

### **3: Child Slavery: Constructing the International Legal Framework**

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#### **Introduction**

As noted in Chapter 2, and in other writing (Walvin 2007; Quirk 2009), slavery has been a feature of virtually all major civilisations in history and children have been caught up in traditional forms of slavery across different cultures. Indeed, children have often been ‘born into’ slavery, i.e. regarded as the possession of a slave-owner from birth. Equally, practices of selling children into slavery for economic reasons have been ubiquitous over time and across different countries and cultures. The phenomenon of ‘child slavery’ has been persistent, even after the formal international legal abolition of slavery in the nineteenth-century in most parts of the world. ‘Modern’ forms of child slavery may include, for example, severe forms of child labour, child trafficking and child sexual ‘exploitation’, (see Ch. 6) or a combination of these.

A rational approach to the construction of international legal regimes will need to take stock of the nature and extent of such practices in the real world. However, despite the best efforts of international organisations such as UNICEF and the International Labour Organization (ILO), the covert character of such practices does not make for easy or reliable empirical evidence to be gathered to measure the extent of child slavery. The nature of the problem is also difficult to define conceptually. The existence of modern forms of child slavery depends in part on one’s view of the parameters of meaning attached to our concept of child slavery. If one takes a narrow view, perhaps based on the legal definition found in the Slavery Convention 1926, the ‘problem’ of child slavery becomes associated with a concern about a smaller subset of occurrences of the phenomenon, so defined, around the world. On the other hand, an over-liberal definition, perhaps based more on the notion of ‘exploitation’ – the dominant language used in the Convention on the Rights of the Child (CRC) 1989 – might include such a broad range of such practices that it loses any analytical integrity or functionality.

To some extent, the international legal framework relating to child slavery has struggled to provide a sensible balance between these two positions, but, as will be seen, globalisation has not produced a coherent, uniform system of international legal protection. Our changing social recognition of the phenomena of *slavery*, *servitude*, *enslavement*, *forced labour* or *practices similar* to these has given rise to a parallel (but not always coterminous) development of such key concepts in international legal instruments, which are fundamental to the construction of the international legal framework. It should be noted, for the purposes of this Chapter, that the ‘construction’ of this framework carries a dual meaning: it includes both the historic manner in which this framework has been built up, and the normative sense of how this framework *ought* to be built.

## Prohibition of slavery

The prohibition of slavery was finally established in the Slavery Convention 1926, subsequently reinforced under Article 4 of the United Nations Declaration of Human Rights 1948. Whilst the Convention's Article 1 still provides the accepted definition of slavery, (see Ch. 2), the realisation that many practices may not have been subsumed within its definition led to the implementation of the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956 which provided for the abolition of a variety of practices similar to slavery under Article 1. These include debt bondage, serfdom, the inheritance of a woman, and extreme forms of child labour. These two conventions were not specifically directed at the rights of the child, but recognised and prohibited a number of practices that applied to both adults and children. Numerous subsequent related treaties have served to crystallise the prohibition of slavery and enhance the view that it has achieved *jus cogens*<sup>1</sup> status, the International Court of Justice defining the prohibition of slavery as an obligation 'erga omnes arising out of human rights law'<sup>2</sup>, an obligation owed by a state to the international community as a whole.

The progressive growth of treaties relating to slavery and servitude reflects the international community's awareness of 'contemporary forms of slavery' and has also moved over time to address the protection of women and children in particular, as those most vulnerable and likely to be subjected to such practices. Thus states are subject to an extensive range of obligations with regard to the prohibition of child slavery and similar practices. The provisions of the CRC and its Optional Protocols, ILO Convention No.182 on the Worst Forms of Child Labour, and the Protocol to the Convention Against Transnational Organised Crime to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereafter the Palermo Protocol – see other Chapters, especially 3,5,6), together with international and domestic judicial discourse, demonstrate a concerted attempt to prohibit, in particular, all possible forms of child exploitation. The forms most commonly linked to slavery include debt bondage, child trafficking, forced marriage, sexual exploitation and the more extreme forms of child labour.

However, as the extent of child exploitation has become more apparent, the term 'slavery' has understandably been appropriated by the anti-slavery non-governmental organisation (NGO) community which has sought to draw attention to the problem by subsuming the breadth of identified practices within the meaning of slavery, thereby benefiting from the stigmatisation attached thereto, even though the practice may not genuinely amount to slavery in strict legal terms.

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<sup>1</sup> A norm accepted by the international community as being so fundamental that there can be no derogation from it. Accepted examples include genocide and piracy.

<sup>2</sup> See *Barcelona Traction, Light and Power Co. Ltd. (Belgium v Spain)* 5 feb. 1971, ICJ Reports 1970: 32.

## Slavery and servitude

The accepted definition of slavery, drawn from Article 1 of the Slavery Convention 1926,<sup>3</sup> provides that 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>4</sup> An examination of the *travaux préparatoires* to the Slavery Convention indicates that it was not intended as a means to combat all forms of exploitation (Allain, 2008), and a narrow interpretation synonymous with chattel slavery has previously been adopted by the European Court of Human Rights.<sup>5</sup> However, more recent case law<sup>6</sup> and current academic discourse demonstrates this as an unnecessarily restrictive interpretation (Cullen 2006; Allain 2009; Nicholson forthcoming); an absolute definition may impact on immigration law and result in lengthy attempts to bring the particular facts within the confines of definition. (Cullen 2006:591-2) A concept of slavery as chattel slavery, i.e. *legal* ownership - the law does not know of any right of ownership over a person - also does not take into account the full wording of the definition. Taken as a whole to include the preceding words ‘*any or all powers attaching to [the rights of ownership]*’, the definition can instead be interpreted to encompass *de facto* slavery.<sup>7</sup> (Allain 2009:274) This interpretation is borne up by the court in *R v Tang* [2008]<sup>8</sup> and by an analysis of the *travaux préparatoires* to the 1926 Convention, and is seen in the Rome Statute of the International Criminal Court which adopts the definition of slavery from the 1926 Convention to define the act of enslavement, but adds ‘...and includes *the exercise of such power* in the course of trafficking in persons, in particular women and children’<sup>9</sup>, an approach that is further supported by the International Criminal Court on interpretation of Article 1 of the 1926 Convention in *Kunarac* (2001).<sup>10</sup>

Instead, a more general concept of child slavery would have the result that forced domestic service, and many other practices similar to slavery, would fall under current legal provisions on slavery without further analysis. The social context of child slavery has shifted and traditional notions of absolute ownership may no longer be relevant. In practice, child slavery has become a generic term for a range of offences – child trafficking, forced marriage, sexual exploitation, and extreme forms of child labour. Some of these practices may in reality be subsidiary to the ‘true’ concept of slavery as envisaged by the drafters of the 1926 Convention, but many will fall within the meaning of servitude, and little justification can be made out for a distinction

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<sup>3</sup> Amended in 1953 by the Protocol Amending the Slavery Convention signed at Geneva on 25 September 1926 (approved by General Assembly Resolution 794 (VIII))

<sup>4</sup> Article 1(1) the Slavery Convention 1926. Article 1 (2) provides “*The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.*”

<sup>5</sup> *Siliadin v France* (2006) 43 EHRR 16.

<sup>6</sup> See *R v Tang* [2008] HCA 39

<sup>7</sup> slavery by fact

<sup>8</sup> Op cit n.6

<sup>9</sup> Rome Statute of the International Criminal Court, 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:...(c) enslavement.*’ The definition of the Slavery Convention 1926 is adopted under article (7)(2) but adds ‘*and includes the exercise of such power in the course of trafficking in persons, in particular women and children.*’

<sup>10</sup> See *Kunarac et als.* (IT-96-23-T &-IT-96-23/1-T) Judgment, 22 February 2001, at 117-118.

between slavery and servitude. Indeed many international and regional treaties place these two terms consecutively within the same provision, unlike slavery and child labour which are often treated separately. (Nicholson forthcoming 2010) Thus, slavery may instead have to be determined via one or more of the following notions: the capability to sell or dispose of a person; the disempowerment of the individual; the denial of bodily integrity; or the devaluation of the person (noting that children have traditionally not been granted full rights as persons).

## Slavery, Servitude and Forced Labour

There nevertheless remains a significant overlap in identified practices falling within the meaning of servitude and forced labour. Most practices outlined in ILO Convention No.182 could amount to child slavery or servitude, but it is also clear that Article 3(d) which provides for work which is likely to harm the health, safety or morals of children may not reach the standard for slavery or servitude. The sale and trafficking of children, debt bondage, serfdom and forced and compulsory labour are stated as forms of slavery or practices similar to slavery under Article 3(a) ILO Convention 182, yet the 2005 Convention on Action Punishing Trafficking in Human Beings provides that, *inter alia*<sup>11</sup>, trafficking *may* include slavery or servitude. Thus there is recognition that these practices *may* amount to slavery or servitude, but are not in themselves routinely regarded as such, perhaps instead being linked to forced labour or other related practices. This begs the question whether any distinction is necessary. However, child labour is not considered as yet to have achieved *jus cogens* status: the existence of qualifications to forced and compulsory labour under ILO Conventions Nos. 29 and 105 may enable a state to classify that its practices fall within an exception<sup>12</sup> thereby avoiding responsibility and leaving the victim with little avenue for redress. The Slavery Convention itself does not prohibit forced labour where for public services, but under Article 5, the parties are to *recognise that recourse to compulsory or forced labour may have grave consequences and undertake ... to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery*. Conversely, there can be no such qualification to the prohibition of slavery and servitude.

Further, accurate and consistent interpretation as to which offence has been carried out will influence the measures implemented to assist the child's psychological and physical recovery, and would additionally impact on sentencing. Recognition that the *mens rea* for slavery or servitude may be distinct from that of similar practices, more certainly of the 'lesser' forms of forced labour, will mean that the penalty will need to reflect the offender's state of mind and parallel the seriousness of the harm. If a legal distinction does exist between slavery and servitude on the one hand, and forced or compulsory labour on the other, a variance in protection may therefore arise, further compounded by issues of cultural relativity, varying notions of childhood, and disparate domestic laws on the rights of the child. (See Chs. 3 and 5)

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<sup>11</sup> Amongst other things

<sup>12</sup> See for example the representations of Myanmar to the United Nations that children and adults are required to work on road construction, despite clear witness reports from Amnesty international indicating that its actions are a clear breach of the ILO Conventions.

Ultimately the problem with determining slavery as an identifiable practice or collection of practices distinguishable from 'lesser' harm may soon be rendered irrelevant in the light of the proliferation of legal instruments on recognised practices relating to child exploitation. International law has become saturated with treaties attempting to tackle these exploitative practices. There is evidence of a significant move towards protecting women and children given their weakened status in society and the resultant vulnerability of their position. It is perhaps time to view the slavery conventions as essentially inert: these are conventions that provide essential definitions and an understanding of the development of human rights law on slavery, but beyond that a precise meaning of slavery may well vanish in favour of a prohibition of more distinct practices, with specific and appropriate measures for protection and reparation, such as those relating to trafficking under the Palermo Protocol.

## **The Inception of Child Specific Rights**

Whilst the 19<sup>th</sup> century abolitionist movements did not usually make distinctions between adults and children, the 20<sup>th</sup> century has seen not only a general sophistication of international texts on human rights protection, but also a focus on the welfare and rights of *children* specifically. Two years prior to the first Slavery Convention, a (non-binding) Declaration of the Rights of the Child was adopted by the League of Nations in 1924, prompted by armed conflict in the Balkans. This brief five-point document had first been promulgated by the non-governmental 'Save the Children International Union' led by the British campaigner, Eglantyne Jebb (1876-1928). It was in fact the first declaration of human rights adopted by an inter-governmental organisation and preceded the (strictly speaking, non-binding) United Nations Universal Declaration of Human Rights 1948<sup>13</sup> by a generation. The Declaration was a product of international concern, in the wake of the First World War, of children's particular vulnerability in times of armed conflicts and famines. As one commentator puts it, 'the devastation of the war gave new credence to the child in distress as the symbol of the problems of social life'. (Marshall 1999: 145) Then came the expansion of this text into a ten-point Declaration of the Rights of the Child 1959 promulgated by the UN's General Assembly. 'The essential theme underlying all of these non-binding declarations was that children need special protection and priority care'. (Cantwell 1992: 19) Although it was not technically binding in international law, 'its unanimous adoption by the General Assembly gave it a significant moral authority' (Buck 2005: 48) and it became the text on which the first drafts of the (binding) CRC 1989 was based thirty years later.

The origins and development of the UN's CRC is a significant and revealing story in its own right. (see Hammarberg 1990; Cantwell 1992; Van Bueren 1995) However, for our purposes, five of its general features can be noted. First, it contained, for the first time in international law, an attempt to produce a comprehensive and coherent account of children's rights, both 'first generation' civil and political, and 'second generation' social, economic and cultural rights. Although the language deployed has

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<sup>13</sup> The *UN Declaration of Human Rights 1948*, Article 4, states that: 'No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.' A near identical prohibition of slavery and the slave trade was contained in the (binding) *International Covenant on Civil and Political Rights 1966*, Article 8(1).

changed – the words ‘slavery’ and ‘servitude’ do not appear at all in the text of the CRC – it includes a number of provisions aimed at addressing exploitative behaviours and practices in respect of children that are analogous to older legal concepts found in the 1926 and 1956 Slavery Conventions.<sup>14</sup> Secondly, the CRC reflects a construction of the child as a more active and distinct right-holder, in contrast to the image of children as passive objects of concern in need of special protection and care contained in older Declarations. Thirdly, spurred on by the UN’s ‘International Year of the Child’ in 1979, the working group developing the text of the CRC met over a lengthy period and was remarkable for the high level of NGO participation (Cohen 1990; Cantwell 1992) in its work. NGOs’ participation has been reflected in the reporting process of the Convention machinery; NGOs may be consulted and contribute to the examination of a Member State’s official periodic reports.<sup>15</sup> Fourthly, this reporting process to a ‘Committee on the Rights of the Child’ established under the CRC remains the only process whereby Member States can be sanctioned for practices departing from CRC standards; there is otherwise no court forum.

Finally, the CRC is famously the international instrument with the most number of ratifications amongst the whole body of international treaties. The only states not to have ratified are Somalia and the United States. Somalia’s non-ratification is largely due to its failure to maintain regular government infrastructures familiar in the international community. There has been an expanding literature to explain the United States’ failure to ratify which had an active interest and participation in the early drafting of the Convention. (Cohen and Davidson (eds.). 1990; Kilbourne 1998; Todres *et al.* (eds.). 2006) In the past there has been a strong suspicion in the United States that ‘children’s rights’ were in competition with ‘parents’ rights’ and that the Convention in certain respects threatened the privatised realm of parent/child relationships. This concern is reflected structurally to the extent that family and child law is generally left as a matter for state legislatures rather than federal institutions. Consequently there are concerns that ratification would inappropriately federalise an area of activity traditionally associated with state competences. The absolute prohibition on capital punishment or life imprisonment without possibility of release (CRC Article 37) sat uneasily with a country where several states had permitted capital punishment of under 18-year-olds in certain circumstances. However, a decision of the Supreme Court of the United States in 2005 held, by a 5-4 majority, that it was unconstitutional to impose capital punishment for crimes committed while under the age of 18.<sup>16</sup> That decision overruled a previous ruling<sup>17</sup> upholding capital punishment for persons at or over the age of 16. In any event, such objections, based on the US Constitution, are not insuperable. Where there are potential conflicts, the United States could always ratify with appropriate ‘reservations, understandings and declarations’.<sup>18</sup> It is also the case that no treaty can override the US Constitution.<sup>19</sup> In any event, it is arguable that the CRC is not a ‘self-executing’ treaty, i.e. it would need *state* legislation to progress the implementation of the CRC. The CRC contains

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<sup>14</sup> For example, protection from economic exploitation (Article 32), illicit production and trafficking of drugs (article 33), sexual exploitation (Article 34), trafficking (Article 35), ‘all other forms of exploitation prejudicial to any aspects of the child’s welfare’ (Article 36), and children’s involvement in armed conflict (Article 38).

<sup>15</sup> CRC Article 45(a).

<sup>16</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>17</sup> *Stanford v. Kentucky*, 492 U.S. 361 (1989).

<sup>18</sup> See CRC, article 51.

<sup>19</sup> *Reid v. Covert*, 354 U.S. 1 (1957).

little by way of direction as to how to *implement* the various rights, so the perceived threat to US state sovereignty is without rational foundation. At the time of writing, it would appear that, prompted by a vigorous campaign to do so, the Obama administration might yet achieve US ratification of the CRC.<sup>20</sup>

The central importance of the CRC in providing a near-global normative legal standard, customised specifically to children, has been further strengthened by the addition of two Optional Protocols to the CRC machinery in 2000: the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography (OPSC)<sup>21</sup> and the Optional Protocol on the Involvement of Children in Armed Conflict (OPAC)<sup>22</sup>. Interestingly, the United States *has* ratified both of these Optional Protocols. OPSC has two overall aims: to strengthen international criminalisation; and, to provide welfare protection for child victims. It is arguably the case that while the Protocol may have assisted in the process of international criminalisation, its implementation appears to have had a weaker impact on the protection of child victims. (Buck 2008:176) Article 38 of the CRC had reiterated states' international duties to respect humanitarian law in armed conflicts relevant to children and to take 'all feasible measures' to ensure that persons under the age of fifteen do not participate directly in hostilities and to refrain from recruiting under 15-year-olds into their armed forces. The CRC also contains a duty on states to take 'all appropriate measures' to the recovery and social reintegration of children who have been victims of a range of exploitative behaviour including armed conflicts.<sup>23</sup> OPAC builds upon these provisions, highly controversial during the drafting of the CRC, and further details the standards against the use of children in armed conflict, in addition raising the minimum age of participation to 18 years.

Indeed, the gathering authority of the CRC on matters of international child law has prompted commentators to argue that it can be regarded as having entered into the body of international customary law; and that the parts of the CRC that, in effect, prohibit child slavery or practices analogous to slavery, can be regarded as *jus cogens*<sup>24</sup> and cannot be derogated from, even by countries that have not ratified it. (Van Bueren 1994:53-57)

## Child Labour

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<sup>20</sup> See *The Campaign to For US Ratification of the Convention on the Rights of the Child*, website at <http://childrightscampaign.org/crcindex.php>

<sup>21</sup> Entered into force in international law on 18 January 2002.

<sup>22</sup> Entered into force in international law on 12 February 2002 ('Red Hand Day').

<sup>23</sup> 'States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.' CRC Article 39.

<sup>24</sup> See n.1. Article 53 of the Convention on the Law of Treaties provides that a treaty will be void 'if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.' This rule, known as *jus cogens* 'will also apply in the context of customary rules so that no derogation would be permitted to such norms by way of local or special custom.' Such peremptory norms probably include: the unlawful use of force; genocide; slave trading; and piracy. (Shaw 2003:117) 'If the prohibition on slavery amounts to *jus cogens*, the argument that the institutions and practices similar to slavery also amount to *jus cogens*, becomes very compelling.' (Van Bueren 1994:56)

Certain ILO Conventions<sup>25</sup> complement the CRC and its Optional Protocols with a developed international regulation of exploitative child labour. Smolin (2008) indicated that there have been four distinct stages of development associated with the history of international legal protection against exploitative child labour. First, five specific areas of work were identified for minimum age in employment regulation between 1919 and 1932.<sup>26</sup> Secondly, progress was made to raise the minimum age from 14 to 15 years via a number of conventions.<sup>27</sup> Thirdly, there followed a consolidation of these efforts in the form of the Minimum Age Convention 1973 (C138). Fourthly, and most recently, the overall tendency has been for the international community to make efforts to *mainstream* child labour issues within ILO; a process that eventually led to the current ‘market leader’ international instrument in this field, the Elimination of the Worst Forms of Child Labour Convention 1999 (C182) (see esp. Ch. 4). In particular, the concept of the ‘worst forms of child labour’ comprises four categories including one which, in effect, assumes that the form of work is intolerable because of the work *relationships* involved:

*...all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict. (Article 3(a)).*

A second and third category assumes the *nature* of the work itself is intolerable, for example, child prostitution, and child pornography and using, procuring or offering a child for illicit activities, in particular the production and trafficking of drugs (Articles 3(b) and (c)). A fourth, residual category refers to ‘work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children’ (Article 3(d)). No doubt reflecting the difficulties of achieving international consensus in this area, the definition of what type of work might belong to this residual category is left to national governments to consider after consulting with the guidance on ‘hazardous work’ contained in the (non-binding) Worst Forms of Child Labour Recommendation 1999 (R190).

The 1999 Convention has provided a model of child protection that arguably reveals a more widespread impetus within the international community to frame international instruments that strike a sensible balance between universalism and cultural relativity. Whilst the CRC can be described as a paradigm of global standard-setting, a focus on child labour inevitably draws in very difficult issues of cultural relativity. The diversity of children’s lives across different cultures and located within differing economic and social conditions does not necessarily lead to single, universal answers to the difficult questions, such as how do we identify when children’s work becomes

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<sup>25</sup> Forced Labour Convention 1930 (C29); Minimum Age Convention 1973 (C138); the Worst Forms of Child Labour Convention 1999 (C182).

<sup>26</sup> Minimum Age (Industry) Convention, 1919 (C5); Minimum Age (Sea) Convention, 1920 (C7); Minimum Age (Sea) Convention, 1920 (C7); Minimum Age (Agriculture) Convention (C10); Minimum Age (Trimmers and Stokers) Convention, 1921 (C15); and Minimum Age (Non-Industrial Employment) Convention, 1932 (C33).

<sup>27</sup> Minimum Age (Sea) Convention (Revised), 1936 (C58); Minimum Age (Industry) Convention (Revised), 1937 (C59); Minimum Age (Non-Industrial Employment) Convention (Revised), 1937 (C60); Minimum Age (Fishermen) Convention, 1959 (C112); and Minimum Age (Underground Work) Convention, 1965 (C123).



‘exploitative’. This is of course especially evident in some developing countries where children’s work to support the family household unit and its economic survival generates rather different normative values than found elsewhere in the world. The 1999 Convention in essence represents an agreement about *priorities* rather than following the absolutist solution of a policy of outright banning of the employment of children represented by the various Minimum Age conventions. There is a significant scholarly literature around the conflict between universalism and cultural relativity (e.g. Donnelly, 1984; Renteln, 1990) and many commentators have concluded both that ‘human rights practice essentially has to learn to operate in the middle ground’ (White, 1999:136) and one must find ‘approaches which involve neither the embrace of an artificial and sterile universalism nor the acceptance of an ultimately self-defeating cultural relativism’. (Alston 1994:2)

## Child Trafficking

The international community has also seen considerable movement in attempts to tackle trafficking in human beings; globalisation and increasing demand for cheap labour and for prostitution means child trafficking is a highly profitable economic crime often concomitant with gender discrimination. (Ch. 5) In this context, it is the human rights of the child at issue; however the trafficking of children will also impact on economic, social and cultural rights.

Child trafficking is not limited to sexual exploitation, but it is concerned with such practices. The sexual exploitation of children is already addressed in CRC Article 34 and in Articles 2 and 3 of its Optional Protocol on The Sale of Children, Child Prostitution and Child Pornography. These have since been enhanced by the Convention on Action Punishing Trafficking in Human Beings 2005 and the Palermo Protocol. The latter Convention and Palermo Protocol were extraordinary in that they were implemented as a means of tackling transnational organised crime, and not principally as human rights instruments. However, as a proportion of transnational organised crime is premised on trafficking and sexual exploitation, the human rights provisions are a fortunate and necessary by-product.

The Palermo Protocol has become particularly important in this regard, clarifying and extending the meaning of trafficking and in particular dealing with the important issue of consent (as irrelevant)<sup>28</sup> and providing for distinct measures to be implemented to assist the victim (Article 6). The accepted meaning of trafficking is now significantly wider and is contained within Article 3 of the Palermo Protocol (see Chs. 2 and 6). Human trafficking is expressed as comprising three elements: the operation (recruitment, transportation, transfer, harbouring or receipt of persons), means (abduction, fraud, deception etc.), and purpose (exploitation). In order for an adult to be recognised as a victim of trafficking therefore, one or more of the criteria for each of these elements must be fulfilled. However, a distinction arises where children are concerned: Subparagraph (c) provides ‘*The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article.*’ This recognition of the particular vulnerability of a

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<sup>28</sup> See Article 3(b)

child and the incapacity of a child to give informed consent means that a child will be considered a victim of trafficking so long as the act (e.g. transportation) and the consequence (exploitation) can be shown. There is no need to prove *how* the child was placed in an exploitative position, the fact that he or she has been recruited *for the purpose* of exploitation is sufficient (from which it can be inferred that exploitation does not have to occur for the trafficker to have committed the crime, although there are likely to be evidential issues for the proof of victim status). The definition is therefore so wide that it is most likely already somewhat supported by existing domestic law on prostitution, and child labour.

A common error is to perceive of trafficking as a practice that requires border-crossing and which relates solely to sexual exploitation. Neither is correct. It is clear that the definition makes no such requirement. Trafficking can therefore occur within a state if the above criteria are fulfilled. A distinction can therefore be made between the treaties concerning migration<sup>29</sup> and those that concern trafficking. Migration involves the voluntary movement of persons across borders, and not the coercion or deception of an individual for the purpose of exploitation.

The explicit mention of prostitution was purposefully included to recognise the additional harm that occurs here. Not only is the child subjected to trafficking by the trafficker, but suffers the additional and particularly grave harm of forced sexual abuse by the user. (Huda 2006) An examination of the discussions on the draft Protocol indicates that the word prostitution was very carefully selected (in place of 'sex work') so as to avoid interpretative debate and in order to emphasise the particular vulnerability of children, girls in particular. The terms 'exploitation of others' and 'other forms of sexual exploitation' were also carefully chosen so as to enable states to determine the legality of prostitution within their domestic laws. However, state policy on prostitution is irrelevant where children are concerned. Any sexual practice to which a child is subjected will not be viewed as legal. However sexual exploitation is not the only criteria.

There is an absence of global consensus on the meaning of exploitation, but children subjected to the practices outlined in the Protocol (for example prostitution and forced labour) would automatically fall within protective legal provisions by virtue of their status as children; there can be no argument of true autonomy, understanding or consent. However, the focus of the Protocol and its related Convention is on the buyers causing demand and the traffickers themselves, which, it has been argued, diverts attention from the wider economic, social and political context of the sex industry – i.e the role of residency, employment and migration policy. (Anderson and Andrijasevic 2008: 140)

Nevertheless, the trafficking provisions are an example of the development of the law in the field of children's rights. The recent and more overt recognition of the vulnerability of the child, in particular gendered children, is reflected in a new emphasis on special measures for the protection and support of victims. Article 6 of the Palermo Protocol provides quite prescriptive measures in an effort to secure the physical, psychological and social recovery of victims of trafficking. This includes the provision of appropriate housing, counselling, psychological and material assistance,

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<sup>29</sup> [Need to put in the protocols here](#)

employment, education, training opportunities, and compensation. Under Article 7, states should also consider adopting measures to enable the reintegration and resettlement (re-patriation) of victims. This potentially indicates a new era of human rights obligations, moving from the formalisation of overarching values and generic rights, to the establishment of more precise obligations. This has important implications for the state which is likely to be concerned to protect its sovereignty. It may also prove harder to see such specific measures consistently observed in domestic laws in the light of cultural and legal divergences.

## **Implementation and Enforcement**

As we have seen, the construction of the international legal framework to address modern forms of child slavery has been challenging both in terms of the conceptual and legal definitional difficulties. These difficulties are further compounded by the complexities of implementation and enforcement of such international instruments at global, regional and national levels of operation. Both the CRC and the ILO conventions, for example, lack the clear lines of a discrete court enforcement mechanism where distinct legal remedies may be available to a state and/or individual litigant. The sanctions for breach of the conventions discussed here are rather to be found in their reporting mechanisms. (see Ch. 2) The way in which the performance of individual states is exposed to political and diplomatic scrutiny and negotiation within nation states and on the international stage, in the United Nations institutions and elsewhere, should be appreciated, but equally not overestimated. The ‘naming and shaming’ function of international law remains an important prompt to states to comply with international law. Unfortunately, although some of the international instruments discussed here have obtained a very good record of ratifications by countries,<sup>30</sup> this in itself is unlikely to guarantee compliance. Hathaway’s ‘integrated theory’ of international law predicts, perhaps counter-intuitively, that countries with very poor human rights records can be as likely or even more likely to ratify treaties as countries with better records, but that unlike those with better records, they are unlikely to comply with those commitments - which are in fact the patterns found. (Hathaway 2005)

However, any assessment of the effectiveness of these instruments should be prefaced by a proper consideration of the criteria by which such evaluation is made. This is not only problematic because, as we have seen, the covert nature of modern forms of slavery make it difficult to establish a reliable empirical research base for appropriate action, but it is contestable as to what time periods to use for any such evaluation. The CRC, for example, has some very long-term programmatic goals to raise general standards of children’s rights, but wide areas of discretion are necessarily left to states to deliver such improvements. The expectation of short, or even medium-term gains may inevitably lead to a negative verdict about their effectiveness.

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<sup>30</sup> State Ratifications as at September 2009: CRC, 193 parties; ILO Worst Forms of Child Labour, 171; International Covenant on Civil and Political Rights, 164 parties; ILO Minimum Age, 154 parties; OPSC, 132 ; OPAC, 130 parties; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 133 parties.

The treaties discussed above do not all provide for an absolute prohibition; ILO Convention No.29 requires states merely to ‘*suppress the use of forced or compulsory labour within the shortest possible time*’ (Article 1(1)). The Palermo Protocol merely requests that states ensure *to the extent possible* implementing the measures provided under Article 6 to assist the victim, and to *consider* introducing those in Article 7.

Ultimately the method of complying with obligations will continue to be subject to interpretation based on the existing social, economic and cultural concerns of the state. Perceptions that the law in place to protect children is ineffective emerge due to the impossibility of accurate monitoring of these practices, legal ambiguity, a lack of enforcement mechanisms, and lack of global consensus as to the notion of childhood and related ethics of child labour. However, the value of the law is as a means of setting global standards and driving reform by the formal identification of universal human rights; states are encouraged to acknowledge normative values and human rights principles and so reflect them in domestic law. There has been widespread ratification of treaties protecting the child, the verbatim adoption of definitions and the implementation of suggested support measures in domestic legislation.

The new approach to obligations evident in the more recent treaties reveals that international law has much to contribute to the debate about the protection of children subject to exploitation. International law continues to develop beyond the basic recognition of rights, and to streamline the human rights of the child, endeavouring to construct a collective and transparent schema for the protection and rehabilitation of children.

## **Conclusion**

The widespread ratification of the treaties discussed here indicate there is now an extensive legal structure in place to address the problem of child slavery and child exploitation, evidenced by the increased promulgation of related domestic legislation. Given the varying jurisdictions, signature, ratification and adoption (and interpretation) of international and regional legal instruments, consistency of definition may become more important in the future; any ambiguity is likely to extend to states’ internal organs, with the result that domestic law may become less effectual.<sup>31</sup> In particular it is clear that there is considerable variance on the meaning of child exploitation, complicated by issues of cultural relativity.

Nevertheless, the movement from generic rights to the creation of treaties concerned with more distinct practices, and a focus on child specific rights, has led to the positive construction of measures that go beyond criminalisation and are aimed at providing more comprehensive assistance to the victim and the recognition of children as active right-holders. Such measures, although only proposals and therefore reliant on state policy, do much to address criticisms that human rights treaties provide little by way of reparation other than through the medium of compensation.

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<sup>31</sup> Confusion as to the correct interpretation can already be seen in the judgment of the Court in *Hadijatou Mani Koraou v The Republic of Niger* (2008) Judgment No. ECW/CCJ/JUD/06/08. 27 October 2008.

Whilst questions as to the effectiveness of international treaties will no doubt continue given the lack of enforcement mechanism, this is somewhat contraindicated by the growth of treaties on children's rights, the large ratification status of existing treaties, and the increased promulgation of related domestic legislation. This trend is likely to continue.

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See more at:

[http://www.policypress.co.uk/info\\_archiving.asp#sthash.R11GbO9u.dpuf](http://www.policypress.co.uk/info_archiving.asp#sthash.R11GbO9u.dpuf)

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