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## Contemporary Forms of Slavery and International Law: From the Commodification to the Commercialization of Human Beings

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## Introduction

Slavery has existed since ancient times.<sup>1</sup> From the beginning of the 16th century to the 19th century the large scale enslavement and transportation of African slaves, which was seen as legitimate, made the phenomenon of slavery more evident.<sup>2</sup> It is difficult to identify the specific moment in which slavery and slave trade began to be perceived as legally problematic. It is thus more appropriate to talk about a gradual awareness among states of its cruelty and a gradual abandonment. However, the abolitionist ideal developed in the 18th century with the purpose to forbid the Atlantic slave trade and to free slaves in the colonies of European countries. Even before the affirmation of the international protection of human rights that emerged after the Second World War, the fight against slavery contained the idea of equal dignity of all human beings.<sup>3</sup>

The first international instrument in this field was the Declaration Relative to Universal Abolition of the Slave Trade (the “1815 Declaration”) which was adopted at the end of the Congress of Vienna. This Declaration condemned only the slave trade and it was one of the abolitionist movement’s first achievements.<sup>4</sup> Thereafter, in 1839, the Anti-slavery International was founded and it is the world’s oldest international human rights organization whose contribution in the struggle against slavery has been fundamental.<sup>5</sup> The Treaty of St-Germain-en-Laye of 1919 took another step forward - in fact, it was the first international treaty which prohibited not only slave trade, but also slavery, showing a progressive intention to abolish all forms of slavery.<sup>6</sup>

The League of Nations, founded in 1920, focused its efforts on the elimination of slavery and slavery-related practices, ensuring that their prohibition, until that moment mainly regulated by bilateral treaties, became an issue of international concern.<sup>7</sup> Under its auspices states adopted the 1926 Slavery Convention which contained the first definition of slavery and slave trade and which became the first treaty on slavery to be universally ratified.<sup>8</sup> The League’s work on the elimination of slavery helped develop the idea that the rights of individuals constituted a legitimate part of international law. Until this moment, international law had mostly dealt with the relationships between sovereign nations.

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<sup>1</sup> W.W. Buckland, *The Roman Law of Slavery*, 1908, p.20.

<sup>2</sup> Hugh Thomas, *The Slave Trade: The Story of the Atlantic Slave Trade*, Simon & Schuster, 1997.

<sup>3</sup> Claude E. Welch, Jr., “Defining Contemporary Forms of Slavery: Updating a Venerable NGO”, The John Hopkins University Press, 2009, p.77.

<sup>4</sup> Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery*, 2008, pp. 42-43. The Congress of Vienna condemned the slave trade as “repugnant to the principle of humanity and universal morality”.

<sup>5</sup> Claude E. Welch, Jr., “Defining Contemporary Forms of Slavery: Updating a Venerable NGO”, The John Hopkins University Press, 2009, pp.79-87.

<sup>6</sup> Treaty of Saint-Germain-en-Laye, 10 September 1919. It came into force on 16 July 1920 and it was concluded between the United States, Belgium, the British Empire, France, Italy, Japan and Portugal. It affirmed: “it was internationally recognized that the contracting parties had to endeavour to secure the complete suppression of slavery in all its forms and of the slave trade by land and sea”.

<sup>7</sup> Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery*, 2008, pp. 41-46.

<sup>8</sup> Slavery Convention, 25 September 1926.

However, the Slavery Convention was a result of the dynamics between anti-slavery advocates and colonial States which wanted to deal in essence with the end of legal slavery.<sup>9</sup> This schism is more evident in the draft Article 2 (b) that originally proposed:

“to bring about [...] the disappearance of slavery in every form, notably in case of *domestic slavery and similar condition*”.<sup>10</sup>

Viscount Cecil, as Rapporteur, in charge of ushering a draft towards acceptance by States, in his report to the Assembly of the League of Nations on 1925 draft Convention, considered the notion of domestic slavery and similar condition to: “include all forms of ‘debt slavery’, the enslaving of persons disguised as the adoption of children, and the acquisition of girls by purchase disguised as payment of dowry,...”<sup>11</sup>

The modification of the 1925 draft of the Convention so as to expunge the term “domestic and other slavery” was brought about as a result of comments made by States which sought to ensure that only slavery as defined by Article 1(a) was included in the Convention and that other types of exploitation would be excluded.<sup>12</sup>

After the Second World War, the United Nations (UN) continued working towards the elimination of slavery. In 1948, the General Assembly adopted the Universal Declaration of Human Rights which provided the base for a range of UN instruments in the field of human rights.<sup>13</sup> The Universal Declaration firmly established slavery as a violation of basic human rights. This gave impetus for the adoption, in 1956, of the Supplementary Convention on the Abolition of Slavery, Slave Trade and Institutions and Practices similar to Slavery which built on the 1926 Convention.<sup>14</sup> The Supplementary Convention prohibits those practices that were excluded from the Slavery Convention, namely debt bondage, serfdom, forced marriage and child exploitation.<sup>15</sup>

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<sup>9</sup> Jain Allain, “The Definition of Slavery in International”, Howard Law Journal, 2009, pp.244-251.

<sup>10</sup> League of Nations, Annex: Draft Convention, League of Nations Official Journal (Special Supplement 33) Records of the Sixth Assembly: Text of Debates, 26 September 1925, p.439.

<sup>11</sup> Viscount Cecil noted in 1925 that such similar conditions “approach very close to and are, in fact a form of slavery, but are not usually included in the simple term slavery. With respect to all those, we [re: the Drafting Committee] ask for their abolition, we ask all the nations to agree to their abolition, which will be carried out, as all reform must necessarily be carried out, as progressively as may be possible, and as soon as possible”. See League of Nations, Question of Slavery: Report of the Sixth Committee; Resolution, League of Nations Official Journal (Special Supplement 33) Records of the Sixth Assembly: Text of Debates, Nineteenth Plenary Meeting, 26 September 1925, p. 156.

<sup>12</sup> By considering the will of Negotiating States, Viscount Cecil reported to the Assembly of the League of Nations in 1926 that the “words *notably in the case of domestic slavery and similar conditions*’ [were] being now omitted”. However, seeking to maintain a wide interpretation of slavery definition, he affirmed: “This modification was made because it was believed that such conditions came within the definition of slavery contained in the first article and that no further prohibition of them in express terms was necessary”. See League of Nations, Slavery Convention: Report presented to the Assembly by the Sixth Committee, LofN Doc. A.104. 1926. VI, as found in League of Nations, Publications of the League of Nations, VI.B. Slavery.1926, VI. B. 5, 24 September 1926, p. 1. See also Slavery Convention, 25 September 1926. Article 2(b): “To bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms”.

<sup>13</sup> The Universal Declaration of Human Rights, GA Res. 217/A, 10 December 1948.

<sup>14</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery ECOSOC Res. 608(XXI), 30 April 1956.

<sup>15</sup> The issue of denomination of these practices was not casual. In fact Contracting States nominated these practices not as slavery but as institutions similar to slavery, showing the will to distinguish among practices covered by Article 1 of Slavery Convention, and those disciplined by Supplementary Convention. See Jean Allain, “On the Curious Disappearance of Human Servitude from General International Law”, Journal of the History of International Law, 2009. The author demonstrates as

Slavery, over time, has undergone many changes, and many multilateral treaties have been adopted to implement its regime. Nevertheless, today, international law still faces many challenges, including those related to the elaboration of a new definition of slavery, the relationship between slavery and other exploitative practices, and the implementation of a multi-dimensional strategy that can contribute to an effective abolishment of modern slavery.

The overall purpose of the thesis is to make a contribution to the understanding of how international legal and political strategies address the phenomenon of slavery. The thesis begins by examining the definition of slavery and practices similar to slavery through an analysis of relevant conventions and soft law instruments. The definition of these practices occupies a central role in the thesis because its entire structure revolves around it and the relationship between slavery and institutions similar to slavery. The thesis then considers the legal regime of slavery under public international law in an attempt to provide a comprehensive account of the legal status of slavery and its evolution over time. To this end, it considers a range of cases of international courts and tribunals. The third chapter focuses on the perpetrators of slavery and demonstrates that the main contemporary culprits are private and economic entities. Therefore, the relationship between multi-national enterprises and slavery is considered to understand how the international community could eradicate this practice in the economic context. The final chapter considers the complexity of slavery and explores what strategies can be adopted to address it. It stresses the importance of taking a multidimensional approach and examines some recent initiatives taken by the international community.

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slavery and servitude expressions are disappearance during the Travaux Préparatoires of Supplementary Convention to be replaced by the term practices/ institutions similar to slavery.



## 1. DEFINITION

### Introduction

This chapter deals with the definitions of slavery and of practices and institutions similar to slavery. These definitions are examined through a systematic interpretation of the most important conventions and of other international instruments such as reports and case law. First, this chapter analyses slavery and similar institutions as dealt with in the “Slavery Convention” and the “Supplementary Convention” as, due to historical reasons, these treaties have a complementary character. The chapter then explores other forms of slavery and forced labor and concludes with an analysis of trafficking in human beings, whose relationship with slavery is controversial. The purpose of the chapter is to understand whether, and to what extent, the definitions provided for by these conventions are still relevant or need to be updated, and to explore the relationship between slavery and institutions similar to slavery. Understanding the definitions of each practices and their relationship with slavery allows for an investigation what contemporary exploitation practices can be considered as modern forms of slavery and, consequently, if they are covered by international anti-slavery regime.

#### 1.1. The definition of slavery in international law and the central role of the “1926 Convention”

Ninety-three years have passed since the adoption of the “1926 Slavery Convention”, and nevertheless its definition of slavery is still relevant and central its normative understanding today. Notwithstanding the past and current debate between scholars, and the various proposals advanced on new concepts of slavery aiming at encompassing other forms of exploitation resembling slavery, any analysis of contemporary forms of slavery which seeks to be complete must begin with consideration of this Convention. The definition of slavery has always been a controversial issue, mainly for two reasons: first, there are conflicting views about what practices should be considered slavery; and second, it is not clear what measures are appropriate to eliminate slavery and to provide remedies. In international law, as well as in other branches of law, a clear definition of a juridical concept is often key for a better application of the relevant law. A definition which is too broad may in fact turn out to be meaningless. The first definition of slavery in an international agreement is contained in the Slave Trade and Slavery Convention of 1926 (“Slavery Convention”), adopted under the mandate of the League of Nations. Article 1 defined slavery as

“the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”.<sup>16</sup>

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<sup>16</sup>The Convention to Suppress the Slave Trade and Slavery, 25 September 1926.

The definition of slavery, as provided by the Slavery Convention, was the product of a wide debate between Viscount Cecil who, as Rapporteur, would introduce a draft of the Convention and the Great Powers. Viscount Cecil interpreted Article 1 of Slavery Convention as including every form of slavery that manifests powers attached to the right of ownership such as debt bondage while representatives of the Great Powers preferred a narrower definition which limited its scope to traditional form of slavery (i.e. chattel slavery).<sup>17</sup>

In 1949, the United Nations Economic and Social Council (ECOSOC) established an Ad Hoc Committee of Experts on Slavery to examine the issue of definition in more detail. The Ad Hoc Committee affirmed that there was “not sufficient reason for discarding or amending the definition contained in Article 1 of the Slavery Convention” and that “this definition should continue to be accepted as an accurate and adequate definition of term”.<sup>18</sup> However, the Committee admitted that the definition in the Slavery Convention did not cover all practices related to slavery and recommended therefore the adoption of a Supplementary Convention.<sup>19</sup> The Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956, expanded, but did not replace, the definition of slavery as contained in the 1926 Convention.<sup>20</sup> The only difference was the introduction of a definition of “slave” which was not contained in Article 1 of Slavery Convention. During the negotiations that led to the adoption of the 1998 Statute of the International Criminal Court, the Contracting States decided to leave the definition of slavery as contained in 1926 Convention unchanged.<sup>21</sup> However, they introduced a recognition that the powers attaching to the right of ownership can be exercised also in the context of the trafficking of persons.<sup>22</sup>

Several other instrument, adopted under the auspices of the United Nations also address the issue of abolishing slavery. These include the International Bill of Human Rights which contributed to giving legal support to Slavery Convention. The International Bill of Human Rights consists<sup>23</sup> of the Universal

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<sup>17</sup> Report presented by the Sixth Comm. On the Slavery Convention, League of Nations, Doc.A.104.1926.VI., 24 September 1926.

<sup>18</sup> Report of the first session of the Ad Hoc Committee on Slavery to the Economic and Social Council, U.N. Doc. E/1660, E/AC.33/9 ,27 March 1950.

<sup>19</sup> Ibid.

<sup>20</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, ECOSOC Res.608(XXI), 30 April 1956. Article 7 sets that: “Slavery means, as defined in the Slavery Convention of 1926, the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, and “slave” means a person in such condition or status”.

<sup>21</sup> Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998. Article 7 states that: "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”.

<sup>22</sup> Ibid.

<sup>23</sup> In addition to this, the International Bill of Human Right contains also the Optional Protocol to the International Covenant on Civil and Political Rights; and the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.

Declaration of Human Rights,<sup>24</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>25</sup> and the International Covenant on Civil and Political Rights.<sup>26</sup> Notwithstanding the fact that these instruments inherently aim at prohibiting slavery, they do not provide any definition of slavery or servitude per se. This means that in the application of these provisions the international community would resort to the definition of the practice contained in other international instruments.<sup>27</sup> As for slavery, this means resorting to the definition given by Article 1 of the 1926 Convention.

This confirms the centrality and continued importance of the Slavery Convention in dealing with the issue of slavery. It appears that the legal definition of slavery has not essentially been altered since 1926 despite the numerous international agreements on the issue that have been adopted since.<sup>28</sup> The subsequent treaties thus confirm that the 1926 Slavery Convention is an authoritative source on what is slavery in international law.<sup>29</sup> The centrality of Slavery Convention was also confirmed by the Trial Chamber of the International Criminal Tribunal for the former (ICTY) in the *Kunarac and others* case in which the Court considered Article 1 of the Slavery Convention.<sup>30</sup> Others international criminal courts or international human rights bodies use the Slavery Convention as a starting point for their considerations of slavery.<sup>31</sup> The same dynamic is present in reports of the Special Rapporteur on Contemporary Forms of Slavery and documents of the Council of Europe that deal with modern forms of slavery.<sup>32</sup>

On the other hand, many scholars argue that it is necessary to develop a new definition of slavery to encompass new forms of slavery because the Slavery Convention refers only to chattel slavery as the traditional manifestation of slavery.<sup>33</sup> According to Kevin Bales, modern forms of slavery do not

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<sup>24</sup> The Universal Declaration of Human Rights, GA Res. 217 A, 10 December 1948. Article 4 states: “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms”.

<sup>25</sup> International Covenant on Economic, Social and Cultural Rights, GA Res.2200A (XXI), 16 December 1966.

<sup>26</sup> International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 16 December 1966. Article 8: (1) ” No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited”. (2) ” No one shall be held in servitude”. (3)(a) “No one shall be required to perform forced or compulsory labor [...]”.

<sup>27</sup> Human Rights Comm., Concluding Observations on the Initial Rep. of Haiti, 9 14, U.N. Doc. CCPR/C/HTI/CO/1, 21 November 2014. In these Concluding observations Human Rights Committee analyzed slavery in Haiti and to define slavery used Article 1 of Slavery Convention.

<sup>28</sup> It is important to emphasize that generally many League Nations’ treaties are no longer applicable, because some are replaced by more recent agreements or some of their provisions became dead-letter law and no more respected because obsolete.

<sup>29</sup> Vienna Convention on the Law of Treaties, 23 May 1969. Art.31 states:” A treaty shall be interpreted [...] (3)(a), “Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”, (c) “Any relevant rules of international law applicable in the relations between the parties”.

<sup>30</sup> *Prosecutor v. Kunarac, Kovac & Vukovic*, Judgment IT-96-23 & 23/1, International Criminal Tribunal for the former Yugoslavia, 12 June 2002. “Slavery Convention acquired the status of customary international law, and that is confirmed by the universal acceptance of that convention and the central role that the definition of slavery in particular has come to play in subsequent international law developments in this field”.

<sup>31</sup> *Siliadin v France*, No. 73316/01, European Court of Human Rights, 26 October 2005; *Rantsev v. Cyprus and Russia*, No. 25965/04, ECHR, 7 September 2010; *Mani Koraou v. Republic of Niger*, No. ECW/CCJ/JUD/06/08, Economic Community of West African States Court of Justice, 27 October 2008.

<sup>32</sup> Special Rapporteur on Contemporary forms of Slavery, Report A/HRC/39/52, 10 July 2018. In this report Special Rapporteur stated: “The Slavery Convention (1926) and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956) define slavery and institutions and practices similar to slavery”. Parliamentary Assembly of Council of Europe, Recommendation 1663, 22 June 2004.

<sup>33</sup> Kevin Bales, “The New Slavery. In Disposable People: New Slavery in the Global Economy.” University of California Press, 2012. See also Miers Suzanne, “Contemporary Forms of Slavery.” Canadian Journal of African Studies, 2000.

manifest powers attached to the right of ownership but present new characteristics. The author affirms a distinction between old slavery as regulated by the Slavery Convention and new slavery. Bales provides a definition of new slavery as containing three elements: control by another person, the appropriation of labour power and the use or threat of violence.<sup>34</sup> Quirk disputes Bales theory stating that a formal distinction between old and new slavery cannot be sustained because modern slavery presents some of the features of old slavery, but agrees with him on the need of a new definition of slavery.<sup>35</sup> In its overview of contemporary slavery, the Joseph Rowntree Foundation has provided its own definition of modern slavery as “severe economic exploitation; the lack of human rights framework; and control of one person over another by the prospect of reality of violence”.<sup>36</sup> Therefore, despite different opinions and proposals on how the definition of slavery should be formulated, it is safe to conclude that finding a new definition of slavery is a common goal of many scholars.

## 1.2. The 1926 Slavery Convention and the League of Nations Era

In 1924, the Council of the League of Nations set up the Temporary Slavery Commission (TSC) which was composed of independent experts. The Commission proposed the adoption of an international convention with the purpose of suppressing slavery in all its forms. During the discussion between the members of the League of Nations, it became clear that some members the League of Nations wanted to abolish slavery only while the TSC hoped to outlaw all kinds of exploitation. The reasons for this contrast must be found in the historical context. Some of the League’s members were major colonial powers which retained various forms of exploitative labour in their colonies.

In fact, during the debate on the 1925 draft convention, the negotiating states limited their obligations “to bring progressively and as soon as possible the complete abolition of slavery in all its forms”.<sup>37</sup> This compromise was formulated to make the Slavery Convention acceptable to the States. It immediately appeared that “the powers attaching to the right of ownership” were required for slavery to exist.<sup>38</sup> These would represent the distinction between slavery and other forms of exploitation not included in the Convention.

Notwithstanding the initial intentions of the Temporary Slavery Commission, which wanted to abolish not only slavery but also domestic servitude and similar conditions, the will of States prevailed. It is evident that the Slavery Convention is a result of a debate between colonial powers which wanted a

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<sup>34</sup> Kevin Bales and Peter T. Robbins, ““No One Shall Be Held in Slavery or Servitude”: A Critical analysis of International Slavery Agreements and Concepts of Slavery”, *Human Rights Review*, 2001, pp. 32-34.

<sup>35</sup> Joel Quirk, “Anti-slavery Project: linking Historical to Contemporary”, John Hopkins University Press, 2009, pp.578-580.

<sup>36</sup> G. Craig et al., “Contemporary Slavery in the UK: Overview and Key Issues”, Joseph Rowntree Foundation, 2007, p. 57.

<sup>37</sup> Slavery Convention, 25 September 1926. Article 2(b):” To bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms”.

<sup>38</sup> Slavery Convention, 25 September 1926. Article 1: “Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”.

narrow definition of slavery and who sought to abolish also other forms of exploitation. Eventually, the Slavery Convention was adopted on 25 September of 1926 and entered into force on 9 March of 1927.

### 1.3. The relationship between ownership and slavery

When dealing with the definition of slavery it is important to start from the concept of ownership, because the whole definition revolves around it. I will first consider ownership as structured in private law and then as it applies to slavery to understand the close relationship between these institutes and what ownership characteristics are present in slavery.

Ownership is a social and juridical concept. The owner has the rights to enjoy and dispose of the thing he or she possesses, provided that he or she abstains from any use prohibited by legislation. Therefore, ownership does not convey absolute rights. The owner also has the right to possess and use the thing without any interference by any other person without the owner's permission. The law provides a legal framework to protect the owner from these interferences and dictates a legal duty to not interfere with the owner's control on the thing. The law guarantees the owner the right to sue, known as claim-right, and other formal mechanisms to enforce this duty. Honorè showed how the characteristics of ownership consist in a "bundle of rights" which mainly consists in rights but also in obligations such as the right to possess, the rights on the income of the thing, the right of absence of the term.<sup>39</sup> Possession is the basic characteristic of ownership as highlighted by Honorè.<sup>40</sup>

The connection between slavery and ownership has ancient roots. The consideration of a human being as an object to possess was already present in Roman Law where a person could have the personal property of another person treated as a "chattel".<sup>41</sup> The slave, as any other chattel, could be object to all ordinary transactions. Today, the concept of ownership is still an essential and distinctive feature of slavery. The ownership related to slavery manifests the same powers which it has in a civil relationship. Historically, the owners of a slaves had the right to possess and use them, to compel and gain from the slave's labor, to buy and to sell them. Today legal slavery is forbidden, which means that no one can have a legal right of ownership over another person. The legal prohibition of slavery does not exclude "de facto slavery" which means that it is still possible for a person to exercise powers similar to those of ownership over another person.

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<sup>39</sup> A.M. Honorè, "Ownership", Oxford Essays in Jurisprudence, 1961 (A.G. Guest ed.) p.105.

<sup>40</sup> About this issue Honorè said "the right to possess is the foundation on which the whole superstructure of ownership rests".

<sup>41</sup> W.W. Buckland, The roman law of slavery: The condition of the slave in private law Augustus to Justinian, (1908).

#### 1.4. Article 1 of the Slavery Convention

One of the most frequent questions is whether the Slavery Convention prohibits both legal and de facto slavery. Article 1 states that “Slavery is the status or condition of a person over whom any or all of the powers attached to the right of ownership are exercised”. From a systematic interpretation of the concepts of “status or condition of a person...” and the “powers attached to the rights of ownership” Article 1 covers both “de iure” and “de facto” slavery. The absence of these sentences would involve the prohibition of only “de iure” slavery.

The Oxford English Dictionary defines status as “the legal standing or position of a person as determined by his membership of some class of persons legally enjoying certain rights or subject to certain limitations e.g. “of liberty or servitude, marriage or celibacy”.<sup>42</sup> The term status refers to a legal concept. Therefore, Article 1 prohibits the legal status of slave, thus abolishing legal slavery.

The notion of status is akin to the notion of “condition” by the conjunction “or”: this means that both concepts satisfy the requirements of Article 1. According to the Oxford English Dictionary “condition” in its common meaning refers to a mode of being, state, position. The example supplied is a “characteristic, attribute of men or things”.<sup>43</sup> Therefore, the use of the term “condition” involves that Article 1 covers not only the eradication of slavery from written legislation but also from the customs of the country.

This interpretation introduces to the distinction between “slavery de iure” which consists in the “status of slave” recognized by the law and “slavery de facto” which means “condition of slave” thus slavery in fact without any legal recognition. Therefore slavery “de facto” relates to a person who exercises over another person not the right of ownership itself but the attributes of the rights of ownership in circumstances where control tantamount to possession is present.<sup>44</sup> That type of control constitutes a prerequisite for any de facto exercise of the powers attaching to ownership.

It is unquestionable that the Slavery Convention covers both “de facto” and “de iure” slavery. The other element that demonstrates the previous assumption is the expression: “powers attached the rights of ownership”.<sup>45</sup> If the drafters of the Convention would have wanted to fight only “de iure” slavery they would have used the expression “rights of ownership” instead of “powers attached to etc.” Therefore, it

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<sup>42</sup> Oxford English dictionary 573 (2d ed.1989).

<sup>43</sup> Oxford English dictionary 684 (2d ed. 1989).

<sup>44</sup> Jean Allain, “The Definition of Slavery in international law”, 52 Howard L.J.239, 2009, pp.261-265. To explain this concept, Allain takes as an example two drugs dealers that have a dispute over a kilogram of Heroin. Neither can sue the other to revendicate his right but either one or the other can exercise the power attaching to the right of ownership, which is possession.

<sup>45</sup> Slavery Convention, 25 September 1926. Art. 11 “The present Convention [...] of which the French and English texts are both authentic [...]” The French version used the term “les attribues” as the translation of “powers attached to [...]”. The term can also be translated as “attributes” of the right of ownership.

is safe to conclude that Article 1 prohibits not only the exercise of the right of ownership but also the exercise of the attributes of the right of ownership over another person.<sup>46</sup>

#### 1.5. Powers attached to the right of ownership as essential elements of the concept of modern slavery

In a 1953 report on slavery the UN Secretary General noted that in the preparatory works of the Slavery Convention there was no explication of what the powers attached to the right of ownership consist of.<sup>47</sup> Starting from Roman law and considering more recent implications the report examined what the powers attached to the right of ownership are:

1. the individual of servile status may be made the object of a purchase;
2. 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 that which might be expressly provided by law;
3. the products of labor of the individual of servile status become the property of the master without any compensation commensurate to the value of the labor;
4. the ownership of the individual of servile status can be transferred to another person;
5. the servile status is permanent, that is to say, it cannot be terminated by the will of the individual subject to it;
6. the servile status is transmitted *ipso facto* to descendants of the individual having such status.<sup>48</sup>

It is evident that these powers are the transposition of the features of ownership in civil law as applied to slavery. The question that now arises is whether some of these powers are enough to indicate that slavery exists. The answer may be found in the extent and nature of the powers exercised which depend on the circumstances and on the degree of control exercised on the person. The exercise of some of these powers is indeed enough to fit slavery only if they manifest to the highest degree of control on the slave that is “de facto” possible merely because the presumed master has the possession of the slave.<sup>49</sup>

A fundamental analysis of these powers is provided by the ICTY in the Kunarac et Others case (2002).<sup>50</sup> The factual circumstances of the case involve women and girls from the Foca region (Bosnia and Herzegovina) who were systematically detained in detention centers where they were raped, and “rented” to soldiers over a period of several months. The tribunal considered the condition of these

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<sup>46</sup> The Special Rapporteur on Contemporary Forms of Slavery in report, A/HRC/36/43 of 2017 affirmed that this “definition relates not only to the de jure status of slavery, but also the de facto condition of slavery”.

<sup>47</sup> Secretary-General, U.N. Doc. E/2357, 27 January 1953.

<sup>48</sup> *Prosecutor v. Kunarac, Kovac & Vukovic*, Case n° IT-96-23 & IT-96-23/1-A, International Criminal Tribunal for the former Yugoslavia, 12 June 2002. The court recalled this list.

<sup>49</sup> Jean Allain, “The Definition of Slavery in International Law”, 52 Howard L.J.239, 2009, pp. 259-260.

<sup>50</sup> *Prosecutor v. Kunarac, Kovac & Vukovic*, Case n° IT-96-23 & IT-96-23/1-A, International Criminal Tribunal for the former Yugoslavia, 12 June 2002.

women as enslavement pursuant to Article 5 of its statute that qualifies it as crime against humanity. The Tribunal enumerated a series of indicators of enslavement to explain the powers attached the right of ownership which can be divided in these points:

1. The restriction or control of an individual's autonomy, freedom of choice or freedom of movement;
2. 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.
3. Exploitation; the exaction of forced or compulsory labor or service, often without remuneration and the accruing of some gain to the perpetrator and often, though not necessary, involving physical hardship; sex; prostitution and human trafficking.<sup>51</sup>

Comparing the findings of the 1953 Report of the UN Secretary-General and the ICTY's judgement in *Kunarac* one may observe an evolution in the conception of slavery. In fact, if for some aspects these analyses are complementary, for others they have different contours. The Secretary General's report mainly focused on a transposition of features of ownership in slavery such as the possibility of purchase or transfer thus considering more traditional forms of slavery (chattel slavery).

The ICTY judgement, on the other hand, provided a more actual and dynamic clarification of these powers underling the importance of elements of control as well as the restriction on freedom of movement, choice and on individual's autonomy.<sup>52</sup> These latter aspects were also recognized by the Special Rapporteur on Contemporary forms of slavery as indicators of modern slavery.<sup>53</sup> The ICTY thus demonstrated that modern forms of slavery can be covered by Article 1 of the Slavery Convention, through an interpretation of that definition and in particular of the "powers attached to the rights of ownership" as forms of control on the victims. The same approach is followed by Special Rapporteur on Contemporary forms of slavery, the Council of Europe and international courts.<sup>54</sup>

In the *Kunarac and others* case, the ICTY Appeals Chamber underlined that the common consequence of the exercise of powers attached to the rights of ownership is the "destruction of the juridical personality".<sup>55</sup> Juridical personality is also protected by Article 16 of the ICCPR which requires States

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<sup>51</sup> The central role of these factors is underlined by their recall carried out by Australian High Court in *R v Tang* case. In any case still today, to understand whether the powers attached to the right of ownership are exercised any interpret considers the explanation of these powers made by the UN Secretary General in his memorandum of 1953 and by the ICTY in the *Kunarac* case.

<sup>52</sup> In fact, the Trial Chamber held that "the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as chattel slavery, has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership".

<sup>53</sup> Special Rapporteur on Contemporary Forms of Slavery, Report A/HRC/24/43, 1 July 2013.

<sup>54</sup> Special Rapporteur on Contemporary forms of Slavery, Report A/HRC/21/41, 10 July 2012. Special Rapporteur when considers slavery definition focuses on elements of control and restrictions of freedom of movement and choice of victims. Parliamentary Assembly of Council of Europe, Recommendation 1663, 2004. *Hadijatou Mani Koraou v The Republic of Niger*, Judgment No. ECW/CCJ/JUD/06/08, ECOWAS Community Court of Justice, 27 October 2008.

<sup>55</sup> *Prosecutor v. Kunarac*, Judgment IT-96-23/1-A, ICTY, 12 June 2002.



to recognize everyone as a person before the law.<sup>56</sup> In its General Comment No.28 on Equality of Rights between Men and Women, the Human Rights Committee affirmed that Article 16 “implies that women may not be treated as objects to be given together with the property of the deceased husband to his family”.<sup>57</sup> The destruction of juridical personality is considered as a typical consequence of traditional slavery because victims were regarded by law as objects and consequently they were deprived of their juridical personality.<sup>58</sup> In reality modern forms of slavery, also if today they do not imply that victims are considered as objects held by owner, violate human rights to such extent that this practically leads to a *de facto* destruction of their personality. Therefore, it can be more appropriate to conclude that the destruction of juridical personality became a consequence also of modern slavery.

#### 1.6. Institutions and practices similar to slavery

In 1948, the UN General Assembly adopted the Universal Declaration of Human Rights, which banned not only slavery but also servitude - a term omitted by the 1926 Slavery Convention- demonstrating the progressive extension of the fight against every form of exploitation. In its report of 1951, the “Ad Hoc Committee on Slavery” of ECOSOC also recognized that there were many forms of servitude which were as repugnant as slavery and had to be explicitly prohibited since they were not included by Article 1 of the Slavery Convention.<sup>59</sup> The Committee recommended therefore the adoption of a supplementary convention to cover all practices similar to slavery.<sup>60</sup>

##### 1.6.1. The scope of the “Supplementary Convention” and its modern implications

Following the recommendations of the ECOSOC Ad Hoc Committee, the “Supplementary Convention on the Abolition of Slavery, Slave Trade and Institutions and Practice similar to Slavery of 1956” (the Supplementary Convention) was adopted and it “went further and covered more ground than the 1926 Convention”.<sup>61</sup> It obliged Contracting States to abolish progressively and as soon as possible not only slavery and slave trade already governed by the Slavery Convention but also the institutions and

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<sup>56</sup> International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 16 December 1966. Article 16: “Everyone shall have the right to recognition everywhere as a person before the law”.

<sup>57</sup> Human Rights Committee, General Comment 28: Equality of Rights between Men and Women (Article 3), ¶19, U.N. Doc. CCPR/C/21/REV.1/ADD., 10 March 2000.

<sup>58</sup> Joel Forbis Quirk, “Anti-Slavery Project: Linking the Historical to Contemporary”, Human Rights Quarterly, 2006.p580.

<sup>59</sup> U.N. Econ. & Soc. Council, Report of the first session of the ad Hoc Committee on Slavery to the Economic and Social Council, 27, U.N Doc. E/1660, E/AC.33/9. In this report the committee analyzed the information received from governments and non-governmental organizations.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

practices similar to slavery identified collectively as “servile status”.<sup>62</sup> More than 60 years later, the institutions and practices similar to slavery as contained in Article 1 of the Convention have not been eradicated. Rather, in the contemporary these practices have acquired features different from the past and an effective legal response often requires a systematic interpretation of different international instruments. However the “Supplementary Convention” remains highly relevant as it contains the basic definition of every practice.

### 1.6.2. Debt Bondage

Article 1(a) of the Supplementary Convention addresses the issues of debt bondage which is defined as:

“status or condition arising from a pledge by a debtor of his personal services or those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined”.

People enter the status or condition of debt bondage when their labor, or the labor of a third party under their control, is demanded as repayment of a loan or of money given in advance. Employers and creditors may adjust interest rates, make further deductions arbitrarily as penalties for perceived poor performance, and/or charge high prices for basic goods or working tools resulting in an increase of the debt.<sup>63</sup> Consequently, bonded laborers often are not able to repay the loan or advance. Women and children often become trapped in situations of bonded labor because of debt contracted by an authoritative member of the family or as a result of the family’s status. Children can also enter into bonded labor by inheriting a debt from a parent or other family member. This practice is known as “indirect bondage”.<sup>64</sup>

Debt bondage can also take the form of forced labor. The ILO Forced Labor Convention of 1930 did not originally cover debt bondage.<sup>65</sup> However, the concept of debt bondage evolved over the years and the ILO included it in the context of the Convention No. 29.<sup>66</sup> The ILO became more aware of the influence of employment policies on debt bondage as well as of the provisions for the protection workers

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<sup>62</sup> Whilst the convention envisages a gradual abolition of these practices similar to slavery and not an immediate one, it is important to underline the progress obtained with the “Supplementary Convention”, which shows the States’ awareness of the existence of practices similar to slavery and their intention to abolish them.

<sup>63</sup> Bonded laborers are often subjected to physical and psychological abuse, to abusive conditions of work, such as long working hours, to dangerous and unhealthy work, and to severe restrictions on their freedom of movement, including in relation to changing employment.

<sup>64</sup> Special Rapporteur on Contemporary forms of Slavery, Report A/HRC/33/46, 4 July 2016. In this report Special Rapporteur analyzed every forms of debt bondage.

<sup>65</sup> ILO Convention concerning Forced or Compulsory Labor (No. 29), 14th ILC session, 28 June 1930.

<sup>66</sup> ILO General Survey concerning the Forced Labor Convention, 1930 (No.29), and the Abolition of Forced Labor Convention, 1957 (No. 105), ILC 52nd Session, 1968.

from abuses.<sup>67</sup> The ILO Convention concerning Basic Aims and Standards of Social Policy, 1962 (No. 117) is particularly concerned with reducing forms of wage payment that foster indebtedness and requires State parties to take “all practicable measures” to prevent debt bondage.<sup>68</sup> In addition, the ILO has encouraged national authorities to set minimum wages.<sup>69</sup>

The definition of debt bondage in the Supplementary Convention is sufficiently broad to cover the situation of workers trapped in debt bondage in systemic, archaic, feudal systems of slave-labor exploitation, as well as that of migrant workers from developing countries who leave their countries accruing debt to cover the costs associated with recruitment. In fact, migrants seeking to enter a new country without authorization are particularly vulnerable to exploitation.<sup>70</sup> It is increasingly common for a person, which received the assistance of a smuggler, trafficker or similar third party in illegally entering a new country, to be forced into an exploitative relationship that may include debt bondage, prostitution or other forms of slavery or slavery-like practices.<sup>71</sup> It has been observed that debt bondage is an area in which the relationship between trafficking and forced labor practices is particularly strong.<sup>72</sup>

The UN Special Rapporteur on Contemporary Forms of Slavery has also identified a new form of debt bondage, called “neo-bondage” which is characterized by short duration of the work (temporary or seasonal).<sup>73</sup> This stands in contrast to traditional forms of debt bondage such as patronage, which have a long duration and, in some cases, perpetuate the cycle of the debt from one generation to the next.

### 1.6.3. Serfdom

In its final report, serfdom was regarded by the Temporary Slavery Commission as the equivalent of “predial slavery” which is the use of slaves on farms or plantations for agricultural production.<sup>74</sup> In the report of Special Rapporteur on Contemporary forms of Slavery the practice of “serfdom” emerged to be intended as applying to a range of practices reported in Latin American countries and was more generally referred to as “peonage”.<sup>75</sup> Those practices had in common the granting of a piece of land to

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<sup>67</sup> Daniel Roger Maul, “The International Labor Organization and The struggle Against Forced Labor From 1919 to the present”, *Labor History* Vol. 48, 15 October 2007, pp. 477–500.

<sup>68</sup> This shows the awareness that extremely low wages are a cause of forced labor and debt bondage. ILO Convention concerning Basic Aims and Standards of Social Policy (No.117), 46th ILC session, 22 Jun 1962.

<sup>69</sup> ILO Convention concerning Minimum Wage Fixing, with Special Reference to Developing Countries (No. 131), 54th ILC session, 22 June 1970. It entered into force on 29 April 1972. Convention No. 131 has been ratified by only 43 States.

<sup>70</sup> Special Rapporteur on Contemporary Forms of Slavery, Report A/HRC/33/46, 4 June 2016.

<sup>71</sup> Special Rapporteur on Trafficking in Persons, Report A/HRC/38/45, 14 May 2018.

<sup>72</sup> *Ibid.*

<sup>73</sup> Special Rapporteur on Contemporary Forms of Slavery, Report A/HRC/33/46, 18 June 2010. “Neo-bondage” is considered to involve the seasonal movement of migrant workers within and between countries. Such workers are recruited by intermediaries who usually demand the payment of an advance and the settlement of wages at the end of the contract in exchange for their intermediation.

<sup>74</sup> Temporary Slavery Commission Report to the Council, LN Doc. A.19.1925. VI., 1925. Para. 97: “Slaves involved in growing and harvesting sugar cane in the West Indies in the eighteenth century were classified as “praedial” or predial slaves”.

<sup>75</sup> Special Rapporteur on Contemporary forms of Slavery, Report A/HRC/24/43, 1 July 2013.

a “peon or serf” in return for specific services such as giving the land owner a portion of the harvest; working on the land of the owner; or doing domestic works. In this case, the character of servitude depends not on labor in return for access to the land, but rather on the inability of the serf to change this status. This last element is also emphasized by the Supplementary Convention which defines serfdom in Article 1(b) as:

“the condition or status of a tenant who is by law, custom or agreement bound to live and labor on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status”.

The UN Working Group on Contemporary Form of Slavery has noted that the manifestations of exploitation included in serfdom are different and in some cases could easily degenerate into slavery.<sup>76</sup> Serfdom has two elements common to slavery: first, there is a lack of choice on the part of the serf who is unable to change his/her status; second, the hereditary character of the serf’s status may affect entire families on a permanent basis. Today, serfdom is frequently practiced and sometimes linked to and reinforced by debt bondage.<sup>77</sup> When this occurs, those affected are obliged to continue working for their landowner on account of debts they supposedly owe as well as on account of their tenant status. A typical example of serfdom occurs in India where members of the poorest caste are forced to work, under inhuman conditions, the land of the richest people. Their salary is often so low that the servants are led to ask for more money from employers, getting into debt for life.<sup>78</sup>

#### 1.6.4. Forced marriage

The Supplementary Convention identifies three types of institutions or practices similar to slavery to which women can be subjected in the context of marriage.<sup>79</sup> These practices are denominated “servile marriage” and are:

1. “A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group
2. The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
3. A woman on the death of her husband is liable to be inherited by another person”.<sup>80</sup>

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<sup>76</sup> Working Group on Contemporary forms of slavery, Report E/CN.4/Sub.2/2000/23, 21 July 2000.

<sup>77</sup> David Weissbrodt and Anti-Slavery International, HR/PUB/02/4, *Abolishing Slavery and its Contemporary Forms*, United Nations, 2002.

<sup>78</sup> Special Rapporteur on Contemporary Forms of Slavery, Report A/HRC/24/43, 1 July 2013.

<sup>79</sup> These practices were called “bride price” by the ad Hoc Committee. The committee noted that in many parts of world the bride is regarded as property of her father and as part of heritable property of her husband.

<sup>80</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, ECOSOC Res. 608(XXI), 30 April 1956. Article 1.

In the first category, abuse is not manifested in the payment per se, but rather in the forced or non-consensual marriage which fails to reflect the will of the woman. In fact, from the beginning of the (forced) marriage, a spouse is treated not as an individual, but as a commodity given that her consent to the marriage is not required.<sup>81</sup> This aspect is even more evident in the latter two categories where the wife is considered as an “object” which can be transferred or inherited.<sup>82</sup> Servile marriage affects both adults and children.<sup>83</sup> Under international human rights law, a child cannot provide informed consent to a marriage.<sup>84</sup> The marriage is therefore considered forced and falls under the slavery-like practices defined in this Convention.<sup>85</sup> Therefore, the Supplementary Convention requires States “to prescribe appropriate, suitable minimum ages of marriage”.<sup>86</sup> Other international instruments such as the ICCPR<sup>87</sup>, also require that a minimum age for marriage be established, with 18 years being the recommended age.<sup>88</sup> Similarly, in 2005, the Parliamentary Assembly of the Council of Europe adopted resolution 1468 on forced marriage and child marriage. It defined the forced marriage as “the union of two persons at least one of whom has not given their full consent to the marriage” and child marriage as “the union of two persons at least one of whom is under 18 years of age”.<sup>89</sup>

Another common phenomenon is the sale of wives. The sale of wives often implies the involvement of commercial agents in organizing marriages.<sup>90</sup> In a report on servile marriage, the Special Rapporteur on Contemporary Forms of Slavery affirmed that nowadays the sale of wives can manifest itself in the form of mail-order marriage and paper marriages.<sup>91</sup> The term “mail-order marriage” refers to the practice of advertising women for marriage outside their country on a variety of media such as magazines, videos

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<sup>81</sup> Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, GA Res. 1763 A (XVII), 7 November 1962. Article 1 specifies that: “no marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and other witnesses”.

<sup>82</sup> Special Rapporteur on Contemporary Forms of Slavery, Report A/HRC/21/41, 10 July 2012. In this report this practice is called wife inheritance.

<sup>83</sup> The majority of victims are women and girls but men also are victims. In any case it is often easier for boys and men to leave forced marriages, live as divorcees, remarry and regain control of their lives, in particular because they are usually more educated and can be financially independent. Girls and women are more vulnerable and more likely to be sexually and physically abused.

<sup>84</sup> ILO Global Estimates of Child Labor: Results and Trends 2012-2013, Geneva, 2017.

<sup>85</sup> Convention on the Elimination of All Forms of Discrimination against Women, GA Res. 34/180, 18 December 1979. This convention establishes that Child marriages, which are unions that involve at least one partner below the minimum legal age of marriage, constitute a form of forced marriage as the child is not in a position to consent. Child marriages have not legal effect. Article 16 (2): “The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory”.

<sup>86</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Economic and Social Council, ECOSOC Res. 608(XXI), 30 April 1956. Article 2 states: “With a view to bringing to an end the institutions and practices mentioned in article 1 (c) of this Convention, the States Parties undertake to prescribe, where appropriate, suitable minimum ages of marriage, to encourage the use of facilities whereby the consent of both parties to a marriage may be freely expressed in the presence of a competent civil or religious authority, and to encourage the registration of marriages”.

<sup>87</sup> International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 16 December 1966. The Covenant requires Member States to establish “a marriageable age to marry and free and full consent of spouses” (art.23(2)(3)).

<sup>88</sup> Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, GA Res 1818 (XX), 1 November 1965. The Minimum Age proposed is not less than 15 years.

<sup>89</sup> Parliamentary Assembly of Council of Europe, Recommendation 1468, 2005.

<sup>90</sup> Parliamentary Assembly of Council of Europe, Recommendation 1663, 2004.

<sup>91</sup> Special Rapporteur on Contemporary forms of Slavery, Report A/HRC/21/41, 10 July 2012.

or the internet. The Committee on the Elimination of Discrimination Against Women (CEDAW) has considered such marriages as a new form of sexual exploitation and slavery.<sup>92</sup> In fact, women are advertised as commodities rather than as people. While the marriage takes place “on paper”, the spouses do not live together as husband and wife. In this case women are forced to earn money for their “fake” husband or another person through prostitution or in any other income-generating activity. These practices are often linked to trafficking in people and other slavery-like practices that take place during servile marriage such as domestic servitude and sexual slavery.<sup>93</sup>

#### 1.6.5. Exploitation of children

In Article 1(d) the Supplementary Convention addresses the issue of child exploitation which is defined as:

“Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labor”.

The broad formulation of Article 1(d) allows for the inclusion of other forms of children exploitation that do not depend necessarily on the sale or transfer of the minor.<sup>94</sup> Considering the difference between child work and hazardous child labor is important to understand what is covered by the Supplementary Convention. The ILO Minimum Age Convention of 1973 (No. 138), for instance, does not forbid child work per se, but sets conditions and limits in order to ensure the fullest physical and mental development of children.<sup>95</sup> According to this Convention the minimum age for work depends on the type of work.<sup>96</sup> In any case it must be light work for a limited amount of hours, respecting age and abilities of minor and must not interfere with a child’s education or leisure activities.<sup>97</sup>

In contrast, hazardous child labor refers to all kinds of labor which jeopardize a child’s physical, mental, educational or social development. Hazardous child labor is defined by Article 3 (d) of ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, 1999 (No. 182) as: (d) “*work which, by its nature or the circumstances in which it is carried out,*

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<sup>92</sup> Committee on the Elimination of Discrimination against Women, General Recommendation CEDAW/C/GC/29, 26 February 2013.

<sup>93</sup> The women in servile marriage are required to perform all domestic household tasks and, in some cases, to work outside the home in shops or on farms.....

<sup>94</sup> International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 16 December 1966. Article 10, paragraph 3, states that children and young people “should be protected from economic and social exploitation”.

<sup>95</sup> ILO Convention concerning Minimum Age for Admission to Employment (No.138), 58th ILC session, 26 Jun 1973.

<sup>96</sup> ILO Convention concerning Minimum Age for Admission to Employment (No.138), 58th ILC session, 26 Jun 1973. In any case the age should be not less than 15 or 14 years in countries in which the “economy and educational facilities are insufficiently developed”. In addition to this, children can do “light work” between the age of 13 and 15 years, 12 years in developing countries. In case of hazardous work, the age is 18 years.

<sup>97</sup> ILO Global Estimates of Child Labor: Results and Trends 2012-2013, Geneva, 2017.

*is likely to harm the health, safety or morals of children*".<sup>98</sup> More specifically, hazardous child labor is work in dangerous or unhealthy conditions that could result in a child being killed, or injured or made ill as a consequence of poor safety and health standards and working arrangements.<sup>99</sup> It can result in permanent disability, ill health and psychological damage. Only hazardous child labor falls within the scope of the Supplementary Convention. An example of such hazardous child work is domestic work as the nature of the work typically requires long work hours, including night-time work and may require carrying heavy loads or handling dangerous and toxic substances such as insecticides or bleach.<sup>100</sup>

Special Rapporteur interprets Article 1(d) of the Supplementary Convention in the meaning that it also includes the trafficking of children.<sup>101</sup> The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation is further prohibited by the Trafficking Protocol.<sup>102</sup> In addition, the Convention on the Rights of the Child specifically prohibits "the abduction of, the sale of or traffic in children for any purpose or in any form".<sup>103</sup> In this case, the prohibition of trafficking is established not only for the exploitation of the child, but also for any other purpose, such as the adoption of the child. Among the more frequent practices of children exploitation that are covered by the Supplementary Convention are prostitution and pornography. The UN Human Rights Council drafted an Optional Protocol to the Convention on the Rights of the Child specifically dealing with the sale of children<sup>104</sup>, child prostitution<sup>105</sup> and child pornography.<sup>106</sup> This Protocol was subsequently adopted by the General Assembly in May 2000.

Every one of these practices has become more complex than in the past. If in the past it was indeed possible to consider each single practice separately, nowadays this is no longer possible because these practices are closely connected to one another. Therefore, in order to have a complete definition of every

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<sup>98</sup> ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (No. 182), 87th ILC session, 17 Jun 1999. It defines and expands the worst forms of child labor ranging from more traditional forms such as debt bondage, serfdom, forced and compulsory labor to newer forms as the use, procuring or offering of a child for illicit activities.

<sup>99</sup> ILO, Appl. 22.182 182. Worst Forms of Child Labor, 1999.

<sup>100</sup> Special Rapporteur on Contemporary Forms of Slavery, Report A/HRC/15/20, 18 June 2010. According to Special Rapporteur domestic work falls within the ambit of the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (No. 182).

<sup>101</sup> In ILO Worst Forms of Child Labor Convention (No.182) it is stated that the trafficking of girls and boys under the age of 18 is a practice similar to slavery.

<sup>102</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, GA Res.55/25,15 November 2000.The prohibition of Trafficking in child is established by Article 3 let. (c).

<sup>103</sup> Convention on the Rights of the Child, GA Res.44/25, 20 November 1989. According to that Convention, Individuals under the age of 18 are considered children unless under the applicable national law legal age is attained earlier.

<sup>104</sup> Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, GA Res. A/RES/54/263, 25 May 2000. Article 2 let. (a):" Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration".

<sup>105</sup> Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, GA Res. A/RES/54/263, 25 May 2000. Article 2 let. (b):" Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration".

<sup>106</sup> Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, GA Res. A/RES/54/263, 25 May 2000.Article 2 let. (c):" Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes".

practice it is necessary to look at the several international instruments that regulate different aspects of each practice.

The Slavery Convention and the Supplementary Convention were adopted in a cultural and historical context different from modern reality whereby slavery and institutions similar to slavery have changed their shapes. In the past, child labor was admitted, today the conditions are changed so child labor can be considered slavery; the selling of women through internet was not possible, today this phenomenon is frequent; debt bondage had a permanent character for many years, now it can be also a temporary form of slavery. The changing of slavery's practices leads to the adoption of more recent treaties that regulated also new characteristics of these practices or reflected the more recent juridical awareness. The proliferation of many treaties makes the interpretation of each practice more difficult. Therefore it is desirable the adoption of a new convention which seeks to regulate these practices in a more complete way and to provide an updated definition in order to better clarify their relationship with slavery.

#### 1.7. The relationship between slavery and institutions and practices similar to slavery

What, then, is the difference between slavery and other practices and institutions similar to slavery?<sup>107</sup> One difference may lie in the exercise of powers attached to the rights of ownership, which are typical of slavery. Indeed, some scholars have argued that a distinctive element relates to the degree and the intensity of the powers of ownership which are greater in slavery than in practices and institutions similar to slavery.<sup>108</sup> In the context of slavery, the power of control extends to every aspect of the life of a slave and is not limited to a particular time or place. Moreover, the slave is seen as an object owned by the master. In contrast, in the case of institutions and practices similar to slavery, the exploiter does not feel like they have possession of the exploited person. Commentators thus appear to agree that classification depends on the degree of control exercised over the victims.<sup>109</sup>

This approach shows that the historical division between slavery and institutions/practices similar to slavery as maintained by international treaty law has become somewhat outdated. The division has been replaced by a more nuanced approach that looks at the specific circumstances and characteristics of the

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<sup>107</sup> Jean Allain, *Slavery In international law: of Human Exploitation and Trafficking*, 2012. In the past, it was believed that the difference consisted in the right of ownership which was typical of slavery.

<sup>108</sup> Report presented by the Sixth Commission on the Slavery Convention, League of Nations Doc. A.104.1926. VI. 24 September 1926. In this report Viscount Cecil remarked that domestic slavery and similar conditions if they manifest powers attached to the right of ownership, they fell within the definition of slavery. Special Rapporteur on Contemporary Forms of Slavery, Report A/HRC/36/43, 2 August 2017." A hierarchy in international law exists among slavery and other forms of exploitation, with slavery being the most severe type of exploitation. The element of control of the person or his/her labor is present in the various forms of exploitation to different degrees, and the most extreme form of control is manifested when it exhibits powers attached to ownership". See also Jean Allain, "The definition of Slavery in General International Law and the crime of Enslavement within The Rome Statute", Guest Lecture Series of the Office of the Prosecutor, 2007 pp. 4-8.

<sup>109</sup> During preparatory works of Supplementary Convention, the hypothesis, that these practices similar to slavery could be both slavery or servitude depending on the circumstances, was advanced. See Joyce A.C. Gutteridge, "Supplementary Slavery Convention 1956", 6 *Int'l & Com. L.Q.* 449, 1957, pp. 459-464. This position was followed initially also by Special Rapporteur.



case rather than the practice's name. The problem is that a focus on the degree of control is easier to affirm in the abstract rather than to demonstrate in practice.

As a consequence, the Special Rapporteur on Contemporary Forms of Slavery<sup>110</sup>, the ILO<sup>111</sup> and the General Assembly<sup>112</sup> do not maintain this division but regard institutions/practices similar to slavery simply as modern forms of slavery. I believe that the marked and formal distinction between slavery and institutions similar is no longer sustainable, a more substantial approach is preferable.<sup>113</sup> In fact from an analysis of these practices similar to slavery, it results that they manifest the same characteristics of slavery with the same intensity whereby these are considered as modern manifestations of slavery.

### 1.8. The fight against forced labor and the ILO Conventions

The fight against forced labor has always been closely related to the international campaign against slavery. At first, the fight against forced labor met many difficulties, since it was one of the main features of the colonial system. This became very evident in the negotiation process of the 1926 Slavery Convention, where the colonial powers showed a strong resistance to all proposals which included the prohibition of various forms of exploitation of labor. The ILO Convention of Forced Labor (No. 29) was eventually adopted in 1930 and entered into force in 1932.

This convention was adopted mainly because the colonies of Contracting States were excluded by its scope. This exclusion was possible thanks to a "colonial clause", in the Organization's constitution of 1919, which granted the Great Powers the right to exclude, in part or entirely, their overseas territories from the ratification of norms, making it difficult to apply ILO standards in colonial territories.<sup>114</sup> The main objective of the Convention was the abolition of forced labor for private purposes and the setting of limits on its use for public purposes.<sup>115</sup> It is considered to be among the most important ILO conventions for two reasons. The first one consists in the fact that it enjoys wide acceptance by the

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<sup>110</sup> Special Rapporteur on Contemporary Forms of Slavery, Report A/HRC/24/43, 1 July 2003. See also Special Rapporteur on Contemporary Forms of Slavery, Report A/HRC/36/43, 2 August 2017. In Special Rapporteur's reports the institutions similar to slavery are regarded as modern form of slavery.

<sup>111</sup> ILO Global Estimates of Modern Slavery: Forced Labor and Forced Marriage, Geneva, 2017. ILO considers forced labor and forced marriage as modern forms of slavery without considering the formal distinction among slavery and institutions/practices similar to slavery.

<sup>112</sup> General Assembly, Res. A/RES/66/140, 19 December 2011.

<sup>113</sup> See Jean Allain, "On the Curious Disappearance of Human Servitude from General International Law", *Journal of the History of International Law*, 2009, pp. 3ss. Allain believes that the term practice and institutions similar to slavery was used as "*escamotage*" in order to not use the expression servitude. In fact the latter was used in Universal Declaration where UN members signed the political commitment to abolish all the forms of slavery and servitude.

<sup>114</sup> Furthermore ILO got round the problem neatly by deeming colonial labor to be a special form of labor referred to as "native labor," to which separate norms applied. A Native Labor Code (NLC), as distinct from the International Labor Code that comprised all ILO conventions, was drafted. Thus, in the spectrum of ILO standardization, the colonies became an area of separate and ultimately less stringent legislation. Even advocates of forced labor accepted that there was a basic difference between "normal" and "colonial" labor. Daniel Roger Maul, "The International Labor Organization and the Struggle against Forced Labor from 1919 to the Present", *Labor History*, 2007 pp. 478-481.

<sup>115</sup> ILO Convention concerning Forced or Compulsory Labor (No.29), 14th ILC session, 28 Jun 1930. See Article 9 and Article 10.

international community as it is almost universally ratified.<sup>116</sup> While the second one deals with the fact that this treaty is essentially the only international instrument which formulated a definition of forced labor, despite the fact that the prohibition of forced labor is endorsed by many treaties, both on international and regional level.<sup>117</sup> The other important ILO Convention was the Convention on Forced Labor No. 105. of 1957.<sup>118</sup> This convention is designed to supplement the Convention No 29. and it expands the forced labor's definition but does not replace it. In fact Article 1 requires Contracting States to suppress the use of forced labor as a method of "political coercion, as a punishment for holding political views or as a method of education, as a method for mobilizing labor for purposes of economic development, as a means of labor discipline, as a punishment for strikes, as a means for racial, social, national or religious discrimination".<sup>119</sup>

### 1.8.1. The definition of forced labor

Article 2 of the "Forced Labor Convention No 29" defines forced and compulsory 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 voluntarily".<sup>120</sup> According to Article 1, there are three essential characteristics of forced labor, which are "work or service" "the menace of any penalty" and "unwillingness". Pursuant to the ILO, the term "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 and threat of punishment as the loss of privileges, rights and advantages".<sup>121</sup> "Unwillingness", on the other hand, deals with the constraint to perform some tasks using threats or coercive measures but also using fraud or deception. In other words, labor is not performed voluntarily. A 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" and may result from indirect coercion and false promises.<sup>122</sup>

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<sup>116</sup> A total of 177 out of 185 ILO Member state ratified the 1930 convention.

<sup>117</sup> International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 16 December 1966. Article 8 deals with forced labor but does not defines it. The Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950. Article 4 prohibits forced labor but does not provide a definition.

<sup>118</sup> Convention concerning the Abolition of Forced Labor (No.105), 40th ILC session, 25 June 1957. This convention was ratified by 174 Member states.

<sup>119</sup> The Convention concerning the Abolition of Forced Labor (No.105), was adopted as response to what was happened during the second world war.

<sup>120</sup> The difference between forced and compulsory labor has never been a central issue on this field. The courts regional and international always doesn't consider this difference. The ECtHR sought to define both these concepts. The court 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 labor refers to state-sanctioned labor. See *Van der Musselle v. Belgium*, Application No. 8919/80, ECHR, 23 November 1983.

<sup>121</sup> ILO, General Survey concerning the Forced Labor Convention, 1930 (No. 29), and the Abolition of Forced Labor Convention, 1957 (No. 105), ILC 96th Session, 2007.

<sup>122</sup> Ibid.

The issue of consent has also been an important feature of relevant case law of the European Court of Human Rights. One of the most important cases is *Chowdury and Others v. Greece*.<sup>123</sup> This case concerned a group of Bangladesh nationals who were recruited to work at the main strawberry farm in Manolada. Their employers failed to pay the applicants' wages and obliged them to work in difficult physical conditions under the supervision of armed guards. The applicants alleged that they had been subjected to forced or compulsory labor. The counterpart stated that there are not the elements of forced labor because workers have freely given their consent to work. In this case, the Court found that consent had to be assessed in light of all the circumstances of the case and that prior consent of the victim may not be sufficient to exclude the hypothesis of forced labor. In fact, a worker might have voluntarily offered his/her labor initially but then withdraw this consent because of the conditions imposed by the employer, such as no payment, extreme physical conditions, exhausting schedule and subjection to constant humiliation.<sup>124</sup>

The concept of forced labor must be distinguished from exploitation of labor. The main difference consists in the fact that in the case of exploitation, the individual retains the freedom to leave work. So, the exploitation is lacking in positive coercion. Forced labor, on the other hand, imposes a higher degree of restriction on the individual's freedom - often through violent means - which makes forced labor similar to slavery in some of its effects upon the individual. Notwithstanding this similarity to slavery, the definition of forced labor makes no reference to the powers attached to the rights of ownership. This absence is the main difference between forced labor and slavery.<sup>125</sup>

Allain and Rickey show an example where the different degree of control between forced labor and slavery is evident: "the case of a textile employer, in Bangladesh, requesting forced labor but not controlling other elements of a worker's life, thus falling short of the threshold of control".<sup>126</sup> Forced labor can be seen as a practice resembling slavery but lacking certain substantial elements. This statement is correct from a defining point of view but not also from a substantial one. The Special Rapporteur on Contemporary forms of Slavery and ILO have considered forced labor as modern form of slavery because they are consciousness that it generally manifests not only the two essential elements, established by its definition, but also some powers attached to the right of ownership.<sup>127</sup> Rarely there are

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<sup>123</sup> *Chowdury and Others v Greece*, Application No. 21884/15, European Court of Human Rights, 30 March 2017.

<sup>124</sup> In cases of force labor, the workers are often threatened with severe hardship and deprivation such as the restriction of their mobility, food, wages or property and the subjection to sexual, physical and verbal abuse. So, it is unquestionable that dehumanizing and degrading treatments are included in forced labor.

<sup>125</sup> Special Rapporteur on Contemporary Forms of Slavery, Report A/HRC/24/43, 1 July 2013. In this report the distinction is underlined: "Slavery and compulsory or forced labor are separate practices that are addressed independently in most international human rights documents".

<sup>126</sup> Jean Allain and Robin Hickey, "Property and The Definition of Slavery", *International and Comparative Law Quarterly*, 2012, p.926.

<sup>127</sup> This dichotomy was present also in 1926 Slavery Convention where in Art. 5 it is stated: "to take all necessary measures to prevent compulsory or forced labor from developing into conditions analogous to slavery".

cases which deal only with forced labor.<sup>128</sup> The case, provided by Allain, is a classic example of forced labor which is not linked to slavery.

Instead forced labor become slavery when the control, exercised by employer over the victims, is not limited to place or time of performance of work but it extends to all life of workers. A typical example of forced labor resembling slavery in its effect is when workers are bound not only to execute forced labor but also to live in specific hostels, to be restricted in the use of the telephone, also in their free time.<sup>129</sup> It is safe to affirm that definition of forced labor as provided by ILO convention does not represent the effective features of this practice because it belongs to a historical and cultural context radically different from contemporary one. Therefore the adoption of amendment of definition of forced labor is necessary in order to have a definition that reflects how this practice actually verifies and to better define its relationships with slavery.

### 1.9. Domestic slavery

Domestic work is one of the oldest and most important occupations for millions of persons around the world. The International Labor Organization (ILO) estimates that between 4 and 10 per cent of the employed workforce in developing countries is engaged in domestic work. For industrialized countries, the figure stands between 1 and 2.5 per cent of total employment.<sup>130</sup> Domestic work, nonetheless, is undervalued and poorly regulated, and many domestic workers remain overworked, underpaid and unprotected. Domestic work remains virtually invisible as a form of employment in many countries<sup>131</sup> because it does not take place in a factory or an office, but at home.<sup>132</sup> The employees do not work alongside other co-workers, but in isolation behind closed doors. The ILO in its 2010 document on the issue highlights the fact that, despite the heterogeneity of domestic work, their common feature is that the workplace is the home.<sup>133</sup> The ILO Domestic Workers Convention, 2011 (No. 189) has subsequently defined domestic work as “work performed in or for a household or households”.<sup>134</sup> Domestic work is

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<sup>128</sup> This definition of forced labor is a product of different conception of this practice. Until 1930 forced labor was seen as a normal mean of state in order to realize public building ...

<sup>129</sup> International Human Rights courts considers three practice slavery, servitude and forced labor. The servitude is seen as an interim practice between slavery the worst and forced labor the less serious. In particular servitude is more serious than forced labor because generally the exploited is forced to live also in the workplace. E.g. In C.N. and V.v. France the ECHR qualified servitude as an aggravated form of forced and compulsory labor. The Court identified the distinguishing feature between these practices in “the victim feeling that their condition is permanent and that the situation is unlikely to change”.

<sup>130</sup> ILO Domestic workers across the world : global and regional statistics and the extent of legal protection (2013).

<sup>131</sup> The domestic employment relationship is not specifically addressed in many legislative enactments, thus rendering domestic workers vulnerable to unequal, unfair and often abusive treatment.

<sup>132</sup> This practice typically entails the otherwise unpaid labour traditionally performed in the household by women, for this reason it is considered unskilled work, despite that fact that actually domestic workers are educated and highly skilled.

<sup>133</sup> ILO, which during International Labor Conference, 99th Session, 2010, adopted an important document on Decent work for domestic workers in which compared different national legislation on this field for emerging the criticisms of this phenomenon.

<sup>134</sup> ILO Convention concerning Decent Work for Domestic Workers (No.189), 100th ILC session, 16 Jun 2011. ILO Recommendation concerning Decent Work for Domestic Workers (No. 201), 100th ILC session, 16 Jun 2011. The convention is supplemented by Recommendation No.201 of 2011 which provides practical guidance concerning possible legal and other measures to implement the rights and principles stated in the Convention.

thus defined by reference to the place in which it is performed and rather than by reference to employer or task. Cleaning, cooking, washing, grocery shopping, taking care of children, the elderly and/or the sick, gardening, guarding the house can all be covered by the definition in the Convention. The Convention defines also the domestic worker who is “any person engaged in domestic work within an employment relationship”.<sup>135</sup> Notwithstanding the fact that the Convention has not yet attracted many ratifications, it is an important step towards better protection of domestic workers.<sup>136</sup>

Generally domestic work can be characterized by two further aspects: it is a highly feminized sector and one with a percentage of migrant workers.<sup>137</sup> This makes domestic workers more vulnerable considering that they often do not speak the local language and, in many cases, do not have any friends or parents. This increases the risk of domestic work degenerating into domestic slavery. According to Special Rapporteur on Contemporary Forms of Slavery domestic work can turn into domestic slavery in the following circumstances:<sup>138</sup>

- restrictions to freedom of movement and residence;
- the threat of withholding food, water or essential medical care;
- lack of rest time, regulated working hours or maternity leave or no payment or remuneration or disproportionate payments;
- prohibition or unreasonable restriction of mobile phones;
- exposure to hazardous chemicals without adequate protection;
- in some cases, domestic workers are forced to sleep in the kitchen, on balconies, in the toilet or in a warehouse;
- domestic workers face severe difficulty in securing access to justice for violations of their rights.

The Council of Europe has also addressed the issue of domestic slavery. Its recommendation 1523 of 2001 lists a range of circumstances that may be indicative of conditions of domestic slavery. These include:

- the victims’ passport are systematically confiscated;
- the victims are subjected to physical and sexual violence;

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<sup>135</sup> By using the expression employment relationship, the convention wants to equipare the domestic work to other type of works. The treaty establishes the application of core labour standards and some specific norms, considering the features of domestic work, such as in-kind payment, decent living conditions that respect the workers’ privacy, no obligation to remain in the household or with its members during their periods of rest or leave...

<sup>136</sup> In European Union member countries, for example, application of labour rights to domestic workers is very limited in both law and practice. Labour inspectors are not often allowed to inspect private homes without judicial authorization, which means that there is no oversight over the working and living conditions of domestic workers.

<sup>137</sup> In its Recommendation 1663 (2004) on Domestic Slavery, Servitude, Au Pairs and “mail-order brides”, the Parliamentary Assembly of the Council of Europe expressed dismay that slavery still exists in Europe, while highlighting that “today’s slaves are predominantly female and usually work in private households”. Therefore it is recommended to elaborate a charter of rights for domestic workers.

<sup>138</sup> Special Rapporteur on Contemporary forms of slavery, Report A/HRC/39/52, 27 July 2018.

- most of the victims are in an illegal situation and having been recruited by agencies and having borrowed money to pay for their journey;<sup>139</sup>
- they are effected psychological problems because of physical and emotional isolation coupled with the fear of world outside.

Therefore from a comparison between these two reports it is possible to indentify indicators of domestic slavery. These can be summarized in three points: 1. limitations to the freedom of movement and of choice of the victim which can be obtained through various means such as passport confiscation and restriction of mobile phones; 2. Harrassment and abuses of different types including physical and sexual violence, the threat of water and food...; 3. Violation of labour standards. All these elements, recognized as indicators of domestic slavery, in reality consists in indicators of every kinds of slavery.

Domestic slavery occur as autonomous practice or can be linked to other forms of slavery. Debt bondage is a case in point. In addition to the agricultural work performed by men, bondage arrangements sometimes extend to women who are forced to serve in the household of the creditor. Also children are often involved in domestic slavery and domestic work can be considered as hazardous for children.<sup>140</sup> Forced marriage combines sexual exploitation with domestic servitude. Also trafficking is one path into domestic servitude.<sup>141</sup> The domestic servitude falls under the expression "for the purpose of exploitation" of the trafficking protocol. The consequences of this practice are devastating for the victims considering that domestic workers, especially if they live with their employers, often finding themselves physically and socially isolated from their families, friends and peers. In fact, the victims often develop mental illness. Considering the links with other forms of slavery, domestic slavery must not be considered merely as a new form of slavery but in historical context.

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<sup>139</sup> People in such situations usually fear reporting exploitation to the authorities, especially where criminal investigations and the enforcement of labor standards are linked to immigration control. This empowers the dependence of the victim to the employer.

<sup>140</sup> Article 4 of Domestic Worker Convention No.189 states that in case of domestic workers aged 15 years old but less than 18 years old, their work should not deprive them of compulsory education, or interfere with their opportunities for further education or vocational training. Special Rapporteur on Contemporary Forms of Slavery, Report A/HRC/15/20, 18 June 2010. Special Rapporteur states that domestic work falls within the ambit of the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (ILO Convention No. 182) because generally it requires long and arduous work's hours, products used contain substances harmful to children's health... However qualification of domestic work as Worst Forms of Child labor depends on the specific circumstances of the case.

<sup>141</sup> Parliamentary Assembly of the Council of Europe: Committee on Equal Opportunities for Women and Men, "Domestic slavery: servitude, au pairs and mail-order brides", Assembly document No. 9102 (2001), para. 21. The Council express concern about all the international trafficking of children aged from 8 to 15 years from West Africa to Europe, where they are exploited in domestic labor, usually in the households of compatriots underlining that in this practice children are treated as commodities who can be moved around and exploited for the benefit of adults.

## 1.10. Sexual slavery and forced prostitution

Sexual slavery is defined in the same terms as slavery<sup>142</sup> with the qualification that the exploitation is of sexual nature and involves the use or threat of force.<sup>143</sup> Women may also find themselves physically weak by pregnancies, births and, on occasion, abortions. As a result of sex with multiple partners reproductive tract infections and sexually transmitted diseases are common. Sexual slavery does not necessarily involve any financial gain. It is rather the imposition of absolute control or power of one person over another.

Cases of exclusive sexual slavery are rare. One of these is the ritual slavery which occurs in Ghana, Togo and Benin. Women in ritual slavery are forced to have sex with the priest who consummates their marriage with the deity. In such cases, women may also be forced to have sex with multiple sexual partners who believe that they become spiritually cleansed by having sex with her.<sup>144</sup> Generally sexual slavery is linked to other practices such as servile marriage, debt bondage, domestic slavery or often occurring in times of armed conflict or belligerent occupation.<sup>145</sup> It is in this latter context that the UN Secretary-General appointed a Special Representative of the Secretary-General on Sexual Violence in Conflict. In one of his reports to the Security Council the Special Rapporteur defined sexual violence as “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence of comparable gravity”.<sup>146</sup>

Conversely forced prostitution<sup>147</sup> occurs when a person is prostituted against his/her will, that is to say is compelled under duress or intimidation to engage in sexual acts in return for money or payment in kind, whether such payment is passed to others or received by the victim of forced prostitution him or herself.<sup>148</sup> Originally, forced prostitution was not considered as a form of slavery, but this remains contentious.<sup>149</sup> Some states consider forced prostitution as a form of forced labor or exploitation. The Working Group on Contemporary Forms of Slavery has found that forced prostitution presents different

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<sup>142</sup> Elements of crime which was issued to help the international criminal court interpret and apply its jurisdiction, defined sexual slavery as “an act is considered the crime against humanity of sexual slavery if it has these elements. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature”.

<sup>143</sup> Weissbrodt David, and Anti-Slavery International, “Abolishing Slavery and Its Contemporary Forms”, New York: Office of the UN High Commissioner for Human Rights, 2002. This is the definition provided by Working Group on contemporary forms of slavery.

<sup>144</sup> Special Rapporteur on Contemporary Forms of Slavery, Report A/HRC/21/41, 10 July 2012.

<sup>145</sup> It could be a crime against Humanity (ICTY, Kunarac et al. Case), a crime of war and even an act of genocide (ICTR, Akayesu case).

<sup>146</sup> Different are the UNSC resolutions on forms of sexual violence where it is affirmed that these could be a crime against humanity or a war crime and that prohibit states from including it in amnesty provisions and require them to prosecute those responsible. Among these resolutions to protect women from all forms of sexual violence, there are: Resolutions 1265 (1999), 1325 (2000), 1820 (2008), 1888 (2009), 1889 (2009), 1960 (2010), 2106 (2013) and 2122 (2013).

<sup>147</sup> Strip clubs, street prostitution and the pornography industry, indoor prostitution, telephone sex agencies.....

<sup>148</sup> Michele Hirsch, Plan of Action against Women and Forced Prostitution, 9 April 1996 Council of Europe EG (96), p.23.

<sup>149</sup> International Agreement for the Suppression of the White Slave Traffic, 18 May 1904. The convention defined forced prostitution in Article 2 as: “any person who, to gratify the passions of others, has by fraud or by the use of violence, threats, abuse of authority, or any other means of constraint, hired, abducted or enticed a woman... for immoral purpose”.

forms of control over prostitutes. These include: “(1) physical abuse; (2) physical control of the prostitutes’ children, with threats to keep the children as hostages if prostitutes leave; (3) serious threats of physical harm, including murder; (4) keeping prostitutes in a continuous state of poverty and indebtedness; and (5) ensuring that they have no freedom to move outside unaccompanied”.<sup>150</sup>

What the above-mentioned conditions have in common is that coercion is involved to maintain a relationship of interpersonal imbalance of power. These features can make forced prostitution<sup>151</sup> a contemporary manifestation of slavery.<sup>152</sup> Ultimately the classification of forced prostitution as slavery or as forced labor depends on the circumstances of the case in question as well as the degree of control which is exercised over the victim.

### 1.11. Trafficking in persons between past and present

The concept of trafficking in persons is not new but finds its origins in the term “traffic”<sup>153</sup> which has been used since the XIX century to describe the practice of the “White slave traffic”, namely the abduction of European adult women and girls, their transportation abroad and their final exploitation in brothels.<sup>153</sup> In the contemporary context trafficking includes not only the transfer of persons for the purpose of sexual exploitation, but also with a view to submitting them to other forms of slavery or exploitation. Another expression frequently used in the past was “the slave trade” which referred to the specific practice of transporting slaves or any acts of capture or acquisition of a persons with intent to reduce him/her to slavery.<sup>154</sup> Therefore while the slave trade is a practice which regards the transportation of only slaves instead trafficking deals also with free persons who do not have the condition of slaves . At least from a definitional point of view the trafficking in persons is a more recent phenomenon.<sup>155</sup>

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<sup>150</sup> Weissbrodt, David, and Anti-Slavery International, “Abolishing Slavery and Its Contemporary Forms”, New York: Office of the UN High Commissioner for Human Rights, 2002. This is the definition provided by Working Group on contemporary forms of slavery.

<sup>151</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, GA Res. 317 (IV), 2 December 1949. It entered into force 25 July 1951. The preamble states: “Whereas prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community[...].”

<sup>152</sup> UN Voluntary Trust Fund on Contemporary Forms of Slavery, Report: “The Human Faces of Modern Slavery”, 2000.

<sup>153</sup> International Agreement for the Suppression of the White Slave Traffic, 18 May 1904.

<sup>154</sup> The Slavery Convention in article 2 forbids the slave trade which “includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves”.

<sup>155</sup> That definition affirmed that trafficking is much wider in scope than previously envisaged: that it can take place for a wide range of end purposes, not limited to sexual exploitation, that it can involve as victims men and boys, as well as women and girls; and that it can take place across borders or within a country, including the victim’s own.



### 1.11.1. Definition of trafficking in persons according to the UN Protocol

Trafficking in persons is a highly complex phenomenon and it has been widely debated in many international forum.<sup>156</sup> The first definition of trafficking in persons in international law was contained in Article 3 of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Woman and Children which was adopted in Palermo in 2000 and entered into force in 2003.<sup>157</sup> This definition is now well entrenched in international,<sup>158</sup> regional and national<sup>159</sup> normative frameworks which have been developed since the adoption of the Protocol. The essential elements of the trafficking definition are three:<sup>160</sup>

- (1) The act of recruitment, transportation, transfer, harbouring or receipt of persons;
- (2) The use of improper means as 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;
- (3) The purpose of exploitation, such as the exploitation of the prostitution of others or others forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.

All three elements must be present for the convention to become applicable within a given factual situation. Regarding the consent of the victim Article 3(b) of the Protocol specifies that it is irrelevant if any of the improper means have been used. In addition the existence of consent is always irrelevant if the victim is a child under the age of eighteen.

### 1.11.2. The purpose of exploitation

As far as the purpose of the exploitation is concerned, Article 3 provides a list which is not exhaustive. This permits to include in the definition of trafficking new forms of exploitation not expressly indicated.

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<sup>156</sup> The Alliance against Trafficking in Persons is a broad international forum that includes international, non-governmental and inter-governmental organizations in joining forces to prevent and combat human trafficking; Global Forum on Migration and Development; Alliance 8.7...

<sup>157</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, GA Res. 55/25, 15 November 2000.

<sup>158</sup> The Council of Europe during the third Summit of the Heads of State and Government in 2005 adopted the Trafficking in Persons Convention which entered into force on 1 February 2008. Article 4 of the Convention sets out a definition of trafficking in human beings, which is identical to the one contained in Article 3 of the UN Trafficking Protocol. This confirms the importance recognized to the definition of trafficking as concerned in UN Trafficking Protocol.

<sup>159</sup> The majority of States (reported in 2012 by UNODC to be 134) have criminalized trafficking in their national laws, generally conforming to the definition in the Protocol as underlined by Global Report on Trafficking in Persons of 2012 (United Nations publication, Sales No. E.13.IV.1).

<sup>160</sup> An action, a means by which that action is achieved, and a purpose of the intended action.

All forms of exploitation listed are left undefined. However, this omission does not create problems as the listed practices are well defined by other international treaties (such as slavery, forced labor and practices and institutions similar to slavery). Trafficking for the purposes of prostitution or the removal of organs is more complicated. The “*Travaux Préparatoires*” reveal that Contracting States were unable to agree whether voluntary adult prostitution should be covered by Trafficking Protocol. So the compromise reached was to insert the generical expression “exploitation of prostitution”, but leave this term undefined.<sup>161</sup> Therefore discretion was left to the States Parties on how to address this phenomenon within their national systems.

The removal of organs falls in the scope of UN Trafficking Protocol only those persons who have undergone that process and whose consent was obtained using improper means.<sup>162</sup> The issue of consent is not the focal point of this practice but rather the fact that the removal of organs is conducted in an illegal way and that the final purpose of the traffickers is to obtain a financial or other material benefit. In this practice more than in any other form of exploitation related trafficking in humans, it is evident the commodification of the human being who is treated as a set of spare parts that can be bought on the market in the same way as any other item”.<sup>163</sup>

In any case the victims are subjected to various forms of exploitation that often vary according to their age and gender.<sup>164</sup> I believed that it is important to underline that these practices are prohibited per se but they fall inside the scope of Trafficking Protocol only if the other requirements are fit. The issue if trafficking in persons is slavery or not is controversial. According to Working Group on Contemporary Forms of Slavery<sup>165</sup> trafficking in persons is a contemporary form of slavery.<sup>166</sup> I believe that this opinion is shareable.<sup>167</sup> In fact a high degree of control is exercised over victims, they do not have any freedom

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<sup>161</sup> Scarpa Silvia, *Trafficking in Human Beings: Modern Slavery*, 2008, pp.4-7.

<sup>162</sup> The removal of organs is not subject to regulation by a comprehensive treaty establishing minimum rules on prohibited conducts or common frameworks per se. However, the United Nations and the Council of Europe have addressed the phenomenon of trafficking in organs, tissues and cells. Committee of Ministers of Council of Europe, Rec. (2004)7E, 19 May 2004.

<sup>163</sup> Scarpa Silvia, *Trafficking in Human Beings: Modern Slavery*, 2008, pp.34 ss.

<sup>164</sup> Consequently, women and girls are mainly exploited in the commercial sex sector (forced prostitution, pornography, child pornography, strip dancing and any related activity and for forced marriages and domestic slavery). While men and boys are subjected to labor exploitation working on agricultural plantations, in mines, factories and fishing... The trafficking experience often is related to debt bondage, so that the victim is exploited until he/she succeeds in repaying an initial debt, the interest and other expenses added to it.

<sup>165</sup> The Working Group on Contemporary Forms of Slavery had the general responsibility in the United Nations for the study of slavery in all its aspects. Meeting for the first time in 1975 as the Working Group on Slavery, the group was renamed in 1988. It consisted of five independent experts chosen on the basis of fair geographical representation from the membership of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The Working Group on Contemporary Forms of Slavery no longer exists.

<sup>166</sup> Weissbrodt, David, and Anti-Slavery International, “Abolishing Slavery and Its Contemporary Forms”, New York: Office of the UN High Commissioner for Human Rights, 2002. This is the definition provides by Working Group on contemporary forms of slavery. Special Rapporteur on trafficking in persons, especially women and children, Report A/HRC/38/45, 14 May 2018. The Special Rapporteur considers that trafficking in persons, especially women and children, is primarily a human rights violation.

<sup>167</sup> *Rantsev v Cyprus and Russia*, Application no. 25965/04, ECHR, 7 January 2010. The court affirms that in trafficking in persons “powers attached to the right of ownership” are exercised over the victims whereby this practice is covered by article 4 of ECHR that forbids slavery. Moreover the ICC statute establishes that trafficking in persons is based on the powers attached to the rights of ownership as well as slavery (Art.7). The trafficking in children is considered as a form of slavery which is covered by Supplementary Convention.

of movement or of choice. The victims are regarded as objects that should be transported from a place to another for the purpose of their exploitation. When victims arrive to destination's place they cannot choose of changing their destiny but are bounded to be exploited as decided by traffickers.

### 1.11.3. Trafficking and smuggling in persons

The Convention against Transnational Organized Crime (CTOC) entered into force on 29 September 2003 and was expanded through followed by the UN Trafficking Protocol 2003 and the UN Smuggling Protocol 2004.<sup>168</sup> According to UN Smuggling Protocol smuggled persons are migrants who buy an illegal transportation service from a smuggler to arrive in a foreign country. Smuggled persons are thus mere clients who have voluntarily given their consent and their relationship with the smuggler ends once they arrive at destination. In contrast, the Trafficking Protocol refers to trafficked persons as victims whose consent has been extorted by improper means and the relationship continues also in the state of destination for the purpose of exploitation. The two practices often overlap. Smuggled persons can often be transported with trafficked victims or may subsequently find themselves in difficulties leading to a condition of exploitation and abuse.<sup>169</sup> The main danger determined by their confusion is that if trafficking victims are not identified as such, they may not even receive the protection they are entitled to by the UN Trafficking Protocol.<sup>170</sup>

## Conclusion

The first and the only definition of slavery in international law is contained in Article 1 of Slavery Convention which was adopted in 1926. For much time this definition reflected effectively the characteristics of slavery, but today this practice has developed and it has acquired also new features. Therefore, Article 1 of the Slavery Convention is too vague and inadequate because it mirrors a past concept of slavery. This chapter has demonstrated that the interpretation of the slavery definition evolved in order to also include modern manifestations of this practice. This evolution was shaped by extensive interpretation of this definition by the Special Rapporteur on Contemporary Forms of Slavery and international courts. The absence of a clear and complete definition of slavery generated uncertainty about which practices can be regarded as modern forms of slavery, whereby still today there are doubts on whether some forms of exploitation are to be considered slavery or not. This uncertainty causes

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<sup>168</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, GA. Res. A/RES/55/25, 15 November 2000.

<sup>169</sup> Special Rapporteur on Trafficking in Persons especially women and children, Report A/HRC/38/45, 14 May 2018. "People do not necessarily enter mixed migration movements as trafficked persons but might become trafficked during their journey or when they reach a transit or destination country".

<sup>170</sup> Special Rapporteur on Trafficking in Persons especially women and children, Report: "First decade of the mandate of the Special Rapporteur on trafficking in persons, especially women and children", 2014. The special rapporteur underlined the importance of first identification of the migrants. According to her the first step at the arrival of migrants must be their protection only after that the migrants could feel more confident and their identification can be made.

difficulties for identifying the applicable legal regime, because if a practice is considered slavery it falls under the legal status of slavery to whom the international law grants the highest protection. Furthermore, the uncertainty creates difficulties in the predisposition of strategies to eradicate this practice. How can a state or international community develop an effective strategy to abolish slavery if it is not clear what practice is to be considered slavery? Therefore, the adoption of a new convention on slavery became desirable in order to provide a more complete definition of this practice and clarify what forms of exploitation can be considered as slavery.

## 2. LEGAL STATUS

### Introduction

The chapter deals with the legal status of slavery in international law seeking to understand whether there was an evolution of its regime over time. Another important issue considered in this chapter involves exploring whether slavery and institutions similar to slavery are disciplined by the same legal regime or if they differ in terms of obligations. Such analysis is necessary, in order to clarify the relationship between these practices from the point of view of legal status. The chapter concludes with an examination of some of the most important cases on slavery to provide a dynamic vision of this phenomenon and to understand how international human rights courts deal with slavery and practices similar to slavery. Particular attention is given to how courts have analyzed and interpreted the definition of slavery and how this developed its legal regime. Clarifying the legal status of slavery facilitates an understanding of potential gaps in obligations to eradicate this practice. It also addresses the question if the legal framework is sufficient to meet the challenge of addressing slavery in all its forms, or if the implementation of additional strategies is necessary.

### 2.1. General Public International Law

Today, the prohibition of slavery has attained “jus cogens” status and constitutes an obligation “erga omnes”.<sup>171</sup> Redman affirms that the right to be free from enslavement was the first human right to be recognized as customary international law.<sup>172</sup> Bassiouni states that slavery’s prohibition was first of all recognized as customary international law and only thereafter it has attained “jus cogens status”.<sup>173</sup>

Article 38 of the Statute of the International Court of Justice,<sup>174</sup> considered as authoritative statement on the sources of international law, does not explicitly mention the concept of “jus cogens”. However, Article 53 of Vienna Convention on the Law of Treaties<sup>175</sup> stipulates that a norm is peremptory if two requirements are satisfied: if it is recognized and accepted by the international community as a whole and if no derogation is permitted.

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<sup>171</sup> Special Rapporteur on Contemporary forms of Slavery, Report A/HRC/36/4, 32 August 2017.

<sup>172</sup> Renee Colette Redman, “The League of Nations and the Right to be Free from Enslavement: The First Human Right to be recognized as Customary International Law Freedom: Beyond the United States”, 1994, pp.759-763. Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol70/iss2/10>.

<sup>173</sup> M. Cherif Bassiouni, “Enslavement as an International Crime”, New York University Journal of Law and Politics, 1991, pp. 445-447.

<sup>174</sup> Statute of the International Court of Justice, 18 April 1946.

<sup>175</sup> Vienna Convention on the Law of Treaties, 23 May 1969.

From these criteria it is possible to affirm that peremptory norms are customary norms,<sup>176</sup> whose “*opinio iuris*” is reinforced by the conviction that their application is non-derogatory.<sup>177</sup> The non-exemptible nature of the prohibition of slavery is recognized also by the International Covenant on Civil and Political Rights and by other international human rights conventions.<sup>178</sup> Another consequence of the fact that slavery has attained “*jus cogens*” status is that its violation is an international offense, irrespective of whether a government has ratified the relevant agreements or not.<sup>179</sup>

The “*jus cogens* status” of the prohibition of slavery was not directly recognized by the Slavery Conventions but rather by a series of circumstances. Indicators of this universal acknowledgment include the large number of states which have ratified treaties related to this practice<sup>180</sup> and the many treaties which forbid enslavement.<sup>181</sup>

Furthermore, many international institutions explicitly recognize slavery as a *jus cogens* norm.<sup>182</sup> The International Law Commission, in a report to the General Assembly of the United Nations, acknowledged that the “prohibition against slavery is one of the oldest and best settled rules of ‘*Jus cogens*’”.<sup>183</sup> The Human Rights Committee, in its General Comment No. 24, likewise confirmed that “a state may not reserve the right to engage in slavery, to torture, to subject people to cruel, inhuman and degrading treatment or punishment.”<sup>184</sup>

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<sup>176</sup> Statute of the International Court of Justice, 18 April 1946. Article 38(1)(b): “international custom, as evidence of a general practice accepted as law”. According to that article a norm is customary if there are two elements: “*diuturnitas*” which is a general and consistent practice among the generality of states and “*opinio iuris ac necessitatis*” namely this practice is accepted and observed out of a sense of legal obligation. The customary law is binding for all states, regardless of whether they signed a treaty.

<sup>177</sup> Therefore if a treaty conflicts with a peremptory norm it is void. Conversely a treaty can derogate to a customary law.

<sup>178</sup> International Covenant on Civil and Political Rights, GA Res 2200A (XXI), 16 December 1966. Article 4(2): “No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision”. Article 4 recognizes the non-derogatory character of article 8 para. 1 and 2. which prohibits slavery and servitude. See also Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950. Article 15(2): “No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision”. American Convention on Human Rights, Adopted at the Inter-American Specialized Conference on Human Rights, 22 November 1969. Article 27(2): “The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery) [...]”.

<sup>179</sup> Natalino Ronzitti, *Introduzione al Diritto Internazionale*, 2013, p.182.

<sup>180</sup> Slavery Convention, 25 September 1926. 99 State are parties to Slavery convention; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 September 1956. 128 State are parties to Supplementary convention; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, GA Res. A/RES/55/25, 15 November 2000. 175 ratified Trafficking Protocol.

<sup>181</sup> There are different opinions on the number of treaties. Bales affirmed that there are more than 300 laws and agreements which deal with slavery while Welch stated that there more than 600 agreements. In any case treaties which deal with slavery are numerous as emphasized in chapter 1. See Kevin Bales and Peter T. Robbins, “No One Shall Be Held in Slavery or Servitude: A Critical Analysis of International Slavery Agreements and Concepts of Slavery”, *Human Rights Review*, 2001, p.18. See also Claude E. Welch Jr., “Defining Contemporary Forms of Slavery: Updating a Venerable NGO”, *Human Rights Quarterly*, 2009, pp. 72.

<sup>182</sup> For example in a report submitted in 1998 to the UN Sub-Commission on Human Rights, the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime stated that “sexual slavery is slavery and its prohibition is a *jus cogens* norm”. See also Special Rapporteur on Contemporary Forms of Slavery, Report A/HRC/33/46, 4 July 2016. Or Special Rapporteur on Trafficking in Persons, especially Women and Children, Report A/HRC/38/45, 14 May 2018.

<sup>183</sup> International Law Commission, Report to the General Assembly UN Doc.A /CN.4/ Ser.A/Add.1, 1963.

<sup>184</sup> Human Rights Committee, General Comment No.24 UN Doc. CCPR/C/21/Rev.1/Add.6, 11 November 1994.

Moreover, the jus cogens nature of slavery prohibition is a common recognized by academic literature<sup>185</sup> as well as international courts.<sup>186</sup> The International Court of Justice, for instance, has also held that the prohibition of slavery is an “erga omnes” obligation. In the Barcelona Traction case it held that: <sup>187</sup>

“an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes”.<sup>188</sup>

These “erga omnes” obligations are owed by a state to the international community as a whole.<sup>189</sup> Consequently, if every state has an interest in compliance with “erga omnes” obligations, this means that any state allows to raise or contest an alleged violation, in contrast to the law of diplomatic protection, which limits standing to bring claims on behalf of an injured person to the state of nationality. This aspect is confirmed by Article 48 of Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001, which establishes the possibility for a state other than the injured one of invoking the responsibility of offender state when “the obligation breached is owed to the international community as a whole” (“erga omnes” obligation).<sup>190</sup>

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<sup>185</sup> M. Cherif Bassiouni “International Crimes: Jus Cogens and Obligatio Erga Omnes”, Law and Contemporary Problems, 1999, p.68. Bassiouni affirmed: “The legal literature discloses that the following international crimes are ‘jus cogens’: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture”. Kevin Bales and Peter T. Robbins, “No One Shall Be Held in Slavery or Servitude: A Critical Analysis of International Slavery Agreements and Concepts of Slavery”, Human Rights Review, 2001. p.19.

<sup>186</sup> An important step was made by International Court of Justice when in Barcelona Traction case recognized that the prohibition against slavery sets “erga omnes” obligations. *Barcelona Traction, Light and Power Co. (Belgium v Spain)*, Judgement, ICJ, 5 February 1970. Cherif Bassiouni affirmed: “erga omnes and jus cogens concepts are often presented as two sides of the same coin”. M. Cherif Bassiouni, “International Crimes: Jus cogens and obligation erga omnes”, Law and Contemporary Problems, 1996, p.72. See also *Prosecutor v. Kunarac, Kovac & Vukovic*, Case n° IT-96-23 & IT-96-23/1-A, ICTY, 12 June 2002. Or *Hadijatou Mani Koraou v The Republic of Niger*, Judgment No. ECW/CCJ/JUD/06/08, ECOWAS, 27 October 2008.

<sup>187</sup> *Barcelona Traction, Light and Power Co. (Belgium v. Spain)*, Judgement, ICJ, 5 February 1970, par. 34: “Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character”.

<sup>188</sup> *Ibid.*

<sup>189</sup> International Court of Justice used for the first time this concept (“erga omnes obligatio”) in Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 28 May 1951, p.23.

<sup>190</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001. Generally in case of breach of an international obligation only the injured state can invoke the responsibility of the guilty Nation. While in case of breach of an “erga omnes” obligations, Article 48 establishes the possibility of “invocation of responsibility by a State other than an injured State”. According to Draft Articles on Responsibility of States, a state other than injured in response of the “erga omnes” obligation’s breach can adopt the following measures: Asking for the cessation of wrongful act, guarantees and assurances of non-repetition, performance of the obligation of reparation in the interest of the injured State or the Beneficiaries of the obligations breached, “restitution in integrum” and recourse to international courts.

## 2.2. The crime of enslavement in international criminal law

Bassiouni states that “slavery whether committed during peace or in the time of war, and with respect to any and all civilian populations, became international crimes under conventional and customary international law”.<sup>191</sup> In fact, slavery has been universally accepted as a crime against humanity.<sup>192</sup> In the *Kunarac* case, the Trial Chamber having surveyed international human rights law, international humanitarian law, the work of the International Law Commission, and the jurisprudence of the Tokyo and Nuremberg tribunals, affirmed that “enslavement is a crime against humanity in customary international law [...]”.<sup>193</sup>

The consideration of enslavement as an international crime has important consequences. First of all it involves the personal responsibility of the individual that committed the crime. Secondly this entails the application of the principle of universality of jurisdiction, regardless of where the crime is committed, by whom and against what category of victims.<sup>194</sup> Enslavement was considered a crime against humanity since the Charters of the International Military Tribunals at Nuremberg and Tokyo.<sup>195</sup> It is also listed as a crime against humanity under the statute of the International Criminal Tribunals for the former Yugoslavia and for Rwanda.<sup>196</sup>

As noted earlier, “enslavement” is deemed a crime against humanity under Article 7(1)(c) of the Rome Statute and it is defined, for the first time, in Article 7(2)(c) as:

“Enslavement means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”.<sup>197</sup>

Particularly interesting is the explanation of “powers attached to the right of ownership”<sup>198</sup> in the Elements of Crimes elaborated upon at its corresponding Article 7(1)(c):

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<sup>191</sup> M. Cherif Bassiouni, “Enslavement as an International Crime”, *New York University Journal of Law and Politics*, 1991, p.447.

<sup>192</sup> Jean Allain, “The Definition of Slavery in International Law”, *Howard Law Journal*, 2009, pp. 240-241.

<sup>193</sup> *Kunarac et als*, Judgment IT-96-23-T & -IT-96-23/1-T, ICTY, 22 February 2001.” Enslavement is crime against humanity in customary international law “.

<sup>194</sup> See M. Cherif Bassiouni, “International Crime: Jus cogens and obligation erga omnes”, *Law and Contemporary Problems*, 1996, p. 63. “International crimes that rise to the level of jus cogens constitute obligatio erga omnes which are inderogable. Legal obligations which arise from the higher status of such crimes include the duty to prosecute or extradite, the non-applicability of statutes of limitations for such crimes, the non-applicability of any immunities up to and including Heads of State, the non-applicability of the defense of “obedience to superior orders” (save as mitigation of sentence), the universal application of these obligations whether in time of peace or war, their non-derogation under “states of emergency,” and universal jurisdiction over perpetrators of such crimes”.

<sup>195</sup> Charter of the International Military Tribunal, 8 August 1945. Article 6(c). Charter of the International Military Tribunal for the Far East, 19 January 1946. Article 5(c).

<sup>196</sup> Statute of International Criminal Tribunal for the Former Yugoslavia, Security Council Res. 827, 25 May 1993. Article 5 (c). Statute of International Criminal Tribunal for Rwanda, Security Council Res 955, 8 November 1994. Article 3 (c).

<sup>197</sup> Rome Statute of the International Criminal Law, 17 July 1998. The first aspect that emerges here is the extension of the definition to include the “exercise of such power in the course of trafficking in persons, in particular women and children”.

<sup>198</sup> *Ibid*



“The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty”.<sup>199</sup>

The powers attached to the rights of ownership which a perpetrator might exercise, track those noted by the Secretary-General in his 1953 Memorandum (i.e. “purchasing, selling, lending or bartering such a person”), but, also including the phrase “imposing on them a similar deprivation of liberty”, Elements of Crime truly reflect the evolution of the fundamental elements of slavery in general international law.

It is important to underline that pursuant to the Rome statute, enslavement, to be considered crime against humanity, must be committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.<sup>200</sup>

Enslavement is considered also as war crime if committed “by a belligerent against the nationals of another Belligerent”.<sup>201</sup> Its consideration as war crime dates back to the 1949 Geneva Conventions<sup>202</sup> and to two Additional Protocols.<sup>203</sup> In particular the 1949 Geneva Conventions recognize to the slavery practice the status of “grave breaches”.<sup>204</sup> This status implies that each Contracting State is obliged to search for and prosecute those persons alleged to have committed “grave breaches”.<sup>205</sup> Therefore since 1949 Geneva Conventions, a “special regime” was recognized to slavery.<sup>206</sup>

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<sup>199</sup> At the end of Element of Crime on Article 7(1)(c), a footnote is added which elaborates on what should be understood by this phrase: “It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labor or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children”.

<sup>200</sup> Rome Statute of the International Criminal Law, 17 July 1998. Article 7(1): “for the purpose of this Statute, crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.

<sup>201</sup> M. Cherif Bassiouni “Enslavement as an International Crime”, New York University Journal of Law and Politics, 1991, p.448.

<sup>202</sup> The Geneva Convention for Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949. Article 3 and 50; The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949. Article 3 and 51; The Geneva Convention Relative to the Treatment of War Prisoners, 12 August 1949. Article 49, 57 and 130. The Geneva Convention Relative to the Protection of Civilian Persons in time of War, 12 August 1949. Article 3, 49, 51, 52 and 147.

<sup>203</sup> The Protocol I Additional to the Geneva Conventions 1949 of 12 August 1949, 12 December 1977. Article 85; The Protocol II Additional to the Geneva Conventions 12 August 1949, 12 December 1977. Article 4.

<sup>204</sup> The Geneva Convention for Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949. Article 50 characterizes slavery as “grave breaches”; The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949. Article 51; The Geneva Convention Relative to the Treatment of War Prisoners, 12 August 1949. Article 130. The Geneva Convention Relative to the Protection of Civilian Persons in time of War, 12 August 1949. Article 147. In reality also the I Additional Protocol considered slavery practice as “grave breaches”. The Protocol I Additional to the Geneva Conventions 1949 of 12 August 1949, 12 December 1977. Article 85.

<sup>205</sup> The Geneva Convention for Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949. Article 50 considers slavery as “grave breach,” and therefore, “each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts”. The regime of grave breaches is common to all Geneva Conventions.

<sup>206</sup> I use the expression special regime because not all breaches of Geneva Conventions are covered by the same regime. The breaches can be classified between breaches of any obligations or “grave breaches”. Only in the latter case each state is obliged to search for and prosecute those persons alleged to have committed “grave breaches”.

More recently this practice is recognized also as war crime by the ICC Statute in article 8(2)(b)(xxii) – (e)(vi) that crystallizes the evolution of international criminal law.<sup>207</sup> In reality Article 8 prohibits only sexual slavery and enforced prostitution.<sup>208</sup> The definition of sexual slavery, provided by Elements of the Crimes on Article 8 (2)(b)(xxii)-2, is the same of enslavement as crime against humanity, with the addition of the phrase “the perpetrator caused such person or persons to engage in one or more acts of a sexual nature”.<sup>209</sup>

The enslavement is considered by the Rome Statute as war crime both in international armed conflicts and in internal one. This shows how protection from slavery became a growing concern of the international community that sought to eradicate this practice in every circumstance. It is necessary to underline that enslavement as war crime to fall under the scope of Rome statute must be “committed as part of a plan or policy or as part of a large-scale commission of such crimes”.<sup>210</sup> In any case it is important to emphasize that the development of enslavement as war crime was fundamental because, among the most frequent reasons of slavery, there is armed conflict.<sup>211</sup>

### 2.3. Institutions similar to slavery and their legal status

A question that raises spontaneously is whether institutions and practices similar to slavery have attained “jus cogens” status. The answer is debated. Bassiouni, affirming that “it is well-established that prohibitions against slavery and slave-related practices have achieved the level of customary international law and have attained jus cogens status”, extends the “jus cogens” status also to practices similar to slavery.<sup>212</sup> Instead, Lenzerini limits this recognition to slavery alone.<sup>213</sup> I find Bassiouni’s opinion convincing. First of all an institution similar to slavery such as debt bondage, as underlined in the first chapter, can integrate slavery or be regarded as practice similar to slavery: it depends on the

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<sup>207</sup>Charter of the International Military Tribunal, 8 August 1945. Article 6(2) (b) considered as war crime only “deportation to slave labor”. Neither the charter of International Military Tribunal of Far East and the Statute of the International Tribunal for the Former Yugoslavia have an express prohibition of enslavement as war crime. In reality in the *Krnjelac case* before the International Criminal Tribunal for the former Yugoslavia, the defendant was accused, inter alia, of “enslavement as a crime against humanity” and of “slavery as a violation of the laws or customs of war” but was acquitted on these counts for lack of evidence. The court considered enslavement as war crime under its jurisdiction. Statute of International Criminal Tribunal for Rwanda, Security Council Res 955, 8 November 1994. The statute of ICTR does not have an express reference to prohibition of slavery as war crime.

<sup>208</sup> Rome Statute of the International Criminal Law, 17 July 1998.

<sup>209</sup> Elements of Crimes on Article 8 (2) (b) (xxii)-3 “War crime of enforced prostitution” states: “1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent. 2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature”.

<sup>210</sup> Rome Statute of the International Criminal Law, 17 July 1998. Article 8(1): “The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes”.

<sup>211</sup> The Global Slavery Index, Walk Free Foundation, 2018.

<sup>212</sup> M. Cherif Bassiouni “Enslavement as an International Crime”, New York University Journal of Law and Politics, 1991, p.445.

<sup>213</sup> Lenzerini Federico, “Suppressing Slavery under Customary International Law”, Italian Yearbook of International law, 2000.

degree of control exercised over the victim. Therefore, regardless of the denomination of a practice, from a substantial point of view, if it is characterized by properties of slavery it is considered as slavery and is covered by its regime. This is reinforced by the fact that the boundaries between slavery and institutions similar to slavery are thinning out until they overlap.<sup>214</sup>

Moreover, according to Special Rapporteur on Contemporary Forms of Slavery and ILO, institutions similar to slavery are considered as contemporary manifestations of slavery whereby these are disciplined by slavery's juridical regime.<sup>215</sup> The international criminal law doesn't know the distinction between slavery and similar institutions, so courts have used the expression of enslavement for both practices.<sup>216</sup> In this way, international criminal courts recognized to institutions similar to slavery the same regime as slavery.<sup>217</sup> Based on analysis of the evolution, over time, of juridical obligations in this field, it is safe to affirm that the legal regime of slavery has developed together with that of institutions/practices similar to slavery.<sup>218</sup> Moreover international human rights conventions recognize the non-exemptible character not only to slavery but also to servitude, expression which is generally used as synonymous of institutions and practices similar to slavery or of forms of exploitation less serious than slavery.<sup>219</sup> In conclusion it is safe to affirm that the institutions similar to slavery have attained the *jus cogens* level.

Instead forced labor needs autonomous considerations. From a defining point of view, it is an independent practice compared to slavery that can present a high degree of individual freedom restrictions. Jordan believed that forced labor is the common denominator of all forms of slavery and so slavery's regime should be applied.<sup>220</sup> I think that forced labor can be seen as a common element to all forms of slavery but it is important to recognize its autonomy as an independent practice.

Moreover, from the point of view of juridical regime, there is an important difference between slavery and forced labor which consists in the fact that forced labor can be derogated. The derogation is established directly by the ILO Forced Labor Convention No.29 but also by other international human right conventions.<sup>221</sup> Article 2 of the ILO Convention No.29 states some explicit exceptions which are

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<sup>214</sup> Special Rapporteur on Contemporary Forms of Slavery, Report A/HRC/24/43, 1 July 2013.

<sup>215</sup> Special Rapporteur on Contemporary Forms of Slavery, Report A/HRC/36/43, 2 August 2017. See also ILO, *Global Estimates of Modern Slavery: Forced Labor and Forced Marriage*, 2017, Geneva.

<sup>216</sup> For example in the Pohl case in 1947, the US Military Tribunal at Nuremberg held that "involuntary servitude, even if tempered by humane treatment, is still slavery".

<sup>217</sup> Bassiouni Cherif M., "Enslavement: slavery, slave relative practices, and Trafficking in Persons for Sexual Purpose.", *International Criminal Law*, 2000.

<sup>218</sup> Special Rapporteur on Contemporary Forms of Slavery, Report A/HRC/36/43, 2 August 2017.

<sup>219</sup> International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 16 December 1966. Article 4 establishes that no derogation is admitted from Article 8 paragraphs 1 and 2. Article 8 par. 2 deals with servitude prohibition. European Convention on Human Rights, 4 November 1950. Article 15 establishes that no derogation is admitted from Article 4 paragraph 1. Article 4 par. 1 deals with the prohibition of slavery and servitude. American Convention on Human Rights, 22 November 1969. Article 27 establishes that any suspension of Article 6 (Freedom from Slavery and Servitude) is admitted.

<sup>220</sup> See Jordan Ann, "Slavery, Forced Labor, Debt bondage and Human Trafficking: From Conceptual confusion to targeted solutions", *American University Washington College of Law*, 2011.

<sup>221</sup> International Covenant on Civil and Political Rights, GA Res 2200A (XXI), 16 December 1966. Article (3)(c). "For the purpose of this paragraph the term "forced or compulsory labor" 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

“compulsory military service”, “normal civic obligations”<sup>222</sup>, the performance of a work “in consequence of a conviction in a Court”<sup>223</sup>, in “cases of emergency”<sup>224</sup> and “minor communal services”.<sup>225</sup> In my opinion the fact that there are exceptions to forced labor leads to affirm that this practice has not attained the “jus cogens” status because this, for its definition, has a non-exemptible character. Therefore an upgrading of forced labor regime is desirable also to clarify the exceptions established by ILO Convention No. 29 and their relationship with slavery.

Regarding the role of forced labor in international criminal law, it is peaceful that it is an international crime.<sup>226</sup> Kevin Bales underlines that “slavery, slave-related practices, and forced labor in international law constitute: a war crime [...] and a crime against humanity[...].”<sup>227</sup> This is confirmed also by Bassiouni that considers slavery, slave-related practices, and forced labor as international crimes, both war crime and crime against humanity, under conventional and customary international law.<sup>228</sup>

Therefore it is safe to conclude that institutions similar to slavery have attained the “Jus cogens” status and they are non-exemptible norms, while forced labor has not achieved this status mainly because of its exemptible character which is established by Article 2 of ILO Convention on Force labor No. 29 and it is confirmed by the subsequent international human rights conventions. Moreover it is safe to conclude

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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”. European Convention on Human Rights, 4 November 1950. Article 4(3): “ For the purpose of this Article the term “forced or compulsory labor” shall not include: (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention; (b) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service; (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community; (d) any work or service which forms part of normal civic obligations”.

<sup>222</sup> According to the ILO, instances of normal civil obligations are service in a jury or in a fire brigade, working as the unpaid guardian of a mentally ill person or the legal representative of indigent client. ILO, General Survey concerning the Forced Labor Convention, 1930 (No.29), and the Abolition of Forced Labor Convention, 1957 (No. 105), ILC 65th Session, 1979.

<sup>223</sup> ILO Convention concerning the Abolition of Forced Labor, 14th ILC session, 28 June 1930. According to Article 2, only convicted criminals may be forced to work. Furthermore the ILO framework imposes two additional conditions (i) the labor must be carried out under the control of a public authority, and (ii) the labor cannot be put at the disposal of private companies. ILO, General Survey concerning the Forced Labor Convention, 1930 (No.29), and the Abolition of Forced Labor Convention, 1957 (No. 105), ILC 65th Session, 1979.

<sup>224</sup> ILO Convention concerning the Abolition of Forced Labor, 14th ILC session, 28 June 1930. Article 2, includes war, a calamity or the threat of one, such as fire, flood, famine, earthquake, violent epidemic..... and any circumstance that would endanger the existence or the well-being of the whole or part of the population. The ILO has specified that the extent and length of the service is limited to what is strictly and absolutely necessary in consideration of the needs of the situation. ILO, General Survey concerning the Forced Labor Convention, 1930 (No.29), and the Abolition of Forced Labor Convention, 1957 (No. 105), ILC 65th Session, 1979.

<sup>225</sup> In order to not be considered as forced labor, Communal service must be (1) minor in nature, (2) performed by members of the community, (3) for the direct benefit the community, and (4) be required only after the community has been consulted in regard to the need for such service. ILO, General Survey concerning the Forced Labor Convention, 1930 (No.29), and the Abolition of Forced Labor Convention, 1957 (No. 105), ILC 65th Session, 1979.

<sup>226</sup> Charter of the International Military Tribunal, 8 August 1945. Article 6(b) established “deportation to slave labor” as war crime. The Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949. Article 52: “Unless he be a volunteer, no prisoner of war may be employed on labor which is of an unhealthy or dangerous nature”. Article 53 governed the duration of daily labor of prisoner of war, rest hours, rest day....

<sup>227</sup> Kevin Bales and Peter T. Robbins, “No One Shall Be Held in Slavery or Servitude”, *Human Rights Review*, 2001, pp.19-20.

<sup>228</sup> M. Cherif Bassiouni, “Enslavement as an International Crime”, *New York University Journal of Law and Politics*, 1991, pp. 447-448.

that all these practices are considered as international crimes, whose classification as war crime or crime against humanity depends on the circumstances of the case.

#### 2.4. Obligations: from conventions to their modern development

The prohibition of enslavement, as shown before, binds all States regardless of whether they ratified the relative Conventions or not. However, international treaties on this field establish specific duties on Contracting States that can be aggregated in three groups: the obligation to not commit the violation;<sup>229</sup> to prevent its commission by private individuals through the adoption of all necessary legislative and others measures;<sup>230</sup> to criminalize these practices<sup>231</sup> and to impose severe penalties in case of infractions.<sup>232</sup>

The strong point of international law is its constant evolution. Therefore, considering the obligations as established by conventions does not lead to a complete discussion on this field. What is important is to see their development according to the Special Rapporteur on Contemporary forms of Slavery and to international courts. In fact I believe it is necessary to underline that the first conventions concerning the prohibition of slavery such as Slavery Convention or Supplementary Convention, were drafted and adopted in an era where juridical awareness on human rights was really different from today, whereby considering obligations' development regarding slavery become fundamental.<sup>233</sup> On the contrary, Trafficking Protocol which is one of the last conventions adopted on slavery, reflects international human rights law development whereby obligations established are not limited to classical duties such as duty of preventing and criminalizing, but include also duties, most recently introduced, such as that of victims' protection.<sup>234</sup>

However a state can be considered responsible for a violation of slavery and practices similar in two situations: when the State is active or complicit in subjecting an individual to slavery, practices similar and forced labour (duty to not commit) or when the State is not implicated in the harm but has failed to

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<sup>229</sup> Slavery Convention, 25 September 1926. Article 2(b): "To bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms".

<sup>230</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, GA Res.55/25, 15 November 2000. Article 2(a): "To prevent and combat trafficking in persons, paying particular attention to women and children"; Slavery Convention, 25 September 1926. Article 2(a): "To prevent and suppress the slave trade".

<sup>231</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, GA Res.55/25, 15 November 2000. Article (5)(1): "Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally".

<sup>232</sup> Slavery Convention, 25 September 1926. Article 6 : "Those of the High Contracting Parties whose laws do not at present make adequate provision for the punishment of infractions of laws and regulations enacted with a view to giving effect to the purposes of the present Convention undertake to adopt the necessary measures in order that severe penalties may be imposed in respect of such infractions".

<sup>233</sup> Jenny S. Martinez, "The Slave Trade and the Origins of International Human Rights Law", Oxford University Press, 2012.

<sup>234</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, GA Res.55/25, 15 November 2000. It establishes the duty to prevent and combat trafficking in persons, to protect and assist the victims of such trafficking, with full respect for their human rights, to promote cooperation among States Parties in order to meet those objectives, to prevention, investigation and prosecution of the offences...

prevent it or to respond appropriately (due diligence duty). In fact, it is peaceful that the State has obligations that extend beyond the negative one of non-interference and include positive conducts.<sup>235</sup>

The European Court of Human Rights (ECHR), in *Siliadin* case, underlines the importance of the duty of criminalizing slavery for two reasons: the first one consists in the criminal law's role as deterrent, while the second one is related to the victim's degree of satisfaction in terms of perception of justice.<sup>236</sup> Moreover the court argues that the criminal law, to be in compliance with the duty of diligence, must be sufficiently clear and detailed and provide a punishment commensurate to the crime. The court found that French criminal law did not afford the applicant practical and effective protection because it "was not sufficiently clear", breaching in this way its duty of criminalizing.<sup>237</sup>

The due diligence standard imposes also a positive duty on States to ensure the enforcement of the criminal law through effective investigation, prosecution of perpetrators and, if necessary, through punishment of the guilty parties. In *Mani* case it is evident that the mere provision of obligation of criminalizing a conduct in violation of prohibition of slavery isn't enough if it isn't accompanied by mechanisms of enforcement.<sup>238</sup> In fact the Economic Community of West African States Court of Justice (ECOWAS) condemned Niger for slavery because, despite the prohibition of this practice under Nigerian criminal law, the national judges have failed the obligations "to bring a criminal prosecution and to punish this crime as need be" [...] and because "national judge did not assume its duty of protecting".<sup>239</sup> Likewise in *Rantsev* Case, The European Court of Human Rights found Cyprus responsible of slavery for its failure to fulfil its positive obligation to carry on an effective investigation into victim's (*Rantseva*) death.<sup>240</sup>

Clearly the respect of these duties implies the direct participation of different state organs such as public officials, police and judiciary who, according to Special Rapporteur on Contemporary Forms of Slavery, need specific training in dealing with slavery and its victims.<sup>241</sup> This is confirmed also by Council of Europe which, in Recommendation 1523 of 2001, expressly asks governments to "ensure that police officers are adequately trained to deal with victims of slavery and increase the number of women officers".<sup>242</sup>

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<sup>235</sup> Special Rapporteur on Contemporary forms of Slavery, Report A/HRC/24/43, 1 July 2013. The Dickson Poon School of Law | King's College London, "State responsibility for modern slavery: uncovering and bridging the gap, p.1.

<sup>236</sup> *Siliadin v. France*, Application no. 73316/01, European Court on Human Rights, 26 October 2005. The importance of duty of criminalizing is underlined also by Council of Europe that it accordingly recommends that the Committee of Ministers ask the governments of member states to: "make slavery and trafficking in human beings, and also forced marriage, offences in their criminal codes". See Assembly Parliamentary of Council of Europe, Recommendation 1523, 2001.

<sup>237</sup> *Ibid.*

<sup>238</sup> *Hadijatou Mani Koraou v The Republic of Niger*, Judgment No. ECW/CCJ/JUD/06/08, ECOWAS Community Court of Justice, 27 October 2008. This aspect is confirmed by Council of Europe, that asks to Member State to: "ensure that the relevant authorities in the member states thoroughly, promptly and impartially investigate all allegations of any form of slavery and prosecute those responsible". See Assembly Parliamentary of Council of Europe, Recommendation 1663, 2004.

<sup>239</sup> *Ibid.*

<sup>240</sup> *Rantsev v. Cipro and Russia*, Application no. 25965/04, ECHR, 7 January 2010.

<sup>241</sup> Special Rapporteur on Contemporary forms of Slavery, Report A/HRC/21/41, 10 July 2012.

<sup>242</sup> Assembly Parliamentary of Council of Europe, Recommendation 1523, 2001.

An obligation that Special Rapporteur believes necessary is the duty of allowing a victim to have access to justice.<sup>243</sup> This implies the provision of establishing accessible, safe and effective complaint mechanisms for victims and setting up or strengthening judicial and administrative mechanisms to enable victims to obtain redress through legal procedures that are fair, inexpensive and accessible.<sup>244</sup> In the idea of ensuring a major protection of victims' right to have access to justice, Parliamentary Assembly of Council of Europe has made a proposal of "increasing victims' time limits for bringing proceedings for offences of slavery".<sup>245</sup>

The major concern of Special Rapporteur on Contemporary Forms of Slavery but also of Council of Europe consists in respecting the duty to ensure the victims' protection and provide remedies.<sup>246</sup> It is peaceful that the reparations for slavery's victims must be timely, full and effective and must respect the principles of appropriateness and proportionality.<sup>247</sup> In fact in Mani decision, the ECOWAS established that compensation "had to be all-inclusive".<sup>248</sup> Considering physical and psychical injuries suffered by victims, it is safe to affirm that the only monetary compensation is not enough.<sup>249</sup> This is underlined also by Council of Europe that in Recommendation 1663 of 2004 affirmed that Member states must ensure that victims of slavery "are provided with reparation, including compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition".<sup>250</sup>

In Mani case, where the court recognized that the victim had been alienated since birth, it stands clear that the victim, without an assistance in reintegrating in the society, would not be able to rebuild his own life.<sup>251</sup> Patterson defines slave status as a form of "social death," a term which encapsulates the radical way in which the life of the slave is held.<sup>252</sup> Patterson says that "when a person becomes a slave, that

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<sup>243</sup> Special Rapporteur on Contemporary forms of Slavery, Report A/HRC/39/52, 27 July 2018.

<sup>244</sup> The nature of the procedural remedies (judicial, administrative or other) should be in accordance with the substantive rights violated and the effectiveness of the remedy in granting appropriate relief for such violations. In the case of grave abuses, such as slavery, practices and institutions similar to slavery and forced labor, remedies need to be mainly judicial. A right of access to effective remedies entails the availability of such remedies under criminal or civil law. The importance of this obligation is underlined also by Article 6 (2) of Trafficking Protocol that states: "Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases: (a) Information on relevant court and administrative proceedings; (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defense".

<sup>245</sup> Ibid. See footnote 180.

<sup>246</sup> Special Rapporteur on Contemporary forms of Slavery, Report A/HRC/15/20, 18 June 2010. Assembly Parliamentary of Council of Europe, Recommendation 1523, 2001.

<sup>247</sup> Andrea Nicholson, "Reflections on Siliadin v. France: slavery and legal definition", The international Journal of Human Rights, 2010, pp 708-709. See also Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, GA Res. 55/25, 15 November 2000. Article 6(6): "Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered".

<sup>248</sup> *Hadijatou Mani Koraou v The Republic of Niger*, Judgment No. ECW/CCJ/JUD/06/08, ECOWAS Community Court of Justice, 27 October 2008. The ECOWAS focused on the importance of the compensation, establishing that it had to be all-inclusive, accounting for an entitlement to assistance for the victim's reintegration in the society. As a matter of fact, however, it only implemented the provision of monetary compensation.

<sup>249</sup> Andrea Nicholson, "Reflections on Siliadin v. France: slavery and legal definition", The international Journal of Human Rights, 2010, p.710. Nicholson talks about a "Fair reparation" as a combination of remedies.

<sup>250</sup> Assembly Parliamentary of Council of Europe, Recommendation 1663, 2004.

<sup>251</sup> Ibid.

<sup>252</sup> Kevin Bales and Peter T. Robbins, "No One Shall Be Held in Slavery or Servitude: A Critical Analysis of International Slavery Agreements and Concepts of Slavery", Human Rights Review, 2001, p.32.

person becomes “naturally alienated” because she/he effectively loses any cultural, social, and personal history and future [...]”<sup>253</sup> Effectively slavery is a state marked by the loss of autonomy, a lack of free will, and subjugation to extreme and violent control that often cause psychological damages. Therefore assistance to victims become a fundamental duty also in order to prevent the victim from being enslaved again.<sup>254</sup>

In fact Special Rapporteur, Council of Europe and ILO underline the importance of state duty of assistance and rehabilitation of victims which implies the predisposition of social plans whose content could vary on the base of specific circumstances of case.<sup>255</sup> In any case, rehabilitation and reintegration plans must include psychological and practical supports for victims such as emergency accommodation, health care, access to education if necessary, psychological and legal counseling services...

This new address has been transposed by Trafficking Protocol whose Article 6(3), dealing with assistance to and protection of victims of trafficking in persons, establishes the duty “implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society [...]”<sup>256</sup>

Recently the Special Rapporteur focused its attention in the predisposition of a comprehensive victim-centered and human rights-based approach, where the human rights of victims are at the center of all efforts to combat slavery.<sup>257</sup> The same approach is taken also by Special Rapporteur on Trafficking in Persons.<sup>258</sup> In reality, notwithstanding the impetus of Special Rapporteurs, few steps have been taken in this direction by states and by international courts.<sup>259</sup>

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<sup>253</sup> Ibid.

<sup>254</sup> The importance of protection of victims from revictimization is also confirmed by Article 9 (b) of Trafficking Protocol that states: “To protect victims of trafficking in persons, especially women and children, from revictimization”.

<sup>255</sup> Special Rapporteur on Contemporary forms of Slavery, Report A/HRC/15/20, 18 June 2010. In case of slave since birth or young age the prevision of right to access education while in case of domestic slavery or debt bondage ensuring that victims are able to access decent work opportunities, providing labor-market reintegration, including vocational training and job placement services. In report on servile marriage, Special Rapporteur proposed the improvement “access to reproductive health services” [...] “and providing information to young mother about proper nutrition and care for them and their children”. See Special Rapporteur on Contemporary forms of Slavery, Report A/HRC/21/41, 10 July 2012. Assembly Parliamentary of Council of Europe, Recommendation 1523,2001. See also Assembly Parliamentary of Council of Europe, Recommendation 1663, 2004.

<sup>256</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, GA Res. 55/25, 15 November 2000. Article 6 (3): “ (a) Appropriate housing; (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand; (c) Medical, psychological and material assistance; and (d) Employment, educational and training opportunities”.

<sup>257</sup> Special Rapporteur on Contemporary forms of Slavery, Report A/HRC/15/20, 18 June 2010.

<sup>258</sup> Special Rapporteur on Trafficking in Persons, especially Women and Children, “First decade of the mandate of the Special Rapporteur on Trafficking in Persons, especially Women and Children”, 2014. See also Special Rapporteur on trafficking in persons, especially women and children, Report A/HRC/38/45, 14 May 2018. Article 2 (b) of Trafficking Protocol states that among its purposes there is that “To protect and assist the victims of such trafficking, with full respect for their human rights”, emphasizing in this way the importance of protection of human rights in the predisposition of efforts against slavery.

<sup>259</sup> *Hadijatou Mani Koraou v The Republic of Niger*, Judgment No. ECW/CCJ/JUD/06/08, ECOWAS Community Court of Justice, 27 October 2008. Ecowas court established only a monetary compensation. *Siliadin v. France*, Application no. 73316/01, European Court on Human Rights, 26 October 2005. ECHR established only a monetary compensation.



## 2.5. The role of the *Siliadin v. France* case (ECHR)

The *Siliadin v France* case is often cited with the *Kunarac* case because the two Courts gave a different interpretation of the definition of slavery which is narrower in the *Siliadin* decision than in the *Kunarac* one.<sup>260</sup> From an European point of view, the importance of *Siliadin* lies in the fact that it is the only judgement of the European Court on Human Rights (ECHR) to be exclusively based on Article 4 of European Convention on Human Rights and the first case related to slavery.<sup>261</sup>

The decision also marks the first recognition by the Court that Article 4 of the European Convention (ECHR), concerning slavery, servitude and forced labor, imposes positive obligations on states.<sup>262</sup> In fact judges emphasized that “it would be inconsistent with the relevant international instruments to limit state responsibilities to a negative obligation upon the state to refrain from a direct violation of Article 4 itself. As a result, Article 4 must include positive obligations for states, particularly to adopt effective criminal law measures to punish both private and public actors”.<sup>263</sup>

The applicant was a young Togolese girl (15 years) who should have worked in France at Mrs. D’s house until the cost of the plane ticket would be covered, while her employer would also arrange for her ongoing education and the regularization of her immigration status.<sup>264</sup> As a matter of fact, however, she became an unpaid housemaid for Mr. and Mrs. D, and her passport was taken away from her. Later on, Mrs. D “lent” the applicant to Mrs. and Mr. B who had three children. She worked seven days a week, without a day off, and was occasionally and exceptionally authorized to go out on Sundays to attend mass. Her working day began at 7.30 a.m., and during the day she was expected to do all the housework and to take care of the children, then she was allowed to go to bed at about 10.30 p.m. The applicant slept on a mattress on the floor in the baby’s room; she had to look after him if he woke up. She was neither paid nor given a chance to attend school and wore second-hand clothes.

In the end, the girl was rescued thanks to the help of a neighbor. After consulting every national legal remedy without success, the applicant resorted to present her application before the European Court of Human Rights, arguing that the defendant State had failed in its positive obligation to have adequate criminal offences in place to protect her rights under Article 4 of the ECHR.<sup>265</sup>

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<sup>260</sup> *Kunarac et als*, Judgment IT-96-23-T & -IT-96-23/1-T, ICTY, 22 February 2001. *Siliadin v. France*, Application no. 73316/01, European Court on Human Rights, 26 October 2005.

<sup>261</sup> Andrea Nicholson, “Reflections on *Siliadin v. France*: slavery and legal definition”, *The international Journal of Human Rights*, 2010, p.706.

<sup>262</sup> Holly Cullen, “*Siliadin v France*: Positive Obligations under Article 4 of the European Convention on Human Rights”, *Human Rights Law Review*, 2006, p. 588.

<sup>263</sup> *Ibid.*

<sup>264</sup> The applicant entered France on a Togolese passport with a tourist visa. The agreement reached between Mrs D and the applicant’s family was that she would work for Mrs D for a period to pay for the cost of her airfare, after which time her immigration status would be regularized and she would be placed in a school.

<sup>265</sup> *Siliadin v. France*, Application no. 73316/01, European Court on Human Rights, 26 October 2005.

### 2.5.1. The definition of slavery in the Siliadin case

Article 4 (ECHR) prohibits three practices, namely slavery, servitude and forced labor but does not provide any definitions of them.<sup>266</sup> So, the ECHR court takes into consideration the definition of slavery as offered by the Slavery Convention.<sup>267</sup> In its analysis, the Court focused on the concept of legal ownership without considering the words “any or all powers attaching to the rights of ownership”.<sup>268</sup> The European Court made a distinction between servitude and slavery, stating that servitude reflects a situation of exploitation that does not require the victim to be objectified to the point of becoming someone else’s property. So, for the Court, the essential feature of slavery consisted in the exercise of the legal right of ownership. Therefore, its conclusion was that the applicant was not subjected to slavery, but rather to servitude since the evidence didn’t reveal that Mr. and Mrs. B. exercised a proper genuine right of legal ownership over her, that would have reduced her status to that of an object.

In fact, the Court emphasized that the victim had some degree of freedom of movement, proved by her possibility to attend the mass and to take the children to school etc... It is evident how the Court isolated the words “right of ownership” from the context of the article, misinterpreting the definition of slavery.<sup>269</sup>

Moreover the court did not consider the psychological constraint suffered by victim. In fact among indicators of the powers attached to the right of ownership, as analyzed by ICTY in Kunarac case or by ECOWAS court in Mani case, the psychological constraint is included.<sup>270</sup> In this case the psychological constraint is evident if we consider the young age of the victim, the fact that she did not have any friends or parents, did not speak the local language and was unlawfully located in France. The perpetrators leveraged her weaknesses. Therefore, even if the victim could occasionally go to mass, they were aware that she would not escape because she did not have any alternatives.

The condemnation of France for servitude and not for slavery has a practical relevance in terms of punishment. In fact ECHR defines the relationship between slavery and servitude on the base of different degree of violation. Slavery is regarded by court as the most serious violation while servitude is less

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<sup>266</sup> European Convention on Human Rights, 4 November 1950. Article 4:” (1.) No one shall be held in slavery or servitude. (2.) No one shall be required to perform forced or compulsory labor. (3.) For the purpose of this Article the term “forced or compulsory labor” shall not include [...]”.

<sup>267</sup> Slavery Convention, 25 September 1926. Article 1(1.): “Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”.

<sup>268</sup> Ibid.

<sup>269</sup> See J. Allain, “The Definition of Slavery in General International Law and the Crime of Enslavement within the Rome Statute”, Guest Lecture Series of the Office of the Prosecutor, 2007, pp.18-19. See also Andrea Nicholson, “Reflections on Siliadin v. France: slavery and legal definition”, *The international Journal of Human Rights*, 2010, p.711.

<sup>270</sup> *Kunarac et als*, Judgment IT-96-23-T & -IT-96-23/1-T, ICTY, 22 February 2001. *Hadijatou Mani Koraou v The Republic of Niger*, Judgment No. ECW/CCJ/JUD/06/08, ECOWAS Community Court of Justice, 27 October 2008.

severe. Therefore pursuant to proportionality's principle this division based on different degree of seriousness of violation leads to the application of a different penalty and monetary compensation.<sup>271</sup>

Furthermore judges condemned France also for forced labor. The European Court analyzed forced labor's definition as contained in ILO Convention on Forced Labor (No.29) and stated that two essential elements of this practice, namely coercion and involuntariness, are present in that case.<sup>272</sup> It considered that the victim was an adolescent girl in a foreign land, unlawfully present on French territory and in fear of being arrested by the police. Accordingly, the Court considered that the first criterion was met, especially since the applicant was a minor at the relevant time and her exploiters fueled her fears. Moreover, the Court found that the second criterion was met too, considering that the victim had performed her work because she was given no other choice.<sup>273</sup>

The court very likely adopted a traditional approach in reconstructing slavery's definition only because this was its first case on slavery and it did not have previous decisions to refer to. However the case shows the difficulties in the reconstruction of slavery's definition as provided by Slavery Convention. Moreover it stands clear that the distinction among definitions of slavery, servitude and forced labor is so open to interpretation that it is understandable that some have sought to subsume a range of practices within the meaning of slavery and that there is confusion on what slavery means.

### 2.5.2. The evolution of slavery's concept in the Siliadin and Rantsev cases

The European Court of Human Rights changed its approach in Rantsev case in 2010, when it showed more familiarity with Article 4, opening the door to new reflections on this field.<sup>274</sup> The case concerned the death of Oxana Rantseva and was brought by her father.

Oxana moved from Russia to Cyprus and started to work as a "cabaret artiste", as one of thousands of women coming to Cyprus. It was widely known that these "artistes" were in practice mostly working as prostitutes.<sup>275</sup> Within a few weeks she left the place where she worked, but was traced by her employer

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<sup>271</sup> *Siliadin v. France*, Application no. 73316/01, European Court on Human Rights, 26 October 2005. See also *C.N. and V. v. France*, Application no. 67724/09, ECHR, 11 October 2012.

<sup>272</sup> Convention concerning Forced or Compulsory Labor No.29, 14th ILC session, 28 Jun 1930. Article 2 (1): "For the purposes of this Convention the term forced or compulsory labor shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".

<sup>273</sup> Thereafter judges draw out the distinction between forced labor and servitude as follows: "Servitude was identified as consisting of a serious denial of the individual's freedom which extends beyond compulsory labor to his or her living conditions and a lack of potential for improvement; it therefore constituted a serious form of denial of freedom". In the court's view, servitude signified an obligation to provide one's services that is imposed by the use of coercion, and which is linked with the concept of slavery. The court then distinguished these indicators from forced labor by stating that servitude would additionally involve "the obligation on the serf to live on another's property and the impossibility of changing his status".

<sup>274</sup> *Rantsev v. Cipro and Russia*, Application no. 25965/04, ECHR, 7 January 2010.

<sup>275</sup> Vladislava Stoyanova, "Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case", *Netherlands Quarterly of Human Rights*, 2012, pp. 167-168. See also the Council of Europe Commissioner for Human Rights, Report on his visit to Cyprus in June 2003 (Comm. DH (2004)2), 12 February 2004, para. 32. Council of Europe Commissioner for Human Rights, Follow-up Report on the progress made in implementing his recommendations (Comm. DH (2006)12), 26 March 2006, at para. 49. In report of 2006 it is stated that: "There is obviously a

who brought her to the police with the aim of having her detained and extradited, so that he could employ someone else. The police noted that she was not illegally staying in Cyprus but had a work permit and made her go back with her employer. Later that night, she tried to escape from the apartment where her employer was keeping her and in doing so fell off a balcony and died. Despite the mysterious circumstances of her death, the context of possible human trafficking was never looked into by the authorities.

Therefore her father resorted to ECHR and complained that the Cypriot police had not done everything possible to protect his daughter from trafficking while she had been alive and to punish those responsible for her death. He also complained about the failure of the Russian authorities to investigate his daughter's trafficking and subsequent death and to take steps to protect her from the risk of trafficking.<sup>276</sup>

European judges recognized that Article 4 of European Convention doesn't deal directly with trafficking because this phenomenon became more frequent in the last years.<sup>277</sup> The court argued that the convention is a "living instrument" which must be interpreted in the light of present-day conditions and that the increasingly high standards required in the area of the protection of human rights require greater firmness in assessing breaches of these rights.<sup>278</sup>

So the Court, through the principle of progressive interpretation of Convention and the notion of Convention as a "living instrument", concluded that trafficking falls within the scope of the Article 4 (ECHR). In fact according to judges the trafficking in persons, whose ultimate purpose is the exploitation of the victims, is based on the exercise of powers attached to the right of ownership. Judges noted that this practice "treated human beings as commodities to be bought and sold and put to forced labor; it implied close surveillance of the activities of victims, whose movements were often circumscribed; and it involved the use of violence and threats against victims".<sup>279</sup> By doing so judges recognized that trafficking is a form of slavery that falls under Article 4 (ECHR).<sup>280</sup>

Therefore the court interprets Article 4 (ECHR) in such a broad way as to include in it a contemporary form of slavery and departs from his previous decision, focusing on powers attached to the right of ownership and not on legal right of ownership anymore. By considering the change of approach and of interpretation's method of Article 4 (ECHR), this decision makes us think that if the court were to deal

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risk that the young women who enter Cyprus on artiste visas may be victims of trafficking in human beings or later become victims of abuse or coercion. These women are officially recruited as cabaret dancers but are nevertheless often expected also to work as prostitutes. They are usually from countries with inferior income levels to those in Cyprus and may find themselves in a vulnerable position to refuse demands from their employers or clients. The system itself, whereby the establishment owner applies for the permit on behalf of the woman, often renders the woman dependent on her employer or agent and increases the risk of her falling into the hands of trafficking networks [...].

<sup>276</sup> Ibid.

<sup>277</sup> European Convention on Human Rights, 4 November 1950. Article 4:" (1.) No one shall be held in slavery or servitude. (2.) No one shall be required to perform forced or compulsory labor. (3.) For the purpose of this Article the term "forced or compulsory labor" shall not include [...]."

<sup>278</sup> Ibid.

<sup>279</sup> Council of Europe, factsheet on Slavery, servitude and forced labor, Press Unit, p5.

<sup>280</sup> The Court unanimously found that trafficking fell within the scope of Art. 4.

again with a case similar to *Siliadin*, it would most likely interpret the definition of slavery in a different way.

However in *Rantsev* case an element of continuity with *Siliadin* case is recognizable, which consists in the fact that the judges reaffirm that states have positive obligations under Article 4 of ECHR.<sup>281</sup> Whereas in *Siliadin*, the Court had focused on the positive obligation to penalize and prosecute acts of slavery, servitude or forced labor, it broadened its approach here - in line with explicitly mentioned other international instruments on human trafficking such as the Trafficking Protocol - to two other aspects: positive obligations to prevent trafficking and to protect victims.<sup>282</sup>

According to judges if the authorities are aware of a situation of human trafficking or of the real risk that an individual will get into such a situation, they are obliged to take appropriate measures. This includes a procedural obligation to investigate situations of potential human trafficking and to cooperate with the investigations of other state parties. This goes for both states of origin and destination. In fact the court emphasized that trafficking, also if covered by Article 4, has its own characteristic which consists in trans-national character which other forms of slavery does not necessarily have. The trans-national character implies that there is a duty to collaborate between state of origin and state of destination in order to prevent this phenomenon and to protect victims.<sup>283</sup>

Consequently judges found guilty of trafficking both Cyprus, as state of destination, and Russia as state of origin. According to judges, Cyprus had violated its positive obligations arising under Article 4 of the Convention on two counts: first, its failure to put in place an appropriate legal and administrative framework to combat trafficking as a result of the existing regime of artiste visas, and, second, the failure of the police to take operational measures to protect the applicant's daughter from trafficking, despite circumstances which had given rise to a credible suspicion that she might have been a victim of trafficking.<sup>284</sup> Furthermore the Court held that there had also been a violation of Article 4 of the Convention by Russia on account of its failure to investigate how and where the applicant's daughter had been recruited and, in particular, to take steps to identify those involved in her recruitment or the methods of recruitment used.<sup>285</sup>

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<sup>281</sup> *Siliadin v. France*, Application no. 73316/01, European Court on Human Rights, 26 October 2005.

<sup>282</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, GA Res. 55/25, 15 November 2000. Article 2: "The purposes of this Protocol are: (a) To prevent and combat trafficking in persons, paying particular attention to women and children; (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and (c) To promote cooperation among States Parties in order to meet those objectives".

<sup>283</sup> According to judges the positive obligations under Article 4 regards both state of origin and state of destination.

<sup>284</sup> *Rantsev v. Cipro and Russia*, Application no. 25965/04, ECHR, 7 January 2010.

<sup>285</sup> Article 3 of Trafficking Protocol includes in trafficking definition also the conduct of recruitment therefore also this conduct is punishable. Article 3 (a): "Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons [...]".

## 2.6. The role of the Hadijatou Mani Koroua v Niger case (ECOWAS)

Mani case is important because it was among the first cases related to slavery ever to be won at international level and the first to condemn the practice of slavery in Niger.<sup>286</sup> Hence, it was considered of historical relevance and received the attention of the global press.

Hadijatou Mani was the daughter of a slave and she inherited her mother's servile status. At the age of 12, she was sold by her mother's owner.<sup>287</sup> She became the "sadaka" or "fifth wife" of her new master. "sadaka" is a female who is taken as a wife but cannot be acknowledged as such under the precepts of Islam.<sup>288</sup> She was raped when she was 13 and ever since that moment she was subjected to constant sexual abuse.<sup>289</sup> For nine years, she was a servant doing all sorts of housework and serving as a concubine. Eventually, her master gave her a certificate of liberation.<sup>290</sup> So she decided to leave the house of her former master but he refused because, even though she was no longer his slave, she had been and still was his wife. However, she managed to escape and never went back.

She brought a complaint before the national Court for the legal acknowledgement of her complete freedom. In the meantime, her former master filed a report for bigamy against her because she married another man.<sup>291</sup> Therefore, the victim resorted to the Economic Community of West African States Court of Justice (ECOWAS) arguing that the State was responsible for slavery and other serious violations of human rights.<sup>292</sup>

### 2.6.1. Slavery according to the ECOWAS Court

The court firstly noted that slavery as a serious violation of human dignity is a non-exemptible right under international human rights instruments and recognized the "erga omnes" nature of the obligations in respect of slavery, citing the words of international court of justice in Barcelona Traction case.<sup>293</sup>

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<sup>286</sup> *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Judgment IT-96-23 and IT-96-23/1-A (2001) and *Prosecutor v Milorad Krnojelac*, IT-97-25 (2002), resulted in criminal convictions for sexual slavery at the International Criminal Tribunal for the former Yugoslavia (ICTY); *Siliadin v France* before the ECHR gave rise to findings not of slavery but of "servitude" and "forced labor".

<sup>287</sup> One particular form of slavery is the practice of Wahaiya, the purchase of young female slaves for the households of wealthy older nobles. Children become slaves by inheriting the status of their parents. Their parents' owner decides what is to become of them. Often, female children are sold to wealthy men as concubines. See Jean Allain, "Hadijatou Mani Koroua v. Republic of Niger", *The American Journal of International Law*, 2009, pp. 312-313.

<sup>288</sup> The practice whereby a young girl is forced into servile status, acting as both domestic servant and concubine, is still current in Niger and is known as "sadaka".

<sup>289</sup> Four children were born during her years as "sadaka".

<sup>290</sup> In Niger slave can be freed through a liberation certificate countersigned by the village chief.

<sup>291</sup> Criminal division of the Court of First Instance found Mani and her new husband, along with her brother as an accomplice, guilty of bigamy and sentenced them each to six months in jail and a fine of the equivalent of \$100. A week later, Mani and her brother were incarcerated. They were provisionally released two months later as a result of an interim order by the Criminal Division of the Court of Appeal in Niamey.

<sup>292</sup> *Hadijatou Mani Koroua v The Republic of Niger*, Judgment No. ECW/CCJ/JUD/06/08, ECOWAS Community Court of Justice, 27 October 2008.

<sup>293</sup> *Barcelona Traction, Light and Power Co, (Belgium v. Spain)*, Judgement, ICJ, 5 February 1970, par.33-34.

Judges cited Article 5 of the African Charter of Human and People's Rights, which prohibits slavery but does not provide a definition of this practice, therefore they referred to other international instruments.<sup>294</sup>

The court considered Article 1 of the Slavery Convention<sup>295</sup> as the starting point of its reasoning and focused on powers attached to the right of ownership as analyzed by the ICTY in the Kunarac and others case, finding that their essential characteristic is the exercise of control over a human being.<sup>296</sup> The Court claimed that slavery exists not only when the powers attached to the right of ownership in the legal sense occur, or when these powers have the classical meanings of sale and purchase, but also when some level of control is exercised by one individual over another.<sup>297</sup>

Judges found that the circumstances of victim's sale and transfer and the conditions in which she subsequently lived, met all of the indicators of slavery's definition as provided by Article 1 of the 1926 Convention and as interpreted by the International Criminal Tribunal for ex-Yugoslavia in the Kunarac case.<sup>298</sup> Therefore judges concluded that "there is no doubt that the applicant, Hadijatou Mani Koraou, was held in slavery for nearly nine years in violation of the legal prohibition of this practice".<sup>299</sup>

Thereafter the Court affirmed that state becomes responsible under international law for any form of slavery violation carried out by private individuals, on the basis that, although the state did not cause them, it had failed to exercise due diligence to prevent, investigate, prosecute, punish or provide reparation. Therefore judges listed a series of measures that a state should take to give effect to these obligations:

- sensitizing public officials, including the police and judiciary, to its domestic legislation with respect to slavery and applicable international human rights norms;
- educating the general public about the rights of women and the prohibition on slavery;
- investigating and prosecuting those involved in the network of slavery and imposing appropriately severe penalties;

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<sup>294</sup> African Charter on Human and Peoples' Rights, O.A.U. Doc. CAB/LEG/67 /3/Rev, 27 June 1981. Article 5:" Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman and degrading punishment and treatment shall be prohibited".

<sup>295</sup> Slavery Convention, 25 September 1926.

<sup>296</sup> *Kunarac et als*, Judgment IT-96-23-T & -IT-96-23/1-T, ICTY, 22 February 2001.

<sup>297</sup> This statement allowed for the inclusion of contemporary forms of slavery in the definition of slavery as provided by Slavery Convention.

<sup>298</sup> Court through the list of ICTY "indiciae" in light of the applicant's case: "she had no freedom of movement; her master completely controlled how she lived; she was psychologically and physically abused by him: he demeaned her with his sexual and other abuse and insults, reminding her she was no more than a slave; her attempts to escape were met with punishment; she was forcefully beaten; and she was raped throughout her time as a slave, including when she was a child. This treatment continued over a period of 10 years and attempts at control continued after her 'liberation' and departure". *Hadijatou Mani Koraou v The Republic of Niger*, Judgment No. ECW/CCJ/JUD/06/08, ECOWAS Community Court of Justice, 27 October 2008, para. 76-80.

<sup>299</sup> *Ibid.*

- and taking necessary and effective measures to abolish customs, and cultural and traditional practices which fall foul of basic human rights.<sup>300</sup>

The Court found Niger legally responsible for its failure to protect the victim from slavery. According to judges Niger had failed through its judicial and administrative authorities to discharge its protective human rights function. The Court criticized the failure of the judiciary to condemn the practice of slavery, when Hadijatou's case came to its attention. It noted that the national judge, instead of denouncing the applicant's status as a slave of its own motion, found that there were circumstances where it was lawful under customary law.

In fact when the victim resorted the local tribunal "the Civil and Customary Law Tribunal of Konni", in order to protest that her former master sought to prevent her from pursuing her freedom despite her "liberation certificate", the judge ruled in her favour and decided that she was free to leave her master, not because slavery was prohibited, but on the basis that the legal requirements for a valid marriage, notably consent, payment of a dowry and a religious ceremony, had not been met.<sup>301</sup>

A higher tribunal, the Tribunal de Grand Instance, reversed this decision and ruled that under Niger's customary law a slave girl is de facto married to her master once she is released. The Court found in favour of the former master because customary law permits "marrying women in conditions of slavery", provided certain conditions are met, and held that Hadijatou was obliged to return to live with him as his wife.<sup>302</sup>

The factual circumstances show how slavery is deeply rooted in some cultures and the way this affects also the judicial and administrative organs. In fact in spite of Nigerian criminal law forbidding slavery, the judicial organs preferred to apply the customary law and the fact that the applicant was a slave was only noticed as a background element.<sup>303</sup> This shows a tolerance and acceptance of that practice. In fact court underlined "that recognizing the slave status of Mrs. Hadijatou Mani Koraou without denouncing this situation is a form of acceptance, or at least, tolerance of this crime or offence".<sup>304</sup>

Moreover the court found that social acceptance of slavery is proved also by the facts that sale and liberation of a human being was governed by contracts of purchase and transfer and certificates of liberation, which were officiated by several people, including village chiefs. These were transactions with certain attendant formalities and were not carried out under cover of night without trace or

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<sup>300</sup> Helen Duffy, "Hadijatou Mani Koroua v Niger: Slavery Unveiled by the ECOWAS Court", Human Rights Law Review, 2009, p12.

<sup>301</sup> Her former master objected on the basis that under custom she was in fact married to him.

<sup>302</sup> Ibid.

<sup>303</sup> Article 12 of Constitution of the Republic of Niger, adopted 9 August 1999, provides that "no-one shall be subject to [ ...] slavery nor cruel, inhuman or degrading treatment or punishment". Article 270.1 to 5, Penal Code of the Republic of Niger as revised by Law No 2003-05 of 13 June 2003.

<sup>304</sup> As a result, the ECOWAS Community Court of Justice concluded that Niger "did not sufficiently protect the applicant's rights against the practice of slavery," awarding Mani approximately \$21,500 and expenses.



evidence, indicative both of the level of social acceptance of the practice and the lack of meaningful attempts at repression and accountability.<sup>305</sup>

In this case it is more evident as slavery is first of all a social institution, a cultural belief. So it emerges that the predisposition of cultural awareness initiatives aimed to population and to professional figures can have an important role for the eradication of slavery. The General Assembly in Resolution 66/140 underlines that the state should implement multisectoral programs in order to engage all stakeholders and to ensure that there is social support to the enforcement of laws and legislation on slavery.<sup>306</sup> Additionally Council of Europe believes fundamental that professional figures directly concerned with slavery are trained through the organization of initiatives of educating and sensitizing.<sup>307</sup>

From the analysis of cases it results that national efforts to effectively eradicate slavery should be of different nature, deal with all state offices and organs, affect different sectors and ensure the involvement of civil society. Here it emerges one of the three dimensions of Multi-dimension approach, proposed by Special Rapporteur on Contemporary Forms of Slavery, which is the national one.<sup>308</sup> In this case the multi-dimension approach refers to different strategies (legislation, administrative measures, rehabilitation's strategies...) which a state should take, and to different agents which a state should involve in order to eradicate slavery.

## Conclusion

Since 1926, when the Slavery Convention was adopted, the prohibition of slavery has undergone continuous evolution that has led to the attainment of "jus cogens" status and the recognition as international crime under international criminal law. Regarding institutions similar to slavery, the issue of whether they obtained "jus cogens" status has long been controversial. Today, it is safe to conclude that these institutions are covered by the same legal regime amount to "jus cogens". The only exception in this regard is forced labor. Contrary to slavery and practices similar to slavery, the prohibition of forced labor is derogable, even though international organizations consider it as a modern form of slavery. Therefore, the adoption of an amendment of its definition and of its legal regime is preferable to better define its relationship with slavery.

An analysis of relevant international case law demonstrates that even though courts have interpreted the definition of slavery in different ways, they tend to agree on the scope of state obligations. A particular focus has centered on the duty of rehabilitating victims and on the necessity of implementing sensitizing

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<sup>305</sup> Helen Duffy, "Hadijatou Mani Koroua v Niger: Slavery Unveiled by the ECOWAS Court", *Human Rights Law Review*, 2009, p.4.

<sup>306</sup> GA, Res. A/RES/66/140, 19 December 2011.

<sup>307</sup> Parliamentary Assembly of Council of Europe, Recommendation 1663, 2004.

<sup>308</sup> Special Rapporteur on Contemporary forms of Slavery, Report A/HRC/36/43, 2 August 2017.

initiatives. Courts appear to agree on the fact that the rehabilitation of victims, in terms of physical and psychological support, is necessary to prevent their revictimization. This chapter has also demonstrated that the normative prescription of slavery is not enough for its effective abolishment. What is necessary is the predisposition of cultural initiatives in order to sensitize members of society. Therefore, a key challenge is the development of alternative instruments and multidimensional measures which address slavery from different perspectives.

### 3. THE PERPETRATORS OF ENSLAVEMENT

#### Introduction

The chapter seeks to identify the main perpetrators of modern forms of slavery. Identifying the main perpetrators allows to develop strategies to eradicate this phenomenon. In particular, this chapter focuses on two categories: states and multi-national enterprises (MNEs). It demonstrates that the main perpetrators of slavery used to be state actors, while today it is mostly perpetrated by non-state actors such as MNEs. Consequently, understanding the relationship between MNEs and global supply chains is important. The chapter concludes by examining measures states and MNEs have adopted to ensure that economic agents are not involved in slavery.

#### 3.1. State

In the past, States were the main perpetrators of slavery. During the colonialism era and in particular since XVI century, with the phenomenon of Atlantic slave trade, slavery was seen as an important component of the political system of some states.<sup>309</sup> Some of the Great Powers used slaves in order to realize great public infrastructures or to cover less skilled jobs.<sup>310</sup> The 1926 Convention represented a watershed. In fact, the Slavery Convention identifies the first important binding act where state committed themselves to prohibit and not to commit slavery.<sup>311</sup> The progressive commitment of states in the struggle against slavery led to the prohibition of slavery obtaining “jus cogens” status. This progressive commitment caused a radical reduction of cases of slavery practiced directly by state organs. In fact today the major part of modern forms of slavery are perpetrated by private agents.<sup>312</sup> Consequently the efforts of States against modern slavery are mainly focused on their responsibility to prevent, protect and punish offence committed by non-state actors. Unfortunately, that approach remains insufficient when States are involved in the commission of the offence through State policy (direct). In fact contrary to what we can imagine today there still are cases of slavery practiced by states.

An internationally wrongful act is directly attributable to the State under international law mainly in two situations: when offence is committed by state organ<sup>313</sup> pursuant to Article 4 of Draft articles on

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<sup>309</sup> Daniel Roger Maul, “The International Labor Organization and the Struggle against Forced Labor from 1919 to the Present”, *Labor History*, 2007, pp. 478-479.

<sup>310</sup> *Ibid.*

<sup>311</sup> Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery*, 2008, pp. 42-47.

<sup>312</sup> Special Rapporteur on Contemporary forms of Slavery, Report A/HRC/39/52, 27 July 2018.

<sup>313</sup> In reality there is another situation where tort is attributable to the state namely when there is a person or entity which is not an organ of the State under Article 4 but which is empowered by law of that state to exercise elements of governmental authority, provided the person or entity is acting in that capacity in the particular instance. Article 5 ARSIWA.

Responsibility of States for Internationally Wrongful Acts, (ARSIWA)<sup>314</sup> or when a person or a group of persons<sup>315</sup> acted on the instructions of, or under the direction or control of state in carrying out the conduct pursuant to Article 8 of ARSIWA.

Findings from the 2018 Global Slavery Index highlight the connection between modern slavery, practiced directly by state, and two major external drivers: highly repressive regimes, in which populations are put to work to prop up the government, and conflict situations which result in the breakdown of rule of law, social structures, and existing systems of protection.<sup>316</sup> I choose to deal with two emblematic cases: North Korea and Uzbekistan that allow me to explore different juridical profiles.

### 3.2. North Korea: “Mobilization” and labor camps

According to the Global Slavery Index 2018, North Korea has the highest percentage of its population enslaved, one in 10 people are in modern slavery with the “clear majority forced to work by the state”.<sup>317</sup> Global Slavery Index denounced that slavery is seen as an essential component of the North Korean political system.<sup>318</sup> The main forms of slavery that can be found are: forced labor, slavery and hazardous child labor.<sup>319</sup> The first commonly used practice consists in repeated and systematic mobilization by the government of children and adults, through mandatory, unpaid<sup>320</sup> “communal labor” in agriculture, road building, and construction. The mobilization implies two consequences: the forced displacement of citizens and the deprivation of freedom to refuse work. In fact if children were to refuse to participate, they would later be punished by school while the penalty for adult’s refusal is a cut in food and in other essential services.<sup>321</sup>

Another form of slavery is practiced inside labor camps. The punishment for being unemployed or failing to attend work is internment in a labor camp. In labor camp workers are seen as slaves, they do

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<sup>314</sup> Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001. Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/56/10). Article 4: “1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State”.

<sup>315</sup> Article 11 of ARSIWA disciplines the case where a private commits a tort and this conduct will be attributable to a State only if and to the extent that state acknowledges and adopts the conduct in question as its own.

<sup>316</sup> Global Slavery Index 2018 was realized by Walk Free Foundation in cooperation with other non-governmental organizations and ILO.

<sup>317</sup> Ibid.

<sup>318</sup> This is the first denounce of slavery in North Korea. In fact in 2017 the Walk Free Foundation partnered with researchers at the Leiden Asia Centre and the Database Center for North Korean Human Rights (NKDB) in an effort to learn more about the hidden reality regarding forced labor and other forms of modern slavery inside North Korea denounced as it was not possible to directly survey or otherwise collect data within North Korea, and that the research involved undertaking interviews with 50 defectors from North Korea who are living in South Korea.

<sup>319</sup> The report also mentions the sale of wives and forced marriage emphasizing that further researches, in this field, are necessary.

<sup>320</sup> In case of children labor the schools, and not the children, received payment for the work.

<sup>321</sup> The participation could be avoided through paying bribes.

not have any freedom of movement or choice and their main task consists in obeying the orders of the leaders. Workers are under continuous surveillance, they can't use the toilet unless they have permission, which is often denied, and are bound to work all day from 6 am to 10 pm. There are different elements such as control over the victims, lack of freedom of movement or of choice, exploitation of labor force of victims without their consent... that makes safe to affirm that practices perpetrated in North Korea are modern forms of slavery.

### 3.2.1. Juridical consequences

From a juridical point of view North Korea did not ratify any slavery conventions but has ratified International Covenant on Civil and Political Rights 1966 which prohibits slavery in article 8.<sup>322</sup> Furthermore the prohibition of slavery has achieved “ius cogens” level and establishes “erga omnes” obligations, as showed in chapter two.<sup>323</sup> Therefore each state has the obligation to respect this prohibition regardless of the ratification of relevant treaties and at the same time any state allows to raise or contest an alleged violation. The practices and policies of North Korea amount to a breach of the prohibition of slavery and constitute an internationally wrongful act entailing the international responsibility of that State under the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).<sup>324</sup> In this case the violation is committed by state against its own citizens but as the breach regards an “erga omnes” obligation, each state has an interest in raising it.

However pursuant to Article 48 (ARSIWA) a State other than an injured State is entitled to invoke the responsibility of another State if the obligation breached is owed to the international community as a whole (“erga omnes” obligation) as in the case under consideration.<sup>325</sup> According to Article 48 states other than injured state may claim: cessation of the wrongful act; assurances and guarantees of non-repetition in accordance with article 30; performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.<sup>326</sup> No states have availed themselves of these faculties.

Moreover states could adopt other measures such as: considering imposing economic, commercial or other types of sanctions within their respective legal frameworks to put pressure on State or adopting

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<sup>322</sup> International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 16 December 1966.

<sup>323</sup> *Barcelona Traction, Light and Power Co*, (Belgium v. Spain), Judgement, ICJ, 5 February 1970. See also M. Cherif Bassiouni, “International Crime: Jus cogens and obligation erga omnes”, *Law and Contemporary Problems*, 1996, p. 63.

<sup>324</sup> As affirmed in Article 1 of Articles on the Responsibility of States for Internationally Wrongful Acts. See Draft articles on Responsibility of States for Internationally Wrongful Acts, 2001. Text was adopted by the International Law Commission at its fifty-third session, in 2001, and was submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/56/10).

<sup>325</sup> Moreover the international Court of Justice in the Case *Congo v. Uganda* (Judgment of 3 February 2006) stated that Article 48 ARSIWA can be applied also in case of violation of human rights convention as International Covenant on Civil and Political rights 1966, because these are intended to protect a collective interest.

<sup>326</sup> Article 48 (3): “The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1”.

countermeasures such as asset freezes, import restrictions or travel bans.<sup>327</sup> UN Security Council has adopted some sanctions against North Korea such as the prohibition or restriction of imports or exports of specific products, cessation of scientific and technical cooperation but not medical one...<sup>328</sup> EU, on its own initiative, has adopted also other measures to reinforce those established by UN, such as the prohibition to invest in North Korea or a ban on the provision of certain services to persons or entities in the DPRK, including IT services.<sup>329</sup> All these sanctions were adopted as response threats to international peace and security because of the proliferating use of nuclear, chemical and biological weapons by North Korea. No sanction has been adopted for violations of the prohibition of slavery.

It is important to underline that the issue of slavery in North Korea emerged recently. It will be necessary to wait for the response of UN and international community. In any case a better consideration of the theme in the international agenda is desirable.

### 3.3. Uzbekistan and the cotton production

In 2012 Human Right Watch denounced that Uzbekistan enslaved over a million of its own citizens in order to harvest cotton.<sup>330</sup> In 2011, Uzbekistan was the world's fifth largest exporter of cotton. The state, in order to maintain this production levels, forces children<sup>331</sup> and adults to work in cotton harvest, in abusive conditions on threat of punishment, from early September until the beginning of November. Regional authorities, police, and school administrators, reporting to the prime minister, transported children and adults by bus to cotton fields in the country, where those far from their homes were assigned temporary housing.<sup>332</sup>

Employers work long hours, 10 to 12 hours a day. Workers are not provided with protective clothing despite the intensive use of harmful defoliants on the cotton and are often denied access to clean drinking water during their work shifts. The conditions in the cotton fields are so abusive and harmful that workers often contract illnesses and suffer serious injuries.<sup>333</sup> Activists reported that teachers had been instructed to be "vigilant" about the possible presence of rights activists and journalists in the cotton fields, and to tell them that the children were working with their families.<sup>334</sup> The forced relocation of

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<sup>327</sup> Natalino Ronzitti, *Introduzione al Diritto Internazionale*, 2013, p. 92.

<sup>328</sup> UNSC, Resolutions: 1718 (6 April 2006), 2397 (26 February 2018), 2375 (10 October 2017), 1718 (20 November 2006).

<sup>329</sup> Decision 2013/88/PESC, 18 February 2013; Regulation (EU) n. 696/2013, 22 July 2013; Decision 2013/183/PESC, 22 April 2013...

<sup>330</sup> Human Rights Watch, *World Report*, events 2012.

<sup>331</sup> Children and students missed school and college and were left exhausted and suffering from malnutrition after weeks of arduous physical work.

<sup>332</sup> The authorities also failed to provide children and adults with adequate accommodations. Adult and child workers were housed together in school gymnasiums, village cinemas, and meeting halls of administrative buildings. They slept on the floor and often lacked access to potable water, adequate food, and hygienic sanitation facilities.

<sup>333</sup> The government establishes cotton quota, namely an amount the person was required to harvest daily on threat of punishment and physical harassment.

<sup>334</sup> Workers are forbidden to talk to foreign activists or persons

workers, the lack of freedom of choice and of refusal to work, continuous abuses and harassment and the high degree of control exercised on the victims, that is not limited to hours of labor but is extended to every aspect of the workers' lives, make safe to affirm that in Uzbekistan slavery is practiced.

### 3.3.1. Juridical consequences and relationship with European Union

Cotton in Uzbekistan is grown on government-controlled farms where farmers have non-tradable ownership rights and are under legal obligation to plant and harvest cotton and deliver the crop to the local gin. Raw cotton is then sold for a third of its value to the state-owned cotton ginning association. 75% of processed lint is then sold for export thereby directly benefitting the government while farmers are left struggling.<sup>335</sup> The violation of prohibition of slavery is attributable to Uzbekistan State for two reasons: the first one because many state organs are engaged in enslavement of population and second one because the government has the control of production and harvesting of cotton.

Bangladesh and China are the main importers of Uzbek cotton, accounting for an estimated 70% of exports. Also significant are Turkey, Germany, Italy and European Union.<sup>336</sup> EU and the Republic of Uzbekistan in 1996 have stipulated a Partnership and Cooperation Agreement (PCA) which has been in force since 1999 and paved the way for a broader bilateral relationship. The Agreement deals mainly with economic relationships establishing most-favored-nation treatment with respect to custom duties and charges applied to imports and exports, providing for the removal of all quantitative restrictions on trade between the EU and Uzbekistan... but it includes also political dialogue, cooperation on prevention of illegal activities, cooperation on matters related to democracy and human rights...

Moreover the parties signed, but not ratified, on 7 April 2011 an additional protocol "Textile Protocol" which amends the PCA and extends the relevant provisions of the PCA to the textile products. Uzbekistan, enslaving its own citizens, violates PCA. In fact this agreement contains some dispositions on human rights such as Article 2, that binds parties to respect of international law and human rights, Article 4, that disciplines the cooperation on the respect, protection and promotion of human rights, Article 20, that establishes the obligation to make improvements on working conditions, and Article 68, that states cooperation for the improvement of protection of human rights and fundamental freedom according to international law...

According to final dispositions of PCA, in particular Article 95, if a party has failed to fulfill an obligation under this agreement, the other may take appropriate measures or may ask to the Cooperation

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<sup>335</sup> Responsible sourcing Network, *From the Field: Travels of Uzbek Cotton Through the Value Chain*, 2012.

<sup>336</sup> Moreover some of the world's largest cotton trading European companies like Paul Reinhart AG, Cargill Cotton, Ecom Agroindustrial Corp. Ltd., and Plexus Cotton Ltd. have developed close ties with the Uzbek government and have offices in Tashkent. See Responsible sourcing Network, *From the Field: Travels of Uzbek Cotton Through the Value Chain*, 2012.

Council to examine the case. Therefore European Parliament suspended the ratification process of the Textile Protocol properly because of many denounces of slavery of non-governmental organizations that made evident the violation of Uzbekistan of PCA, and subjected the ratification of the Protocol to the respect of human rights and to the elimination of slavery.<sup>337</sup> Moreover the Parliament, identifying the International Labor Organization (ILO) as a partner in the field, called for greater cooperation by the government of Tashkent, especially to ensure effective control and monitoring in the fields and farms. Eventually ILO obtained the right of inspection, mapped the production centers and assessed the situation of rights. After that, in 2015, the ILO recognized and certified the partial abolition of forced labor.<sup>338</sup>

Therefore the European Parliament lifted its suspension of the ratification of ‘Textile Protocol’, as Uzbekistan had taken effective measures against child and forced labor during the cotton harvest. In fact on 14 December 2016 the European Parliament during plenary in Strasbourg by an overwhelming majority had given its consent to the legislative resolution to conclude the Protocol between Uzbekistan and the EU, amending the PCA, in order to extend the provisions of the Agreement to bilateral trade in textiles.<sup>339</sup>

Doubtless the conditions of respecting human rights thank to the European position are improved, but today there still are reports of non-governmental organizations, among these the Global Slavery Index (2018), that denounce that cases of slavery still are present in Uzbekistan.<sup>340</sup> Recently ILO estimated that 336,000 laborers were forced to pick cotton in Uzbekistan in 2017 similarly the Uzbek-German Forum for Human Rights (UGF) found evidence of forced labor in each of the seven regions monitored.<sup>341</sup> Nevertheless EU lifted the suspension of ratification of the Textile Protocol and on July 2018 started the negotiations for an upgraded Enhanced Partnership and Cooperation Agreement, showing a strong signal from both states of their common interest in strengthening relations.

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<sup>337</sup> European Parliament, Resolution C 168 E/200, 15 December 2011.

<sup>338</sup> ILO, Third Party Monitoring of the use of child labor and forced labor during the Uzbekistan 2015 Cotton Harvest, 20 November 2015.

<sup>339</sup> European Parliament, Res. C 238/394, 15 December 2016.

<sup>340</sup> The US State Department downgraded, in 2016, Uzbekistan in its annual Trafficking in Persons report, pointing out the lack of effort to end forced labor. The U.S. Department of State released its 2018 Trafficking in Persons Report (TIP), which provides a tool for foreign governments to address modern slavery. The report listed Uzbekistan on the “Tier 2 Watch List,” an improvement from its position on Tier 3 - the lowest tier in the report - since 2016. The State Department explained its upgrade of Uzbekistan to the Tier 2 Watch List was because it “does not fully meet the minimum standards for the elimination of trafficking; however, it is making significant efforts to do so. Anti-slavery movement still denounced of slavery cases in Uzbekistan in 2016 underlining that victims who refuse to participate have to pay large sums to buy themselves free and face threats, intimidation and punishment and that activists trying to monitor the situation are routinely harassed and abused by the regime. See The Cotton Campaign, Uzbekistan: Cotton Campaign & senior govt. officials meet & commit to further steps needed to eliminate forced labor, 2019. See Anti-slavery, European Parliament Trade Committee has passed a resolution backing the Uzbek Textile Protocol despite widespread forced labor concerns, 2016.

<sup>341</sup> ILO, Third-Party Monitoring of Measures Against Child Labor and Forced Labor During the 2017 Cotton Harvest in Uzbekistan, 2017; The Uzbek-German Forum for Human Rights, We Pick Cotton out of Fear: Systematic forced labor and the accountability gap in Uzbekistan, 2017.



Moreover EU earmarks €168 million for supporting Rural Development in Uzbekistan in four subsectors<sup>342</sup>: employment and income generation; enhancement of socio-economic living standards of the most vulnerable groups in rural areas. EU has never suspended this financing, despite their link with agricultural sector and consequently with cotton harvest. Many non-governmental organizations complained to the European Institutions about this situation and asked for measures to be taken to ensure that cotton is not produced by enslaved workers or that products containing cotton from Uzbekistan are banned.<sup>343</sup> EU did not consider these proposals.

An interesting initiative is supported by some non-governmental organizations which is known as “Uzbek cotton pledge” which consists in a commitment from 310 apparel brands to not “knowingly source” cotton from Uzbekistan until it is no longer produced with government-organized forced labor.<sup>344</sup> In response to the evolving situation in Uzbekistan, the pledge was updated on 10 July 2018, and it is underlined that vigilance needs to continue. However it is safe to affirm that Uzbekistan has improved the conditions of respecting human rights and has reduced cases of slavery but at the same time it is also safe to affirm that there still are forms of slavery perpetrated by Uzbek state. Considering the serious breaches of human rights and the consequences of slavery on the victims, as illustrated in chapter two, it is desirable a major consideration by European Union of this issue or the adoption of measures that press the Uzbek government to further improve the respecting of human rights.

### 3.4. Private actors

ILO, General Assembly and Special Rapporteur on Contemporary forms of Slavery denounce that the majority of cases of modern forms of slavery occur in private sphere.<sup>345</sup> This concept regards all agents that act in their individual juridical capacity and it can include individuals, criminal organizations and corporates. The case of law analyzed in chapter two represents an example of cases of slavery where the perpetrators are private actors.<sup>346</sup> The form of slavery generally occurring between private agents is domestic slavery, that for its nature takes place in the household of the perpetrators.<sup>347</sup> Trafficking in human being is one of the most favored activity by criminal organizations because it has the most

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<sup>342</sup> Diversification/productivity; sustainable management of natural resources and ecosystems.

<sup>343</sup> For example after many protests of rights activists in May 2018, U.S. Customs and Border Protection (CBP) took the extraordinary step of exercising its authority under the Tariff Act to ban the import of any products containing cotton from Turkmenistan due to the country’s systematic use of state-sponsored forced labor during the annual cotton harvest. CBP’s import ban was widely covered in the media and helped drive over 45 multinational companies (including Adidas, Gap, H&M, and Marks & Spencer) to sign a public pledge not to knowingly use Turkmen cotton in their products.

<sup>344</sup> <https://www.sourcingnetwork.org/uzbek-cotton-pledge>.

<sup>345</sup> GA, Resolution A/RES/66/140, 27 March 2012; ILO Forced and compulsory labor in international human rights law, 2014; Special Rapporteur on Contemporary forms of Slavery, Report A/HRC/24/43, 1 July 2013.

<sup>346</sup> *Siliadin v. France*, Application no. 73316/01, European Court on Human Rights, 26 October 2005; *Hadijatou Mani Koraou v The Republic of Niger*, Judgment No. ECW/CCJ/JUD/06/08, ECOWAS Community Court of Justice, 27 October 2008.

<sup>347</sup> Special Rapporteur on Contemporary Forms of Slavery, Report A/HRC/39/52, 27 July 2018.

profitable profits.<sup>348</sup> In fact the United Nations International Office on Migration estimates that US\$ 150 billion of profits are generated by trafficking in persons.<sup>349</sup> Special Rapporteur on Contemporary forms of Slavery in its report A/67/261 has observed that trafficking in persons is in most cases committed by non-State actors and that businesses often derive economic benefits from labor or services provided by trafficked persons.<sup>350</sup>

Special Rapporteur on Trafficking in persons but also Special Rapporteur on Contemporary forms of Slavery emphasize as MNEs and the global supply chains are fertile ground for modern forms of slavery.<sup>351</sup> Many reports of non-governmental organizations focused on these contexts, denouncing serious violations of the human rights of workers.<sup>352</sup> From a comparison of different reports and documents it is safe to affirm that the MNEs and global supply chains can be considered not only among the main actors of modern slavery but that they contributed to create new forms of slavery adapted to economical context and corporate necessities.<sup>353</sup> Therefore it became interesting to explore what are the reasons of relationship between slavery and these economic agents.

### 3.5. Globalization

There is not an agreed definition of globalization, but all of the possible definitions draw it as a complex and unprecedented flow of capital, goods, services, and labor through each continent, fueled by technological advancement. The technological advancement allowed the reduction of distances and facilitated connections also in the world of business giving birth to new and complex structures of production such as supply chains and capital management.

The key words are two: the creation of global trade and the functional integration of dispersed economic activity. In fact the globalization has created a global market regardless of national borders and it is resulted in a loss of governmental control. Kevin Bales emphasized as globalized trade and money have been rapidly free from national controls and have become supra-national activities.<sup>354</sup> The breaking down of economic borders has had two consequences for the global economy: greater competitiveness between companies and the possibility for the latter to choose where to locate their production plants or invest (practice of portability of capitals). The downward pressure on products prices engendered by

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<sup>348</sup> Loring Jones; David W. Engstrom, Tricia Hilliard, Mariel Diaz, “Globalization and Human Trafficking”, *Journal of Sociology & Social Welfare*, 2007, p.108. It is not casual that Trafficking Protocol was adopted to supplement the United Nations Convention against Transnational Organized Crime.

<sup>349</sup> Kevin Bales, “Expendable people: Slavery in the age of Globalization”, *Journal of International Affairs*, 2000, p.471.

<sup>350</sup> Special Rapporteur on Contemporary Forms of Slavery, Report A/67/26, 17 August 2012.

<sup>351</sup> Special Rapporteur on trafficking in persons, Report A/HRC/23/48/Add.4, 4 March 2013. Special Rapporteur on contemporary forms of slavery, Report A/HRC/24/43, 1 July 2013.

<sup>352</sup> Human Rights watch, *Human Rights in Supply chains: A Call for a Binding Global Standard on Due Diligence*, 2016; Business and Human Rights Research Center, *KnowTheChain: Ranking of 43 apparel and footwear companies on efforts to address forced labor in supply chains*, 2018.

<sup>353</sup> *Ibid.*

<sup>354</sup> Kevin Bales, *Expendable People: Slavery in the Age of Globalization*, 2000, pp. 472-475.

increased competition has led to a shift in investment and production from developed countries to developing countries where there are more advantageous conditions for the production such as less stringent rules on the protection of human rights or the environment, tax breaks, preferential treatment...

The large scale capital flows from foreign investors to developing countries combined with slight internal regulatory system and with high rate of corruption within political systems may increase the possibilities of slavery.<sup>355</sup> According to Special Rapporteur on Contemporary Forms of Slavery the use of slavery or form of exploitation as a way to reduce the labor and production costs has been possible also because of the deregulation of market that has contributed significantly to the economic vulnerability of a large proportion of the world's poor and because of the non-integration in economic system of human rights principles.<sup>356</sup>

According to it, globalization has developed in such form because it has been profoundly shaped by neo-liberal notions of political economy based on the idea that markets unfettered by government oversight and control will encourage economic growth and wealth creation that in turn will bring trickle-down economic benefits for all members of society. Furthermore, in my opinion, the deregulation of market led to the centrality of economic interests and agents such as multinationals enterprises which have achieved a power so strong that can determine and influence the development of national and international policies.<sup>357</sup> Therefore by considering the power acquired by economical agents, dealing with their role in the struggle against slavery has become necessary.

### 3.6. The global supply chains and multinational enterprises between opportunities and criticalities

#### 3.6.1. Global supply chains

In our globalized economy, supply chains have become a common way of organizing investment, production and trade in international market.<sup>358</sup> The global supply chains consist in the cross-border organization of the persons, resources and activities required to produce goods or services and bring them to consumers through inputs and various phases of development, production and delivery.<sup>359</sup> The

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<sup>355</sup> Furthermore, recently it is happened, in developing countries, the phenomenon of “social and environmental dumping” which consists in lowering levels of human rights and environment’s protection for producing goods with lower and more competitive prices.

<sup>356</sup> Special Rapporteur on Contemporary forms of slavery, Report A/HRC/30/35, 8 July 2015.

<sup>357</sup> In confirmation of their centrality, part of doctrine states that economic agents give birth to a new “lex mercatoria” namely a form of law created directly by these whose purpose is to regulate juridical situations typical of economical markets. See Angela Del Vecchio, *I tribunali internazionali tra la globalizzazione e localismi*, 2015, pp.29-32.

<sup>358</sup> Special Rapporteur on Trafficking in Persons, Report A67/261, 7 August 2012. Different terms exist to indicate them including “Global production networks” and “Global value chains”. All of these terms focus on the same basic feature which is the cross-border character of production and trade.

<sup>359</sup> The definition is really very broad in fact this process starts with feedstocks leads to realization of product and its management in stock and ends with the delivery of the final product to the customer. The whole process is divided into several steps, and in each step different professional figures are involved.

global supply chains link firms, including multinationals enterprises, across countries, and often involve large number of suppliers and even local sub-contractors who work outside the formal factory system.

Complex global supply chains can offer important opportunities for economic and social development, for example the International Labor Organization (ILO) emphasizes how more than 450 million people work in supply chain.<sup>360</sup> At the same time they often present serious human rights risks that many companies have failed to mitigate and respond to effectively.<sup>361</sup> In fact according to ILO the 90% of forced labor cases take places in the supply chains.<sup>362</sup> When the supply chain has multiple levels of sub-suppliers, it becomes more difficult to ensure that the goods and services purchased are not the result of forced labor or slavery practices.<sup>363</sup> Special Rapporteur emphasized that while the first tier of supply chains is less susceptible to the risk of contemporary forms of slavery, the lower levels have been shown to be at risk because products or raw materials are sourced from home-based or small workshops (located in developing countries) or from the informal economy.<sup>364</sup>

### 3.6.2. Multinational enterprises

Another recent phenomenon is that of increasing of multinational enterprises (MNEs)<sup>365</sup> which insert in the global supply chains in order to facilitate the realization of and delivery of products.<sup>366</sup> The multinational corporations, as defined by OECD Guidelines for Multinational Enterprises (2000), are “usually comprise companies or other entities established in more than one country<sup>367</sup> and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed”.<sup>368</sup> The MNE is characterized by the economic-decisional unit (*unicum* economic) and

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<sup>360</sup> ILO Global Estimates of Modern slavery: Forced Labor and forced marriage, Geneva 2017.

<sup>361</sup> Human Rights Watch, Human Rights in Supply Chains: A call for a binding Global Standard on Due diligence, 2016.

<sup>362</sup> Ibid.

<sup>363</sup> Special Rapporteur on Contemporary forms of slavery, Report A/HRC/30/35, 8 July 2015. Measure which ensuring traceability of products are necessary as well as measures establishing transparence of the activity of supply-chains and of the links between companies.

<sup>364</sup> Ibid. I consider, as example, a supply chains of jewelry which is composed by: artisanal and small-scale miners producing gold, local traders buying gold, exporters buying and selling gold to refiners and refineries that sell refined gold to international jewels companies. Often the final producer (such as multinational enterprise) doesn't know who extracted the gold contained in the jewels.

<sup>365</sup> They can be also called: Transnational corporations (TNCs) or Multinational corporations (MNCs). See Patricia Feeney, “Business and Human Rights: The struggle for accountability in the UN and the Future Direction of the Advocacy Agenda”, 2009, p.105.

<sup>366</sup> There are many reasons for businesses to sub-contract parts of their work to other businesses across the globe. These include increasing operational flexibility and the opportunity to access specialized services without having to incur the costs of establishing these in-house. They also enable businesses to procure goods from cheaper labor markets hence allowing for reduced costs and potential increases in profits to the businesses.

<sup>367</sup> The cross-border character is evident in more than profile e.g. the shareholders mostly from a third state, the workers are from another state, the economic and financial operations in another one.

<sup>368</sup> See the OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications.

by plurality of legal entities.<sup>369</sup> In fact, it has a pyramidal structure where there is a one parent company, which is the core management, and a series of subsidiaries-firms incorporated under national law of different countries. The control of the parent society is exercised on the subsidiaries generally through the possess of long-term holdings.<sup>370</sup>

The MNEs have a central role in the international economy so much so that they are considered as “the most powerful non-state actors in the world”.<sup>371</sup> Ilias Bantekas starts his paper on Corporate Social Responsibility in International Law emphasizing their economic power: “It is no secret that many multinational enterprises (MNEs) have annual turnovers higher than that of the GDP of a significant number of less developed countries (LDCs) put together”.<sup>372</sup> On one hand, MNEs have an enormous potential to provide an enabling for the enjoyment of human rights through investment, employment creation and stimulation of economic growth but from the other they have often been complicit in human rights violations and in enslavement of employees.<sup>373</sup> The MNE can be accused of committing slavery mainly in two situations: the first one because MNE enslaves its employees in its own factories, that are generally located in developing countries, the second one because its sub-contractors exploit their workers.<sup>374</sup>

### 3.7. Overview of global economic sectors with high risk of modern slavery

Special Rapporteur on Contemporary Forms of Slavery in its report A/HRC/30/35 focuses on sectors of global economy that can present a high risk of contemporary forms of slavery occurring in global supply chains.<sup>375</sup> The largest proportion of enslaved workers is found in agriculture sectors, followed by textile

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<sup>369</sup> Another definition is provided by Draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights: “an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively”. See Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Economic and Social Council, 26 August 2003.

<sup>370</sup> One of the most frequent mean used by multinational enterprises is foreign direct investment whose aim can be of setting up a branch abroad and of acquiring holdings. In both cases the investment must involve a certain degree of investors’ involvement in the direction and management of the related or incorporated undertaking. Multinational companies make a direct investment when 3 orders of advantages are usually made simultaneously: advantages related to property rights (*ownership-specific competitive advantages*); advantages depending on the characteristics of the country chosen for the location (location advantages); advantages of internationalization, i.e. wider benefits deriving from internationalizing (through the acquisition of the supplier company) upstream and downstream production phases, which were previously carried out by foreign companies. This theory was introduced by J.H. Dunning (1977), and it is known as OLI (*Ownership, Location, Internationalization*) approach.

<sup>371</sup> Angela Del Vecchio, *I Tribunali Internazionali tra globalizzazione e localismi*, 2015, pp.11-15.

<sup>372</sup> Ilias Bantekas, “Corporate Social Responsibility in International Law”, *Boston University international law Journal*, 2004, pp 309-310. Coca Cola Co. announced profits from its first six months of operations in 2003 in the amount of \$2.1 billion, Press Release, Coca Cola Company, The Coca Cola Company Announces Second Quarter and Year-To-Date 2003 Results, at <http://www2.coca-cola.com/presscenter/earnings07172003.html> (July 17, 2003); comparably, according to World Bank statistics, the GDP of Gambia for 2002 was \$370 million, for Liberia \$562 million, for Eritrea \$642 million, for Djibuti \$592 million. The World Bank Group, World Development Indicators Database, available at <http://www.world>.

<sup>373</sup> *Ibid.*

<sup>374</sup> Special Rapporteur on Contemporary form of slavery, Report A/HRC/30/35, 8 July 2015.

<sup>375</sup> *Ibid.*

sectors and by mining and quarrying. The Veritè<sup>376</sup>, a non-profit organization, denounces of slavery's cases in all sectors of agricultural production such as the sugar produced in Burundi and cotton produced in Uzbekistan.<sup>377</sup> This sector, as well as mining, is particularly sensitive to the exploitation of workers mainly for two reasons: because by its nature it takes place in more isolated places that easily escape the controls of the authorities and it belongs to the informal economy.<sup>378</sup> In fact it is properly in the informal economy that the major number of cases of slavery are reported also in textiles sector, for example in the field of processing and production of textiles or in the manufacture of buttons.<sup>379</sup> Clearly slaves are also used, though in smaller numbers, in many other kinds of sectors: brick making, leather working, gem and jewelry making, cloth and carpet making, forest clearing, manufacturing of electronic goods, construction, the food processing and packaging<sup>380</sup> and fishing<sup>381</sup> ...

### 3.8. Forms of slavery in multinational enterprises and global supply chains

The general idea is that forced labor is the only form of slavery which occurs in global supply chains or in MNEs because, for its nature, it is compatible with the typical activity of these contexts. In reality from an analysis of documents and reports it is safe to affirm that other forms of slavery can be practiced.<sup>382</sup> The increase in the forms of slavery practiced by MNEs has been possible from one hand because ancient forms of slavery have changed some of their characters, adapting to economic context, and from the other because the levels of production where slavery can occur are different and this allows the insertion of diverse types of slavery.<sup>383</sup> Eventually I found that the modern forms of slavery which are generally practiced in MNEs or are linked to supply chains are: forced labor which resembles slavery in its effect, child exploitation, debt bondage and trafficking in persons.<sup>384</sup>

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<sup>376</sup> <https://www.verite.org/commodity-atlas/>. In research released recently, it found tea, coffee, coal, sugar and tobacco are among the top eight products that have an increased risk of slavery links

<sup>377</sup> Human Rights Watch, Report on Uzbekistan: Forced Labor Widespread in Cotton Harvest, 25 January 2013,

<sup>378</sup> SCL - Stop Child Labor and ICN - India Committee of the Netherlands, Rock Bottom Modern Slavery and Child Labor in South Indian Granite, May 2015.

<sup>379</sup> Special Rapporteur on Contemporary form of slavery, Report A/HRC/30/35, 8 July 2015.

<sup>380</sup> The food processing and packaging industry has been frequently implicated in slavery, above all forced labor and trafficking, in fish and seafood processing in parts of South-East Asia. See, for example, ILO, *Caught at sea: forced labor and trafficking in fisheries* (2013) ([www.ilo.org/wcmsp5/groups/public/---ed-norm/---declaration/documents/publication/wcms\\_214472.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed-norm/---declaration/documents/publication/wcms_214472.pdf)); Environmental Justice Foundation, *Slavery at Sea: the continued plight of trafficked migrants in Thailand's fishing industry* (2014) ([http://ejfoundation.org/sites/default/files/public/EJF\\_Slavery-at-Sea\\_report\\_2014\\_web-ok.pdf](http://ejfoundation.org/sites/default/files/public/EJF_Slavery-at-Sea_report_2014_web-ok.pdf)).

<sup>381</sup> Robin McDowell and others, Slavery taints global supply of seafood: AP investigation, Washington Times, 25 March 2015 ([www.washingtontimes.com/news/2015/mar/25/slavery-taints-global-supply-seafood](http://www.washingtontimes.com/news/2015/mar/25/slavery-taints-global-supply-seafood)).

<sup>382</sup> Liberty Shared and Orrick, *Modern Slavery and the Hotel Industry: best practice guidance for franchising*, 2018; Veritè, Working Paper on Human Trafficking & Global Supply Chains, 2012.

<sup>383</sup> Kevin Bales, "Expendable people: Slavery in the Age of Globalization", *Journal of International Affairs*, 2000, pp. 465-470.

<sup>384</sup> Ibid



### 3.8.1. Forced labor

Forced labor is the modern form of slavery most practiced by the MNEs and in the global supply chains. This is confirmed by ILO that in its report of 2016 affirms that there are 21 million of persons in forced labor, most of which work in supply chains.<sup>385</sup> The forced labor as modern form of slavery has often been cited as occurring in global supply chains of international brands in textile sectors but it can occur also in other sectors including construction, agricultural, mining, electronics manufacturing... Based on a reading of different reports of non-governmental organizations it is possible to affirm that rarely there are cases of forced labor that manifests only its essential element because it often presents limitations on freedom of movement and choice of victims<sup>386</sup> and abuses<sup>387</sup> so strong that it resembles slavery in its effect.<sup>388</sup>

In particular some reports denounce a new form of forced labor, named “Sumangali”, which was introduced 10 years ago by textile and garment manufacturers in India.<sup>389</sup> Recruiters, hired by the factories, visit poor villages and identify the families with daughters in the age between 13 and 18, or even younger, that are in financial need. They present the “Sumangali”<sup>390</sup> scheme as ‘a unique opportunity for young women’ to earn up to 40,000 rupees (€640) in three years with a promise of a final lump sum which many hope to use as dowry.<sup>391</sup>

In practice many do not receive the final payment, as they leave before the completion of their three-year contract, often due to ill health. For what reasons? The workers, unpaid, are required to work 12 hours per day, 6 days to 7 without breaks because the rest hours should be compensated.<sup>392</sup> The conditions of workplaces are unsafe and they don’t have any protection from the toxic substances that

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<sup>385</sup> International Labor Organization, “Forced labor, human trafficking and slavery”, 2016. ILO, “Global Estimate of Forced Labour: Results and methodology” ,2012.

<sup>386</sup> Human Rights Watch, Paper Room to Bargain: Unfair and Abusive Labor Practices in Pakistan, 2019. “One worker at a factory in Karachi said she had developed kidney problems because of the restrictions on toilet breaks to only twice in a day.” “We are allowed a lunch break for half an hour and two short bathroom breaks. If anyone asks for an additional bathroom break, the managers verbally abuse him and mock him for having a weak bladder. The only way to cope is to not drink water except for at lunch”.

<sup>387</sup> A victim reports that “a couple of months ago, when a worker refused to do forced overtime, he was locked inside the security office for two days”.

<sup>388</sup> Too many of these workers endure abuses such as poor working conditions, including minimum wage violations; forced overtime; child labor; unsafe working conditions, exposure to toxic substances and other extreme occupational hazards; and retaliation against workers who attempt to organize. Workers facing these abuses often lack access to complaints mechanisms, or legal recourses.

<sup>389</sup> See, for example, Centre for Research on Multinational Corporations and India Committee of the Netherlands, Flawed Fabrics: the abuse of girls and women workers in the South Indian textile industry, 2014, ([www.indianet.nl/FlawedFabrics.html](http://www.indianet.nl/FlawedFabrics.html)); Anti-Slavery International, Slavery on the high street: forced labor in the manufacture of garments for international brands, 2012, ([www.antislavery.org/includes/documents/cm\\_docs/2012/s/1\\_slavery\\_on\\_the\\_high\\_street\\_june\\_2012\\_final.pdf](http://www.antislavery.org/includes/documents/cm_docs/2012/s/1_slavery_on_the_high_street_june_2012_final.pdf)).

<sup>390</sup> The Tamil word “Sumangali” is used to refer to an unmarried girl becoming a respectable woman by entering into married life. However the word has become synonymous with a new practice for bonding the labor of girls and young women.

<sup>391</sup> It should also include comfortable accommodation, three nutritious meals a day and leisure and educational activities.

<sup>392</sup> During peak season they even have to work on Sundays. For overwork, they do not receive any compensation.

are used or from cotton that is present in the air.<sup>393</sup> Some victims report that for only one sick day they must work one month for free. The girls are confined to the mills, sleeping in hostels, during their contract period and are rarely, if ever, allowed out during that time.<sup>394</sup> Even while going out to buy personal things, workers are closely monitored. They are allowed to go to the market once a fortnight but are always accompanied by guards from the mill. Mobile phones are often prohibited and in the hostel there is only a telephone available but it could be used only for emergency and always under the control of guards.<sup>395</sup> The only visitors that are allowed, just occasionally, are their parents, many of whom regard this as a safe form of employment for their daughters.

What is the link between these Indian textile manufactures and international brands? The problem is that international brands acquire textiles and fabrics both directly from these local factories or by intermediaries buying from the latter.<sup>396</sup> Generally there are big local apparel manufactories which own many small factories, producing textiles, in different regions. They sell their fabrics to intermediaries, generally specialized sourcing organizations that supply various clothing brands and retailers throughout Europe and USA. An example of this structure could be: SSM India which is one of the largest vertically integrated apparel manufacturers. The company operates six facilities and employs around 5,000 people. Its main client is Crystal Martin (UK), that supplies customers like Mothercare, M&S, Next, Abercrombie & Fitch, Primark (Ireland), Mark and Spenser.... The same situation regards other international brands that are supplied by many apparel factories based in India which use the “Sumangali” scheme.<sup>397</sup>

### 3.8.2. The Sumangali scheme and economic slavery

The restrictions on freedom of movement and choice, abuses and the elements of bonded labor associated with the “Sumangali” system mean that it is a contemporary form of slavery and it is recognized as such by the Indian Courts but also by Special Rapporteur on Contemporary Forms of Slavery.<sup>398</sup> I chose to deal with “Sumangali” scheme for two reasons: the first one consists in the fact

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<sup>393</sup> Many victims report that Doctors founded cotton in their lungs, and they had developed TB. Due to the strains of excessive overwork, headaches, stomach aches, sleeplessness and tiredness are common among the girls. Other common diseases are miscarriages, infertility and discontinuous cycle...

<sup>394</sup> Many victims declare that the food quality was so poor that their weight decreased to 30 kilos.

<sup>395</sup> A victim declared that “Once a month the warden permitted me to call my parents. But I could not speak freely about the situation, because the warden was able to overhear me”.

<sup>396</sup> Anti-Slavery International, Slavery on the high street: forced labor in the manufacture of garments for international brands, 2012, ([www.antislavery.org/includes/documents/cm\\_docs/2012/s/1\\_slavery\\_on\\_the\\_high\\_street\\_june\\_2012\\_finmaal.pdf](http://www.antislavery.org/includes/documents/cm_docs/2012/s/1_slavery_on_the_high_street_june_2012_finmaal.pdf)).

<sup>397</sup> Eastman Exports is one of the biggest players in the Tamil Nadu textiles and garment industry and supplies a large group of European and US brands such as BestSeller (Denmark), C&A (Germany/ Belgium), Celio (France), Cortefiel (Spain), Diesel (Italy), Diramode (Pimkie, France), El Corte Ingles (Spain), Haugkaup (Iceland), Inditex (Spain), IZOD (Philips van Heusen, US), K Mail Order (Klingel, Germany), Matalan (UK), Mexx (Liz Claiborne, US), Migros (Switzerland), Noel Soccer (France), Norprotex (France), Old Navy (GAP, US), Timberland (US), Tommy Hilfiger (Philips-van Heusen, US). The Bannari Amman Group is one of the largest industrial conglomerates in South India with a wide spectrum of manufacturing, trading, distribution and financing activities: American Eagle Outfitters (US), C&A (via Yeswe Creations, division of Shiva Tex Yarn).

<sup>398</sup> Report, Special Rapporteur on Contemporary Forms of Slavery, 4 July 2016, A/HRC/33/46.



that “Sumangali” is a new form of slavery born in relation with economical context. This shows as MNEs and in general the economic dimension are fertile grounds for the development and birth of modern forms of slavery. The second reason deals with slavery as economic institution. Kevin Bales emphasizes the economic character of modern forms of slavery.<sup>399</sup> According to him one of the meanings of slavery as economic institution consists in the fact that slaves are seen as input, easily exchangeable, in a manufacturing process.<sup>400</sup> This concept is evident in “Sumangali” scheme. In fact the contracts have a duration of three years at the end of which girls are fired and replaced without any possibilities to continue their work. Moreover in case of permanent or temporary disabilities, also caused by work, workers are fired, and no chance of being reinserted in other roles is allowed.<sup>401</sup>

### 3.8.3. Child exploitation

Child labor is still a serious problem in the global economy. ILO estimated that 85 million of children are engaged in hazardous works that put their health or safety at risk.<sup>402</sup> According to Human Rights Watch, a non-governmental organization, children are employed in hazardous sectors in particular in agricultural cultivation<sup>403</sup> such as tobacco<sup>404</sup>, carpet factory and in mines<sup>405</sup> for local or global markets. Thomson Reuters Foundation documents that the average age of the employed child is around 6 and that often children are born and grow in the textiles factories because their mother doesn't have any alternative.<sup>406</sup>

A question which raises spontaneously is why should a company use children for its production if these, considered the youth age, are clearly under-skilled?<sup>407</sup> The main reason deals with some of their physical

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<sup>399</sup> Kevin Bales, “Expendable people: Slavery in the Age of Globalization”, *Journal of International Affairs*, 2000, pp. 470-475.

<sup>400</sup> Ibid.

<sup>401</sup> Anti-Slavery International, *Slavery on the high street Forced labor in the manufacture of garments for international brands*, 2012.

<sup>402</sup> ILO, *Global Estimates of Child Labor, Results and Trends 2012-2016*. Supplementary Convention of 1956 in article 7 covers the practice of delivering of children for their exploitation but actually this article is interpreted as forbidding all worst forms of children exploitation including child labor.

<sup>403</sup> Agricultural job is considered as hazardous because children handle toxic pesticides or other harmful substances, work with sharp tools or heavy machinery, or are exposed to extreme heat. See Human Right Watch, *A Call for a Binding Global Standard on Due Diligence*, 2016.

<sup>404</sup> Among the most harmful activities for children there is Tobacco cultivation. In fact children who come in contact with tobacco plants risks suffering acute nicotine poisoning. See Human Rights Watch, *The Harvest is in My Blood: Hazardous Child Labor in Tobacco Farming in Indonesia*, 2016.

<sup>405</sup> Another harmful activity is working in mine to mining minerals that are exported. See Human Rights Watch, *Mali—A Poisonous Mix: Child Labor, Mercury, and Artisanal Gold Mining in Mali*, 2016. Human Rights Watch, *Ghana—Precious Metal, Cheap Labor: Child Labor and Corporate Responsibility in Ghana’s Artisanal Gold Mines*, 2015.

<sup>406</sup> Thomson Reuter Foundation, *India's tourist magnet starts to clean child labor blot*, 2011. “Impoverished children from Bihar have for years been trafficked to tourist-magnet Jaipur. The 80 percent of the child workers in Jaipur have been trafficked from Bihar to work as slaves”.

<sup>407</sup> There are other two reasons: the first one is that children can be easily managed and intimidated, the second one consists in the fact that any physical assault by the managers on the children is not generally viewed seriously by their parents, because of the cultural acceptance of corporal punishment.

characteristics that allow children to do certain works more easily.<sup>408</sup> The last aspect is confirmed by a report of Thomson Reuters Foundation where it results, for example, that in some sectors of handicraft industry such as hand-embroidered clothes, sewing buttons, costume jewels and bangles, children are preferred by manufacturers as they have nimble fingers to pick up small beads to stick on bangles or embroider an intricate design on a fabric.<sup>409</sup>

The mining sector is one of the activity with the major number of children exploited.<sup>410</sup> The mining apparently may be far from our daily lives, but many of the goods we have actually contain minerals or products which come from mining such as cosmetics, electronic devices, jewels... The Verité reports of cases of enslaved children in the mining of most of the minerals or stones that we use, even the most precious one.<sup>411</sup>

Human Rights Watch documents the use of child labor even in artisanal or unlicensed mines of Ghana, which is one of the world's top 10 gold producers.<sup>412</sup> In fact major international gold refiners from Switzerland, the United Arab Emirates, the United States and other countries use artisanal mined gold from Ghana. The supply chain of gold has a "funnel" structure: there are many traders buying gold from many mining sites and a small number of international refiners; once gold reaches refineries, it becomes even more difficult to identify its origin, because gold from all over the world may be mixed and processed together; after the gold is refined, it is sold to banks, jewel businesses, the electronics industry, and other enterprises. Human Rights Watch reports that three of Ghana's largest four gold exporting companies have declared that they had sometimes bought gold they could not trace back to the mine.

The non-traceability regards also one of the most precious stone which is diamond.<sup>413</sup> The same situation regards also other less precious minerals<sup>414</sup> or natural stone<sup>415</sup> such as sapphires produced in Madagascar<sup>416</sup> or emeralds mined in Colombia. The common problem of all minerals and stones is that the long exporting process generally obscures the source country of the stones and often many of the

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<sup>408</sup> In fact extensive use of child labor was identified by Anti-slavery in the Sangam Vihar and Tughlakabad areas of Delhi, particularly relating to work on applying sequins, beads, embroidery and similar finishes to garments for international markets.

<sup>409</sup> Thomson Reuter Foundation India's tourist magnet starts to clean child labor 'blot', 2011. ILO, Global Estimates of Child Labor, Results and Trends 2012-2016.

<sup>410</sup> This high risk of slavery depends on the isolated nature of workplaces and the weak regulation and law enforcement that combined with high value commodities such as gold and other minerals attract organized criminals and lead to the growth of illegal, unlicensed or unregulated mines.

<sup>411</sup> <https://www.verite.org/commodity-atlas/>.

<sup>412</sup> Human Rights Watch, Ghana: Child Labor Taints Gold Supply Chain Refiners May Benefit from Children's Hazardous Work in Artisanal Gold Mines, 2015. It is estimated that thousands of children work in hazardous conditions.

<sup>413</sup> Amnesty International, Chains of Abuse: The Case of Diamonds from the Central African Republic and the Global Diamond Supply Chain, 2015 (<https://www.amnesty.org/en/documents/afr19/2494/2015/en/>). The diamond industry is very centralized, with just a few major corporations like De Beers and ALROSA accounting for the majority of global production and trade. Despite this centrality, the problem lies in the fact that after mining, raw diamonds are sent to sorting and cutting centers where diamonds from all locations are mixed together, making traceability difficult. The criticism is that 65 percent of diamonds global trade comes from African countries, including those that were often cited for forced and/or child labor.

<sup>414</sup> Various gems are mined with child labor in Tanzania, and Zambia.

<sup>415</sup> See Stop Child Labor and India Committee of the Netherlands, Rock Bottom: Modern Slavery and Child Labor in South India, 2016. India is a leading producer and exporter of natural stone in the world. The report denounces that the worker in mining are reduced to slavery mainly debt bondage and child labor. Other Precious stones are extracted most commonly from mines in Southeast Asia and Africa.

<sup>416</sup> Nearly half of the world's sapphires are mined with child labor in Madagascar.

top exporting countries do not reflect the location of the original mining activities. Therefore by considering the size of this problems how can supply chains or MNEs ensure the traceability of minerals used in their products?

#### 3.8.4. Debt bondage

It is interesting to understand how MNEs can be charged of committing or to being complicit in debt bondage. The debt bondage for its historical nature is generally used in agricultural sector<sup>417</sup> or associated to processing and collection of raw materials such as mining.<sup>418</sup> In reality from an analysis of non-governmental organizations reports it is evident that it has spread to other sectors including textiles<sup>419</sup> and to other levels of supply chains such as selling or manufacturing.<sup>420</sup> However it generally finds fertile ground in the informal economy. According to ILO situations of debt bondage are reported to be prevalent within the tobacco industry in Malawi and in Zimbabwe which are among its major producers and exporters.<sup>421</sup>

The Special Rapporteur on Contemporary forms of Slavery emphasizes how this practice unlike the past has acquired also a temporary character which is perfectly compatible with some agricultural activities.<sup>422</sup> Some reports document of cases of debt bondage for deforestation of the Amazon forest, particularly in Brazil.<sup>423</sup> In fact workers are given an advance in their home towns and are persuaded to

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<sup>417</sup> Among different cases of debt bondage in agricultural denounced by Verité there is what of Pakistan where this practice has its typical structure whereby hereditary debt ties families and communities to the land they work on for cotton 's production bought by international trade.

<sup>418</sup> Special Rapporteur on Contemporary forms of Slavery, Report A/HRC/33/46, 4 July 2016. The debt bondage in the mining sector has been reported to involve multinational corporations that work on the extraction of precious metals or minerals. In the Kivu provinces in the east of the Democratic Republic of the Congo, debt bondage has been reported as one of the most common forms of contemporary slavery in mines. Workers contract debts to purchase food, supplies and working tools when they start working and continue to accrue debt in order to meet their basic needs.

<sup>419</sup> Special Rapporteur reports that in India, Pakistan and Nepal, which are major hubs in the global knitwear sector that supplies international brands, a high number of women are reduced in debt bondage in textile mills and garment factories that supply international brands. In particular it results that there are many cases in which workers receive a pay so low that they are bounded to ask for money to their employees who in return want any kind of service. Human Right Watch: No Room to Bargain Unfair and Abusive Labor Practices in Pakistan, 2019. Special Rapporteur on Contemporary Forms of Slavery, Report A/HRC/33/46, 4 July 2016.

<sup>420</sup> For example the manufacturing of Samsung and Panasonic devices. In fact the Guardian newspaper has found evidence of worker exploitation, harassment and illegality within the supply chains of technology companies. Interviews with Nepali employees, who have been engaged to work in Malaysian factories, reported of ethics offenses. These relate to debt bondage and harsh conditions for employees. Staff were recruited in Nepal by a third-party recruitment agency. For this, the workers were required to pay a fee, which they believed would be offset against enhanced future earnings abroad. See Forbes (Jonathan Webb): Samsung And Panasonic Accused of Debt Bondage And Worker Exploitation In Supply Chain.

<sup>421</sup> Both are included in the top producer of Tobacco. In particular Zimbabwe is the major African producer and exporter. Submission from the Eliminating Child Labor in Tobacco Growing Foundation; and submission from ILO, "A rapid assessment of the tobacco sector in Malawi" 2015, p. 9. Tobacco is traditionally grown by farmers who use waged workers, temporary workers and also tenants who can be led to a situation of debt bondage. The costs charged to tenants by the estate or farm owners exceed the amount received from tobacco sales due to manipulation of the debts. This leads to tenants, who are reportedly predominantly male, and their families, becoming trapped in situations of debt bondage.

<sup>422</sup> Special Rapporteur on Contemporary forms of Slavery, Report A/HRC/33/46, 4 July 2016.

<sup>423</sup> University of Nottingham's Rights Lab, Royal Holloway University of London, and the Independent Anti-Slavery Commissioner, Report on Modern Slavery, Environmental Destruction and Climate Change: Fisheries, Field, Forests and Factories.

come and work in the Amazon during the appropriate season. Once they arrive at the farms they are told that they will have to pay for their transport, food and lodging, as well as pay back any advance they have been given. They are charged a very high rate of interest and find that their salaries rarely cover their costs.<sup>424</sup> According to Greenpeace Amazon's precious wood, produced outlaw and by bonded laborers, is bought by MNEs both for the realization of their products or for selling to States.<sup>425</sup> In fact Greenpeace denounces as for the realization of large public buildings such as the Brooklyn's Bridge in New York, World Trade Center in Geneva, Paris's National Library and Turin's Polytechnic, wood produced outlaw from Amazon has been used.

Thomson Reuters Foundation recently has reported an interesting case of debt bondage workers in Global food companies: Danone and Dairy Partners Americas Brazil (DPA)<sup>426</sup>, partly owned by Nestle.<sup>427</sup> These companies are in danger of being added to Brazil's "dirty list" of companies that have engaged in slave labor. In fact Danone and DPA are accused of being complicit with a businessman who kept 28 people in debt bondage, because their affiliated distributors sold him their products in bulk without monitoring working conditions at his operation.<sup>428</sup> The businessman used the door-to-door salesmen who had been trafficked from poor regions of the state of Ceará and made them sell soon-to-be-expired yoghurts at a discount in the city of Salto, in the state of Sao Paulo. Clearly both companies were not directly involved in the commission of the breach but inspectors want to hold them accountable for not monitoring their distribution chain.

This case is interesting for two reasons: the first one consists in showing that debt bondage can be used in different levels of supply chains and not only on processing of raw materials, while the second one shows the structure of supply chains of MNEs which includes also subcontractors or local contractors that, if not controlled, are more susceptible to the use of slavery practices. In this paragraph I'd like to emphasize as debt bondage, a form of slavery with ancient roots, has been transformed over time and perfectly adapted to new changes.

### 3.8.5. Trafficking in human beings

In recent years, the role of corporations as potential perpetrators of human trafficking has become a matter of growing importance.<sup>429</sup> Human trafficking has been identified by General Assembly in the

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<sup>424</sup> In some case they become more and more indebted as they have to buy anything they need at inflated prices from the estate shop. In the work camps workers are often watched by armed guards, and threats of violence against them and their families are frequent, making it impossible to escape.

<sup>425</sup> The environmental association also names the companies that buy Brazilian Amazonian wood: Pinto Leitão and Tradelink in Europe, Lumber Liquidators in the United States.

<sup>426</sup> DPA, a joint venture between New-Zealand company Fonterra and Nestle that sells refrigerated products.

<sup>427</sup> Thomson Reteur Foundation, Danone and Dairy Partners America Brazil are accused of being complicit with a businessman who kept 28 people in debt bondage, 2018.

<sup>428</sup> Many victims state that "Many workers arrived already in deb due to the cost of travel".

<sup>429</sup> Special Rapporteur on Contemporary Forms of Slavery, Report A/67/261, 7 August 2012.

resolution 23/5, as a problem in various economic sectors, including those integrated into global markets.<sup>430</sup> Companies face the threat of human trafficking at diverse levels and their involvement in this crime can be very significant, not only in laundering the profits of the illegal activity, but also in recruiting potential victims and exploiting them. Therefore businesses may be linked to human trafficking in various ways.<sup>431</sup>

They can be directly linked to the practice through the recruitment, transport, harbouring, or receipt of a person for the purpose of exploitation. This may occur with or without the knowledge of the management or if the company has recruited the persons itself or through a third party, such as a private recruitment agency. For example, the construction industry has been linked to trafficking in this manner, exploiting internal or international migrants supplied through informal and clandestine recruitment systems.<sup>432</sup>

Companies may be implicated in human trafficking if their premises, products or services, for example, are used by traffickers for the purpose of trafficking. This may occur, for example, in the hospitality and catering sector, where hotels, restaurants and cafes may be used to provide sexual services by trafficked persons, and in the transport sector, where trafficked persons may be transported using the company's logistics and services. There is an interesting report "Modern Slavery and the Industry of Hotel" of Liberty Shared Creating an Environment Safe from Trafficking, that shows as the Hotels in franchising are often used by Traffickers in different ways.<sup>433</sup> In fact big Hotels can unknowingly be used both as the first mooring of trafficked victims or as a base for sexual exploitation.

Furthermore, businesses may be indirectly associated with the crime of trafficking when their suppliers, subcontractors or business partners supply goods or services produced or provided by trafficked persons. Recently, some international companies have been accused of benefiting from trafficked children who were forced to work under harsh conditions in cocoa farms in West Africa.<sup>434</sup>

Having considered the many forms of slavery that can be used in these contests and the complexity of this phenomenon different links between slavery and MNEs or supply chains become clearer. But how is it possible to address slavery in MNEs and supply chains? What initiatives can be taken and what subjects can be involved in the struggle against slavery in the economic sphere?

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<sup>430</sup> GA, Res. A/HRC/RES/23/5, 19 June 2013.

<sup>431</sup> Special Rapporteur on contemporary forms of slavery, Report A/HRC/23/48/Add.4., 4 March 2013. Human trafficking in supply chains has been identified as a serious problem and a challenge that needs to be addressed in various economic sectors, including those integrated into global markets.

<sup>432</sup> See, for example, Human Rights Watch, *Are You Happy to Cheat Us? Exploitation of Migrant Construction Workers in Russia*, 2009. Available from [www.hrw.org/sites/default/files/reports/russia0209web\\_0.pdf](http://www.hrw.org/sites/default/files/reports/russia0209web_0.pdf).

<sup>433</sup> Liberty Shared and Orrick, "Creating an Environment Safe from Trafficking: Modern Slavery and the Industry of Hotel", 2018.

<sup>434</sup> Veritè, *Working Paper on Human Trafficking & Global Supply Chains*, 2012. Moreover, global clothing companies have been accused of human trafficking through the use of subcontractors who exploited migrant workers in Asia.

### 3.9. The primary responsibility of the state: Towards a new treaty on business and human rights

MNEs don't have international legal personality, so they cannot be direct addressees of international treaties and are not internationally responsible for wrongful acts.<sup>435</sup> Consequently these can be disciplined, by international law<sup>436</sup>, mainly in two ways: through binding treaties in which State entities are the direct addressees of rights and obligations, but which indirectly affect and have a domestic impact upon MNE operations such as ILO conventions, BITs... and through "soft law"<sup>437</sup>, including the Preamble to the 1948 Universal Declaration on Human Rights (UDHR)<sup>438</sup>, the 1992 Rio Declaration on Environment and Development<sup>439</sup>, and others<sup>440</sup>, that are the only international instruments that can directly regulate them. Therefore MNEs are regarded by international law as juridical entities governed mainly by national law.

As mentioned in chapter 2, the primary responsibility for implementing the legislation on human rights is vested in the State.<sup>441</sup> This includes the duty to protect individuals and groups against human rights abuses committed by private actors, such as business enterprises.<sup>442</sup> Even the Guiding Principles on Business and Human Rights, unanimously endorsed by the Human Rights Council in 2011, validate the primary duty of States to protect against and redress business-related human rights harms.<sup>443</sup>

In the context of contemporary forms of slavery, this duty to protect could translate into a mix of measures to ensure that businesses engage in their responsibility to respect human rights, including

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<sup>435</sup> Ilias Bantekas, *Corporate Social Responsibility in International Law*, Boston University International Law Journal, 2004.

<sup>436</sup> Professor Y. M. Kolosov considers that «Transnational corporations correspond to a drastically new level of international differentiation of labour which gives the right to talk about the foundation of so-called Transnational Law as a branch of International Economic Law within the framework of which TNCs could hold not only rights but also obligations. » Y. M. Kolosov & E. S. Krivchikova: *Mejdunarodnoe pravo [International Law]*, Uchebnik. Mejdunarodnie otnosheniya, Moscow, 2000, p. 86

<sup>437</sup> The Soft Law instruments that relate to and deal with multinational enterprise are numerous because they are the only way to directly regulate MNEs and to ensure their direct involvement also in the struggle against slavery.

<sup>438</sup> "A common standard of achievement for all peoples and all nations, to the end that governments, other organs of society and individuals shall strive, by teaching and education to promote respect for human rights and freedoms" ...

<sup>439</sup> It is evident in principles 5 and 27 of the 1992 Rio Declaration, where the obligations arising from sustainable development are addressed to "all States and all people."

<sup>440</sup> Such as the United Nations Millennium Declaration, adopted in 2000 by the General Assembly, 2002 World Summit on Sustainable Development Johannesburg Declaration on Sustainable Development. The principle of Sustainable Development contributes to this new approach, in fact the initiatives in this field provide for direct commitments of MNEs. For example, the Johannesburg Declaration expressly stated: "[...] the private sector [...] has a duty to contribute to the evolution of equitable and sustainable communities and societies".

<sup>441</sup> Special Rapporteur on trafficking in persons, especially women and children, Report A/HRC/23/48/Add.4, 4 March 2013. States have an obligation under international human rights law to respect, protect and fulfil the human rights of all persons in their territory and/or jurisdiction.

<sup>442</sup> Special Rapporteur on Contemporary forms of Slavery, Report A/HRC/30/35, 8 July 2015. Considering that neither the supply chains and MNEs possess legal personality and therefore they can't be direct addressees of international rights and obligations, it is a duty of governments oversee and regulate business human rights practices domestically and abroad.

<sup>443</sup> Guiding Principles on Business and Human Rights, implementing Protect, Respect and Remedy: A Framework for Business and Human Rights, GA Res. 17/4, 16 June 2011. Here the different roles and responsibilities of States (first pillar) and businesses (second pillar) to address their impact on human rights and the access to remedy for business-related human rights abuse (third pillar) are clarified. According to Guiding Principles on Business and Human Rights State duty to protect against business-related human rights harms is to be done through effective policies, legislation, regulations and adjudication (principle 1). State duties include setting out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations (principle 2).

through undertaking human rights due diligence throughout their supply chains and remediating the adverse impact of their operations on human rights.<sup>444</sup> States should ensure that businesses realize the implications of purchasing products or services that have in any way been linked to forced labour or other contemporary forms of slavery.

For these reasons the latest trend in international law consist in the intention of preparing a binding-treaty that obliges governments to require businesses to conduct human rights due diligence in global supply chains. The UN Human Rights Council has created an Inter-Governmental Working Group on Business and Human Rights whose purpose consist in developing a new international legally binding instrument, which will aim to regulate, through international human rights law, the activities of business.<sup>445</sup> The aim is to impose obligations on states in relation to their actions to protect human rights abuses by companies and to provide enforceable remedies to victims. It may also make companies directly legally responsible for their human rights abuses.<sup>446</sup> The general idea is that these initiatives, if widely ratified, will set common standards and obligations for developing and developed states, reducing businesses' ability to relocate in order to avoid human rights obligations.

Based on the previous sessions, as well as a series of open informal consultations held in 2018, the OEIGWG prepared a draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, as well as a draft optional protocol to be annexed to the draft legally binding instrument. The draft treaty served as the basis for negotiations which started in October 2018.<sup>447</sup> Likewise, International Labour Conference, in 2016, decided to initiate the process for a new, international, legally binding standard that obliges governments to require businesses to conduct human rights due diligence across the entirety of their global supply chains.<sup>448</sup>

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<sup>444</sup> For a detailed analysis of different regulatory frameworks, see International Corporate Accountability Roundtable report, Human Rights Due Diligence: The role of States, 2012. (<http://icar.ngo/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf>).

<sup>445</sup> Human Rights Council, Resolution A/HRC/RES/26/9, 26 June 2014, on "Elaboration of an International Legally Binding Instrument on transnational corporations and other businesses with respect to human rights".

<sup>446</sup> Olivier De Shutter, "Towards a New Treaty on Business and Human Rights", *Business and Human Rights Journal*, 2015, pp. 41-43.

<sup>447</sup> The negotiations started during the fourth session of the OEIGWG which took place from 15 to 19 October 2018. Potential elements of the future treaty that are debated are: 1. The obligation for companies to demonstrate due diligence: According to the option highlighted in the Elements, the states parties shall adopt legislative and other to make due diligence mandatory for TNCs and OBEs, including with respect to their subsidiaries; 2. Strengthening legal liability: According to the Elements, states parties shall regulate the legal liability of TNCs and OBEs from an administrative, civil and penal point of view with respect to violations of human rights resulting from their activities. In particular, all states should recognize the criminal liability of companies; 3. A broad concept of jurisdiction is required, allowing victims to have access to justice either in the country where the violation occurred or in the country where the parent company has its seat; Provision of effective remedies has to be guaranteed: The right to effective remedies is central to human rights law and to the UNGPs; nevertheless, victims of corporate abuses have difficulty getting access to remedies. The treaty is expected to impose an obligation on states to guarantee access to justice and effective remedies; 4. Establishing remedial mechanisms at international level: The 'Elements' propose an International Court on Transnational Corporations and Human Rights and special chambers of existing international and regional courts. The 'Elements' also put forward the proposal for a non-judicial mechanism, namely an international committee composed of experts, which would examine progress made by states parties, issue reports and receive communications; Improving judicial cooperation among states parties is another objective; 5. The Elements provide for the facilitation of mutual legal assistance and for the recognition of relevant court decisions.

<sup>448</sup> Human Rights Watch, *Human Rights in Supply Chains: A Call for a Binding Global Standard on Due Diligence*, 2016.

Also the EU has followed this international trend: firstly EU participates to the negotiations of the draft convention on business and human rights and secondly began to directly regulate due diligence policy.<sup>449</sup> In fact for the first time EU dealt with due diligence concept by adopting the Directive 2014/95/EU, which lays down the rules on disclosure of non-financial information by large companies.<sup>450</sup> Companies are required to include non-financial statements in their annual reports from 2018 onwards. EU rules on non-financial reporting only apply to large public-interest companies with more than 500 employees.<sup>451</sup> The Directive gives companies significant flexibility to disclose relevant information in the way they consider to be the most useful.<sup>452</sup>

Another legislative initiative imposing due diligence obligations on EU companies is the recently adopted Conflict Minerals Regulation, which will take full effect on 1 January 2021.<sup>453</sup> EU Importers of four minerals (tin, tantalum, tungsten and gold) into the EU will be obliged to check the likelihood that the raw materials could be financing conflict or could have been extracted using forced labor.<sup>454</sup> The EU regulation focuses on conflict affected or high-risk areas.<sup>455</sup> Therefore these importers will have to carry out due diligence on their supply chain. In other words, they will have to check where the minerals and metals they import have been mined and processed responsibly.<sup>456</sup> EU Member States are responsible for checking that EU importers respect the requirements which the regulation sets out.<sup>457</sup>

Therefore it is safe to affirm that despite the recognized importance of voluntary initiatives or of soft law instruments, the latest international trend consists in seeking to adopt international binding instruments, to ensure that corporates, regardless of their size, respect their duty of human rights

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<sup>449</sup> European Parliament, Briefing on Towards a binding international treaty on business and human rights, 2018.

<sup>450</sup> Council Directive, 2014/95/EU, 22 October 2014, amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups. Large companies have to publish reports on the policies they implement in relation to environmental protection; social responsibility and treatment of employees; respect for human rights; anti-corruption and bribery; diversity on company boards (in terms of age, gender, educational and professional background).

<sup>451</sup> This include listed companies; banks; insurance companies; other companies designated by national authorities as public-interest entities.

<sup>452</sup> Companies may use international, European or national guidelines to produce their statements – for instance, they can rely on UN Global Compact, OECD guidelines for multinational enterprises ... In June 2017 the European Commission published its guidelines to help companies disclose environmental and social information.

<sup>453</sup> EU Regulation, 2017/821, 17 May 2017.

<sup>454</sup> Indirectly, the regulation affects smelters and refiners of tin, tantalum, tungsten and gold, both inside and outside the EU. This is because EU importers of minerals and metals will need to make sure they source from responsible smelters and refiners.

<sup>455</sup> This includes areas with widespread and systematic violations of international law, including human rights abuses.

<sup>456</sup> They will have to carry out checks on their supply chain by following a five-step framework. This is set out in a document "Due Diligence Guidance for Responsible Supply Chains from Conflict-Affected and High-Risk Areas". Experts at the Organization for Economic Co-operation and Development (OECD), a group of 35 developed countries, drew up the guidance. The OECD Guidance requires an importer to follow the five steps: Establish strong company management systems; Identify and assess risk in the supply chain; Design and implement a strategy to respond to identified risks; Carry out an independent third-party audit of supply chain due diligence; Report annually on supply chain due diligence.

<sup>457</sup> EU Regulation, 2017/821, 17 May 2017. "Member State competent authorities should be responsible for ensuring the uniform compliance of Union importers of minerals or metals who fall within the scope of this Regulation by carrying out appropriate ex-post checks. Records of such checks should be kept for at least five years. Member States should be required to establish the rules applicable to infringements of this Regulation"; Article 10(1) "Each Member State shall designate one or more competent authorities responsible for the application of this Regulation".



compliance also through their supply chains. Therefore today the role of state to regulate business human rights compliance is still totally fundamental and necessary.

### 3.9.1. State measures to ensure the anti-slavery compliance of corporates and their supply chains: Towards a mandatory due diligence policy.

States have adopted diverse approaches to address this issue.<sup>458</sup> Recently governments have understood that also disclosure and transparency can be featured as legal obligations rather than being limited to voluntary corporate social responsibility initiatives.

The model, followed by many states, is the UK Modern Slavery Act which is a law adopted in March 2015 by the Parliament of the United Kingdom.<sup>459</sup> This law criminalizes slavery, trafficking, forced labor and servitude, provides for the confiscation of the assets of those who commit modern slavery crimes and introduced a new institution, the Independent Anti-Slavery Commissioner, to deal with slavery.<sup>460</sup> Finally, the MSA incorporated a new section (n.54) on transparency in supply chains. This section bonds companies to report annually on steps taken to ensure that neither slavery and human trafficking are involved in any part of their supply chains.<sup>461</sup> This duty regards corporates which are either headquartered or conducting business in the UK, that supply goods or services and have a minimum turnover of £36 million. It results in slavery and human trafficking statement' each year and it has to be published on the company's website, if it has one.<sup>462</sup> The MSA does not provide for the imposition of any penalties for non-disclosure, except that the Secretary of State can apply for an injunction to compel the company to comply.<sup>463</sup>

In the context of transparency, the most often cited legislation is the California Transparency in Supply Chains Act of 2010, which came into effect on 1 January 2012.<sup>464</sup> Under the Act, all retailers and manufacturers with annual global revenues of over US\$100 million doing business in California, whether or not they have their headquarters there, are required to disclose online their efforts to eradicate

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<sup>458</sup> Special Rapporteur on Contemporary forms of Slavery, Report A/HRC/30/35, 8 July 2015.

<sup>459</sup> The Dutch government passed the Child Labor Due Diligence Law, France adopted a Human Rights Due Diligence Law, Switzerland is considering mandatory human rights due diligence and parent company liability legislation.

<sup>460</sup> It is appointed by the Secretary of State and its mandate is to encourage good practice in the prevention, detection, investigation and prosecution of the offences of the Act, as well as the identification of victims.

<sup>461</sup> The government has produced a guide on the operation of the provision, according to section 54(9). The guide further explains which businesses are covered, and what steps they need to take in order to comply.

<sup>462</sup> The statement may cover issues such as the structure of the organization, its business and supply chains, its policies and due diligence processes on slavery and trafficking, the parts of the business where there is a special risk, as well as the steps taken to address the risk, and the effectiveness in ensuring that modern slavery does not occur in its business or supply chains, measured against appropriate indicators. There are two private initiatives, through the Business and Human Rights Resource Centre and the TISC report, which put the statements together in an online register, in an attempt to make the reports more easily available.

<sup>463</sup> There are an estimated 12,000 to 17,000 statements that will be produced under this reporting requirement, many of which are housed on the Business and Human Rights Resource Centre (BHRRC) Modern Slavery Registry.

<sup>464</sup> Available at [www.state.gov/documents/organization/164934.pdf](http://www.state.gov/documents/organization/164934.pdf).

slavery and human trafficking from their direct supply chains for tangible goods offered for sale. Failure to comply results in an action being brought for injunctive relief by the Attorney-General of California.

On 1 January 2019, the Australian Modern Slavery Act took effect as law. This law, as the precedent ones, require corporates to produce annual modern slavery statements reporting on the risks of modern slavery, most commonly forced labour, in their operations and supply chains, and actions taken to assess and address those risks.<sup>465</sup> The distinctive element of Australian Modern Act is that these statements must be approved by the principal governing body of the entity (i.e. a company's board of directors, or equivalent) and signed by a responsible member of the entity. Moreover the other characteristic is that these statements will be published on an online government register.<sup>466</sup> It does not penalise entities financially for failure to report, for which it has attracted some criticism, but it is based on the idea that the power of public scrutiny, largely by investor and advocacy groups, will encourage compliance.<sup>467</sup>

It is safe to affirm that there is a new trend whereby governments seek to regulate directly, enacting laws, the due diligence obligations of corporates. These new laws should be viewed within the broader, international context of increasing corporate human rights regulation. Mandatory reporting and due diligence laws requiring companies to examine and report on how they address the risk of modern slavery existing in their supply chains are rapidly emerging as a popular legislative tool. In recent years, the UK, the US and the EU have introduced new laws with this purpose and many other states are considering a similar move.<sup>468</sup> Even though these laws represent an important step forward for the regulation of corporates and their supply chains, however there still are many criticalities, including the absence of prevision of penalty in case of infractions, or the lack of a mechanism that monitors whether businesses produce a statement...<sup>469</sup>

Another interesting proposal, that is different from the previous ones, is which of the Brazilian Ministry of Labor who introduced a "dirty list" system by adopting a ministerial decree in 2003. The "dirty list" is a register of employers (both people and legal entities) caught exploiting workers under abusive and coercive conditions. Enterprises that appear on it are barred from accessing credit from state banks or

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<sup>465</sup> The Commonwealth Act requires over 3,000 large companies and other entities, including not-for-profits and universities, to publish annual public statements on their actions to address modern slavery. The Commonwealth Act applies to entities based, or operating, in Australia, with an annual turnover of \$100 million.

<sup>466</sup> Statements will be given to the Minister for Home Affairs to be held on a free, publicly accessible, government-run register - the Modern Slavery Statements Register. This register will be available on the internet. This is a distinctive element compared to UK MSA.

<sup>467</sup> Amy Sinclair, "Tackling modern slavery now a matter of legal compliance", Legal updates Human Rights, 2019, pp.86-87.

<sup>468</sup> Modern slavery reporting laws are under consideration in Hong Kong, Canada and Norway. As a next step, France has legislated to require companies to undertake mandatory human rights due diligence to ensure supply chains are free from slavery, and both Germany and Switzerland are considering a similar move.

<sup>469</sup> Virginia Mantouvalou, "The UK Modern Slavery Act 2015 Three Years On", The Modern Law Review, 2018, p.25. The author emphasizes some criticalities of UK MSA "include: the fact that there is no central list of businesses with which have to comply with the legislation; the lack of a mechanism that monitors whether businesses that are covered by the Act produce a statement; and the fact that there is no official central repository for the statements of businesses, which can only be found on their websites".

other public financial support and are bounded to pay a fine.<sup>470</sup> The enterprises will be monitored for two years and, if during this period, the offence does not occur again and all fines are paid, the employer's name may be removed from the list. Throughout the years the list has undergone many constitutional challenges from employers and actually its survival still is debated but despite these difficulties it was internationally recognized as good system to contribute to the abolishment of slavery in corporates.<sup>471</sup>

At the United States federal level, under the Trafficking Victims Protection Reauthorization Act of 2005, the Department of Labour's Bureau of International Labour Affairs is mandated to, inter alia, create and maintain a List of Goods Produced with Child Labor or Forced Labor.<sup>472</sup> This lists is intended to ensure that United States federal agencies do not procure goods made by this labor. This transparency initiative primarily provide data for government procurement but also assist investors and consumers.

Other interesting initiatives deal with the institution of supervisory organs of supply chains in specific sectors as made by English government<sup>473</sup> or the finalizing of accord of cooperation between state and MNEs such as Bangladesh Accord on Fire and Building Safety.<sup>474</sup> Despite the importance of many instruments that governments have adopted to ensure that slavery does not occur in MNEs and supply chains, considering the power that these entities have acquired over time, these instruments should be implemented by voluntary initiative of corporates to achieve their better involvement in this field.

### 3.10. The voluntary initiatives of multinational enterprises

Recently there has been increasing public interest in how MNEs and Supply chains can respect human rights. This interest is attributable to many reports of non-governmental organizations that claim the

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<sup>470</sup> The process of including an employer on the list goes as follows: A complaint is lodged to the government or a civil society organization; A labor investigation group visits the workplace to investigate the complaint; If it is established that the workers are subjected to slave-like conditions, the landowners are prosecuted by the labor inspectors on the GEFM team; The charges are sent to the Ministry of Labor and Employment and undergo an administrative process; The employer may be required to pay a fine. (It is rare that they get criminal convictions or jail time.); Employers found guilty will have their names (or the name of their enterprise), included on the dirty list.

<sup>471</sup> In May 2016, a new Decree (no. 4/2016) resolved these issues, but the government put the "Dirty List" under embargo until March 2017, when, after a long judicial battle, the Ministry of Labor was obliged to issue the list under new technical rules. Since the resumption of publication, there has been criticism that the list has not been updated, as the 2017 list identifies only 68 businesses, compared with the 609 names listed in 2014 when it was last released. This has raised concerns about the utility of the list over the longer term. See Walk Free Foundation, Global slavery index, 2018.

<sup>472</sup> United States Department of Labor, list of goods produced with child labor or forced labor, available at [www.dol.gov/ilab/reports/child-labor/list-of-goods/](http://www.dol.gov/ilab/reports/child-labor/list-of-goods/).

<sup>473</sup> English Government set up Gangmasters Licensing Authority (GLA), knows also as Gangmasters and Labor Abuse Authority (GLAA), whose purpose is to govern and control the supply of workers to the agricultural, horticultural industries. It has supervisory powers and carries out surveys on cases of exploitation of workers, unauthorized activities, employment agencies .....

<sup>474</sup> This is the legally binding accord named Bangladesh Accord on Fire and Building Safety which was signed in May 2013 by more than 200 apparel and footwear companies and it created an independent inspection system, and publicly disclosed all factories covered by the agreement, inspection reports, and corrective action plans. Even if the scope of that agreement was limited in the field and in time, it contributed to enforce cooperation between government and companies in the protection of human rights.

violations of human rights and enslavement by supply chains and MNEs and also to some disasters now well-known thanks to Media. Among these tragedies one of the most known and recent is the Rana Plaza disaster in April 2013 in Bangladesh, that put the spotlight on poor working conditions and labor rights abuses in factories producing for global apparel and footwear brands.<sup>475</sup> In the wake of the numerous disasters, major apparel brands launched new initiatives to protect the safety of workers in their supply chains.

Global brands and other transnational corporations operating complex supply chains that span multiple jurisdictions have increasingly adopted voluntary codes of conduct to address contemporary forms of slavery in their operations, as well as those of their suppliers, prompted mainly by reputational risks.<sup>476</sup> Codes of conduct<sup>477</sup> contain non-binding norms which cover a wide variety of issues, social, environmental, human rights (the prohibition of forced labor) and recently also anti-corruption.<sup>478</sup> Despite their important role in complementing the normative framework, voluntary codes of conduct are often bald statements without any independent monitoring mechanisms and leave numerous gaps in protection.<sup>479</sup>

In fact, these are often accompanied by other guarantee mechanisms. Many businesses rely on social audit which consists in a form of compliance assessment conducted at workplace in business supply chains.<sup>480</sup> The criticisms of this measure are numerous because of the lack of impartiality or their performance's way.<sup>481</sup> On the base of these criticisms, new strategies are developed that include proactive independent investigations and robust independent verification, which incorporate consultations with workers with due regard to confidentiality and privacy. Consumer and trade union advocacy can play an important role in ensuring the involvement of workers and their representatives in

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<sup>475</sup> The eight-story Rana Plaza building was located outside Bangladesh's capital, Dhaka, and housed garment factories that employed over 5,000 workers. The building's catastrophic collapse killed over 1,100 workers and injured over 2,000. Actually, Bangladesh has seen concrete improvements on fire and building safety, but apparel and footwear supply chains are still plagued by serious human rights problems.

<sup>476</sup> The first attempt of codification of standard of conduct for multinational enterprises was the Sullivan Principles which was adopted by some MNEs operating in Sud Africa during the period of Apartheid. These were elaborated by Reverendo Leon H. Sullivan, member of the Board of trustees of General Motors, and they recommended to multinational companies not to separate blacks from whites during work or in the canteen. Examples of more recent codes of conduct are what elaborated by some group of civil society such as Amnesty International's Human Rights Principles for Companies or Workers Rights Consortium's Model Code of Conduct ...

<sup>477</sup> Often code of conduct can be adopted by a single enterprise but also by a coalition of many enterprises such as Electronic Industry Citizenship Coalition, a trade association comprising more than 110 electronics companies, which adopted a code of conduct which forbids the trafficking in human beings and prohibits its suppliers in more than 120 countries from using forced labor.

<sup>478</sup> A recent innovation is the development of policies that address recruitment and hiring in labour supply chains by banning private employment or recruitment agencies supplying workers to facilities in their supply chains from charging recruitment fees to those workers. For example, the Electronics Industry Citizenship Coalition has adopted a "no fees" policy for its members.

<sup>479</sup> Special Rapporteur on Trafficking in Persons, Report A/HRC/35/37, 19 June 2013. These do not apply to all entities, especially informal sector and home-based suppliers and subcontractors.

<sup>480</sup> Recently a new method is introduced which is "social audit" which consists in a form of compliance assessment conducted at workplace in business supply chains. A social audit is a formal review of a company's endeavors, procedures, and code of conduct regarding social responsibility and the company's impact on society in order to understand if company is achieving its goals.

<sup>481</sup> In fact, often who made the audit doesn't speak the language of workers, or it was made in workplace in presence of manager ...

such processes. In fact, some companies have already piloted new protocols that prioritize the confidential testimony of workers and attempted to develop more robust investigative techniques, sometimes in partnership with civil society.<sup>482</sup>

Another strategy in tackling the risk of contemporary forms of slavery in supply chains relates to transparency and reporting, on the one hand, and traceability, on the other. In both cases, pressure from regulators, civil society actors and investors has pushed companies not only to disclose data about business relationships in supply chains, but to implement measures to track products and materials from finished goods to the commodities level to promote “clean” production at every step of the way.<sup>483</sup> Regarding the transparency and reporting there is a very important initiative of the Global Reporting Initiative which provides the framework that can be used by companies in order to have an efficient and complete report.<sup>484</sup>

Eventually I believe that the most efficient way to address slavery in these contexts, particularly for consumers’ awareness, is the certification. The certification guarantees from one hand the traceability of certified products and from the other that these were not realized by slaved labour. Often the certification regards not only producers but also farmers, suppliers, subcontractor... and this is a fundamental aspect considering that often suppliers are excluded from the measures on Human Rights.<sup>485</sup> The most well-known certification is the Fairtrade Mark, which can be found on a wide range of products — over 27,000 — and certifies that those products meet internationally agreed Fairtrade Standards, including those relating to child labour and labour rights.<sup>486</sup> Another example<sup>487</sup> is the GoodWeave certification label, which provides assurance that no child labour was used in the manufacture of rugs.<sup>488</sup> The GoodWeave certification is based on a tripartite structure: licensing to producers that must meet the requirements of the GoodWeave Standard<sup>489</sup>; regular, unannounced inspections, by GoodWeave, of all production facilities that cover tier one factories and all outsourced

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<sup>482</sup> For example, Apple, Hewlett Packard, Patagonia, Gap Inc., Coca Cola, the Arcadia Group and Philip.

<sup>483</sup> Special Rapporteur on contemporary forms of slavery, Report A/HRC/30/35, 8 July 2015.

<sup>484</sup> In October 2016, GRI launched the first global standards for sustainability reporting. Developed by the Global Sustainability Standards Board (GSSB), the GRI Standards enable all organizations to report publicly on their economic, environmental and social impacts – and show how they contribute towards sustainable development.

<sup>485</sup> Special Rapporteur on trafficking in persons, especially women and children, Report A/HRC/RES/23/5, 19 June 2013.

<sup>486</sup> Fairtrade is an alternative approach to conventional trade and is based on a partnership between producers and consumers. When farmers can sell on Fairtrade terms, it provides them with a better deal and improved terms of trade. This allows them the opportunity to improve their lives and plan for their future. Fairtrade offers consumers a powerful way to reduce poverty through their everyday shopping. When a product carries the FAIRTRADE Mark, it means the producers and traders have met Fairtrade Standards. The Fairtrade Standards are designed to address the imbalance of power in trading relationships, unstable markets and the injustices of conventional trade. See [www.fairtrade.net](http://www.fairtrade.net).

<sup>487</sup> There are different types of certification including UTZ CERTIFIED, which regards farmers. The applicability of this certification is aimed at all actors in the food chain who, through a "Chain of Custody" programme, can contribute to the production of sustainable products. It is aimed at those who produce coffee and chocolate beans, distributors, primary processors and industries in the food sector. The entire chain must be able to demonstrate that it maintains the identification and traceability of sustainable coffee, sustainable cocoa and the.

<sup>488</sup> The Good Weave label means that no child, forced or bonded labor was used in the making of a certified product, and that your purchase supports programs that educate children and ensure decent work for adults. See [www.goodweave.org](http://www.goodweave.org).

<sup>489</sup> No child labor is allowed; No forced or bonded labor is allowed; Workplace conditions are documented and verifiable.

production, including homes, to verify compliance with this Standard; a separate annual audit, made by producers, to document their performance against the Standard's following progress principles.<sup>490</sup>

According to Working Group on Business and Human Rights states should seek to ensure some benefits in terms of legal defense or tax breaks to the corporates that adopt due diligence policies.<sup>491</sup>

## Conclusion

This chapter has demonstrated that the perpetrators of slavery have changed over time. Today, most modern forms of slavery are perpetrated by private agents, mainly by MNEs. This requires new strategies to eradicate this phenomenon. In the past, measures to abolish slavery were centered on the role of the state in not committing slavery. Today, measures must involve both civil society as and economic agents. This chapter has argued that the most efficient state measures in ensuring that economic agents are not involved with slavery, are those adopted by both the importer State or the one where the corporate's head office is located, and by developing countries where MNEs locate their subsidiaries or where they are connected with local subcontractors. In fact, if both states adopt control measures, this increases the likelihood that goods are not produced by slaves. Past efforts to ensure that slavery did not occur in the economic context dealt only with corporates, today these measures are being extended to the entire supply chains of corporates. The recognition of criticisms of supply chains and their consequential involvement in eradicating slavery was an important milestone given that the majority of slavery cases occur in these contexts. One of the most symptomatic aspects, as explained in this chapter, is that MNEs are not only among the main perpetrators of slavery, but that they have contributed to the evolution of modern forms of slavery. The chapter has argued that slavery is a complex phenomenon that cannot be considered as a violation of any human rights only, but one that needs a multi-dimensional regulatory approach.

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<sup>490</sup> Freedom of association and collective bargaining are recognized; No discrimination is practiced; Decent working conditions are respected, including workplace safety and health, wages, working hours, and disciplinary practices; Negative environmental impacts of production are identified and minimized.

<sup>491</sup> The third regards legal risk management. As noted in the Commentary to the Guiding Principles: "conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse". The OHCHR report explains that exercising human rights due diligence could be a basis for a possible defense to liability in some cases, depending on the type of harm and the connection to it, as well as other factors that will be specific to each jurisdiction and legal system. Human Rights Council in 2011 (resolution 17/4)

## 4. MULTI-DIMENSIONAL APPROACHES IN THE STRUGGLE AGAINST SLAVERY

### Introduction

The chapter seeks to understand some of the key causes and contemporary manifestations of slavery and examine what the international community can do to abolish it. It explores some international initiatives gives particular attention to proposals of the Special Rapporteur on Contemporary Forms of Slavery.

#### 4.1. Global estimate of modern slavery

It is estimated that today 40.3 million of persons are victims of modern forms of slavery, about 71 per cent of whom are women and girls.<sup>492</sup> From an analysis of different estimates results that today slavery is a global phenomenon that affect both developed and developing country unless with different percentages. Modern slavery, according to the Global Slavery Index 2018, is most prevalent in Africa (7.6 per 1,000 people), followed by Asia and the Pacific region (6.1 per 1,000).<sup>493</sup> Instead in Europe the minor number of slaves (2,7%) is found.<sup>494</sup> Despite these results are the most reliable, the data on slavery should be interpreted cautiously as emphasized by ILO and Walk Free Foundation.<sup>495</sup>

In fact a criticism which many authors complain consist in the fact that there isn't a unique method data collection<sup>496</sup> on moderns form of slavery and that official data in strategic regions such as Arab states<sup>497</sup> and in referring to some forms of slavery as child soldiers lack.<sup>498</sup> Moreover the lack of certainty about the number of slaves is mainly due to the fact that anybody, NGO or international organization, that tries to quantify slavery, interprets the definition of slavery differently so that some include in it some forms of exploitation, that indeed are excluded from others. In fact there are many documents that report different data, making confusion on where slavery is more rooted and what are the forms more practiced. Consequently this leads to a major difficulty in the predisposition of strategies of eradication of this practice.

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<sup>492</sup> Walk Free Foundation, *The Global Slavery Index Report*, 2018. In this report results that in the past 5 years, 89 million people experienced some form of modern slavery for periods of time ranging from a few days to the whole five years.

<sup>493</sup> Ibid. Among the countries with the highest prevalence of modern slavery – the Central African Republic, Afghanistan, South Sudan, Pakistan, Eritrea and Burundi.

<sup>494</sup> The developed country which are more affected by slavery, are: United States, Australia, United Kingdom, Germany, France, the Netherlands, and several other European nations.

<sup>495</sup> ILO and Walk Free Foundation, *Global Estimates of Modern Slavery: Forced Labor and Forced Marriage*, 2017.

<sup>496</sup> Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery*, 2008, pp 8-12. The author denounces the lack of complete system of data collection on slavery.

<sup>497</sup> Given this is a region that hosts 17.6 million migrant workers, representing more than one tenth of all migrant workers in the world and one in three workers in the Arab States, and one in which forced marriage is reportedly widespread, the current estimate is undoubtedly a significant underestimate.

<sup>498</sup> Slavery disproportionately affects the most marginalized members of society, such as minorities, women, and children whereby it often results difficult to collect data.

The number of victims of modern slavery is many high, despite many progresses are made in the struggle against this practice, as showed in the precedent chapters. A doubt raises spontaneously: if slavery has been only a juridical institution the only legal prohibition would significantly reduce the number of slaves, therefore the persistence still so numerous of this practice lead to think that it has never been only a juridical institution.

#### 4.2. Slavery from juridical character to social and economic dimension

Nowadays it is peaceful that slavery can't be regarded as a juridical institution recognized by law but rather as a "de facto" practice. By losing its juridical feature, slavery began to develop in much more fluid and less visible ways than when it was legally regulated and, as many other illegal activities, it adapts to changing legal, economic and social conditions.<sup>499</sup>

Kevin Bales in his paper "Expendable People: Slavery in the Age of globalization" demonstrates how modern forms of slavery have evolved rapidly into a globalized economic and how these have acquired an economic character.<sup>500</sup> The economic character of this practice is evident in two perspectives: the first one consists in the fact that slavery became an economic activity in the meaning that it generate profits<sup>501</sup> that flow across the world and enrich organized criminals, while the second one deals with the role of slave in the global economy who is regarded as an "input", easily replaceable, of production process, as showed in chapter 3 in referring to "sumangali" practice.<sup>502</sup> Recently it is estimated that the total illegal profits generated by forced labor, in the private economy worldwide, amount to US\$150 billion per year.<sup>503</sup> Interpol asserts that organized criminal networks are shifting their attention from drugs to human trafficking because the profits are equally high or higher but the statutory penalties for

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<sup>499</sup> The author Bales distinguishes between old and new slavery: the first was based on legal property and it leads to the commodification of human beings while new slavery today has moved away from slaves as capital investments to the use of slaves as inputs in an economic process. So, slaves today are transformed from fixed assets into fungible resources. Therefore, globalization now carries connotations of the commercialization of humanity. If in the past slaves were expensive and it was necessary to safeguard them as an investment by having clear and legally document ownership, instead today the fact that ownership of slaves is now illegal leads to that slaves are disposable. This new connotation leads to from one hand new forms of slavery are less permanent and so today slavery is often of short duration, and some people fall in and out of slavery but from the other to slaves no longer viewed as property, but are seen merely as disposable inputs into production. See note 489, pp.463-465.

<sup>500</sup> Kevin Bales, "Expendable People: Slavery in the Age of Globalization", *Journal of International Affairs*, 2000, pp 470-471.

<sup>501</sup> It is estimates that bonded agricultural laborers would generate approximately US\$ 860 million.

<sup>502</sup> In fact, there are some economic sectors, such as informal economy which are based on slavery because of a lack of regulation and control. There are countries such as Pakistan, India, Northern and Western Africa... where slavery and industry co-exist.

<sup>503</sup> A majority of these profits are generated in Asia. An estimated US\$99 billion is generated by forced sexual exploitation, while US\$51 billion derives from forced labor exploitation, including in domestic work, agriculture and other economic activities. Trafficking in human beings generates every year \$150billion. See Tom Keatinge and Anne-Marie Barry, "Disrupting Human Trafficking: The Role of Financial Institution, Royal United Services Institute for Defense and Security Studies", 2017.



human trafficking are significantly lower.<sup>504</sup> It is clearer as slavery became an economic activity with advantageous profits.

It is safe to affirm that slavery has survived also as a cultural institution.<sup>505</sup> In fact today there are still some States that have local culture or tradition and religious practices that determine the enslavement of one part of the population because of their belonging to a specific group or for particular circumstances such as a relative committing a sin. For example in Sindh, a Pakistan province, the custom of “swara” is practiced, by which women are used as commodities to settle disputes between clans and tribes.<sup>506</sup> Furthermore many reports document of systematic cases of enslavement of girls in West Africa in order to atone for the real or alleged sins of a male relative.<sup>507</sup> In fact there is a belief that gods often punish a person’s sin by causing the deaths of family members until the sin is pardoned. So, as reparation, priests take young virgins who are expected to serve a priest as concubines for a certain period, depending upon the severity of the crime.<sup>508</sup>

When slavery is regarded as a cultural tradition it is more complicated to eradicate it because the population doesn’t recognize it as an illegal activity.<sup>509</sup> This statement is evident in Mani case where despite the Nigerian criminal and constitutional law forbidden slavery the judges justified the slave status of victims applying the customary law.<sup>510</sup>

The two dimensions of modern slavery show that slavery is a complex phenomenon, whereby a complete analysis of this practice requires also social, cultural and economic considerations. The fact that slavery has changed and transformed some of its characteristics, despite its prohibition, leads to think that there are various factors that contribute to the increasing of this phenomenon, whereby the only legal prohibition is not enough to abolish it. Therefore become interesting and necessary to explore what are slavery’s reasons because only understanding what are its causes it is possible to elaborate a strategy to effectively eradicate this practice.

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<sup>504</sup> Raymond E. Kendall, Secretary-General, Interpol, personal communication, October, 1999.

<sup>505</sup> Special Rapporteur on Contemporary Forms of Slavery, Report A/HRC/30/35, 8 July 2005.

<sup>506</sup> Special Rapporteur on Contemporary Forms of Slavery, Report A/73/139, 10 July 2018.

<sup>507</sup> Ibid

<sup>508</sup> The girl’s family can redeem her after that period, but the priest demands a high price. If the priest dies, the girl becomes the property of his successor. If the girl dies without her family redeeming her, her family is obligated to replace her with another virgin.

<sup>509</sup> On the last 21 February, the Thomson Reuters Foundation website published a report that demonstrates cases of slavery in two religious’ communities (Igreja Adventista Remanescente de Laodiceia and Igreja Cristã Traduzindo o Verbo) in Brazil. Families send their sons in these communities so that they may receive a hard education without recognizing that in reality they are reduced to slavery.

<sup>510</sup> *Hadijatou Mani Koraou v The Republic of Niger*, Judgment No. ECW/CCJ/JUD/06/08, ECOWAS, 27 October 2008.

### 4.3. Causes of slavery

The causes of slavery are different in nature and reflect complexity of this practice. The process that leads to slavery can be determined by a combination of economic, social and political factors. Poverty, lack of education, employment, resources and opportunities are the main causes of slavery or trafficking.<sup>511</sup> This is confirmed by Special Rapporteur on Contemporary Forms of Slavery that identifies a series of “socio-economic trends” that can generally lead to slavery or contribute to the increase in forms of exploitation.<sup>512</sup>

Kevin Bales found three leading factors that, combined, contribute to enslavement: high population growth, economic vulnerability and corruption that allows the illegal use of violence to capture and control vulnerable people.<sup>513</sup> Population’s increase has been higher in those countries where slavery is most frequent. Among these, Southeast Asia, South Asia, Africa and the Arab countries, where slavery is still practiced or has been part of the historical culture, so population growth has increased the supply of potential slaves.<sup>514</sup>

Doubtless economic issues also contribute to the spreading of slavery. These regard in particular the market’s logic of demand and supply that on one hand causes migration flows and on the other requires more labor at an increasingly low price in order to obtain the cheapest products and maximize corporate or employer profit at the expense of human rights.<sup>515</sup> Regarding the economic vulnerability, considered by Bales, this is mainly due to two factors: the deregulation of world market which characterized the globalization and the corruption that can divert money and assets to illicit organizations or activities causing prejudice to citizens' services.<sup>516</sup>

According to Special Rapporteur there is also another cause of slavery which is often underestimated: cuts in public spending, which characterized not only developing countries but also developed countries, thus contributing to the growth of slavery in the latter too. Special Rapporteur on Contemporary Forms of Slavery, in report A/73/139, emphasizes the link between slavery and cuts in public spending (such as austerity measures, regressive tax shifts, reduction in spending on social service, on education and information projects), because these hinder the capacity of states to effectively tackle causes and consequences of slavery.<sup>517</sup>

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<sup>511</sup> UNICEF, “Early Marriage: Child Spouses”, Innocenti Research Centre, Florence, March 2001. This study shows that a girl from the poorest household is three times more likely to marry than a girl from the richest household. Often parents force a bride into servile marriage to improve their economic situation or to pay off the family’s debts.

<sup>512</sup> Special Rapporteur on Contemporary Forms of Slavery, Report A/72/139, 17 July 2017.

<sup>513</sup> Kevin Bales, “Expendable People: Slavery in the Age of Globalization”, *Journal of International Affairs*, 2000, pp 472-475.

<sup>514</sup> *Ibid.*

<sup>515</sup> Special Rapporteur on Contemporary forms of Slavery, Report A/HRC/36/43, 2 August 2017.

<sup>516</sup> *Ibid.*

<sup>517</sup> Special Rapporteur on Contemporary Forms of Slavery, Report A/73/139, 17 July 2018.

According to Special Rapporteur on Contemporary Forms of Slavery, gender inequality is the “heart of contemporary forms of slavery”.<sup>518</sup> Discrimination against women is often enshrined in laws, customs and results in a hierarchical distribution of powers and rights that favors men and disadvantages women. In some countries it is impossible for women to have access to major resources such as owning property, land, credit, inheriting and also having access to education and information, thus contributing to their marginalization.<sup>519</sup> Silvia Scarpa<sup>520</sup> talks about the feminization of poverty and of migration following the direction taken by many international organs that underline the gender dimension of contemporary slavery.<sup>521</sup> Discrimination based on sex is often widespread in countries where other forms of discrimination, based on caste, origin, nationality and social and economic status, disability, sexual orientation... are practiced. Clearly discrimination contributes to the vulnerability of the person concerned and in more extreme cases leads to their marginalization whereby they are more susceptible to exploitation.

ILO emphasized as the vulnerability of governments covers a central place in the increasing of slavery. In fact International Labor Organization and Walk Free Foundation in their common report of 2017 “Global Estimates of Modern Slavery: Forced Labor and Forced Marriage” emphasize that much of modern slavery today occurs in contexts of state fragility, conflict, and crisis.<sup>522</sup> Doubtless catastrophic events and conflict and post-conflict situations, especially when governments are not able to control the whole territory and find and prosecute criminals, cause a general increase in illegal activities, including the lucrative traffic in persons and other forms of slavery. Moreover it is found that during an armed conflict, modern slavery is often used as a tactic of modern warfare, where armed groups use for example sexual violence and forced marriage as a means to subjugate a population. It is interesting the proposal of ILO and Walk Free Foundation that points to the need to address the risk of modern slavery as part of humanitarian actions in these situations.<sup>523</sup>

Therefore by analyzing the root causes of slavery and by considering its economic and social dimensions it is evident that the obligations established by international conventions in order to abolish this practice are necessary but aren't enough because they do not consider this phenomenon as whole. Consequently a complete strategy to eradicate slavery should consider this practice in its complexity, affecting its

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<sup>518</sup> Special Rapporteur on Contemporary Forms of Slavery, Report A/73/139, 17 July 2018. Special Rapporteur emphasizes as “All responses aimed at the prevention and eradication of contemporary forms of slavery must focus on promoting substantive gender equality and women’s human rights by redressing the socioeconomic disadvantage experienced by women in all areas of life, addressing harmful gender stereotypes...”

<sup>519</sup> Ibid.

<sup>520</sup> Silvia Scarpa, *Trafficking in Human beings: modern slavery*, 2008, pp 12- 16.

<sup>521</sup> Special Rapporteur on Trafficking in Persons, especially Women and Children, Report A/73/171, 17 July 2018; APWLD (Asia Pacific Forum on Women, Law and Development), *Briefing paper on the gender dimension of contemporary forms of slavery, its causes and consequence*, 2018. This report was realized on the occasion of the roundtable convened by the UN Special Rapporteur on Contemporary Forms of Slavery, Geneva 11-12 April 2018. On 26 October 2018, the Office of the United Nations High Commissioner for Human Rights organized a side event on *Gender Dimensions of Contemporary Forms of Slavery and Trafficking in Persons*.

<sup>522</sup> International Labor Organization and Walk Free Foundation, *Global Estimates of Modern Slavery: Forced Labor and Forced Marriage*, Geneva, 2017.

<sup>523</sup> Ibid.

causes and consequences over the victims and involving the major number of persons including state organs, civil society and economic agents. What are the responses of international community on strategy to abolish slavery?

#### 4.4. Millennium Development Goals: a lost opportunity

For many years slavery's problem was underestimated because it was believed that this phenomenon belonged to the past and that efforts provided by conventions had contributed significantly to its decline. Millennium Development Goals, an international initiative of the beginning of the new millennium, was a product of this misinterpretation.<sup>524</sup>

In fact the MDGs, established a new concept of sustainable development based also on protection of human rights but failed to address slavery. The international community did not understand that such important initiative could be an opportunity to address slavery. In fact this omission was criticized by Special Rapporteur who considered it as a serious weakness that caused the exclusion of measures to eradicate slavery and other forms of exploitation from development programs.<sup>525</sup>

Furthermore Special Rapporteur criticized the fact that besides the omission of a goal on slavery, MDGs, as structured, could have addressed root causes and consequences of slavery, dealing with eradication of poverty, gender inequality and education...<sup>526</sup> Clearly MDGs failed in understanding the important links between slavery and the causes and consequences of underdevelopment.

In 2005 ILO estimated that at a minimum 12.3 million of persons found themselves in forced labor during the period from 1995 to 2004. In 2012 ILO's new estimation raised the number to 21 million.<sup>527</sup> The number of people victim of contemporary forms of slavery had increased during the period of implementation of MDGs. How could sustainable development be achieved if slavery's rate had increased? Eventually States understand that the continued prevalence of contemporary forms of slavery could be seen also as a symptom of weakness in the efforts to eradicate its causes and consequences and that strategy to abolish this practice would deal with all aspects link to slavery. Therefore it was evident that a new consideration of slavery and a new method to eradicate this phenomenon was necessary.

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<sup>524</sup> General Assembly, Resolution A/RES/55/2 on United Nations Millennium Declaration, 18 September 2000. The MDGs went on conclusion with the 2015 year.

<sup>525</sup> Special Rapporteur on Contemporary forms of slavery, Report A/72/139, 17 July 2017.

<sup>526</sup> Ibid.

<sup>527</sup> ILO, A Global Alliance Against Forced Labour, 2005; ILO, World of Work Report 2012: Better Jobs for a Better Economy, 2012.

#### 4.5. A new approach in the struggle against slavery

In the last 20 years, as a consequence of the work of non-governmental organizations that have documented cases of slavery all over the world and because of a series of disasters or happenings reported by media, it has become clear that slavery continues to be present in modern society.<sup>528</sup>

The adoption of the Trafficking Protocol in the first years of the new millennium showed a new consciousness and concern of the international community on slavery's issue.<sup>529</sup> In fact the increase of trafficking phenomenon emphasized how slavery became more complex than in the past and how it affected not only the developing states but also developed nations.<sup>530</sup> Therefore the need for a new method in the fight against slavery was increasingly felt.

The breaking point in relation to past approaches in the struggle against slavery, which considered slavery as an isolated practice, was the institution of Special Rapporteur on Contemporary Forms of slavery in 2007.<sup>531</sup> The institution of this organ was not casual but it represented the new commitment of UN to tackle slavery with an effective and pragmatical approach in the idea that new forms of slavery were born. The Special Rapporteur's mandate is radically different from the one of its predecessor Working Group on Contemporary Forms of Slavery.

In fact by analyzing both organs' documents it is clear that the Working Group on Contemporary Forms of Slavery had adopted a definitory and doctrinal approach aimed to expand the definition of slavery in order to include its modern forms and also other forms of exploitation. Instead the Special Rapporteur on Contemporary forms of Slavery focuses on economic and social slavery's reasons, analyzing this phenomenon in its complexity and minimizing the defining considerations. For Special Rapporteur it is not important to find a complete definition of a practice but rather to understand what are its root causes and consequences in order to develop a more comprehensive strategy. Before the institution of Special Rapporteur, the international community failed to understand the links between this practice and other socio-economics trends. The change in approach will be more evident in the transition from the Millennium Development Goals (2000-2015), which failed to address slavery, to the 2030 Agenda

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<sup>528</sup> See Anti-slavery International ([www.antislavery.org](http://www.antislavery.org)); [www.verite.org/Commodities](http://www.verite.org/Commodities) and [www.humanrightswatch.org](http://www.humanrightswatch.org) ... A comprehensive database of reported cases can be found on the Business and Human Rights Resource Centre website ([www.business-humanrights.org](http://www.business-humanrights.org)).

<sup>529</sup> UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Woman and Children, GA Res.55/25, 15 November 2000. This Protocol was adopted during Palermo's conference in 2000 and entered into force in 2003.

<sup>530</sup> Special Rapporteur on Trafficking in persons, especially women and children was instituted by UN Commission on Human Rights by adopting the decision 2004/110. In July 2017, the mandate of the Special Rapporteur was extended again for three years by Human Rights Council resolution 35/5. The institution of Special Rapporteur on Trafficking in Person' confirmed the centrality of this phenomenon in the international agenda. The Special Rapporteur on trafficking in persons, especially women and children is one of the thematic special procedures overseen by the United Nations Human Rights Council, and is charged with monitoring human rights violations committed against trafficked persons and contributing to efforts to combat trafficking. The main functions of the Special Rapporteur are to communicate with governments about alleged violations, conduct country visits to more fully understand the trafficking situation, and submit reports to the Human Rights Council and UN General Assembly annually.

<sup>531</sup> In 2007, the United Nations Human Rights Council in resolution 6/14 created the Special Rapporteur on Contemporary Forms of Slavery, including its causes and consequences.

(2015-2030) which is one of the turning keys of struggle against slavery. So what could be the best strategy to eradicate modern slavery?

#### 4.6. Multidimensional approach

The response to this question was subject to multiple debates. General Assembly, Special Rapporteur on Contemporary forms of Slavery and Special Rapporteur on Trafficking in Persons, affirm that the only effective way to eradicate slavery consists in the predisposition of a multi-dimensional approach.<sup>532</sup> All reports of Special Rapporteur on Contemporary forms of slavery have a reference to a multi-dimensional approach and seek to provide its possible structure.<sup>533</sup> It is safe to affirm that the expression “multi-dimensional” approach is used in referring to three different aspects: national strategies, causes and consequences of slavery and involvement of different actors.

In the second chapter, I explained the multilevel national strategies that can be adopted. These should ensure the involvement of different state actors including judges or police officers and different sectors such as the predisposition of plans of rehabilitation for the victims (“*ex post*” measures) or establishing labor inspectors (“*ex ante*” measures). Special Rapporteur on Contemporary forms of Slavery clarifies this aspect in its report A/72/139 where affirms: “Ending all forms of contemporary forms of slavery [...] require a ‘multifaceted approach’, including the development of comprehensive national responses to contemporary forms of slavery, which should combine the effective rule of law, comprehensive national legal frameworks, robust institutional and policy frameworks, the prohibition and elimination of discrimination, effective child protection, strong labor market protection and regulation, effective oversight of the business sector and full and equitable access to justice”.<sup>534</sup>

In referring to the second dimension, the multi-faceted response, as underlined by General Assembly, should address the array of forces – economic, social, cultural and legal – that contribute to vulnerability and enable abuses.<sup>535</sup> Therefore the complex, global, and multi-dimensional phenomenon of slavery requires an integrated, coordinated strategy to address root causes, consequences, and impacts.<sup>536</sup>

The third dimension deals with the involvement, both at national and international level, of different actors not only of state institutions but also civil society such as private actors, enterprises, trade unions, research center, non-governmental organizations or no-profit organizations. Special Rapporteur on

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<sup>532</sup> General Assembly, Resolution A/RES/66/140, 27 March 2012; Special Rapporteur on Contemporary forms of Slavery, Report A/HRC/24/43, 1 July 2013; Special Rapporteur on Trafficking in persons, especially women and children, Report A/HRC/23/48/Add.4, 4 March 2013

<sup>533</sup> Special Rapporteur on Contemporary forms of Slavery, Report A/HRC/21/41, 10 July 2012; Special Rapporteur on Contemporary forms of Slavery, Report A/HRC/33/4, 4 July 2016.

<sup>534</sup> Special Rapporteur on Contemporary forms of Slavery, Report A/72/139, 17 July 2017.

<sup>535</sup> General Assembly, Resolution A/RES/66/140, 27 March 2012.

<sup>536</sup> Ibid.

Contemporary forms of slavery generally structured the part of its reports on “Conclusions and Recommendations” in many parts.<sup>537</sup> Every of these parts deal with different actors whose involvement, in the struggle against slavery, is believed necessary by Special Rapporteur which generally are: Member states, United Nations Agencies, private sector including business activities, supply chains, civil society organizations... According to the Special Rapporteur the involvement of different agents should be ensured at both national and international level to better address slavery.<sup>538</sup>

However the involvement of different actors recently become central in the field of protection of human rights and in particular of slavery. In fact actually the international community is passed from traditional State-centric approach based mainly on the involvement of governments, to a new discipline that establish a direct involvement of supply chains, international corporations and other agents in the struggle against slavery.<sup>539</sup> The general idea consists in the fact that every actors can give their own contributes on the base of their competences. But how is it possible to structure a multi-dimension approach? And what steps have been taken in this direction by international community? I chose to show how international community have realized multi-dimensional approach through some international initiatives.

#### 4.7. Agenda 2030: the eradication of slavery’s causes and consequences

During the debate that led to the adoption of Agenda 2030, the issue of slavery emerged and was regarded as an emergency considering its continuous increase.<sup>540</sup> Since the beginning it was evident that for an effective eradication of slavery it was necessary to consider this phenomenon as a whole. In fact Agenda addresses slavery both establishing its direct eradication under Goal 8 and in a transversal way in more than one goals.<sup>541</sup>

Goal 8 and in particular target 8.7 include all forms of modern slavery by establishing the commitment to “take immediate and effective measures to eradicate forced labor, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labor, including recruitment and use of child soldiers, and by 2025 end child labor in all its forms”. This target is seen

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<sup>537</sup> Special Rapporteur on Contemporary forms of Slavery, Report A/HRC/36/43, 2 August 2017.

<sup>538</sup> Ibid.

<sup>539</sup> Patricia Feeney, “Business and Human Rights: The struggle for accountability in the UN and the future direction of advocacy agenda”, *International Journal on Human Rights*, 2009, pp 160 ss.

<sup>540</sup> General Assembly, Res. A/RES/70/01 on *Transforming our world: the 2030 Agenda for Sustainable Development*, 25 September 2015. “an Agenda for global action for the next 15 years – is a charter for people and planet in the twenty-first century”.

<sup>541</sup> Agenda 2030 for the Sustainable Development is composed by 17 goals known as “Sustainable Development Goals” (SDGs) structured in 169 targets to be achieved by 2030.

by Special Rapporteur on Contemporary Forms of Slavery as an “historic opportunity”, considering political consent and financial resources generated by this global initiative.<sup>542</sup>

The eradication of slavery is effectuated also through the inclusion of targets and goals relating to human rights such as access to justice,<sup>543</sup> eradication of poverty,<sup>544</sup> quality education,<sup>545</sup> gender equality,<sup>546</sup> decent work and economic growth, peace and justice.... that tackle its causes and consequences.

In Agenda 2030 it is evident the change of the role of slavery in the international scene. In my opinion the first fundamental contribute of Agenda 2030 consists in bringing slavery, for many ways confined to a remote past, back to the center of attention of the international community, demonstrating that it has contemporary implications and there's still a lot to be done to eradicate it.

Furthermore Agenda 2030 shows how to realize a multi-shareholders approach, often invoked by Special Rapporteur.<sup>547</sup> In fact for the first time slavery is not regarded as an isolated practice but as a phenomenon closely linked to other socio-economic factors. Thanks to Agenda 2030 the international community has become more conscious that national legislative and policy measures to end contemporary forms of slavery are very important but not effective if they will not be accompanied by eradication of the systemic, structural and global socioeconomic trends that enable its widespread prevalence. Ending contemporary forms of slavery is therefore an integral part of the broader struggle to combat poverty, underdevelopment and gender inequality and achieve human rights-based development and justice for all.

Therefore Agenda 2030 provides a new method for the struggle against slavery which is multi-level in the meaning that it affects both causes and consequences of slavery and for its implementation establishes the direct involvement of all civil society, which is key factor in the eradication of slavery as showed in the second chapter.<sup>548</sup> Therefore State-centered approach, in slavery's eradication, becomes a multi-shareholders approach in which every actor of civil society can contribute to sustainable

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<sup>542</sup> Special Rapporteur on Contemporary forms of slavery, Report A/72/139, 17 July 2017.

<sup>543</sup> Goal 16 “Promote peaceful and inclusive societies for sustainable development, provide access to Justice for all and build an effective, accountable and inclusive institutions at all levels”. Goal 16 seeks to ensure equal access to justice for all. The importance of this inclusion is emphasized by the Special Rapporteur on Contemporary Forms of Slavery that considers access to justice and remedy for victims of contemporary forms of slavery an essential component of efforts to eradicate the phenomena. In fact, effective access to justice and remedy helps the process of rehabilitation and reintegration of victims, prevents revictimization and can create disincentives to future violations among those who may seek to ruthlessly exploit vulnerable individuals.

<sup>544</sup> Goal 1 “End poverty in all its forms everywhere”.

<sup>545</sup> Goal 4 “Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all”. Of particular interest is the target 4.7 where it is established the acquisition by all learners of knowledge and skills needed to promote sustainable development, human rights, gender equality and non-violence in order to create an inclusive and peaceful culture. By doing this way Agenda 2030 provides for a strengthening of the role of citizens who become the promoters of sustainable development.

<sup>546</sup> Goal 5 “Achieve gender equality and empower all women and girls”. The approaches in this field are different. From one hand there is prospective of protection of women establishing the elimination of trafficking, child, early, forced marriage and all forms of violence, from another hand women's empowerment is arranged by undertaking reforms to give them equal access to all economic and social resources, ensuring the full and effective participation and equal opportunities for leadership.

<sup>547</sup> Ibid.

<sup>548</sup> The Expression components of civil society includes private and public firms, philanthropic institutions, universities and research center, international financial institutions...



development complementing the efforts of Governments. Agenda 2030 has the merit to change the way of conceiving the method of combating slavery by crystallizing the progressive evolution of international thinking in the struggle against this practice.

#### 4.8. Partnership: the involvement of different agents in the struggle against slavery

The third dimension of multi-dimension approach deals with the involvement of different actors in the struggle against slavery. This involvement was possible mainly thanks to development of instrument of partnerships.<sup>549</sup> In fact the international community encourages the realization of multi-stakeholder partnership involving the authorities, businesses, trade unions, consumers and other stakeholders, each acting from their own areas of expertise to enforce mutually agreed goals. Such initiatives are frequently international in scope, given the breadth of transnational operations. Some focus on a single sector, industry or commodity,<sup>550</sup> while others are cross-sectoral.<sup>551</sup> Others focus on a single issue like child or forced labour,<sup>552</sup> while many typically address a cross-section of labour and human rights issues alongside the environment and general principles of ethical business.<sup>553</sup>

Agenda 2030, for example, gave birth to different partnerships in order to realize Goals of Sustainable Development, the most important in slavery's field is the Alliance 8.7. This is an inclusive global partnership committed to achieving Target 8.7 of the 2030 Sustainable Development Goals. The Alliance brings together actors<sup>554</sup> at all levels to collaborate, strategize, share knowledge and ultimately accelerate progress so we can deliver on this commitment by 2030.

Another interesting international initiative was the Global Compact which as well as Agenda 2030 gives birth to a series of consequential cross-border initiatives and partnerships. In the next paragraph it will be more evident that Global compact completes the efforts provide by Agenda 2030 in the struggle against slavery. In fact while Agenda 2030 deals mainly with the eradication of causes and consequences of slavery, Global Compact deals with another aspect of modern slavery which is when this is used in Multinationals enterprises and provides a possible solution for the involvement of these entities and other subjects in the straggle against this practice.

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<sup>549</sup> Special Rapporteur on Contemporary forms of Slavery, Report A/72/139, 17 July 2017.

<sup>550</sup> For example, the Fair Wear Foundation or Fair Labor Association, both of which address apparel only.

<sup>551</sup> Such as Social Accountability International and the Ethical Trading Initiative. The latter developed a Base Code guiding its members to comply with ILO standards (e.g. fair recruitment, humane working conditions, decent work and a living wage) as a means of preventing forced labor and other contemporary forms of slavery (see [www.ethicaltrade.org/eti-base-code](http://www.ethicaltrade.org/eti-base-code)).

<sup>552</sup> Including the Eliminating Child Labor in Tobacco Growing Foundation and the International Cocoa Initiative. Both participate in the Child Labor Platform, a thematic membership- based work stream of the Human Rights and Labor Working Group of the Global Compact, opened to companies, other United Nations agencies, trade unions, business associations and other relevant stakeholders, and focused on child labor, particularly in supply chains.

<sup>553</sup> For example, the Roundtable on Sustainable Palm Oil and the Responsible Jewelry Council.

<sup>554</sup> The strength of the Alliance lies in the diversity of its partners and their commitment to reaching across borders and meeting the challenges together.

#### 4.9. Global Compact: the involvement of economic agents

In 1999, the UN Secretary-General Kofi Annan launched the UN Global Compact, described as a voluntary learning initiative<sup>555</sup> aiming to align business operations with Ten Principles<sup>556</sup> in the area of human rights,<sup>557</sup> labor,<sup>558</sup> environment<sup>559</sup> and anti-corruption.<sup>560</sup> By incorporating the Ten Principles into strategies, policies and procedures, companies respect their social responsibilities and at the same time they set the stage for long-term success. How slavery is concerned in this initiative?

Modern forms of slavery are not affected in a direct way but figure prominently among the categories of human rights and labor rights (Principles 1,2,4 and 5). Moreover the Global Compact as sharing platform brings together Governments, UN Agencies, employers, civil society groups and trade unions, private enterprises, as well as other stakeholders, for promoting respect of good governance principle and consequently to ensure that corporates do not use slavery as production's mean.<sup>561</sup> In my opinion Global Compact is one of the most complete initiatives that establishes the involvement of corporates for the protection of human rights.<sup>562</sup> It is based on the idea that protection of human rights is a common interest. It proposes projects, initiatives, webinars<sup>563</sup>; online forums<sup>564</sup>; guidelines<sup>565</sup> in which members

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<sup>555</sup> The UN Global Compact is a leadership platform for the development, implementation and disclosure of responsible corporate policies and practices. [www.unglobalcompact.org](http://www.unglobalcompact.org). This initiative was launched on 31 January 1999 by UN Secretary-General Kofi Annan during World Economic Forum, Davos with 9 Principles while the Principle 10 (on corruption) was announced by Kofi Annan in 2004 during the first summit "Global Compact Leaders". Former Secretary of the United Nations Kofi Annan invited the leaders of the world economy present at the meeting to sign a "Global Compact" with the United Nations, in order to address, in a logic of collaboration, the most critical aspects of globalization. For the first time, the desire to align the objectives of the international community with those of the private interests of the business world, was expressed.

<sup>556</sup> The Global Compact requires its member companies and organizations to share, support and apply within their sphere of influence a set of fundamental principles. The Ten Principles of the United Nations Global Compact are derived from: the Universal Declaration of Human Rights, the International Labor Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption.

<sup>557</sup> Human Rights: Principle 1: "Businesses should support and respect the protection of internationally proclaimed human rights"; and Principle 2: "make sure that they are not complicit in human rights abuses".

<sup>558</sup> Labor: Principle 3: "Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining"; Principle 4: "the elimination of all forms of forced and compulsory labor"; Principle 5: "the effective abolition of child labor"; and Principle 6: "the elimination of discrimination in respect of employment and occupation".

<sup>559</sup> Environment: Principle 7: "Businesses should support a precautionary approach to environmental challenges"; Principle 8: "undertake initiatives to promote greater environmental responsibility; and Principle 9: encourage the development and diffusion of environmentally friendly technologies".

<sup>560</sup> Anti-Corruption : Principle 10: "Businesses should work against corruption in all its forms, including extortion and bribery".

<sup>561</sup> This initiative is based on the idea that an effective human right protection' is possible only through the involvement of the private sector.

<sup>562</sup> Today, the UN Global Compact is the largest corporate sustainability initiative in the world, with more than 9,500 companies and 3,000 non-business signatories based in over 160 countries, with activities supported by 76 Local Networks.

<sup>563</sup> The Global Compact hosts a Webinar Series on specific labor topics. Each webinar is conducted by ILO experts and engages business participants with practical guidance and relevant tools and resources for advancing the labor principles profitably.

<sup>564</sup> Forums are the most frequent practices, and there is at least one forum for every principle. The UN Global Compact Business Partnership Hub aims to do just that, utilizing digital technology and map-based analytics to bring partners to the table. This interactive, online platform is designed to connect business with potential partners in support of societal goals. Through the Hub, companies and other organizations can find partners for their own projects or join existing ones.

<sup>565</sup> UN Global Compact Guide to corporate Sustainability.

voluntarily participate.<sup>566</sup> The Human Rights and Business Dilemmas Forum, for example, helps companies tackle questions related to approximately 25 human rights and business theme.<sup>567</sup>

An interesting and innovative aspect of Global Compact is that it provides initiatives for the involvement of most strategic enterprise organ' such as Board of Directors<sup>568</sup>, General Council and even Supply Chains. The Global Compact's Management Model, for example, guides companies of all sizes through the process of committing to, assessing, defining, implementing, measuring and communicating a corporate sustainability strategy. Another interesting initiatives is the Global Compact Board Programme<sup>569</sup> which was created to support Boards of Directors to implement the social responsibility in enterprise's strategies. In addition the extension of sustainability policies to supply chains is an important and complex goal posed by UNGC. Its achievement depends on size of the supply chain, distance from suppliers, and partners operating where there are lower standards.<sup>570</sup> For these reasons different initiatives are created such as Guide to Traceability, and host webinars on topics such as occupational health and safety in the supply chain. The key word of UNGC is doubtless the transparency.

The global compact as voluntary initiative lacks a means of enforcing its principles.<sup>571</sup> The activity of reporting is only commitments required, in fact if Companies fail to report may be removed from the initiative.<sup>572</sup> Therefore Signatories to the Global Compact are required to produce an annual Communication on Progress (COP).<sup>573</sup> The importance of these reports lies in the possibility for consumers to understand if and how an enterprise respect human rights due diligence and for investors to know the link between sustainability and financial performance.<sup>574</sup> However for the corporates it is advantageous to adhere to global compact initiatives mainly for two reasons: for visibility and reputation and for help in implementing social responsibility.

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<sup>566</sup> Some of these initiatives have a local character such as Global Compact Local Networks which approximately are in 85 countries and support business participants. They are organized and work locally and led by business, but always bringing key stakeholders to the table from civil society, labor and academia.

<sup>567</sup> At the forum a firm find an expanding list of human rights themed dilemmas that are relevant to business, including explanation of the risks to business and suggestions for how to approach the dilemma.

<sup>568</sup> The Board of Directors can set a company's long-term goals and lay out strategies that allow for investments and adjustments necessary over time to shift towards a truly sustainable operation. The board of Directors, generally absent from dispositions on corporate sustainability, is disciplined in some UNGC's proposals.

<sup>569</sup> It creates an action plan for embedding sustainability into Board responsibilities and structures.

<sup>570</sup> If the chief executive sees the supply chain as an extension of their work force and community, then expectations can be set related to best practices in key areas such as selection, training, auditing and remediation.

<sup>571</sup> Special Rapporteur on Contemporary Forms of Slavery, Report A/HRC/30/35, 8 July 2015. Special Rapporteur underlines that the most obvious gap of Global Compact is in terms of a follow-up mechanism for monitoring and implementation.

<sup>572</sup> The Global Compact collaborates with other frameworks – for example, the Global Reporting Initiative (GRI), CDP and ISO 26000 – to ensure facilitating more quality reporting with less duplication. There is an agreement of collaboration with it, whereby corporate submissions that meet the GRI Guidelines will be accepted under the relevant Compact reporting procedures.

<sup>573</sup> The overall format of a COP is flexible, and COPs can be prepared in any language. The COP could be contained in shareholders communication's, in annual reports. Moreover, in absence of formal communications, they could be as a standalone document. Based on a company's self-assessment, COPs are categorized as GC Advanced, GC Active or GC Learner depending on the depth of their disclosure. Every COP must contain three parts: 1. statement by the chief executive, where he expresses the will to support Global Compact; 2. A description of practical actions that the company has taken to implement Global compact; 3. measurement of outcomes.

<sup>574</sup> Over 28,000 COPs can be found on the Global Compact website

#### 4.10. Liechtenstein initiative: for a Financial Sector Commission on Modern Slavery and Human Trafficking

The Liechtenstein initiative was developed jointly by the governments of Liechtenstein, Australia and the Netherlands as well as the United Nations University Centre for Policy Research, and in partnership with a consortium of Liechtenstein banks, Liechtenstein philanthropic foundations, the Liechtenstein banking association and other partners in order to respond to calls by the G-20 in July 2017 for States and the financial sector to tackle modern slavery and human trafficking.<sup>575</sup>

This initiative is based on the idea that in many cases, modern slavery and human trafficking go hand in hand with a lack of access to formal financial services and credit... Therefore its purpose consists in ensuring the use of new financial innovations such as microcredit, supply-chain credit, social impact bonds ... and new uses of technology, from mobile money to distributed ledger technologies because they may offer new possibilities for accelerating the fight against modern slavery and human trafficking. At the same time there is the awareness that modern slavery and human trafficking touch the financial sector in a number of ways:<sup>576</sup> through their transnational supply chains, through laundering illicit profits, and through possible investments to businesses that then engage in this form of exploitation. It is interesting the fact that the international community became aware of the relationship between slavery and financial sector, showing an effective will in the eradication of this practice.

The Liechtenstein Initiative for a Financial Sector Commission on Modern Slavery and Human Trafficking is a public-private partnership that aims to put the financial sector at the heart of global efforts to end modern slavery and human trafficking.

The main purpose of this initiative consists in the establishment of a global, multi-stakeholder Financial Sector Commission on Modern Slavery and Human Trafficking, that will be a forum for a wide range of financial sector stakeholders and other agents to discuss the sector's role in tackling modern slavery.<sup>577</sup> It is made up of leaders in the field who act as Commissioners. Through global consultations taking place between September 2018 and September 2019 across three continents, it will discuss mainly three aspects:

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<sup>575</sup> G20 Leaders' Declaration, Hamburg, 7/8 July 2017. Particular focus is given to global supply chains "Global Supply Chains can be an important source of job creation and balanced economic growth. However, challenges for achieving an inclusive, fair and sustainable globalization remain. In order to achieve sustainable and inclusive supply chains, we commit to fostering the implementation of labor, social and environmental standards and human rights in line with internationally recognized frameworks, such as the UN Guiding Principles on Business and Human Rights and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy"; "as national action plans on business and human rights and underline the responsibility of businesses to exercise due diligence"; "We will encourage multinational companies to conclude international framework agreements as appropriate".

<sup>576</sup> The Commission will consider a concrete roadmap to accelerate action by the financial sector in combatting this \$150-billion industry.

<sup>577</sup> <https://www.financialsectorcommission.org/>

- 1) The involvement of financial institutions in the struggle against slavery;
- 2) The use of technology and its appliances to ensure the respect of human rights of workers and to control the anti-slavery and anti-trafficking compliance of supply chains (such as technology-enabled due diligence solutions);<sup>578</sup>
- 3) Financial sector innovation to address modern slavery and human trafficking and responsible investment and lending practices.

#### 4.10.1. The strategic role of financial institutions in the struggle against slavery

As showed in the previous paragraphs, today slavery has become an economic activity which has favorable profits.<sup>579</sup> In particular it is estimated that profits of trafficking in human beings are about 150\$ billion annually, and the criminal organizations use various mechanisms for laundering these money.<sup>580</sup> Therefore, considering that financial institutions can be touched at any stage of the trafficking process as money is spent, transferred or laundered, these are now trying to ensure that they are neither financing companies connected with THB nor unwittingly facilitating movement of its profits. According to Europol, the vast majority of OCGs employ mechanisms to launder illegal earnings that are similar to those for other types of crime, such as the use of cash-intensive businesses, informal banking systems, front companies and real estate to place money into the formal financial system.<sup>581</sup>

A very common practice consists in the identity theft, in fact criminals often use victims' identities to open bank accounts, register bogus companies, rent private apartments or pay bills.<sup>582</sup> Traffickers may sometimes act as a custodian to a bank account opened up in the name of the victim, in order to take

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<sup>578</sup> Digital technology initiatives are being developed, including using blockchain technology, to trace and verify the provenance of goods and related labor conditions within global supply chains, along with new data collation and visualization tools that integrate multiple sources of information and big data to improve supply chain transparency. Digital worker reporting platforms are designed to obtain information directly from workers in order to generate data on working conditions at scale such as mobile-phone based channels such as SMS, IVR-Interactive Voice Response, telephone hotlines, or smartphone Apps to collect information from workers directly in the communities and production facilities being investigated or monitored. Labor Voices was one of the first product developers to use SMS technology to inform a manager about the working conditions that site level workers experience, while Slavery Footprint was one of the first apps to connect consumers and their consumption behavior with possible slavery by informing consumer about labor risks in products they buy. Issara Institute has been partnering since 2014 with a range of US, UK, and European global brands and retailers to use worker voice technology to identify labor risks in Southeast Asian supply chains. Issara's worker voice technology started as a multi-lingual hotline, and has now expanded to smartphone technology, taking advantage of the fact that the great majority of migrant workers in the region have smartphones. A key aspect of the model includes having an on-the-ground technical team to cross-check and verify incoming data, respond to worker needs. See Samir Goswami, "The Technology to Address Human Trafficking and Forced Labor in Supply Chains", 2006; Bassina Farbenblum, Laurie Berg and Angela Kintominas, *Transformative technology for migrant workers, opportunities, challenges and risks*, 2018.

<sup>579</sup> Kevin Bales, "Expendable People: Slavery in the Age of Globalization", *Journal of International Affairs*, 2000, pp 470-471.

<sup>580</sup> ILO, *Profits and Poverty: The Economics of Forced Labor*, Geneva, 2014, p. 13. The UN deems THB to be the third most profitable crime after drugs and arms trafficking and traffickers. UN News Centre, "Human Trafficking Has No Place in Modern World, General Assembly President Says", 14 July 2014.

<sup>581</sup> Financial Action Task Force (FATF), "Money Laundering Risks Arising from Trafficking in Human Beings and Smuggling of Migrants", FATF Report, July 2011.

<sup>582</sup> Tom Keatinge and Anne-Marie Barry, "Disrupting Human Trafficking: The Role of Financial Institutions", Royal United Services Institute for Defence and Security Studies, 2017.

control of the victim's account and withdraw their benefit payments. They also use legitimate business structures and shell companies to invest in real estate and undertake financial investments in their countries of origin to launder the money generated by exploitation.<sup>583</sup> All these could be the indicia of trafficking practice, therefore if financial institutions recognize them, they could alert the competent authority.

In the paper “Disrupting Human Trafficking: The Role of Financial Institutions” it is proposed that financial institutions can have an active role in the struggle against slavery, in particular they can support anti-human trafficking providing these efforts:<sup>584</sup>

1. Carrying out necessary due diligence to ensure that they are only investing in or loaning funds to projects or companies that are showing commitment to the eradication of trafficking and slavery, paying particular attention to those industries that are known to be high risk;<sup>585</sup>
2. Performing due diligence on goods and services provided to them such as cleaning, catering and security, as well as all other services that use agency, temporary or migrant staffing, and ensuring that staff are aware of the issue of human trafficking.
3. Taking the immediate and practical step of ensuring that staff receive human trafficking awareness training, for example with regard to reporting suspicions such as a customer acting as though under the direction of another when depositing or withdrawing money.<sup>586</sup>
4. Working to ensure that they are neither hosts to nor conduits for illicit proceeds of modern slavery, and monitoring transactions for suspicious THB-related activity.

The involvement of financial institutions in the struggle against slavery is fundamental because they can provide financial data which are important to identify the proceeds of crime related to THB, and they can also provide crucial evidence when it comes to building a case in court. Financial institutions can therefore not only contribute to the prevention of THB by ensuring greater awareness of the services they commission and the businesses they finance but they can also provide invaluable support to the identification, disruption and prosecution of THB cases as a result of their ability to analyze the associated money flow. However, despite the considerable difficulties in effectively detecting human trafficking through money flows, financial institutions are increasingly seeking to apply their

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<sup>583</sup> Under the UK Modern Slavery Act 2015, modern slavery is now a predicate offence to money laundering and thus allows the financial gains earned from this crime to be targeted by the powers of the Proceeds of Crime Act 2002 (POCA). In this way become easier for confiscation proceedings to be brought against someone committing an act of modern slavery.

<sup>584</sup> Ibid.

<sup>585</sup> Any industry which uses low-skilled or migrant labor and involves hazardous or monotonous work is at higher risk of involvement with labor exploitation. Subcontracting and the use of labor agencies also increases the risk of modern slavery. For an overview of a selection of ‘high-risk’ industries see, Anne-Marie Barry and Rachel Palmer, “Forced Labor, Human Trafficking & the FTSE 100: A Review of Company Disclosure and Recommendations for Investor Engagement”, Finance Against Trafficking, October 2015.

<sup>586</sup> Interpretation of the guidance provided by the authorities to produce training and awareness material that is relevant for staff regards both those who are customer-facing and those involved in internal financial intelligence or investigation units;

capabilities to the task. Moreover, the proceeds generated by human trafficking are, in many jurisdictions, a predicate offence for money laundering whereby the role of financial institutions could give an important contribute.

The Financial Sector Commission proposes different methods that can be adopted to ensure the involvement of these institutions, for example it considers a good approach that of creating the links between banks and law enforcement agencies to develop some guide lines to help bank in individuating slavery's evidences or between banks and financial investigation units. These direct links between different entities allow to collect evidences more rapidly and to address the trafficking phenomenon more easily. The US approach is based on this dual structure.

Conceived in 2012 by the Thomson Reuters Foundation and Manhattan District Attorney Cyrus Vance Jr, the Bankers' Alliance Against Trafficking in the US brought together financial services companies, NGOs and law enforcement agencies in a collaborative effort to target and tackle human trafficking through the use of financial data. This project resulted in a guidance paper and informed advisory information produced by FinCEN (Financial Crime Enforcement Network) aimed at empowering the wider financial industry to help detect and report suspicious transactions related to human trafficking and smuggling.<sup>587</sup> The guidance issued by FinCEN in September 2014 provides a detailed list of 'red flags' that could indicate financial activity related to human smuggling and human trafficking. Therefore, banks are required to report cases of "suspicious activity" by their clients to their national financial intelligence unit.<sup>588</sup>

Moreover in recent years, human trafficking has become integral to the investigation units of all those US financial institutions, for example, newly employed financial investigators pass an exam that includes a section on human trafficking investigations, with staff also regularly required to complete training on the subject and special investigations team with human trafficking expertise receives any alerts that come from a branch and which may indicate human trafficking.

Also UK has adopted a similar approach. Formed initially as a pilot in February 2015 before being placed on a permanent footing in April 2016, JMLIT (The Joint Money Laundering Intelligence Taskforce) convenes UK financial institutions and law enforcement agencies (led by the NCA) for regular consultations.<sup>589</sup> In this forum, crimes related to money laundering are discussed and analyzed,

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<sup>587</sup> US Department of the Treasury FinCEN, "Guidance on Recognizing Activity That May be Associated with Human Smuggling and Human Trafficking – Financial Red Flags", Advisory, FIN-2014-A008.

<sup>588</sup> Among indicators there are cases where the bank was facilitating flows from multiple senders in one country back to a single beneficiary in a well-known origin country. This has been done by using geographic filters and keyword searches in SWIFT messages (the interbank service for communicating financial transactions) looking for particular high-risk industries. ILO and Walk Free Foundation, Global Slavery Index, 2017. This report looks at the prevalence of modern slavery and specific exploitation types in countries around the world. It allows the bank to identify the 'hotspots' for human trafficking and determine jurisdictions of interest.

<sup>589</sup> Tom Keatinge and Anne-Marie Barry, "Disrupting Human Trafficking: The Role of Financial Institutions", Royal United Services Institute for Defense and Security Studies, 2017.

with the aim of improving disruption via public–private sector collaboration.<sup>590</sup> In December 2014, prior to the formal inception of JMLIT, this NCA guidance was issued after a consultation between the members of the NCA and the banks involved in the taskforce. This guide provides a relatively short number of indicators related to account activity in cases of labor exploitation, benefit trafficking, victim-identity hijacking and child trafficking, as well as a section of information on the general picture of trafficking in the UK (as in 2014).<sup>591</sup> Therefore if a staff member recognizes one of these indicia should alert the competent financial authority.

Eventually the Financial Sector Commission, on the base also of the experiences of US and UK individuates some of the methods that can be and are being employed by financial institutions to enhance their contribution to the disruption of human trafficking, which include: 1. training on human trafficking for both financial investigators and front line staff; 2. building profiles and typologies reflecting the activity of networks involved in the crime; 3. and working with other agencies with relevant information and knowledge on the issue. Most significantly, effective financial indicators from financial institutions can provide law enforcement agencies with a picture of money flows and open lines of enquiry to actors ‘upstream’, identifying those colluding with traffickers in a transnational context and allowing prosecutions to be secured with less need to rely on victims’ testimony alone.<sup>592</sup>

## Conclusion

The Global Slavery Index 2018 confirms that modern slavery is a crime that affects all countries globally, including, perhaps surprisingly, highly developed countries, whereby the struggle against slavery is a concern of the entire international community. Slavery over time has changed some of its characteristics and has acquired an economic and cultural dimension which makes its eradication more complex. From the analysis of reasons of this practice it is evident that slavery is a product of the combination of many factors, known as socio-economics trends, such as economic, social, cultural, political ones which show how it is rooted in some cultural, social and economic structures, whereby an effective strategy for the elimination of this practice needs to address all of these factors. The

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<sup>590</sup> The creation of JMLIT has also led to a significant increase in trust and collaboration between financial institutions and law enforcement agencies in the UK, which has led to a more focused and effective response to a range of financial crimes, including THB.

<sup>591</sup> For example some of these criteria, individuated by this list, to understand if there could be a risk of human trafficking, are: 1. Multiple payments to websites that advertise adult services, such as AdultWork; 2. Regular, large cash payments deposited into and then withdrawn from an account; 3. Payments to high-end restaurants and cheap diners on the same day (with the assumption that exploited girls might be taken for expensive dinners while their handlers eat cheaply nearby); 4. Regular (daily) payments of £10–20 to pharmacies that could be for contraceptives.

<sup>592</sup> Building on the success of the US Bankers’ Alliance, in 2015 the Thomson Reuters Foundation, supported by Europol, established the European Bankers’ Alliance – a working group that includes representatives from leading European financial institutions. These form of partnership of the Bankers’ Alliance model has taken more time – the European human trafficking dynamic differs considerably to that in the US and its disruption is inherently more complex, given the need to work and share information across national borders.



international community has long failed to understand the links between slavery and the socio-economic trends, disciplining this practice as if it was isolated from its context and framing the strategies for its abolishment as the responsibility of states. More recently, the Special Rapporteur on Contemporary Forms of Slavery has contextualized slavery, proposing an innovative strategy for its eradication, which presents a multi-dimensional character. It operates on different levels: national strategies, agents involved in the struggle against slavery, the affecting of slavery's causes and consequences. The multidimensional approach considers and affects slavery in its complexity. In fact, it is based on the idea that an effective eradication of modern slavery is possible only if its root causes and consequences are considered, and through the involvement of as many agents as possible, such public organs or members of civil society including MNEs, NGOs and financial institutions.

## Conclusion

It is an actual reality that even in present times, men, women and children all over the world remain victims of modern slavery. They are bought and sold in public markets, forced to marry against their will and provide labor disguised as “marriage,” forced to work inside clandestine factories on the promise of a salary that is often withheld, or on fishing boats where men and boys toil under threats of violence. They are forced to work on construction sites, in stores, in farms, or in homes as maids. Labor extracted through force, coercion, or threats produces some of the food we eat and the clothes we wear. The minerals that men, women, and children have been made to extract from mines find their way into cosmetics, electronics, and cars, among many other products. This is modern slavery. It is widespread and pervasive, often unacknowledged, and its extent was previously believed to be unknowable.

Even though the (international legal) abolition of this practice dates back to 1926, today the international community still faces many challenges. Sadly, many of the issues that concerned abolitionists movement since 1839 remain today, despite the growth of international awareness and legal protection. In fact, despite the global decline of chattel slavery, other forms of slavery remain. The major role that international law can play in this field is to reform the definition of slavery given that the only definition of slavery is provided by Slavery Convention which was adopted in 1926. This definition reflects a concept of slavery which does not correspond to how slavery really works today. This has generated uncertainty on which forms of exploitation can be considered slavery and which cannot. From the absence of a clear definition of this institution a series of consequences comes out, which affect: the regime applicable, the obligation of states, statistics about the number of slaves and their localization. Consequently, elaborating a strategy of eradication turns out to be more difficult.

Slavery today is deeply rooted in social, cultural and economic systems whose consideration is necessary for the development of an effective strategy to abolish this practice. In fact, the struggle against slavery has splintered into many areas, and each issue requires multiple strategies operating on different levels. Even though much progresses have been made by the international community, many challenges remain. As this thesis has demonstrated, these challenges include:

- 1) the need to redefine relevant legal structures in order to provide a clear definition of slavery and to eliminate overlaps and gaps;
- 2) the need to effectively regulate this practice, toughen penalties, and ensure a better law enforcement;
- 3) the necessity to strengthen education and awareness initiatives and publicity;
- 4) the need to effectively regulate the victims’ rehabilitation;
- 5) the implementation and enhancement of a multidimensional strategy that affects slavery from many perspectives.

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