rights on “servitude”, and considers that the term in Article 6.1 of the Convention should be interpreted as “the obligation to perform work for others, imposed by coercion, and the

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423. *Siliadin*, 2005-VII Eur. Ct. H.R. ¶ 123.

424. Jean Allain, *On the Curious Disappearance of Human Servitude from General International Law*, 11 J. HIST. INT’L L. 303, 316 (2009).

425. BOSSUYT, *supra* note 339, at 184.

426. The desirability of including references to the existing conventions was challenged since “the idea underlying the proposal was already covered by paragraph 2 of Article 5 of the draft covenant.” There was thus a preference in favour of a general provision in the ICCPR to define the relationship between the Covenant and other international conventions. *Id.*

427. See JEAN ALLAIN, *SLAVERY IN INTERNATIONAL LAW: OF HUMAN EXPLOITATION AND TRAFFICKING* 8, 202 (2013).

428. BOSSUYT, *supra* note 339, at 184.

429. STOYANOVA, *supra* note 47 at 257. It has to be, however, acknowledged that basing the definition of servitude on the feelings of the victims is hardly convincing. In essence, the ECtHR is rather interested in the isolation of the victims and their inability to form contacts with the outside world.

obligation to live on the property of another person, without the possibility of changing that condition”.<sup>430</sup>

Accordingly, to understand the meaning of servitude, we must enquire into the meaning of forced labor.

### C. Forced and Compulsory Labor

Unlike slavery and servitude, which were viewed as forms of domination of men by men, forced and compulsory labor, at the time of the ICCPR’s drafting, was conceptualized as labor exacted by states.<sup>431</sup> Drafters raised the question of whether forced and compulsory labor should be defined, and reference was made to the definition in the ILO Forced Labor Convention. They concluded, however, that “[t]his definition, especially when read in the light of the exceptions was not considered entirely satisfactory for inclusion in the covenant.”<sup>432</sup> In particular, the United States and other states argued that the ILO Convention’s definition of forced labor should not be inserted in Article 8 of the ICCPR, “as it would unduly restrict the scope of the article.”<sup>433</sup> Some delegations maintained this position since they tried to ensure more sweeping exceptions, i.e. a broader range of circumstances when forced labor could be used. I will return to these exceptions and how they have been interpreted by the HRC, the ECtHR and the ILO below. Prior to this, my focus will be directed to the definition of forced and compulsory labor.<sup>434</sup> Notably, from a contemporary perspective this definition cannot be limited to circumstances when states demand labor and services.<sup>435</sup>

#### 1. The Human Rights Committee

*Bernadette Faure v. Australia* offers the most detailed insight into the position of the HRC on the meaning of forced labor under the ICCPR.<sup>436</sup>

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430. *Brasil Verde Workers v. Braz.*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 318, ¶ 280 (Oct. 20, 2016).

431. *STOYANOVA*, *supra* note 47, at 210 (2017).

432. U.N. GAOR, 10th Sess., Ch. VI, ¶ 19, U.N. Doc. A/2929 (July 1, 1955); *BOSSUYT*, *supra* note 339 at 169.

433. U.N. SCOR, *supra* note 337, ¶ 38.

434. The HRC has not clarified the difference between force and compulsory labor. The ECtHR has observed that while the adjective “forced” refers to “the idea of physical or mental constraint”, the adjective “compulsory” refers to exercise of compulsion by the law. When a private person forces another person to do labor, the relevant concept is forced labor. Compulsory labour refers to state-sanctioned labor. *Van der Musselle v. Belg.*, 6 Eur. H.R. Rep 163, ¶ 34 (1983).

435. See the judgments cited below where the ECtHR has applied the definition in the context of private harm. See also *Brasil Verde Workers*, Inter-Am. Ct. H.R. (ser. C) No. 318 at ¶ 293. See also INT’L LABOUR OFFICE, A GLOBAL ALLIANCE AGAINST FORCED LABOR, 5-9 (2005), at 5-9, [http://www.ilo.org/wcmsp5/groups/public/—ed\\_norm/—declaration/documents/publication/wcms\\_081882.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—declaration/documents/publication/wcms_081882.pdf) for the ILO position.

436. See *Faure v. Austl.*, Communication No. 1036/2001, U.N. Doc. CCPR/85/D/1036/2001, (Nov. 23, 2005).

The complainant in *Bernadette Faure v. Australia* argued that she was subjected to forced or compulsory labor in violation of Article 8(3)(a) (“No one shall be required to perform forced or compulsory labour”) of the ICCPR since she had to attend the Work for Dole program as a precondition for receiving social benefits. The HRC observed that

the Covenant does not spell out in further detail the meaning of the terms “forced or compulsory labour.” While the definitions of the relevant ILO instruments may be of assistance in elucidating the meaning of the terms, it ultimately falls to the Committee to elaborate on the indicia of prohibited conduct.<sup>437</sup>

Here, the HRC alludes to the possibility that there might be divergences between the meaning of the term under the ICCPR and under the ILO Convention. As an important reminder, the ILO Forced Labor Convention contains a definition of forced labor: “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”<sup>438</sup> This definition, however, was not even quoted by the HRC in *Bernadette Faure v. Australia*. Instead, the Committee observed that

the term “forced or compulsory labour” covers a range of conduct extending from, on the one hand, labour imposed on an individual by way of a criminal sanction, notably in particularly, coercive, exploitative or otherwise egregious conditions, though, on the other hand, to lesser forms of labour in circumstances where punishment as a comparative sanction is threatened if the labour directed is not performed.<sup>439</sup>

It seems that the HRC requires a punishment comparative to a criminal sanction *in conjunction with* labor in “coercive, exploitative or otherwise egregious conditions” in order to trigger Article 8(3)(a). Additionally, the HRC appears to demand a “degrading or dehumanizing aspect of the specified labour performed.” The absence of “degrading or dehumanizing aspect of the specific labour performed” in *Bernadette Faure v. Australia* was an important factor in the court’s conclusion that the complainant had not performed forced or compulsory labor.

While the HRC has not offered any additional clarifications on the definition of forced labor outside the context of *Bernadette Faure v. Australia* and has not applied the concept to abuses at an inter-personal level, it is evident that the HRC stance diverges from both the ILO and the ECtHR’s interpretations.

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437. *Id.* ¶ 7.5.

438. Forced Labor Convention, *supra* note 66, at 11.

439. Faure, Communication No. 1036/2001, U.N. Doc. CCPR/85/D/1036/2001 ¶ 7.5.

## 2. The ILO

The ILO has taken a relatively broad approach to the meaning of forced labor. It has clarified that the definition of forced labor in the ILO Forced Labor Convention comprises three elements—work or service, menace of any penalty and absence of consent<sup>440</sup>—which all must be present.<sup>441</sup> It has clarified that penalty “might take the form also of a loss of rights or privileges. This may occur, for instance, when persons who refuse to perform voluntary labor may lose certain rights, advantages or privileges.”<sup>442</sup> By way of comparison with the *Bernadette Faure v. Australia*, mere loss of advantages and privileges is not sufficient to constitute forced labor. Pursuant to the ILO, menace of penalty “should be understood in a very broad sense: it covers penal sanctions, as well as various forms of coercion, such as physical violence, psychological coercion, retention of identity documents, etc.”<sup>443</sup> As to the absence of consent, the ILO has opined that voluntary offer “refers to the freely given and informed consent of workers to enter into an employment relationship and to their freedom to leave their employment at any time.”<sup>444</sup> The ILO has added that indirect coercion that negates a voluntary offer may result from employers’ practices “where migrant workers are induced by deceit or false promises.”<sup>445</sup>

## 3. The European Court of Human Rights

In contrast to the HRC and the ILO, the ECtHR has taken a different approach in its determination on whether factual circumstances amount to forced labor. The origins of this approach can be traced to *Van der Musselle v. Belgium*, a case about a junior lawyer who claimed that the requirement to defend indigent clients for free was forced labor.<sup>446</sup> The ECtHR explicitly rejected the position that for forced labor to be constituted “the obligation to carry it out must be “unjust” or “oppressive” or its performance must constitute “an avoidable hardship”; in other words, it must be “needlessly distressing” or “somewhat harassing.”<sup>447</sup> As a result of this

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440. Forced Labor Convention, *supra* note 66, ¶ 1.

441. International Labor Conference, 96th session, *General Survey Concerning the Forced Labor Convention, 1930 (No.29), and the Abolition of Forced Labor Convention, 1957 (No.105)*, 19 (2007), [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@relconf/documents/meetingdocument/wcms\\_089199.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_089199.pdf) [hereinafter the 2007 ILO General Survey].

442. 2007 ILO General Survey, *supra* note 441, at 20.

443. International Labor Conference, 101th session, *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization*, 111 (2012), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_174846.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_174846.pdf) [hereinafter the 2012 ILO General Survey].

444. *Id.* at 111.

445. *Id.*

446. *Van der Musselle v. Belg.*, 13 Eur. Ct. H.R. (ser. A) (1983).

447. *Id.* ¶ 37.

rejection, these elements (unjust, oppressive, harassing) cannot be part of the analysis whether circumstances amount to forced or compulsory labor.

If the HRC chooses to follow the ECtHR line of reasoning in the future, it will have to abandon the requirement that the labor is done in “particularly, coercive, exploitative or otherwise egregious conditions.”<sup>448</sup>, a requirement that is suggestive of the “unjust”, “oppressive” and “harassing” element rejected by the ECtHR. On this point, then, the ECtHR and the HRC currently diverge. The requirements raised by the HRC appear to be more stringent, decreasing the range of circumstances where the concept of forced labor is applicable.

Measured against the ILO’s standards, the circumstances of the applicant in *Van der Mussele v. Belgium* might qualify as forced labor: there was a menace of penalty (deregistering the applicant from the registry of lawyers if he did not comply) and he certainly did not do the work voluntarily. Indeed, the ECtHR cited in *Van der Mussele* the ILO definition of forced labor but immediately added that “[t]his definition can provide a starting-point for interpretation of Article 4 . . . of the European Convention” and that “sight should not be lost of that Convention’s special features or of the fact that it is a living instrument to be read in the light of the notions currently prevailing in democratic States.”<sup>449</sup> The utilization of the ILO definition only as a starting point resembles the HRC’s position that “it ultimately falls to the Committee to elaborate the indicia of prohibited conduct.”<sup>450</sup>

The ECtHR acknowledged that Van der Mussele was threatened with a penalty. Contrary to the ILO’s simplistic approach to voluntariness, however, it made the issue of consent an entry point for proportionality reasoning:

[T]he Court will have regard to all the circumstances of the case in the light of the underlying objectives of Article 4 (art. 4) of the European Convention in order to determine whether the service required of Mr. Van der Mussele falls within the prohibition of compulsory labour. This could be so in the case of a service required in order to gain access to a given profession, *if the service imposed a burden which was so excessive or disproportionate to the advantages attached to the future exercise of that profession, that the service could not be treated as having been voluntarily accepted beforehand*; this could apply, for example, in the case of a service unconnected with the profession in question.<sup>451</sup>

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448. Faure v. Austl., Communication No. 1036/2001, U.N. Doc. CCPR/85/D/1036/2001, ¶ 7.5 (Nov. 23, 2005).

449. Mussele, 13 Eur. Ct. H.R., ¶ 32 (1983). See also Stummer v. Austria, Eur. Ct. H.R. 1096, ¶ 118 (2011) (confirming the approach adopted in *Mussele* court).

450. Faure, Communication No. 1036/2001, U.N. Doc. CCPR/85/D/1036/2001, ¶ 7.5.

451. Mussele, 13 Eur. Ct. H.R., ¶ 37 (1983).

The court concluded that in light of the advantages of the profession and of its importance to the wellbeing of society (i.e. legal representation of indigent defendants in criminal proceedings), the burden imposed on the junior lawyer was not disproportionate and, therefore, he had not been subjected to forced labor. More recently, in *Chitos v. Greece*, the Court applied a similar proportionality analysis.<sup>452</sup> The case was about a military doctor who was forced to pay a substantial fee to the state to resign before the end of his period of service. The ECtHR determined that this was a disproportionate burden, especially considering the large sum that he was required to immediately pay as a compensation to the state for his education.

The test of “excessive or disproportionate burden” has been also used when labor is demanded by non-state actors. *C.N. and V. v. France*,<sup>453</sup> is the first judgment in this respect. There, two sisters who worked as unpaid domestic servants for a family were subjected to egregious and unfair conditions.<sup>454</sup> France argued that there was no forced labor; rather, each sister lent “a helping hand which can reasonably be expected of other family members or people sharing accommodation.”<sup>455</sup> The court reasoned that

not all work exacted from an individual under threat of a “penalty” is necessarily “forced or compulsory labour” prohibited by this provision. *Factors that must be taken into account include the type and amount of work involved.* These factors help distinguish between “forced labour” and a helping hand which can reasonably be expected of other family members or people sharing accommodation. Along these lines, in the case of *Van der Musselle v. Belgium* (23 November 1983, § 39, Series A no. 70) the Court made use of the notion of a “disproportionate burden” to determine whether a lawyer had been subjected to compulsory labour when required to defend clients free of charge as a court-appointed lawyer [emphasis added].<sup>456</sup>

The court concluded that the first applicant in the case (C.N.) was “forced to work so hard that without her aid Mr. and Mrs. M would have had to employ and pay a professional housemaid.”<sup>457</sup> Thus, the type and amount of work performed was found to be excessive and the circumstances amounted to forced labor. In contrast, the second applicant (V.) was found not to have provided “sufficient proof that she contributed in any excessive measure to the upkeep of Mr. and Mrs. M’s household.”<sup>458</sup>

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452. *Chitos v. Greece*, Eur. Ct. H.R. 529, ¶ 96 (2015).

453. *C.N. & V. v. Fr.*, App. No. 67724/09 (Oct. 11, 2012).

454. *Id.* ¶ 60–63.

455. *Id.* ¶ 74.

456. *Id.*

457. *Id.* ¶ 75.

458. *Id.*

The second case implicating labor demanded by a private actor where the ECtHR invoked the “excessive or disproportionate burden” test is *Chowdury and Others v. Greece*,<sup>459</sup> briefly mentioned in Section V.B.2. Here a more elaborate description of the factual circumstances is apposite. The applicants were 42 Bangladeshi nationals in Greece with undocumented status. They were recruited to work on a strawberry farm and lived therein in egregious conditions. Despite not being paid, they continued to work since they were afraid that if they were to leave, they would be never paid. When they demanded their wages, one of the armed guards opened fire and seriously injured many of them.

From a definitional perspective, the challenge raised by the case was that the migrants were free to leave the farm (in fact, the employed forced them to leave) and in this sense, there was arguably no coercion, but rather consent. As a response to this challenge, the ECtHR observed that the validity of the consent has to be assessed in the light of all the circumstances of the case.<sup>460</sup> What is particularly prominent in the assessment conducted by the court is the strong emphasis on the vulnerability of the applicants flowing from their irregular migration status:

[T]he applicants did not have a residence permit or a work permit. The applicants were aware that their irregular situation put them at risk of being arrested and detained with a view of deportation from Greek territory. An attempt to leave their work would no doubt have increased this prospect and would have meant loss of any hope of receiving their salaries or at least part of them. Given that they had not received any salary, they could not leave Greece.<sup>461</sup>

The ECtHR also added “[. . .] where the employer abuses his power, or takes advantage of the vulnerability of the workers in order to exploit them, they do not offer their work voluntary. The prior consent of the victim is not sufficient to exclude the classification of forced labor.”<sup>462</sup> It was acknowledged that at the time of their hiring, the workers might have offered their labor voluntary; however, this changed as a result of the conditions imposed by the employer (no payment, extreme physical conditions, exhausting schedule and subjection to constant humiliation).<sup>463</sup> It can be reconstructed from the reasoning in the judgment that these conditions denoted the excessiveness of the circumstances.<sup>464</sup>

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459. *Chowdury & Others v. Greece*, Eur. Ct. H.R. 300, ¶ 91 (2017).

460. *Id.* ¶ 90.

461. *Id.* ¶ 95.

462. *Id.* ¶ 96.

463. *Id.* ¶ 98.

464. For further analysis of the case see Vladislava Stoyanova, *Irregular Migrants and the Prohibition of Slavery, Servitude, Forced Labor and Human Trafficking under Article 4 of the ECHR*, EJIL TALK! (Apr. 26, 2017), at <https://www.ejiltalk.org/irregular-migrants-and-the-prohibition-of-slavery-servitude-forced-labour-human-trafficking-under-article-4-of-the->

In conclusion, although both the HRC and the ECtHR quote the ILO's definition of forced labor, both bodies prefer to set their own standards and frameworks for determining whether abuses qualify as forced labor under human rights law. While not entirely developed—due to the overall scarcity of judicial engagement with Article 4 of the ECHR<sup>465</sup>—the developments under the European regional framework are more advanced compared to its global counterpart, the ICCPR. The “excessive or disproportionate burden” test under Article 4 of the ECHR introduces a complex approach for defining forced labor but may be more convincing than the simple and unhelpful binary between voluntary versus involuntary labor, which originates from the ILO definition of forced labor.<sup>466</sup> This binary was found problematic by the U.N. Special Rapporteur on Contemporary Forms of Slavery herself. As observed in Part III.A., she exposed the problem of how legislation in many countries considers coercion and absence of consent as determinative. Thus, if there is consent, it can be implied that there is no labor exploitation, notwithstanding the actual working conditions.

#### 4. The Inter-American Court of Human Rights

As opposed to the ECtHR, the other regional court has not been confronted with cases implicating subtle forms of forcing compliance that might raise controversies as to the applicability of the ILO definition of forced labor. Rather the circumstances where the court determined that forced labor was constituted manifested extreme forms of coercion. For example, in *Brasil Verde Workers v. Brazil* the workers at the farm performed the work under threats of armed guards, were not allowed to leave without payment of their debt, feared retaliation and death in case of escape.<sup>467</sup> In the light of these clear forms of coercion, the application of the ILO definition appeared straightforward.

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echr/. See also Vladislava Stoyanova, *Sweet Taste with Bitter Roots. Forced Labour and Chowdury and Others v Greece* EUR. HUM. RTS. L. REV. (forthcoming).

465. This assessment refers to judgments addressing circumstances of private harm under Article 4 of the ECHR. So far there are seven such judgments (*Siliadin v. Fr.*, Eur. Ct. H.R. 2110 (2011); *Rantsev v. Cyprus & Russ.*, Eur. Ct. H.R. 22 (2010); *C.N. & V. v. Fr.*, App. No. 67724/09 (Oct. 11, 2012); *C.N. v. U.K.*, Eur. Ct. H.R. 380 (2010); *M. & Others v. It.*, Eur. Ct. H.R. 1967 (2012); *L.E. v. Greece*, Eur. Ct. H.R. 107 (2016); *Chowdury & Others v. Greece*, Eur. Ct. H.R. 300 (2017)). There is a separate line of case law under Article 4 of the ECHR addressing forced labor demanded by the state. See generally WILLIAM SCHABS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 210–18 (2015).

466. See Cathryn Costello, *Migrants and Forced Labor: A Labor Law Response*, in *THE AUTONOMY OF LABOR LAW* 189 (Alan Bogg et al. eds., 2015) (arguing that the binary between forced and voluntary labor is simplistic).

467. *Brasil Verde Workers v. Braz.*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 318, ¶¶ 301–03 (Oct. 20, 2016); See also *Ituango Massacres v. Colom.*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶¶ 161–65 (July 1, 2006) (arguing that the threatening the foreign laborers with death if they escape contributed to their feeling of vulnerability).

A definitional issue that requires clarification in the context of the Inter-American Convention concerns the role of the state. Specifically, in *Ituango Massacres v. Columbia* the Inter-American Court added an element for defining forced labor complementing the elements of coercion and involuntariness: “to constitute a violation of Article 6(2) of the American Convention, it is necessary that the alleged violation can be attributed to State agents, either due to their direct participation or to their acquiescence to the facts.”<sup>468</sup> Subsequently, however, in *Brasil Verde Workers v. Brazil*, a case where it was clear that state agents did not participate in the submission of the workers to forced labor, but private individuals, the court clarified that this additional element was not relevant where the issue was whether the state had fulfilled its positive obligations to prevent abuses and ensure the rights.<sup>469</sup>

### 5. The Exceptions

Article 8(3) of the ICCPR allows exceptions to the prohibition in certain circumstances: prison labor, service of military character, service in case of emergency and service forming part of normal civil obligations. Similar exceptions are made by Article 4(3) of the ECHR, Article 6 of the American Convention on Human Rights and Article 2(2) of the ILO Forced Labor Convention. These exceptions are relevant to circumstances when the state requires labor. In what follows I will review the scope of the exceptions in order to reveal the discrepancies between the above mentioned instruments.

#### a. Prison Labor

The first exception to forced labor as allowed by Article 8(3)(c)(i) of the ICCPR relates to prison labor. Similarly, Article 2(2)(c) of the ILO Forced Labor Convention excludes from the scope of the prohibition on forced labor “any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations.” There are notable differences in the text of the provisions originating from the ICCPR and the ILO Convention. First, Article 8(3)(c)(i) of the ICCPR refers to labor “normally required” of a person under detention. This qualification was included in the text of the ICCPR so that a distinction can be maintained between labor “normally required” from prisoners and “hard labour” in prisons.<sup>470</sup> The latter is allowed under the terms of Article 8(3)(b) of the

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468. *Ituango Massacres v. Colom.*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 160 (July 1, 2006).

469. *Brasil Verde Workers v. Braz.*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 318, ¶¶ 293, 316 (Oct. 20, 2016). For positive obligations see Section VI.

470. Similar distinction can be found in the text of Article 6(2) and 6(3) of the American Convention on Human Rights. However, instead of “hard labor” (the term used in Arti-

ICCPR as a form of punishment.<sup>471</sup> Second, the ILO standards are more demanding from the perspective of states since for prison labor to be allowed under the exceptions, the ILO Forced Labor Convention requires “a conviction in a court of law.”<sup>472</sup> In contrast, the ICCPR requires only a “lawful order of a court” thus allowing labor during pre-trial detention. Article 6(3)(a) of the American Convention on Human Rights converges with the ICCPR standard since it allows imposition of labor upon a person imprisoned pursuant to “formal decision passed by the competent judicial authority.”

Third, the ILO framework imposes two additional demands so that forced labor during detention is allowed: (i) the labor must be carried out under the control of a public authority, and (ii) the labor cannot be placed at the disposal of private companies.<sup>473</sup> Textually speaking, the ILO’s framework is therefore more protective because it requires additional conditions to be satisfied before the exception to forced labor may be applied. These two additional conditions are also raised by Article 6(3)(a) of the American Convention and therefore in this respect the regional treaty is harmonized with the ILO standards.

In *Radosevic v. Germany* the HRC elaborated on the scope of the exception. The complainant was denied an adequate remuneration for work that he performed during imprisonment; this, he argued, amounted to forced labor. The HRC held that

Article 8, paragraph 3 (c) (i), read in conjunction with article 10, paragraph 3, of the Covenant [the essential aim of the penitentiary system shall be reformation and rehabilitation of prisoners] requires that work performed by prisoners *primarily aims at their social rehabilitation*, as indicated by the word “normally” in article 8, paragraph 3 (c) (i), but does not specify whether such measures

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cle 8(3)(b)), Article 6(2) of this regional human rights treaty refers to “deprivation of liberty at forced labor” as a form of punishment, which is distinguished from “work or service normally required of a person imprisoned”. As opposed to Article 8(3)(b) of the ICCPR, Article 6(2) of the American Convention on Human Rights added that the forced labor that is demanded as a form of punishment “shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner”.

471. Article 8(3) of the ICCPR except from the prohibition on forced labor both “hard labor” and labor “normally required” of a prisoner. “Hard labor,” however, can be imposed only as a punishment for a crime and pursuant to a sentence by a court. These two requirements are not raised by Article 8(3)(c)(i) of the ICCPR which allows imposition of labor “normally required” from prisoners.

472. 2007 ILO General Survey, *supra* note 441, at 25.

473. “[. . .] the exception provided for in this Article for compulsory work of convicted persons does not extend to their work for private institution, even if they are not for profit and even if they are under public supervision and control.” International Labor Conference, 104th Session, *Direct Request (CEACR)* (2015), at [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID,P11110\\_COUNTRY\\_ID,P11110\\_COUNTRY\\_NAME,P11110\\_COMMENT\\_YEAR:3184678,102544](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3184678,102544); 2007 ILO General Survey, *supra* note 441, at 26–27.

would include adequate remuneration for work performed by prisoners.<sup>474</sup>

The HRC added that “[s]tates themselves may choose the modalities for ensuring that treatment of prisoners, including any work or service normally required of them, is essentially directed at these aims [reformation and rehabilitation].”<sup>475</sup> What follows is that inadequate remuneration for work performed by prisoners is not a sufficient ground for excluding the work from the exceptions as to when forced and compulsory labor can be used. The HRC has thus taken an approach in support of state’s position favoring insufficient remuneration for prisoners.

The ECtHR has been also confronted with a question like the one raised in *Radosevic v. Germany*. In *Stummer v. Austria*,<sup>476</sup> the applicant argued that prison labor without affiliation to the old-page pension system is forced labor and prohibited by Article 4(2) of the ECHR. The ECtHR did not endorse Stummer’s argument because there was no sufficient consensus in Europe on the issue. Therefore, the work that Stummer performed had to be regarded as “work required in the ordinary course of detention,” not “forced or compulsory labour.” In comparison with the HRC, though, the ECtHR’s reasoning is much more sophisticated and holds transformative potential since in case of further developments concerning the rights of prisoners, it is very likely that the Court will change its position.<sup>477</sup>

#### b. Military Service

Article 8(c)(c)(ii) of the ICCPR exempts “any service of a military character” from the prohibition on forced labor. “[A]ny national service required by law of conscientious objectors” in countries where conscientious objection is recognized, also falls within the scope of the exception. In *Yeo-Bum Yoon and Myung-Jon Choi v. Republic of Korea*, the complainants argued that enlistment in compulsory military service, despite conscientious objection, constituted forced labor. They refused to be drafted within the prescribed period and were arrested, criminally charged and sentenced. The HRC held that the text of Article 8 of the Covenant “neither recognizes nor excludes a right of conscientious objection.” Thus, it decided to assess the claim solely in the light of Article 18 of the Covenant, which enshrines the right to freedom of thought, conscience and religion. Eventually, Korea was found to be in violation of the latter provision.<sup>478</sup> *Cenk Atasoy and Arda Sarkut v. Turkey* exposed more

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474. *Radosevic v. Ger.*, Communication No. 1292/2004, U.N. Doc. CCPR/C/84/D/1292/2004, ¶ 7.3 (Aug. 5, 2005).

475. *Id.*

476. *Stummer v. Austria*, App.No.37452/02 Eur. Ct. H.R. 1096 (2011).

477. *See id.* (Tulkens, J., Kovler, J., Gyulumyan, J., Spielmann, J., Popovic, J., Malinverni J., and Pardalos J. dissenting).

478. *Yeo-Bum Yoon & Myung-Jon Choi v. Republic of Korea*, Communication No. 1321/2004 and 1322/2004, U.N. Doc. CCPR/88/D/1321-1322/2004, ¶ 8.2 (Jan. 23, 2007). The

clearly the contradiction that may exist between Article 8(3)(c)(ii) and Article 18(1) of the ICCPR, particularly regarding the issue of conscientious objectors. The applicants had refused to perform military service due to their religious beliefs. They complained that the absence in Turkey of an alternative to compulsory military service and the possibility for criminal proceedings against conscientious objectors, were in breach of their right to freedom of thought, conscience and religion. In response, Turkey argued that Article 18 of the ICCPR does not cover conscientious objection to military service. To support this argument Turkey invoked Article 8(3)(c)(ii) of the ICCPR, which leaves it within the discretion of states as to whether to recognize conscientious objections. The respondent government contended that if conscientious objection were to be covered by Article 18(1), there would be no contradictory reference in Article 8 of the ICCPR. More specifically, the latter provision clearly accepts that countries might choose not to recognize conscientious objection to military service. In other words, Turkey contended that for Article 8 and 18 of the ICCPR to be consistent with each other, the latter could not entail a right to conscientious objection.<sup>479</sup> Thus, Turkey argued, Article 8 legitimized compulsory military service.<sup>480</sup> The HRC upheld its approach which initially emerged with *Yeo-Bum Yoon and Myung-Jon Choi v. Republic of Korea* and rejected the Turkish government's argument. It added that

the right to conscientious objection to military service is inherent to the right to freedom of thought, conscience and religion. It entitles any individual to an exemption from compulsory military service if the latter cannot be reconciled with the individual's religion and belief. The right must not be impaired by coercion. A State party may, if it wishes, compel the objector to undertake a civilian alternative to military service, outside of the military sphere and no under military command.<sup>481</sup>

A potential problem, which the HRC has yet to face, will transpire if the alternative service demanded by the state is exploitative and oppressive. Perhaps as a response to this concern, the HRC has supplemented its reasoning with the affirmation that “[t]he alternative service must not be of a

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HRC concluded that the refusal by the complainants to be drafted for compulsory service was a direct expression of their religious belief and therefore, fell within the ambit of Article 18 of the ICCPR. The HRC found that the Republic of Korea has not demonstrated that the imposed restriction on the right to freedom of religion was necessary within the meaning of Article 18(3) of the ICCPR.

479. *Cenk Atasoy & Arda Sarkut v. Turk.*, Communication Nos. 1853/2008 and 1854/2008, U.N. Doc. CCPR/C/104/D/1853-1854/2008, ¶ 7.8 (June 19, 2012).

480. *See also* *L.T.K. v. Fin.*, Communication No.185/1984, U.N. Doc. CCPR/C/25/D/185/1984, ¶ 5.2 (July 9, 1985) (the HRC maintaining a similar reasoning in its decision of inadmissibility).

481. *Cenk Atasoy & Arda Sarkut*, Communication Nos. 1853/2008 and 1854/2008, U.N. Doc. CCPR/C/104/D/1853-1854/2008, ¶ 10.4.

punitive nature, but must rather be a real service to the community and compatible with respects for human rights.”<sup>482</sup>

A comparison between the ICCPR and the ILO Forced Labor Convention reveals two key differences on the scope of the military service exception.<sup>483</sup> First, the ILO instrument raises the requirement that the work must be of a *purely* military character to fall within the scope of the exception. This additional safeguard was added to prevent the imposition of compulsory service obligations for public works under the guise of compulsory military service.<sup>484</sup> Second and relatedly, Article 2(2)(a) of the ILO instrument does not refer to the possibility of conscientious objection. Instead, the ILO Committee of Experts has clarified that when a choice is given between military service proper and non-military work (the latter to be potentially performed by objectors), both choices are based on compulsory service obligations. Accordingly, this choice is not between voluntary work and compulsory service, “but between two forms of compulsory service, one of which is excluded from the scope of the Convention, while the other is not.”<sup>485</sup> It follows that the services performed by objectors are prohibited forms of forced and compulsory labor under the terms of the ILO Forced Labor Convention. On the other hand, however, the ILO is not entirely consistent on this point because it has also referred to conscientious objection as a privilege. To this effect, it has held that in examining whether conscientious objection is a privilege granted to individuals on their request or forced labor, “due account should be taken of the number of persons concerned and the conditions in which they make their choice.”<sup>486</sup> In this way the ILO has suggested that a context specific analysis is necessary for assessing whether the service performed by objectors is within the prohibition of forced labor. Ultimately, however, it is not definitely clear whether, under the ILO, conscientious objectors are viewed as a privileged category or a category of individuals generally subjected to forced labor.

In *Bayatyan v. Armenia*, the ECtHR was also confronted with the issue of conscientious objection in relation to the application of Article 4(4)(b) of the ECHR.<sup>487</sup> It held that

the sole purpose of sub-paragraph (b) of Article 4(3) is to provide a further elucidation of the notion “forced or compulsory labour.” In itself it neither recognizes nor excludes a right to conscientious objection and should therefore not have a delimiting effect on the

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482. *Id.*

483. Article 6(3)(b) of the American Convention on Human Rights follows the language of Article 8(3)(c)(ii) of the ICCPR and Article 4(3)(b) of the ECHR.

484. 2007 ILO General Survey, *supra* note 441, at 22.

485. *Id.* at 23.

486. *Id.*

487. *See Bayatyan v. Arm.*, App.No.23459/03 Eur. Ct. H.R. 1652 (2009).

rights guaranteed by Article 9 [freedom of thought, conscience and religion].<sup>488</sup>

The Court substantiated this conclusion by taking note of the trend among European countries to recognize the right to conscientious objection.<sup>489</sup> It drew inspiration *inter alia* from the HRC General Comment No. 22<sup>490</sup> and the above quoted excerpt from the communication against the Republic of Korea,<sup>491</sup> where the Committee considered that the right to conscientious objection could be derived from the right to freedom of thought, conscience and religion.<sup>492</sup> The judgment concluded with a finding that Armenia *was* in breach of the right to freedom of thought, conscience and religion because the applicants were not offered an alternative to the military service.<sup>493</sup> On the point of conscientious objection, therefore, there is clear convergence between the positions taken by the HRC and the ECtHR. So far, no case of conscientious objection to military service has been presented to the Inter-American Court of Human Rights.<sup>494</sup>

### c. Normal Civic Obligations

Any work or service that forms part of normal civic obligations is excluded from the scope of forced or compulsory labor in accordance with Article 8(3)(iv) of the ICCPR. Similar exclusions can be found under Article 2(2) of the ILO Forced Labor Convention, Article 4(3)(d) of the ECHR and Article 6(3)(d) of the American Convention on Human Rights. As it emerges from *Bernadette Faure v. Australia*, the obligation to perform work as a condition for receiving social benefits is an example of a normal civic obligation within the meaning of Article 8(3)(iv) of the ICCPR. The HRC has held that

to so qualify as a normal civil obligation, the labour in question must, at a minimum, not be an exceptional measure; it must not possess a punitive purpose or effect; and it must be provided for by law in order to serve a legitimate purpose under the Convention. In the light of these considerations, the Committee is of the view that the material before it, including the absence of a degrad-

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488. *Id.* ¶ 100.

489. *See id.*, ¶ 103.

490. *See* U.N. Human Rights Comm. (HRC), *General Comment No. 22*, U.N. Doc. CCPR/C/21/Rev.1/Add.4, ¶ 11 (Sept. 27, 1993).

491. *See* Yeo-Bum Yoon & Myung-Jon Choi v. Republic of Korea, Communication No. 1321/2004 and 1322/2004, U.N. Doc. CCPR/88/D/1321-1322/2004 (Jan. 23, 2007).

492. *Bayatyan*, Eur. Ct. H.R. 1652, ¶ 105.

493. For a more compressive analysis of the ECtHR case law on this issue see Christoph Bezemek, *Services exacted instead of Compulsory Military Service: The Structure of the "Prohibition of Forced or Compulsory Labor" According to Article 4(2) of the ECHR*, 3 EUR. HUM. RTS. L. REV. 263 (2014).

494. HITOMI TAKEMURA, INTERNATIONAL HUMAN RIGHT TO CONSCIENTIOUS OBJECTION TO MILITARY SERVICE AND INDIVIDUAL DUTIES TO DISOBEY MANIFESTLY ILLEGAL ORDERS 115 (2009).

ing or dehumanizing aspect of the specified labour performed, does not show that the labour in question comes within the scope of the proscriptions set out in article 8.<sup>495</sup>

In its reasoning, the HRC did not distinguish between situations in which social benefits are conditional on prior payments of contributions and situations in which they are not.<sup>496</sup> (*Bernadette Faure* communication fell within the second group.) In contrast, the ILO has taken note of this distinction and, as a consequence, has taken the position that in cases falling within the second group—where benefits are granted on purely social grounds—“a requirement to perform some work in exchange for the allowance would not *in itself* constitute forced or compulsory labour.”<sup>497</sup> The ILO has, however, also added that even in the circumstances where social benefits are not conditional on prior contributions paid by the person concerned, “if the work required to be performed is not “suitable employment,” it would constitute a form of forced labour.”<sup>498</sup> The standard of “suitable employment” appears to be more favorable from the perspective of the individual concerned than the benchmarks used by the HRC in *Bernadette Faure v. Australia*, e.g., work not as an exception measure or without a punitive purpose or effect.

The ECtHR has not been confronted so far with the issue how Article 4(2) of the ECHR applies to cases where the state demands services as a precondition for receiving social benefits. Service in a jury,<sup>499</sup> at a fire brigade,<sup>500</sup> as an unpaid guardian of a mentally ill person,<sup>501</sup> and as a legal representative of indigent clients for free<sup>502</sup> are conditions that have been recognized as examples of normal civic obligations. ECtHR case law is distinct from the HRC and the ILO in that the court does *not* seem to consider these conditions as forms of exception to forced labor. Instead, they are regarded as relevant factors in the assessment of whether a disproportionate burden has been imposed on the applicant and, thus, whether the service was forced labor in the first place. For example, in *Van der Mussele v. Belgium* at no point did the court say that the applicant had been subjected to forced or compulsory labor in the sense of Article 4 of the ECHR.<sup>503</sup> It instead held that his service ensured that indigent persons could benefit from their right to free legal assistance as recognized by the

495. *Faure v. Austl.*, Communication No. 1036/2001, U.N. Doc. CCPR/85/D/1036/2001, ¶ 7.5 (Nov. 23, 2005).

496. *Id.* ¶ 4.8.

497. 2007 ILO General Survey, *supra* note 441, at 70.

498. *Id.*

499. *See, e.g., Zarb Adami v. Malta*, App.No. 17209/02 Eur. Ct. H.R. 1209 (2006).

500. *See, e.g., Karlheinz Schmidt v. Ger.*, App. No. 13580/88 Eur. Ct. H.R. 22 (1994).

501. *See, e.g., Graziani-Weiss v Austria*, App. No. 31950/06 Eur. Ct. H.R. 1730 (2011).

502. *See, e.g., Van der Mussele v. Belg.*, App. No 8919/80 Eur. Ct. H.R. 13 (1983).

503. *See id.*

ECHR<sup>504</sup> and was “founded on a conception of social solidarity and [could not] be regarded as unreasonable.”<sup>505</sup> The court summarized its approach in the following way:

Paragraph 3 (art. 4-3) is not intended to “limit” the exercise of the right guaranteed by paragraph 2 (art. 4-2), but to “delimit” the very content of this right, for it forms a whole with paragraph 2 (art. 4-2) and indicates what “the term ‘forced or compulsory labour’ shall not include” (ce qui “n’est pas considéré comme ‘travail forcé ou obligatoire’ ”). This being so, paragraph 3 (art. 4-3) serves as an aid to the interpretation of paragraph 2 (art. 4-2). The four sub-paragraphs of paragraph 3 (art. 4-3-a, art. 4-3-b, art. 4-3-c, art. 4-3-d), notwithstanding their diversity, are grounded on the governing ideas of the general interest, social solidarity and what is in the normal or ordinary course of affairs.<sup>506</sup>

Thus, forced or compulsory labor may be interpreted by considering the circumstances described in Article 4(3) as a single operation, and not as two separate stages of the analysis.<sup>507</sup>

#### d. Emergencies

One final exception to forced labor must be mentioned: work or service “exacted in cases of emergencies or calamity threatening the life or well-being of the community.”<sup>508</sup> This has not given rise to cases before the HRC, the ECHR or the Inter-American Court. The ILO has clarified that “the power to call up labour in cases of emergency is limited to what is strictly required by the exigencies of the situation.”<sup>509</sup> This is reminiscent of the emergency circumstances in which states may derogate from human rights law obligations.<sup>510</sup> There is no definitive pronouncement by the human rights bodies whether the safeguard “to the extent strictly required by the exigencies of the situation” will be actually be applied.

## VI. OBLIGATIONS CORRESPONDING TO THE RIGHT NOT TO BE HELD IN SLAVERY, SERVITUDE, AND FORCED LABOR

The previous section of this article proceeded under the assumption that for the rights enshrined in Article 8 of the ICCPR to become effectively applicable legal standards, there must be clarity as to the meaning

504. *Id.* ¶ 39 (citing article 6 section(3)(c) of the European Convention on Human Rights).

505. *Id.* ¶ 39.

506. *Id.* ¶ 38.

507. For detailed analysis see STOYANOVA, *supra* note 47 (2017).

508. ICCPR, *supra* note 5, art. 8(3)(c)(iii); Convention Concerning Forced or Compulsory Labor, *supra* note 63, art. 2(2)(d); ECHR, art.4(3)(e); American Convention on Human Rights, “Pact of San Jose”, Costa Rica, art. 6(3)(c), Nov. 22, 1969, 1144 U.N.T.S. 123.

509. 2007 ILO General Survey, *supra* note 441, at 32.

510. *See, e.g.*, ICCPR, *supra* note 5, art. 4(1); ECHR, art. 15(1).

and the scope of the terms used therein. The search for clarity, however, is not self-serving. Even if relatively lucid in terms of definitional boundaries, this provision has little impact without an understanding of the obligations it triggers. To understand the significance of Article 8 of the ICCPR, therefore, it is necessary to examine the related obligations. Identifying the obligations sharpens our understanding of what is necessary to realize this right.<sup>511</sup> Some of these obligations can be easily correlated to the right. The right not to be required to perform forced labor, for example, relates to states' obligations not to require forced labor. The latter is an obligation which, as discussed in the previous section, is qualified by the permissible exceptions. The right not to be subjected to slavery correlates to the states' unqualified obligation not to enslave. This corresponds to the traditional understanding of human rights law: "to erect barriers between the individual and the state, so as to protect human autonomy and self-determination from being violated or crushed by governmental power."<sup>512</sup> However, the mere abstention by the state to intervene by not enslaving or keeping individuals in slavery, servitude, and forced labor is not nearly sufficient.

#### A. Positive Obligations

In his influential book, *Basic Rights*, Henry Shue argues that the rights enshrined in human rights treaties can generate multiple obligations. Human rights law thus imposes not only obligations upon states to respect (i.e., to refrain from violating) these rights but also obligations to protect (i.e., to restrain third parties from violating) these rights and to fulfill (i.e., to foster) positive liberties.<sup>513</sup> The last two of these obligations correspond to the one imposed by Article 2(1) of the ICCPR which requires that state parties undertake to ensure to all individuals within their jurisdiction the rights recognized in the Covenant.<sup>514</sup> The HRC clarified in its General Comment No. 31 that

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511. ALSTON & GOODMAN, *supra* note 317, at 181.

512. Karl E. Klare, *Legal Theory and Democratic Reconstruction: Reflection on 1989*, 25 U. BRIT. COLUM. L. REV. 69, 97 (1991).

513. HENRY SHUE, BASIC RIGHTS: SUBSISTANCE, AFFLUENCE AND U.S. FOREIGN POLICY 52 (1980); SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES 2, 69 (2008); The conceptual breakthrough took place in mid 1980s when Asbjorn Eide, as the Rapporteur to the then U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, proposed four layers of state obligations – obligation to respect, obligation to protect, obligation to ensure and an obligation to promote. Asbjorn Eide (Special Rapporteur), *Rep. on the Right to Adequate Food as a Human Rights*, U.N. Doc. E/CN.4/Sub.2/1983/25 (July 25, 1983). Later this was revisited to become a tripartite division of human rights obligations: to respect, to protect and to fulfill. Asbjorn Eide (Special Rapporteur), *Rep. on the Right to Adequate Food as a Human Rights*, U.N. Doc. E/CN.4/Sub.2/1987/23 (July 7, 1987).

514. See Anja Seibert-Fohr, *Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its Article 2 Paragraph 2*, 5 MAX PLANCK Y.B. U.N. L. 399, 404 (2001); see generally DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL

The legal obligation under article 2, paragraph 1, is both negative and positive in nature. [. . .] Article 2 requires that State Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfill their legal obligations. [. . .] the positive obligations on state parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by state agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights [. . .] There may be circumstances in which a failure to ensure the Covenant rights as required by article 2 would give rise to violations by state parties to those rights, as a result of state parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.<sup>515</sup>

Accordingly, states must take positive measures to ensure that private individuals or entities do not inflict harm on others.<sup>516</sup> This might imply certain guarantees in the domestic legal order and legislation.<sup>517</sup> Such

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RIGHTS (1991) (analyzing the of states' obligation to respect and ensure the rights recognized by article 2 of ICCPR).

515. Human Rights Comm., *General Comment No. 31[80] The Nature of the General Legal Obligations Imposed on State Parties to the Covenant*, ¶¶ 6–8 U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2014) [hereinafter HRC General Comment No. 31]. It is not entirely clear how the drafters perceived the obligation to ensure. See Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 72, 77 (Louis Henkin ed., 1981) (observing that the drafting history is not explicit, but the language of Article 2(1) “may perhaps require the state to adopt laws and other measures against private interference.”).

516. HRC General Comment No. 31, *supra* note 515, ¶ 8; See also Human Rights Comm., *General Comment No.35 -Article 9 (Liberty and Security of Person)*, ¶¶ 7, 9 U.N. Doc. ICCPR/C/GC/35, (2014) (stating that states must protect individuals against deprivation of liberty by *inter alia* individual criminals and “lawful organizations, such as employers, schools and hospital.” The right to personal security obliges states to “protect individuals from foreseeable threats to life or bodily integrity proceedings from any governmental or private actors” (emphasis added)); Human Rights Comm., *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, ¶ 6.1 U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994); see also ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS* 328–32 (2006).

517. HRC General Comment No. 31, *supra* note 515, ¶ 13. Such guarantees have to ensure that the national authorities take into consideration “the special vulnerability of persons . . . who have been subjected to human trafficking”. *Osayi Omo-Amenaghawon v. Denmark*, Communication No. 2288/2013, U.N. Doc. CCPR/C/114/D/2288/2013, (Sept. 15, 2015) ¶ 7.5 (The author of this communication was a victim of human trafficking who argued that if returned to Nigeria she would be at risk of being killed or tortured by persons linked to the human trafficking network in Nigeria. Her fears were exacerbated by the fact that she had testified against her traffickers in criminal proceedings in Denmark. The HRC found that her deportation to Nigeria would constitute a violation of her rights under Article 6 and 7 of the ICCPR. The Committee reasoned that the Danish authorities failed to “take into due consideration the special vulnerability of persons (in this case, the author) who have been subjected to human trafficking, which often lasts for several years even after they have been rescued or are able to free themselves from their aggressors, and the author’s particular status as witness

guarantees include investigation and criminalization of abusive conduct, as well as bringing perpetrators to justice.<sup>518</sup> Essentially, however, the guarantees are not limited to the effective operation of the national criminal law, which plays an important part in serious instances of abuse amounting to slavery, servitude, and forced labor. Still, as the above excerpt demonstrates, the positive obligations are more far reaching than mere criminalization.

In addition to the HRC, the regional human rights protection systems have also made significant advances in developing positive obligations corresponding to the rights. The seminal judgment originating from the Inter-American Court of Human Rights is *Valásquez-Rodríguez v. Honduras*,<sup>519</sup> where the following broad and open-ended obligation was formulated: states are under the obligation “to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.”<sup>520</sup> The regional court has also added that the obligation to ensure human rights is not limited to the adoption of national constitution and laws, “but must rather permeate all the legal provisions of a statutory or regulatory nature and translate into the effective enforcement, in practice, of the human rights protection standards.”<sup>521</sup> The Inter-American Court has specifically in relation to the right not to be held in slavery, servitude, or forced labor observed that states have the obligation to initiate *ex officio* investigation to identify, prosecute and punish those responsible whenever there is a complaint or a reasonable grounds to believe that persons are subjected to ill-treatment; to repeal any legislation that toler-

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in the criminal proceedings against her aggressors. The State party has also not taken into consideration the specific capacity of the Nigerian authorities to provide the author, in her particular circumstances, with protection to guarantee that her life and physical and mental integrity would not be at serious risk.”). For the application of the *non-refoulement* principle to victims of human trafficking see Vladislava Stoyanova, *Complementary Protection for Victims of Human Trafficking under the European Convention on Human Rights* 3(2) GÖTTINGEN J. INT. L. 777 (2011).

518. HRC General Comment No. 31, *supra* note 515, ¶ 18. *See generally* Anja Seibert-Fohr, *The Fights Against Impunity under the International Covenant on Civil and Political Rights*, 6 MAX PLANCK Y.B. U.N. L. 301 (2002) (arguing that the HRC has denied an individual rights of victims of crimes under the ICCPR to see their violators prosecuted; however, there is still duty upon states to bring violators to justice); *see also generally* ANJA SEIBERT-FOHR, *PROSECUTING SERIOUS HUMAN RIGHTS VIOLATIONS* (2009) (examining the duty to prosecute serious human rights violations). *See also* Bénédicte Bourgeois, *Statutory Progress and Obstacles to Achieving an Effective Criminal Legislation against the Modern-Day Forms of Slavery: the Case of France*, 38 MICH. J. INT'L L. (2017).

519. *Valásquez-Rodríguez v. Hond. Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4*, ¶ 166 (July 29, 1988).

520. *Id.*

521. *Vélez Loor v. Pan., Preliminary Objections, Merits, Reparations and Costs, Judgments, Inter-Am. Ct. H.R. (ser. C) No. 132*, ¶ 286 (Nov. 23, 2010); *see also* *Juridical Condition and Rights of Undocumented Migrants, (Advisory Opinion) OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18*, ¶¶ 147–48 (Sept. 17, 2003); Laurens Lavrysen, *Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights*, 7 INTER-AM. & EUR. HUM. RTS. J. 94, 97 (2014).

ates these forms of abuses; to criminalize them with severe penal sanction; to conduct inspection or take other measures to detect them; to adopt measures to protect and assist victims.<sup>522</sup> The regional court also added that

States should have an adequate legal framework for protection with effective enforcement and prevention policies and practices to enable them to respond effectively to complaints. The prevention strategy must be comprehensive, that is, it must prevent risk factors and at the same time strengthen institutions so that they can provide an effective response to the phenomenon of contemporary slavery. In addition, States should take preventive measures in specific cases where it is clear that certain groups of persons may be victims of trafficking or slavery.<sup>523</sup>

The ECtHR has also made major inroads in elevating the abstract rights outlined in the ECHR to effectively applicable legal standards, largely by identifying the corresponding positive obligations upon states.<sup>524</sup> Similarly to the Inter-American Court on Human Rights, the ECtHR has issued a leading judgment on the positive obligations corresponding to the right not to be subjected to slavery, servitude, forced labor, and human trafficking (Article 4 of the ECHR). In *Rantsev v. Cyprus and Russia*, it held that

the spectrum of safeguards set out in the national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking. Accordingly, in addition to criminal law measures to punish trafficking, Article 4 requires member States to put in place adequate measures regulating business often used as a cover for human trafficking. Furthermore, a State's immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking.<sup>525</sup>

This reflects a well-settled aspect of states' positive obligations under the ECHR; namely, states are under the obligation to ensure an adequate and effective regulatory environment so that individuals are protected. As Jeremy McBride has framed it, "it is hard to imagine compliance with the undertaking in Article 1 to secure the Convention rights and freedoms to everyone without some legal basis for all of the latter being provided."<sup>526</sup> Laurens Lavrysen has framed this positive obligation as "protection by the

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522. *Brasil Verde Workers v. Braz.*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 318, ¶ 391 (Oct. 20, 2016).

523. *Id.* ¶ 320.

524. *STOYANOVA*, *supra* note 47, at 319.

525. *Rantsev v. Cyprus & Russ.*, App.No.25965/04 Eur. Ct. H.R. 22 (2010).

526. JEREMY MCBRIDE, *Protecting Life: A Positive Obligation to Help*, in *EUROPEAN LAW REVIEW HUMAN RIGHTS SURVEY* (1999) 43, 43 (1999).

law,” an obligation which prescribes States to develop both substantive and procedural guarantees to proactively protect the Convention rights.<sup>527</sup> These positive obligations extend to the whole web of national laws and regulations. In other words, states may fail to protect an individual because of certain deficiencies in the applicable national legislation, and therefore be found in violation of the ECHR.

The ECtHR has also clarified that Article 4 of the ECHR triggers a procedural obligation of investigating.<sup>528</sup> In relation to the obligation to investigate, it has been added that “where the possibility of removing the individual from the harmful situation is available, the investigation must be undertaken as matter of urgency.”<sup>529</sup> States are also under the duty to “cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories.”<sup>530</sup> Finally, under certain circumstances where a particular individual is under a real and immediate risk of being harmed, national authorities must take reasonable measures to remove him/her from that risk.<sup>531</sup>

Given the above safeguards, the ECtHR’s contributions to the development of regional obligations corresponding to one’s right not to be subjected to slavery, servitude, and forced labor has been very useful.<sup>532</sup> Its case law is indeed quite advanced because it had coalesced around specific positive obligations. Thus, shifting the analysis on contemporary forms of slavery from rights to state obligations might be very valuable in that it moves the debate to the issue of implementation and what states must do so that the rights are realized.<sup>533</sup> The Inter-American Court of Human Rights has also moved the debate in this direction with the *Brasil Verde*

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527. Laurens Lavrysen, *Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect the ECHR Rights*, in HUMAN RIGHTS & CIVIL LIBERTIES IN THE 21ST CENTURY 69, 70 (Eva Brems & Yves Haeck eds., 2014).

528. *Rantsev*, Eur. Ct. H.R. ¶ 288 (2010). The obligation to investigate as developed in the case law of the ECtHR is triggered only under certain conditions and it is an obligation of means, not of result. See Juliet Chevalier-Watts, *Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?* 21 EUR. J. INT’L L. 701 (2010).

529. *Rantsev*, Eur. Ct. H.R. ¶ 288 (2010).

530. *Id.* ¶ 289.

531. *Id.* ¶ 286; see also *L.E. v Greece*, App. No.71545/12, 21 Eur. Ct. H.R. 107 (2016) (finding that a State has obligation to take concrete action to protect a victim of article 4 violation when the state has or should have knowledge of actual and immediate danger to the victim); Vladislava Stoyanova, *L.E. v. Greece: Human Trafficking and the Scope of States’ Positive Obligations under the ECHR*, 3 EUR. HUM. RTS. L. REV. 301 (2016).

532. The ECtHR drew inspiration from the regional anti-trafficking instrument (i.e. the Council of European Convention on Action against Trafficking in Human Beings, No. 197) in order to inform its approach under Article 4 of the ECHR. As opposed to the U.N. Trafficking Protocol, the CoE anti-trafficking convention imposes concrete obligations upon states to protect and assist victims of trafficking.

533. See James. W. Nickel, *How Human Rights Generate Duties to Protect and Provide*, 15 HUM. RTS. Q. 77, 85 (2001); Thomas Pogge, *Human Rights and Human Responsibilities*, in GLOBAL RESPONSIBILITIES: WHO MUST DELIVER ON HUMAN RIGHTS?, 3–35 (Andrew Kuper ed., 2005).

*Workers v. Brazil* judgment. Another advantage would be heightened attention not only to the national efforts to prosecute and convict alleged criminals<sup>534</sup> but also to the whole national legal and regulatory landscape which facilitates abusive practices. Such a shift is particularly important from the perspective of migrant workers whose vulnerability to abusive practices is often structured by the national legislation in host states.<sup>535</sup> If such a transformation is achieved, then slavery, servitude, and forced labor will not be perceived as deviant criminal conduct but rather as abuses produced by the national legal and regulatory environment. The latter must be modified in accordance with states' positive obligations to ensure human rights.

### B. Challenges

While acknowledging the advantages from such a shift, we should be also aware of some challenges. First, the scope of the positive obligations is not entirely determined. As Monica Hakimi has observed, there is confusion as to when they are triggered and what they require.<sup>536</sup> On a related point, positive obligations are subject to the test of reasonableness and raise questions about the allocation of costs. As the ECtHR has indicated, the positive obligations are “to be interpreted in such a way as not to impose an excessive burden on the authorities.”<sup>537</sup> Measures applied by the state to protect against acts of violence “should be effective and include reasonable steps to prevent ill-treatment of which the authorities had, or ought to have had, knowledge and effective deterrence against such serious breaches of personal integrity.”<sup>538</sup> The test of reasonableness opens the door for qualitative reasoning in light of the particular circumstances of each case, thus fostering indeterminacy. This relates to the nature of positive human rights obligations as obligations of due diligence: diligence is due without guaranteeing the end result.<sup>539</sup>

A second challenge is that states have leeway in which legislative and regulatory steps they take to give effect to these rights, and that these steps may be adjusted to different features of various domestic legal systems.<sup>540</sup> As the ECtHR has clarified

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534. In its Concluding Observations under Article 8 of the ICCPR, the HRC places a strong focus on strengthening of the criminal law response at national level. See, e.g., Human Rights Comm., *supra* note 247, ¶ 22; Human Rights Comm., *supra* note 248, ¶ 15; Human Rights Comm., *supra* note 249, ¶ 17.

535. Judy Fudge, *Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers*, 34 COMP. LAB. L. & POL'Y J. 95 (2012).

536. Monica Hakimi, *State Bystander Responsibility*, 21 EUR. J. INT'L. 341 (2010).

537. O'Keefe v. Ir., App. No.35810/09 Eur. Ct. H.R.155, ¶ 144 (2014).

538. Söderman v. Swed., App. No. 5786/08 App. No.35810/09 Eur. Ct. H.R. 1287, ¶ 81 (2013).

539. See John H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L L. 1, 21–24 (2008).

540. Christian Tomuschat, *National Implementation of International Standards on Human Rights*, CAN. HUM. RTS. Y.B 1984-1985 31, 42 (1985).

The Convention does not lay down for the Contracting States any given manner for ensuring within their internal law the effective implementation of the Convention. The choice as to the most appropriate means of achieving this is in principle a matter for the domestic authorities, who are in continuous contact with the vital forces of their countries and are better placed to assess the possibilities and resources afforded by their respective domestic legal systems.<sup>541</sup>

Although this leeway is somehow limited by the principle of effectiveness,<sup>542</sup> there is still indeterminacy. In addition, the obligation to ensure the rights contains a progressive element; consequently, implementation of human rights treaties can never be static.<sup>543</sup> This is certainly a positive feature; however, it does introduce insecurity and fosters difficulties in pinpointing the obligations. A related and sufficiently serious problem is the danger of blurring the line between positive obligations that are owed to human rights holders and mere moral aspirations of the state. Extra care must be taken so that the demarcation between the two is maintained. Otherwise, we risk diluting the positive obligations that are owed into mere recommendations.<sup>544</sup>

A third challenge, which has been made evident by the Special Rapporteur's reports, concerns the reality that slavery, servitude, and forced labor are often related to extreme forms of poverty.<sup>545</sup> These are caused by a multitude of factors not clearly attributable to the state or to third parties, clearly complicating the obligation to protect.<sup>546</sup> Positive duties to

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541. D.J. v. Croat., App.No.42418/10 Eur. Ct. H.R. 1642, ¶ 93.

542. In the words of the ECtHR, the ECHR "is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective." Airey v. Ir., 32 Eur. Ct. H.R. (ser. A), ¶ 24 (1979).

543. Seibert-Fohr, *supra* note 514, at 414.

544. In its Concluding Observations under Article 8 of the ICCPR, the HRC often makes determinations that states have to adopt measures which are questionably reflective of binding obligations. For example, the HRC has determined that victims have to "receive adequate medical care, free social and legal assistance, and reparation, including rehabilitation." Office of the High Commissioner for Human Rights (OHCHR), *Concluding observations on the seventh periodic review of Ukraine*, U.N. Doc. CCPR/CIKR/CO/7, ¶ 16 (Aug. 22, 2013). In relation to Belgium, the HRC has determined that "[t]he State party should consider amending its laws so that the issuance of residence permits to victims of human trafficking is not conditional upon cooperation with court authorities." Office of the High Commissioner for Human Rights (OHCHR), *Concluding observations on the fifth periodic review of Belgium*, U.N. Doc. CCPR/C/BEL/CO/5, ¶ 16 (Nov. 16, 2010).

545. See Part III *supra*.

546. Stephanie Leinhardt & Krista Nadakavukaren Schefer, *Positive or Negative, Legal or Moral: What Duties to Reduce Poverty?*, in *POVERTY AND THE INTERNATIONAL ECONOMIC LEGAL SYSTEM: DUTIES TO THE WORLD'S POOR* 391, 392 (Krista Nadakavukaren Schefer ed., 2013).

protect and fulfill are essential in constructing the law of poverty reduction;<sup>547</sup> however, they have their own complexities.<sup>548</sup>

A fourth challenge concerns the application of human rights law to migrants in relation to whom there is overwhelming empirical evidence that they are subjected to severe forms of exploitation in receiving countries.<sup>549</sup> Migrants are “outsiders” to the host community and although human rights law has placed emphasis on the human being (as opposed to the citizen), this does not change the reality that human rights are dependent on the nation state for implementation and realization.<sup>550</sup> The nation state is the same entity which is entitled to control its territorial boundaries and the membership of the community within those boundaries. Concerns with protecting the bounded national territory structure the status of the migrant and could negatively affect the operation and the effectiveness of human rights law. As Linda Bosniak has explained “[t]he noncitizen immigrants have entered the special domain of universal citizenship, but they remain outsiders in a significant sense: the border effectively follows them inside.”<sup>551</sup>

### C. Transnationality and Shared Responsibility

A fifth challenge brings into the picture the trans-border nature of many of the activities that cause harm, an issue which is sufficiently complex to warrant a separate section. At this junction, it is useful to remind the reader of the Special Rapporteur’s report on supply chains, wherein she describes how corporations have extended their operations across national borders, including to developing countries, to source the cheapest products and maximize profit.<sup>552</sup> The cross-border operation of agencies, which supply workers in host countries, also raises transnational issues.<sup>553</sup> The question which emerges here is how to identify the specific duty and the duty-bearer. A related question which also emerges is whether the re-

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547. Elizabeth Ashford, *The Duties Imposed by the Human Rights to Basic Necessities, in FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWNS WHAT TO THE VERY POOR?* 183, 206–17 (Thomas Pogge ed., 2007).

548. Samantha Besson, *The Allocation of Anti-Poverty Rights Duties: Our Rights, but Whose Duties?*, in *POVERTY AND THE INTERNATIONAL ECONOMIC LEGAL SYSTEM: DUTIES TO THE WORLD’S POOR* 408 (Krista Nadakavukaren Schefer ed., 2013).

549. The reports by the Special Rapporteur (see Part III above) and the HRC Concluding Observations (see Part IV above) testify to this effect. For a comprehensive study covering Europe see EUROPEAN AGENCY FOR FUNDAMENTAL RIGHTS, *FUNDAMENTAL RIGHTS OF MIGRANTS IN AN IRREGULAR SITUATION IN THE EUROPEAN UNION* (2011).

550. Werner Hamacher, *The Right to Have Rights (Four-and-a-Half Remarks)*, 103 S. ATLANTIC Q. 343, 349–50 (2004).

551. LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMA OF CONTEMPORARY MEMBERSHIP* 4 (2006).

552. Office of the High Commissioner for Human Rights (OHCHR), *supra* note 164, at 6.

553. Judy Fudge, *Blurring Legal Boundaries: Regulating for Decent Work*, in *CHALLENGING THE LEGAL BOUNDARIES OF WORK REGULATION* 1, 15 (Judy Fudge et al. eds., 2012).

sponsibility for the harm can be shared between various states as duty-bearers. In this sense, there might be more than one state that has contributed to harmful outcomes that international law seeks to prevent.<sup>554</sup> It suffices to provide the following example to illustrate the difficulties in tackling these issues. Thailand is the largest supplier of tropical shrimps to the Netherlands, the United Kingdom, and Germany. It has been reported that the pre-processing of the shrimps is done in particularly exploitative working conditions prior to being shipped to European markets.<sup>555</sup> Thailand certainly has positive obligations under human rights law to regulate the working conditions to ensure the rights under Article 8 of the ICCPR. The jurisdictional threshold question might raise doubts as to the applicability of the Covenant to the workers as rights-holders and to the European states as duty-bearers.<sup>556</sup> However, is it fair to hold Thailand responsible for all the harm considering possible failures by the European states to regulate their own businesses and control how they purchase products?<sup>557</sup>

Extraterritorial application of human rights law and shared responsibility are topics that cover a vast terrain, and it would be impossible to explore that here. It suffices to mention that the very question of positive duties only arises once jurisdiction has been established.<sup>558</sup> This certainly raises difficulties in triggering the human rights obligations of the above-mentioned European countries, since the affected individuals are not within their territory.<sup>559</sup> It is a contentious issue whether jurisdiction is established where a state contributes to the harm without a direct connec-

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554. See generally André Nollkaemper & Dov Jacobs, *Shared Responsibility in International Law: A Conceptual Framework*, 34 MICH. J. INT'L L. 359 (2013) (analyzing international law principles in relation to responsibility sharing among states).

555. FAIRFOOD INT'L, CAUGHT IN A TRIP: THE STORY OF POVERTY WAGES BEHIND ASIAN SHRIMP SOLD IN EUROPEAN SUPERMARKETS 18–22 (Wendy Schutte et al. eds., 2015), <http://web.archive.org/web/20160309215801/http://www.fairfood.org/wpcontent/uploads/2015/04/Caught-in-a-trap.pdf>.

556. Article 2(1) of the ICCPR provides “[e]ach State Party to the present Covenant undertake to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant . . . .” ICCPR, *supra* note 5, art. 2(1) (emphasis added); See generally MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY (2011).

557. As a matter of international law, only states can be held responsible under the law on state responsibility. However, there is a separate development for considering the role and responsibilities of private companies. Illustrative of this are the U.N. Guiding Principles on Business and Human Rights. See John Ruggie (Special Representative on Business and Human Rights), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect, and Remedy” Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

558. Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to*, 25 LEIDEN J. INT'L L. 857, 868 (2012).

559. “Jurisdiction” signifies the factual nature of the relationship between the state and the individual. The essential issue is whether any conduct of the state that affects the individual in the enjoyment of his/her rights outside its territory brings the person within that state jurisdiction; or whether a particular threshold operationalized through the “effective control”

tion with the eventual victim.<sup>560</sup> In this sense, the harm sustained by the workers in the shrimp industry in Thailand might not be seen as sufficiently proximate<sup>561</sup> to the failures of the importing states to legislate.<sup>562</sup>

Even if the jurisdictional question is somehow settled,<sup>563</sup> obligations might arise for each state separately and distinctively<sup>564</sup> in proportion to its share in the contribution to the harm. Additional complications arise with questions of how to measure this contribution, how to tailor the scope of the obligation of each contributing state, and how to distribute reparation obligations among multiple wrongdoing states.<sup>565</sup>

In sum, positive obligations under human rights law form an intricate area rife with complex sub-questions. Although human rights are universal, we must also attend to the technicalities of the subject. Human rights law typically separates rights from corresponding obligations.<sup>566</sup> These obligations are not universal and they are certainly not unlimited in scope.

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criterion has to be met. See Maarten den Heijer, *Procedural Aspects of Shared Responsibility in the European Court of Human Rights*, 4 J. INT'L DISP. SETTLEMENT 361, 366 (2013).

560. For positive developments on this issue before the ECtHR see Maarten den Heijer, *Shared Responsibility before the European Court of Human Rights*, 60 NETH. INT'L L. REV. 411, 437–38 (2013).

561. On the issue of proximity see Vladislava Stoyanova, *Causation Between State Omission and Harm Within the Framework of Positive Obligations Under the ECHR*, 18(2) HUM. RTS. L. REV. (forthcoming 2018).

562. The issue raised in *Tugar v. Italy* before the European Commission of Human Rights bear close similarity to the above discussed problems. The applicant was struck by a mine of an Italian origin in Iraq. He complained that Italy failed to fulfill its positive obligations under Article 2 of the ECHR (the right to life) since its failed to adopt an effective arms transfer licensing system, thus exposing the applicant to the risk of indiscriminate use of such arms by Iraq. In rejecting the case, the Commission held that “[t]here is no immediate relationship between the mere supply, even if not properly regulated, of weapons and the possible “indiscriminate use” thereof in a third country, the latter’s action constituting the direct and decisive cause of the accident which the applicant suffered.” *Tugar v. It.*, Eur. Ct. H.R. 100 (1995).

563. See, for example, MAASTRICHT PRINCIPLES ON EXTRATERRITORIAL OBLIGATIONS OF STATES IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS (2013), at [http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx\\_drblob\\_pi1%5BdownloadUId%5D=23](http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUId%5D=23) for a discussion where it is argued that jurisdiction is established in situations “over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory.”

564. See Samantha Besson, *Concurrent Responsibilities Under the European Convention on Human Rights: the Concurrence of Human Rights Jurisdictions, Duties and Responsibilities*, in *THE ECHR AND GENERAL INTERNATIONAL LAW* (Anne van Aaken & Iulia Motoc eds., forthcoming); Heijer, *supra* note 560, at 416 (“The allocation of responsibilities occurs on the basis of separate assessments of the conduct of each contributing entity.”); Nollkaemper & Jacobs, *supra* note 554, at 364 (“Current international law is largely based on the notion of independent international responsibility (mainly of states and international organizations.)”).

565. John E. Noyes & Brian D. Smith, *State Responsibility and the Principle of Joint and Several Liability*, 13 YALE J. INT'L L. 225, 242 (1988).

566. Monica Hakimi, *Human Rights Obligations to the Poor*, in *POVERTY AND THE INTERNATIONAL ECONOMIC LEGAL SYSTEM: DUTIES TO THE WORLD’S POOR*, 395 (Krista Nadakavukaren Schefer ed., 2013).

## CONCLUSION

The scarcity of judicial engagement at the international law level with slavery, servitude, and forced labor is striking. The HRC has barely touched the issue. Its regional counterpart, the ECtHR, has only recently started to engage with Article 4 of the ECHR and, in this sense, its case law might be a valuable source to draw from going forward. The Inter-American Court of Human Rights has even more recently joined the conversation as to the definitional limits of these concepts; in comparison with its European counterpart, its contribution has been more forward-looking in that “slavery” was interpreted progressively. Within the context of Article 8 of the ICCPR, however, international human rights law has yet to develop standards as to the material scope of the right not to be held in slavery, servitude, and forced labor. It must more profoundly address the challenging issues that arise in determining the type and the scope of the corresponding positive obligations upon states.

This is perhaps startling because, as mentioned in the Introduction, the “fight” against slavery has been perceived as the core of human rights law. However, as revealed in Part I and II, this “fight” and the underlying discourse must be differentiated from any legal regime.<sup>567</sup> The legal regime and the institutions built with it are with checkered history and many setbacks. Even the present regime, which embodies an individual’s right not to be held in slavery, held in servitude or required to perform forced labor, is underdeveloped. As demonstrated in Part III, the U.N. Special Rapporteur on Contemporary Forms of Slavery has made important contributions in terms of providing an overview of the factual circumstances underlying the problem and betterment of the understanding of the phenomenon. These are essential to engaging the proper and relevant human rights laws. Such considerations, however, rather fall with the ambit of the work of the HRC, whose mandate is more of a legal nature. As Part IV explains, the Committee has not made significant advances in this respect. Even worse, it has muddled the legal regime with the additional concept of human trafficking.

Against the backdrop of this deficiency, Part V has explained how the concepts enshrined in Article 8 of the ICCPR can be interpreted, considering the generally applicable principles of treaty interpretation. Slavery is not limited to traditional forms of slavery; rather its legal definition can be applied to contemporary circumstances when powers attaching to the right of ownership are exercised in relation to a human being. Servitude is a form of personal dependence and domination over another and is regarded as less severe than slavery. Finally, in relation to the concept of forced labor, human rights law has distanced itself from the binary be-

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567. See Philip Alston, *Does the Past Matter? On the Origins of Human Rights*, 126 HARV. L. J. 2043, 2078 (2013) (book review) (Given the polycentric nature of human rights law, there must be an analytical distinction between human rights as an idea, a discourse, a social movement, a practice, a legal regime or “a system that is capable of effectively promoting respect or the rights of individuals and groups.”).

tween voluntary versus involuntary labor; instead, it seems to have adopted a proportionality analysis.

The effectiveness of Article 8 of the ICCPR is as much contingent on deeper engagement with the obligations that it produces. The task of Part V was precisely to tackle this by not only outlining important developments regarding positive human rights obligations but also identifying the challenges. Without pretending for exhaustiveness, five challenges were explained: the scope of the positive human rights obligations is indeterminate due to *inter alia* the operation of the test of reasonableness; states have discretion in which measures to undertake in order to ensure the rights; often contemporary forms of slavery are closely related to deep structural problems like poverty; the application of human rights law to migrants; the transnational nature of the activities that cause harm, and the ensuing difficulties in determining how responsibility can be shared among different states.