



# Slavery and Human Trafficking International Law and the Role of the World Bank

María Fernanda Perez Solla

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**SLAVERY AND HUMAN TRAFFICKING: INTERNATIONAL LAW AND THE  
ROLE OF THE WORLD BANK**

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## **Abstract**

This paper reviews the international legal framework applicable to the World Bank and Member States on contemporary forms of slavery, in particular, trafficking.

The Palermo Trafficking Protocol is specially analyzed. Moreover, the paper refers to the preventive framework constituted by human rights obligations, particularly those of international labor law.

The World Bank's mandate appears to permit preventive action. The Articles expressly refer to the goal of improving conditions of labor. On one hand, the Bank's practice includes today work in areas linked to human rights, which reveals tacit agreement by Member States. In addition, human rights obligations have been widely accepted by the international community, though implementation is poor. Moreover, poverty causes vulnerability to slavery-like practices, and they perpetuate poverty.

A modest set of recommendations and areas in which further research is needed are included. The paper encourages mainstreaming the issues analyzed strategically in the Bank's core operations (concerning processes and results), with country-led and country specific efforts, identifying the issues important for poverty reduction and growth.

JEL Classification: K33, K31, K42

Keywords: international law, human trafficking, slavery, migration

THE LEGAL FRAMEWORK FOR THE WORLD BANK'S ENGAGEMENT IN  
ISSUES RELATED TO CONTEMPORARY FORMS OF SLAVERY,  
PARTICULARLY, HUMAN TRAFFICKING

**MARÍA FERNANDA PEREZ SOLLA\***

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# **SLAVERY AND HUMAN TRAFFICKING: INTERNATIONAL LAW AND THE ROLE OF THE WORLD BANK**

María Fernanda PEREZ SOLLA\*

## **I. INTRODUCTION**

This paper intends to deal with the task of describing the international legal framework applicable to contemporary forms of slavery, in particular, trafficking in persons, and assessing whether the World Bank, according to its mandate, can work in this arena. Moreover, the author considers that the issues under analysis are human rights concerns, with the bias of being a human rights lawyer; consequently, special attention is given to the analysis whether the Bank can work in the field of human rights. The task before us is complex, and some arguments are not extensively presented for reasons of space.

International law is still created by States, and is predominantly reactive. Most solutions adopted follow the perception of concrete problems. Many problems need to be recognized first as an international problem as to originate some type of decision-making leading to international law-making and cooperation. The majority of the existing international law rules are included in treaty law. Many other rules are embodied in customary international law, and they bind all States. Treaties are normally the product of many years of work. Once in force, they bind only those States which have decided to become parties to them. Though some of the instruments we shall mention have been widely ratified, the relative character of the international obligations must be underlined. The same set of rules does not necessary oblige another international actor. Every State is free to decide which international obligations it assumes, as far as treaty-law is concerned. This insight reveals an additional difficulty: no general approach can be adopted, but one considering the particular obligations assumed by a concrete State.

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The notions to mention here have been the result of very different motivations. They range from public morals to actual concern on recognized values. Economic analysis is not a reason to draft international law rules.

We shall mention the rules of international law applicable to contemporary forms of slavery, including human trafficking. Though the international community has generally revealed basic agreement in this field, conceptual difficulties of ideological and political character exist in the field of trafficking. Though most States require today lack of consent or a wicked consent by an adult as to qualify a situation as trafficking, some countries consider that consensual engagement in sex work also amounts to trafficking.

Moreover, some States have embraced the anti-trafficking or counter-trafficking field from a law enforcement perspective, in an effort to fight international organized crime. This legitimate and necessary goal is, in the praxis, missing sensitiveness to the rights of victims or survivors, particularly, if they are migrants. Some governments have the political goal to show commitment and success in law enforcement, especially concerning delicate issues involving children and women. Victims are not at the center of the effort, but security measures.

The feminist agenda has taken lead in the fight against trafficking, perhaps with special attention to consensual trafficking for prostitution, as a worldwide symbol of exploitation of women. The situation of those trafficked for labor purposes has been, pursuant to this approach, not so prominent. Moreover, this perspective is particularly opposed by migrant rights and sex workers groups, that assert that sex work is not always exploitative, and can constitute the only means of subsistence of some families under constrained economic conditions. They claim for labor rights, and the recognition of their activities as licit, assuming that the construction of sex work as illicit activity is what originates instances of exploitation. The punishment of the demand side of sex work is here also a critical issue.

Human and migrants rights advocates and some international organizations try to place the human rights of the victim at the center of the scene, together with the empowerment of those vulnerable to contemporary forms of slavery. These efforts face often serious obstacles, due to the confrontation with the perspectives mentioned above,

plus the interests of some business sectors to keep the labor market as unregulated as possible, and labor costs low.

This paper is written from a human rights perspective.<sup>1</sup> The underlying principle is that the center of attention should always be the rights of the victim or survivor, and the empowerment of those concerned. Legitimate security concerns are not undermined by recognizing that all human beings have rights, and should be treated accordingly, with due respect to their dignity. Moreover, the feminist approach is respectable if the stakeholders, particularly, the women affected, as human rights holders, agree with that point of view, and participate in the design of programs and policies elaborated as to address such concerns. Not to place the emphasis on the empowerment and the rights of the victim or survivor implies to compromise further their situation.<sup>2</sup>

Another trend is to pay more attention to the demand of persons trafficked (perhaps with the huge influence of the opinion asserting that the person demanding the services of sex workers is the cause of sex work). This has originated an imbalance of attention, with negligence to the “offer” side, that is, the human beings being trafficked, and their rights.

Some of the rules described in this paper have become customary international law. They bind all subjects of international law, including international organizations such as the World Bank. This is the case of the prohibition of slavery. Though the exploitation of human beings is as ancient as history, international law, traditionally focusing on State relations, has only recently devoted time and efforts to rules directly applicable to individuals. The first notions have resulted on the criminalization of certain behaviors, particularly, slavery,<sup>3</sup> traffic in women,<sup>4</sup> and enslavement and forced labor during armed conflict.<sup>5</sup>

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<sup>1</sup> This approach has also been adopted, for instance, by the EU in the 2005/C 311/01, *EU plan on best practices, standards and procedures for combating and preventing trafficking in human beings*, O.J. C311/1, 9.12.2005, asserting that “The EU recognises the importance of taking forward a human rights and victims-centred approach.”

<sup>2</sup> Aide-Mémoire Expert group Meeting *Promotion and Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) with Particular Emphasis on Violence against Women and Trafficking in Women* Bangkok, Thailand from 3 to 5 October 2005, at 2.

<sup>3</sup> 1815 *Declaration Relative to the Universal Abolition of the Slave Trade*.



Human rights rules in a post-UN world have been later drafted. States have agreed to respect the rights enumerated in the international instruments, and to ensure their respect, through domestic legislation, or other type of adequate measures. Human rights rules are considered today goals and means to realize the respect for human dignity. They embody values and are, at the same time, an effective technique for their achievement.

## II. INTERNATIONAL LAW NOTIONS OF CONTEMPORARY FORMS OF SLAVERY, INCLUDING HUMAN TRAFFICKING

The notion “contemporary forms of slavery” is employed here for practical reasons: it is coherent with all the existing treaty-making efforts, and is employed by scholars and practitioners as to characterize the series of phenomena presented in this paper.<sup>6</sup> According to the UN Office of the High Commissioner for Human Rights, “[t]he word ‘slavery’ today covers a variety of human rights violations. In addition to traditional slavery and the slave trade, these abuses include the sale of children, child prostitution, child pornography, the exploitation of child labor, the sexual mutilation of female children, the use of children in armed conflicts, debt bondage, the traffic in persons and in the sale of human organs, the exploitation of prostitution, and certain practices under apartheid and colonial régimes.”<sup>7</sup> Contemporary forms of slavery are a global problem

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<sup>4</sup> *International Agreement for the Suppression of the "White Slave Traffic,"* 18 May 1904, 35 Stat. 1979, 1 L.N.T.S. 83, entered into force 18 July 1905; *International Convention for the Suppression of the "White Slave Traffic,"* May 4, 1910, 211 Consol. T.S. 45, 1912 GR. Brit. T.S. No. 20, as amended by *Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic,* May 4, 1949, 2 U.S.T. 1999, 30 U.N.T.S. 23, entered into force June 21, 1951.

<sup>5</sup> See particularly *Laws and Customs of War on Land (Hague IV)*, October 18, 1907, *Annex to the Convention Regulations Respecting the Laws and Customs of War on Land*, Article 6. The Nuremberg Constitution of the International Military Tribunal has mentioned, in Article 6, the war crime of deportation to slave labor as breach of the customs and rules of war; enslavement of civilian population is included as crime against humanity. The 1998 Rome Statute includes enslavement as a crime against humanity.

<sup>6</sup> See for example: Anti Slavery International, *Contemporary Forms of Slavery in Brazil*, 2006, with reference to forced labor, trafficking, and child domestic work; A Yasmine Rassam, “International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach,” 23 *Penn St. Int’l L. Rev.* 809 2004-2005; Human Rights Watch Asia, *Contemporary Forms of Slavery in Pakistan: Contemporary Forms of Slavery* By Farhad Karim, 1995; Claude E. Welch, “Defining Contemporary Forms of Slavery: Updating a Venerable NGO,” *Buffalo Legal Studies Research Paper Series* Paper No. 2008-002, 2008.

<sup>7</sup> OHCHR, *Fact Sheet No.14, Contemporary Forms of Slavery*, <http://www.unhcr.ch/html/menu6/2/fs14.htm>

which affects all continents and most countries of the world that counts with specific gender and age dimensions.<sup>8</sup>

We have preferred this language to the use of the term exploitation. Exploitation is not defined by international law. Some conventions on children rights, *infra*, and the Palermo Trafficking Protocol mention this language, but without defining it. Though all the notions mentioned here imply the presence of exploitation, there are no clear guidelines to assert what constitutes and what does not constitute exploitation. We could define exploitation as a conduct that, as a minimum, is not respecting the international labor rights we shall mention *infra*. In their most serious forms, they have been defined as crimes in treaties. For instance, we could consider exploitation work without the legal right to periodic holidays. However, though the international community has recognized the right to periodic holidays, it has not asserted that its violation amounts to exploitation.

We prefer, due to the lack of positive guidelines in this regard, instead of using the language “exploitation,” to identify the contemporary forms of slavery already defined by the international community. After that, we shall address the need of implementation of basic human rights and labor rights, that clearly intend to prevent different forms of human exploitation.

Available statistics are limited and contested in the field of contemporary forms of slavery, due to the clandestine character of most activities. This represents a serious deficit when trying to approach this topic with quantitative methodologies. Qualitative research appears to be extraordinarily important and useful in this arena. However, mainstream research is still focusing mainly on quantitative methods. The UNESCO Trafficking Project has shown the disparities among different statistical sources.<sup>9</sup> We shall just mention some examples, which reveal the impressing problem, underlying that other sources easily contradict these statistics. The civil society organization IAbolish indicates that there are currently about 27 millions people enslaved. According to the ILO, from the 12.3 million people who are victims of forced labor, 1.39 million are

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<sup>8</sup> See UN Human Rights Council, Resolution 6/14. Special Rapporteur on contemporary forms of slavery, 28 September 2007.

<sup>9</sup> [http://www.unescobkk.org/fileadmin/user\\_upload/culture/Trafficking/statdatabase/Worldwide\\_Estimates\\_Feb2008.pdf](http://www.unescobkk.org/fileadmin/user_upload/culture/Trafficking/statdatabase/Worldwide_Estimates_Feb2008.pdf)

involved in forced commercial sexual exploitation, and 40–50 per cent are children. UNICEF considers that, in 2004, 218 million children were engaged in child labor, excluding child domestic labor. Moreover, some 126 million children aged 5–17 are believed to be engaged in hazardous work. Children appear to represent 40–50 per cent of all victims of forced labor, or 5.7 million children are trapped in forced and bonded labor. Moreover, 1.2 million children appear to be trafficked worldwide every year. The UN Working Group on Contemporary Forms of Slavery has recognized that some 20 million people are still held in debt bondage around the world.

International law concepts have the advantage to have been accepted by States, normally after several years of discussions at international bodies. International State obligations require the effective implementation of these notions under domestic legislation. In some of the cases, international monitoring mechanisms have been created, though this is not the case concerning the slavery conventions. Most definitions are relatively broad, and they probably require the development of further operational concepts as to tailor concrete activities, with essential participation of relevant stakeholders. These definitions permit those planning a concrete intervention to determine whether the problem exists in the country under analysis.

## **2.1 Slavery, slave-trade and institutions and practices similar to slavery**

After many efforts, starting especially at the beginning of the 19th century, a treaty was adopted in 1926 to eliminate slavery by imposing an obligation on each State to define it as a crime. This paradigm prevails today in most instruments protecting persons from contemporary forms of slavery.

Slavery is, in addition, proscribed by international human rights law,<sup>10</sup> a prohibition which is considered today customary international law, that is, the obligation

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<sup>10</sup> Article 4 of the *Universal Declaration on Human Rights* (hereinafter UDHR); Article 8.1 of the *International Covenant on Civil and Political Rights* (hereinafter ICCPR); Article 4.1 of the *European Convention on Human Rights and Fundamental Freedoms* (hereinafter ECHR); Article 6.1 of the *American Convention on Human Rights* (hereinafter ACHR); Article 11.1 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, Adopted by General Assembly resolution 45/158 of 18 December 1990, Enters into force on 1 July 2003 (hereinafter ICMW).

is binding for all the international community, including the World Bank. 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>11</sup>

The prohibition is normally linked to the prohibition of slave-trade,<sup>12</sup> which is forbidden independently of the means of conveyance.<sup>13</sup> The 1956 Supplementary Convention on the Abolition of Slavery (hereinafter Supplementary Convention) adds the criminalization of the act of enslaving another person or of *inducing another person to give himself* or a person dependent upon him into slavery or other servile status.<sup>14</sup> Consequently, *there is no consensual slavery under international law*.

There is an evident overlap between slavery and the notion of forced labor, *infra*, though the first notion is characterized by the concept of condition or status. Another overlap exists with the Palermo Trafficking Protocol, which encompasses trafficking for slavery purposes, as already mentioned. Finally, the ILO Convention on the Worst Forms of Child Labor forbids child slavery, *infra*.

In addition to slavery, the Supplementary Convention forbids further practices similar to slavery:

*2.1.(a) Bonded labor (or debt bondage)*

This is the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services, as 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.<sup>15</sup> There is no debt bondage if the value of the services, reasonably assessed, is applied towards the liquidation of the debt, and the nature of those services is limited and defined.

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<sup>11</sup> *Slavery Convention*, 60 L.N.T.S. 253 (1926).entry into force 9 March 1927, in accordance with article 12

<sup>12</sup> *See idem*.

<sup>13</sup> *Protocol amending the Slavery Convention*, 182 U.N.T.S. 51, entered into force December 7, 1953. State Parties: 119.

<sup>14</sup> *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 226 U.N.T.S. 3, entered into force April 30, 1957, Article 6.

<sup>15</sup> *Idem*.

### 2.1.(b) *Serfdom*

Servitude was identified for the first time in the Universal Declaration of Human Rights (hereinafter UDHR).<sup>16</sup> Later the Supplementary Convention condemned servile status together with slavery, including debt bondage, serfdom, not-free forms of marriage and child labor.<sup>17</sup> Serfdom is defined 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;

International human rights treaties also condemn servitude.<sup>18</sup> However, the American Convention on Human Rights (hereinafter ACHR) refers only to “involuntary servitude,” but in all its forms.<sup>19</sup> Serfdom also overlaps with forced labor, but implies, again, a condition or status.

### 2.1.(c) *Exploitative marriages and further institutions implying the exploitation of women.*

The Supplementary Convention also covers:

Any institution or practice whereby:

- (i) A woman, without the right to refuse, is *promised or given in marriage* on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or
- (ii) The husband of a woman, his family, or his clan, has *the right to transfer her* to another person for value received or otherwise; or
- (iii) A woman on the death of her husband is *liable to be inherited* by another person;<sup>20</sup>

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<sup>16</sup> Article 4 of the UDHR.

<sup>17</sup> *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 226 U.N.T.S. 3, entered into force April 30, 1957

<sup>18</sup> Article 8.2 of the ICCPR; Article 4.2 of the ECHR; Article 11.1 of the ICMW.

<sup>19</sup> Article 6.1 of the ACHR.

<sup>20</sup> *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 226 U.N.T.S. 3, entered into force April 30, 1957, Article 1 paragraph c.

### 2.1.(d) *Child exploitation*

The same Supplementary Convention forbids 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.<sup>21</sup>

## 2.2. **Forced labor**

Under contract law, a free expression of will is required as to count with a valid contract. A series of situations where consent is wicked are recognized, as they can originate the invalidity of the contract, due to a formation defect, for instance, coercion.<sup>22</sup> In addition, some clauses may be prohibited by law, since they are considered as being in conflict with the notion of public order of a given community.

Particularly in the field of labor law, the free will to contract has been limited through legislation.<sup>23</sup> Domestic rules normally recognize that parties to labor contracts do not count with equal bargaining power. There are incentives for the party with more power to take unfair advantage, or to exploit the weaker party, normally the worker.<sup>24</sup> However, these standards do vary from country to country. International labor standards and human rights rules constitute a *minimum* set of norms which oblige States to adopt the necessary legislation to implement them. Many countries follow these standards, as a starting point. However, even in those cases, the lack of effective respect of these rules

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<sup>21</sup> *Idem*, Article 1 paragraph d.

<sup>22</sup> See, for instance, Rick Bigwood, "Coercion in Contract: The Theoretical Constructs of Duress," *The University of Toronto Law Journal*, Vol. 46, No. 2, (Spring, 1996), pp. 201-271.

<sup>23</sup> See David M. Trubek, Jim Mosher, Jeffrey S. Rothstein, "Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks," *Law & Social Inquiry*, Vol. 25, No. 4, (Autumn, 2000), pp. 1187-1211, at 1190.

<sup>24</sup> Joseph William Singer, "Jobs and Justice: Rethinking the Stakeholder Debate," *The University of Toronto Law Journal*, Vol. 43, No. 3, Special Issue on Corporate Stakeholder Debate: The Classical Theory and Its Critics, (Summer, 1993), pp. 475-510, at 491.

permits *de facto* the existence of different instances of abuse. Liberalization of labor markets has sometimes originated the erosion of labor standards.<sup>25</sup>

Forced labor is currently present in almost all countries.<sup>26</sup> The notion is defined by the 1929 ILO Convention 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>27</sup>

As hinted above, this notion is included in most of the notions already analyzed. This Convention was followed by the Abolition of Forced Labor Convention, 1957 (No. 105) that expanded the concept to forced labor:

- (a) As a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
- (b) As a method of mobilizing and using labor for purposes of economic development;
- (c) As a means of labor discipline;
- (d) As a punishment for having participated in strikes;
- (e) As a means of racial, social, national or religious discrimination.<sup>28</sup>

Forced labor is also forbidden by human rights law,<sup>29</sup> and it does neither mean only low wages or poor working conditions, nor cover situations of pure economic necessity.<sup>30</sup> It comprises two elements: the work or service, exacted under the menace of

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<sup>25</sup> With brief references of the negative impact of labor market and capital market liberalization to the poor, see Joseph Stiglitz, *Ethics and the Economics of Globalization*, Tanner Lectures, Oxford, 2004, [http://www2.gsb.columbia.edu/faculty/jstiglitz/download/papers/powerpoints/ETHICS\\_AND\\_THE\\_ECONOMICS\\_OF\\_GLOBALIZATION\\_TANNER\\_2004.ppt](http://www2.gsb.columbia.edu/faculty/jstiglitz/download/papers/powerpoints/ETHICS_AND_THE_ECONOMICS_OF_GLOBALIZATION_TANNER_2004.ppt). See also Katherine V.W. Stone, "Flexibilization, Globalization, and Privatization: Three Challenges to Labor Rights in Our Time," UCLA School of Law Research Paper No. 05-19, Osgoode Hall Law Journal, Fall 2005; Earl V. Brown, Jr, *Corporate Social Responsibility And Labour Rights: An International Labor Lawyer's Perspective*, [www.nuigalway.ie/sites/eu-china-humanrights/seminars/ds0406c/earl%20v%20brown-eng.doc](http://www.nuigalway.ie/sites/eu-china-humanrights/seminars/ds0406c/earl%20v%20brown-eng.doc)

<sup>26</sup> ILO, *A global alliance against forced Labor Report of the Director-General Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, 2005, at 1.

<sup>27</sup> *Forced Labour Convention, Convention (No. 29)*, Adopted on 28 June 1930, entry into force 1 May 1932.

<sup>28</sup> *Abolition of Forced Labour Convention, Convention (No. 105)*, Adopted on 25 June 1957, entry into force, 17 January 1959.

<sup>29</sup> Article 8.3 of the ICCPR; Article 4.2 of the ECHR; Article 6.2 of the ACHR; Article 11.2 of the ICMW.

<sup>30</sup> ILO, *Fundamental Rights at Work and International Labor Standards*, 2003, Geneva, pp. 36 - 38.

a penalty that is undertaken involuntarily. The penalty does not need to be a criminal sanction. The most extreme form involves physical violence or restraint, or even death threats addressed to the victim or relatives. Subtler forms can be psychological menaces, including threats to denounce the person to the police or immigration authorities, if the employment status is not legal, or denunciation to village elders, if girls are forced to prostitute themselves in distant cities. Penalties can also be financial, such as those linked to a debt, non-payment of wages, loss of wages accompanied by threats of dismissal, if workers refuse to do overtime beyond their contracts or in breach of legislation. Moreover, from the ILO perspective, an activity does not need to be recognized officially as an economic activity to fall within the ambit of forced labor. Forced labor is included among the worst forms of child labor, as defined in the ILO's Worst Forms of Child Labor Convention, 1999 (No. 182), *infra*.

The notion of forced labor reveals some problems in its implementation. Pursuant to the principle of free contracting, an individual should have the right to enter into any contract, even non-favorable, as voluntariness is considered *per se* a welfare improvement.<sup>31</sup> International law recognizes rights to individuals born with dignity, liberty and autonomy, that is, it follows basically this paradigm. On the other hand, reality shows that workers can have limited information, live in situations plenty of constraints, possibly combined with moral hazard on the part of employers. These factors could impair the expression of valid and informed consent. The prohibition of concrete exploitative work, or work obtained through certain kind of undue influence, could consequently, enhance the welfare of workers affected by the ban, as it would improve the set of options that the worker faces.<sup>32</sup> Accordingly, the ILO supervisory bodies have found that there exist many subtle forms of coercion. Many victims enter a labor relation initially with their consent, without perceiving fraud or deception disguising forced labor. The victim may discover it later. By then, he or she is not free to withdraw from the job, due to legal, physical or psychological coercion. Initial consent may be irrelevant, if

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<sup>31</sup> Nirvikar Singh, "The Impact of International Labor Standards: A Survey of Economic Theory" in Kaushir Basu et al, *International Labor Standards*, Blackwell, Oxford 2003, at 132,

<sup>32</sup> *Id.*, at 133-134.



deception or fraud has been used to obtain it.<sup>33</sup> This clearly contrasts the solution adopted in the Palermo Trafficking Protocol, *infra*. The ILO Committee of Experts has analyzed such a problem, and understood that the particular situation in which the individual is found has to be carefully considered. However, the State or a particular employer cannot be held accountable for all external constraints existing in the real world.

The notion of “position of vulnerability” in the Palermo Trafficking Protocol *travaux préparatoires*, *infra*, could provide for some guidance to assess situations deserving protection. However, it still leaves substantial questions unresolved. The voluntary offer of the worker may have been manipulated, or have not been based on an informed decision. Moreover, if migrant workers are induced by deceit, false promises and retention of identity documents, or forced to remain at the disposal of an employer, the ILO supervisory bodies have noted a violation of the Forced Labor Convention.<sup>34</sup> In cases where an employment relationship is originally the result of a freely concluded agreement, the workers’ right to free choice of employment remains inalienable<sup>35</sup> -and restriction on leaving a job, even when the worker freely agreed to enter it, may actually constitute forced labor.<sup>36</sup>

The European Court of Human Rights (hereinafter ECtHR) has followed a similar approach. Consent cannot legitimize slavery or servitude. However, things are less clear-cut when analyzing cases of forced or compulsory labor. If someone willingly subjects herself to very harsh working conditions, there is no forced labor, and authorities would have neither the obligation nor the right to intervene.<sup>37</sup> If the individual has consented to non-favorable living and working conditions, the next step is to examine whether there was a *clear choice and true consent, or whether the agreement was actually coerced*.<sup>38</sup>

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<sup>33</sup> ILO, *A global alliance against forced Labor Report of the Director-General Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, 2005, at 6.

<sup>34</sup> *Forced Labour Convention, Convention (No. 29)*, Adopted on 28 June 1930, entry into force 1 May 1932.

<sup>35</sup> ILO, *Fundamental Rights at Work and International Labor Standards*, 2003, Geneva, pp. 36 - 38.

<sup>36</sup> See ILO, *Human Trafficking and Forced Labour Exploitation Guidance for Legislation and Law Enforcement International Labour Office*, 2005, at 21-23.

<sup>37</sup> Virginia Mantouvalou, “Servitude and Forced Labour in the 21st Century: The Human Rights of Domestic Workers,” *Industrial Law Journal*, Vol. 35, No. 4, December 2006, at 410, citing the *Cases of W, X, Y and Z v UK*, App. N. 3435–3438/67, Admissibility decision of 19 July 1968, and *Van der Mussele v. Belgium*, No. 8919/80, Judgment of 23 November 1983, Para. 34.

<sup>38</sup> *Id.*, at 411.

Again, the international community protects fundamentally the *personal freedom* of the worker. This approach is quite similar to the notion of abuse of a position of vulnerability mentioned *supra*. The analysis intends to underline that, for any planned intervention, a deep analysis of the conditions in a concrete country, region, society, is necessary as to appreciate whether clear choices do exist.

### **2.3. Trafficking and the discussion about consent**

The notion of consent is very important in every legal system. Under criminal law, the victim's consent may constitute an excuse, a defense, a reason for exculpation of conducts normally prohibited by the law.<sup>39</sup> This applies only to certain crimes, it constitutes actually an exception. The list of crimes that can be consented and consequently, can be excused, varies from country to country. Consent does not justify every criminal conduct, as the legal systems assume that some goods have to be protected even in the case that those affected have agreed to suffer some harm, as we could appreciate in the above mentioned instruments. This notion of consent is hinted in most treaties analyzed in this section, and represents a core source of dissent among States.

Trafficking has developed under treaty law as an international criminal law notion. The only exception is the COE Convention, *infra*, that addresses the problem from a human rights perspective.

States adopted in 1904 the "White Slave Traffic" Agreement,<sup>40</sup> treaty applicable to "*procuring* of women or girls for immoral purposes abroad" or "destined for an immoral life." It concerns women or girls who have consented to their trafficking. That is, the international community preferred to deal with trafficking first from a public morals perspective, penalizing even the case where the woman has agreed to perform sex work abroad. In 1910, a new agreement obliged State Parties to punish anyone who *recruits* a woman, *below the age of majority*, into prostitution, even with her consent.<sup>41</sup> In

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<sup>39</sup> See, for instance, Graham Hughes, "Morals and the Criminal Law," *The Yale Law Journal*, Vol. 71, No. 4, (Mar., 1962), pp. 662-683.

<sup>40</sup> *International Agreement for the Suppression of the "White Slave Traffic,"* 18 May 1904, *see supra* note 2.

<sup>41</sup> *International Convention for the Suppression of the "White Slave Traffic,"* 1910, *see supra* note 2.

1921, a new treaty extended the definition to *traffic in children of both sexes*.<sup>42</sup> In 1933, the adopted instrument obliged State parties to punish Whoever, in order to gratify the passions of another person, has procured, enticed or led away *even with her consent*, a woman or girl of full age for immoral purposes to be carried out *in another country ...*<sup>43</sup>

The 1949 Convention omitted the wording “in another country,” by criminalizing also domestic traffic.<sup>44</sup> The following notion was consequently included:

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

(1) Procures, entices or leads away, for purposes of prostitution, another person, *even with the consent of that person*;

(2) Exploits the prostitution of another person, *even with the consent of that person*.

The conception has been called abolitionist, as it reflects the wish to abolish prostitution or sex work.<sup>45</sup> A new Convention, concluded in 1950, consolidated the above-mentioned documents, following the 1949 definition.<sup>46</sup> That is, *for the State parties to this document, “consensual” trafficking for sex work is to be punished*. Please, compare, *infra*. The victim’s consent is irrelevant.

The debate between consensual and non-consensual sexual exploitation emerged again when debating new instruments on transnational organized crime in 2000. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime [hereinafter Palermo Trafficking Protocol] adopted a compromise solution by defining “trafficking in persons” as the recruitment, transportation, transfer,

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<sup>42</sup> 1921 *International Convention for the Suppression of the Traffic in Women*, reproduced in the AJIL, Vol. 18, No. 3, Supplement: Official Documents (Jul., 1924), pp. 130-137. [46 State parties] This instrument was modified by the *Protocol* signed at Lake Success, New York, on 12 November 1947, to amend the *Convention for the Suppression of the Traffic in Women and Children*, concluded at Geneva on 30 September 1921, and the *Convention for the Suppression of the Traffic in Women of Full Age*, concluded at Geneva on 11 October 1933, that counts with 42 States parties.

<sup>43</sup> *International Convention for the Suppression of the Traffic in Women of Full Age*, Oct. 11, 1933, 150 L.N.T.S., entered into force Aug. 24, 1934 [31 State Parties]

<sup>44</sup> *International Convention for the Suppression of the "White Slave Traffic,"* 1910, *see supra* note 2.

<sup>45</sup> 1950 *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 96 U.N.T.S. 271, entered into force July 25, 1951 [State Parties: 80]

<sup>46</sup> *Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others*, open for Signature at Lake Success, New York, on March 21, 1950 [State Parties: 75]

harboring or receipt of persons, *by means of* the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others *or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs*;<sup>47</sup> [Article 3 (a)]

This is the most widely accepted definition of trafficking today. Consent is irrelevant if any of the means enumerated has been employed against the victim. That is, the international community has agreed *on a third way*, not mentioning consent, and on criminalizing trafficking when means that could have impaired a valid expression of consent have been employed. The notion complements the previously adopted instruments, without replacing them, that is, for States also parties to the previously mentioned instruments trafficking may also be consensual and should be punished.<sup>48</sup> Moreover, the Protocol applies not only to exploitation for sexual purposes, but also to further serious instances of exploitation, particularly in the labor arena. An additional question is included: the removal of organs.

If the victim is a child, there is trafficking even if none of the means enumerated has been employed. Consequently, a child cannot give valid consent to trafficking.

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<sup>47</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001), entered into force Sept. 9, 2003. Signatories: 117, Parties: 123 [Last visited: 09/18/08] <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html>

<sup>48</sup> NGOs in countries of origin question the notion of “choice” of the “free” prostitution discourse, arguing that under high and increasing female unemployment, sex discrimination in the labor market, sexual harassment in paid employment, and economies affected by organized crime, the women options are minimal. See Liz Kelly, “The Wrong Debate: Reflections on Why Force Is Not the Key Issue with Respect to Trafficking in Women for Sexual Exploitation,” *Feminist Review*, No. 73, 2003, pp. 139-144, at 141.

The Palermo Trafficking Protocol definition counts with three basic elements:

Acts	Means	Purpose
<ul style="list-style-type: none"> <li>• Recruitment</li> <li>• Transportation</li> <li>• Transfer</li> <li>• Harboring or</li> <li>• Receipt of persons</li> </ul>	<ul style="list-style-type: none"> <li>• The threat or use of force</li> <li>• Other forms of coercion</li> <li>• Abduction</li> <li>• Fraud,</li> <li>• Deception,</li> <li>• Abuse of power</li> <li>• Abuse of a position of vulnerability</li> <li>• Giving/receiving payments or benefits to achieve the consent of a person having control over another person.</li> </ul>	<p>Exploitation, that includes as a minimum</p> <ul style="list-style-type: none"> <li>• Exploitation of the prostitution of others</li> <li>• Other forms of sexual exploitation</li> <li>• Forced labor or services</li> <li>• Slavery</li> <li>• Practices similar to slavery</li> <li>• Servitude</li> <li>• The removal of organs</li> </ul>

The Protocol refers to exploitation, a notion which is not defined, as we had already anticipated. It encompasses concepts not characterized by the treaty, but partially by existing international agreements, that we have analyzed in detail in other sections.<sup>49</sup> This gives origin to a clear overlap: in a given case, both treaties (the Palermo Trafficking Protocol and the treaty defining the notion) can be applied. As to give an example: the Convention against Slavery prohibits slavery and does not require the use of any of the mentioned means of the Palermo Trafficking Protocol as to qualify a situation as slavery. In case that one of the acts and means mentioned in the Trafficking Protocol has, as purpose, to subject a person to slavery, both treaties are applicable. The difference relies on the legal consequences, as each international instrument includes different obligations and consequences for States parties. The instruments complement and do not substitute each other.<sup>50</sup>

The *travaux préparatoires* of the Palermo Trafficking Protocol define the *abuse of a position of vulnerability* as any situation in which the person involved has *no real and*

<sup>49</sup> See *supra*.

<sup>50</sup> ILO, *Human Trafficking and Forced Labour Exploitation Guidance for Legislation and Law Enforcement* International Labour Office, 2005, at 1.

*acceptable alternative but to submit to the abuse involved.*<sup>51</sup> In such a case, the victim has no freedom to consent to his or her destiny. In the praxis, the notion will be defined under domestic law. If we would qualify the underlying values and policy, the older conventions have probably targeted the protection of public morals, while the Protocol has privileged the notion of personal freedom.

The terms “exploitation of the prostitution of others” or “other forms of sexual exploitation” are not defined. They depend, consequently, on domestic legislation. States are free to recognize sex work as labor and regulate it, or to prohibit it, in line with the old treaties.

Though many States follow the Palermo Trafficking Protocol definition, there are still conceptual discrepancies.<sup>52</sup> For example, some States have added some courses of conduct to the notion of trafficking when implementing their criminal legislation, such as forcing a person to commit an offence, the illegal use of tissue, bonded labor, forced marriage,<sup>53</sup> illegal adoption,<sup>54</sup> forced begging,<sup>55</sup> illegal use of persons in armed conflicts, forced fertilization, etc.<sup>56</sup>

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<sup>51</sup> *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions Addendum Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, U.N. GAOR, A/55/383/Add.1, 3 November 2000, p. 12

<sup>52</sup> *Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime Analytical report of the Secretariat*, CTOC/COP/2005/314, September 2005, Para. 29; *Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime: updated information based on additional responses received from States for the first reporting cycle - Analytical report of the Secretariat*, CTOC/COP/2005/3/Rev.1, 8 August 2006.

<sup>53</sup> See CTOC/COP/2005/3/Rev.1, *idem*, Para. 27.

<sup>54</sup> See *idem*.

<sup>55</sup> *Idem*.

<sup>56</sup> See *supra* note 52, CTOC/COP/2005/314, Para. 24.

Most international organizations use the notion of trafficking of the Palermo Trafficking Protocol as a working definition,<sup>57</sup> though they are not strictly or legally obliged to do that. This is the case of the World Bank. The reason is practical. As indicated before, the notion has already been accepted by many States, and the creation of new notions could lead to further discrepancy. The Palermo Trafficking Protocol notion is even referred to by organizations with standard-setting mandates, such as the OHCHR or the COE, that have drafted the OHCHR Principles and Guidelines in Trafficking,<sup>58</sup> and the COE Convention on Action against Trafficking.<sup>59</sup> However, the definition adopted by the European Union is slightly different.<sup>60</sup> The ADB employs a working definition that counts with some relevant differences: it omits any reference to exploitation, but to the effect of placing the person in a forced-labor or slavery-like situation, and it requires that the person is placed in a different community.<sup>61</sup> Moreover, the SAARC Convention on

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<sup>57</sup> See ILO Thesaurus “Trafficking in persons,” <http://www.ilo.org/public/libdoc/ILO-Thesaurus/english/tr1655.htm>, or ILO, *Mekong Sub-Regional Project to Combat Trafficking in Children and Women – Conceptual Framework Legislation*, <http://www.ilo.org/public/english/region/asro/bangkok/child/trafficking/projectoverview-conceptual.htm>; IOM, *Counter-trafficking*, <http://www.iom.int/jahia/Jahia/pid/748>; OSCE, MC(10).JOUR/2, *Declaration on Trafficking in Human Beings*, 7 December 2002; Interpol, *Trafficking in women*, <http://www.interpol.int/Public/THB/Women/Default.asp>. On the other hand, see: WHO, *World report on violence and health*, Geneva, 2002, p.150, defining trafficking as “the organized movement of people (usually women), between countries and even within countries for sex work. Such trafficking often includes coercing a migrant into a sexual act;”

<sup>58</sup> UN High Commissioner for Human Rights, *Principles and Guidelines on Human Rights and Trafficking*, E/2002/68/Add.1 (2002).

<sup>59</sup> Council of Europe, *Convention on Action against Trafficking in Human Beings* (2005) CETS No.: 197, Entry into force: February 1st, 2008.

<sup>60</sup> Council Directive 2004/81/EC of 29 April 2004 *on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities*, Official Journal L 261,06/08/2004, 19 – 23. This instrument is binding, and States should have implemented it by August 6, 2006. The differences are: The language “including exchange or transfer of control over that person” is used instead of transfer; the notion of abuse of authority or position of vulnerability (the person has no real and acceptable alternative but to submit to the abuse involved) is directly included in the definition of trafficking; exploitation of compulsory labor is added to the notion forced labor; sexual exploitation includes expressly pornography; There is no reference to exploitation for removal of organs.

<sup>61</sup> ADB, *Combating Trafficking of Women and Children in South Asia - Guide for Integrating Trafficking Concerns into ADB Operations*, April 2003, at 4: “Trafficking in persons means: 1.The recruitment, transportation, purchase, sale, transfer, harboring or receipt of persons by threat or use of violence, abduction, force, fraud, deception or coercion (including the abuse of authority), or debt bondage, for the purpose of: 2.Placing or holding such person(s), whether for pay or not, in forced labor or slavery-like practices, in a community other than the one in which such person lived at the time of the original act described in 1.”

Preventing and Combating Trafficking in Women and Children for Prostitution follows the old definitions: trafficking encompasses consensual sex work.<sup>62</sup>

#### **2.4. Child labor and the worst forms of child labor**

The Convention on the Rights of the Child (hereinafter, CRC) recognizes the right of every child to be protected from economic exploitation and from work likely to be hazardous, or to interfere with his or her education, or harmful to his or her health or physical, mental, spiritual, moral or social development.<sup>63</sup> As to fight these problems, the CRC considers that minimum ages for employment, appropriate regulation of the hours and conditions of employment, as well as appropriate sanctions to enforce the corresponding provisions, are necessary measures to adopt.<sup>64</sup>

Child labor is defined by the ILO as work depriving children of their childhood, their potential and their dignity, and harmful to physical and mental development.<sup>65</sup> This is a narrower concept than economically active children.

The ILO Minimum Age Convention, 1973 (No. 138)<sup>66</sup> represents the most comprehensive and authoritative international definition of minimum age for admission to employment or work, defined as economic activity. Child labor implies the following:

Ages 5-11: At least one hour of economic work or 28 hours of domestic work per week.

Ages 12-14: At least 14 hours of economic work or 28 hours of domestic work per week.

Ages 15-17: At least 43 hours of economic or domestic work per week.

Hazardous work by children is any activity or occupation that, by its nature or type, has or leads to adverse effects on the child's safety, health (physical or mental) and moral development. Hazards could also derive from excessive workload, physical conditions of work, and/or work intensity in terms of the duration or hours of work even where the activity or occupation is known to be non-hazardous or safe.

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<sup>62</sup> South Asian Association for Regional Cooperation, *Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*, 2002.

<sup>63</sup> Article 32.1 of the Convention on the Rights of the Child.

<sup>64</sup> Article 32.2 of the Convention on the Rights of the Child.

<sup>65</sup> <http://www.ilo.org/ipec/facts/lang--en/index.htm> [Last visited: 05/10/08]

<sup>66</sup> *Minimum Age Convention, 1973 (No. 138)* Adopted on 26 June 1973, Entry into force: 19 June 1976.



An additional instrument, the Convention on the Worst Forms of Child Labor Convention, 1999 (No. 182), forbids the following forms of child labor:

- (a) All forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labor, including forced or compulsory recruitment of children for use in armed conflict;
- (b) The use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) The use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;<sup>67</sup>
- (d) 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.

Taken together, Conventions Nos. 138 and 182 set the boundaries of the types of work that are unacceptable for children. Work falling within these legal limits and not interfering with children's health and development or prejudicing their schooling is considered work that can constitute a positive experience. Pursuant to that exposed above, child labor is proscribed under international law in the following cases:

- (a) The unconditional worst forms of child labor of Convention 182.
- (b) Labor performed by a child who is under the minimum age specified for that kind of work, according to national legislation.
- (c) Labor that jeopardizes the physical, mental or moral well-being of a child, either because of its nature or because of the conditions in which it is carried out, known as hazardous work.

Another relevant instrument is the Optional Protocol to the Convention on the Rights of the Child on *the sale of children, child prostitution and child pornography*.<sup>68</sup> This treaty defines and proscribes:

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<sup>67</sup> This problem had already been recognized by Article 33 of the CRC.

<sup>68</sup> *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 enters into force on 18 January 2002.

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

Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration<sup>69</sup>

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.<sup>70</sup>

Additionally, the CRC obliges States to adopt measures to prevent the *inducement* or coercion for a child to engage in any unlawful activity, the “the exploitative use” of children in prostitution or other unlawful sexual practices or pornographic performance and materials,<sup>71</sup> as well as the sale of children.<sup>72</sup> On sale of children, the Protocol obliges States to forbid the domestic or international offering, delivering or accepting, by whatever means, of a child for the purpose of sexual exploitation, transfer of organs for profit, and engagement in forced labor. There is clear overlap with the Supplementary Convention,<sup>73</sup> as well as with the Palermo Trafficking Protocol.

## **2.5. Further situations linked to contemporary forms of slavery**

Further situations have been linked to the notion of contemporary forms of slavery, in particular, by the UN Working Group on Contemporary Forms of Slavery (hereinafter WG), recently substituted by a Special Rapporteur.

*Domestic workers* are those who work in households of people other than their closest family doing domestic chores, caring for children, running errands and sometimes helping the employer run a small business from home. They include persons who are paid for their work, as well as those who are not paid or who receive in-kind benefits, such as

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<sup>69</sup> The Protocol forbids offering, obtaining, procuring or providing a child is for sale or prostitution.

<sup>70</sup> The Protocol forbids producing, distributing, disseminating, importing, exporting, offering, selling or possessing that representation.

<sup>71</sup> See Article 34 of the CRC.

<sup>72</sup> See Article 35 of the CRC.

<sup>73</sup> See *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 226 U.N.T.S. 3, entered into force April 30, 1957.

food and shelter.<sup>74</sup> They are particularly vulnerable to contemporary forms of slavery. The ILO has identified the following features: most of them are women, migrants, and they usually work in private households and have to live with their employer.<sup>75</sup> Another vulnerable group consists of migrant workers. *Migrant worker* is a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.<sup>76</sup> The WG has additionally identified (a) Illegal activities of certain religious and other sects, as, for instance, marrying girls to a deity;<sup>77</sup> (b) Incest and sexual abuse of children; (c) Traffic in human organs and tissues; (d) Pedophilia; (e) Early marriages; (f) Slavery during wartime; (g) Sex tourism; (h) Child soldiers.

### III. THE HUMAN RIGHTS PREVENTIVE FRAMEWORK

Most of the rules mentioned until now are international criminal law rules: States are obliged fundamentally to define them under domestic legislation. Human rights rules have a different structure. Normally rights are enumerated in international instruments, and States are obliged to respect them and to adopt measures as to implement them domestically. The human rights system, if adequately implemented, operates as a preventive framework against contemporary forms of slavery, among them, human trafficking. Human rights rules are, at the same time, goals and means for policy design, and they permit to develop standards, indicators and programs based on them.

In addition to the recognition of the right to liberty and security of the person, to physical and psychical integrity, to the right of access to a remedy, notions that are essential to the crimes enumerated in the previous sections, social rights play a protective role particularly in the labor arena.

Conventions ratified by ILO Members are binding for States parties to them. The ILO also prepares recommendations, which are non-binding guidelines. In addition, the Decent Work Agenda is a tool for development and social inclusion. The Agenda

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<sup>74</sup> <http://www.un.org/womenwatch/daw/egm/elim-disc-viol-girlchild/ExpertPapers/EP.10%20%20Flores%20Oebanda.pdf>

<sup>75</sup> See Virginia Mantouvalou, "Servitude and Forced Labour in the 21st Century: The Human Rights of Domestic Workers," *Industrial Law Journal*, Vol. 35, No. 4, December 2006, at 397.

<sup>76</sup> See *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, Adopted by General Assembly resolution 45/158 of 18 December 1990, in force since 1 July 2003.

<sup>77</sup> Anti-Slavery International, *Women in Ritual Slavery* by Maggie Black, 2007.

considers that productive employment is the main route out of poverty. Decent work means “opportunities for women and men to obtain decent and productive work in conditions of freedom, equity, security and human dignity.”<sup>78</sup>

Among the main instruments developed within the ILO system, we can underline the binding instruments on forced or compulsory labor,<sup>79</sup> freedom of association and the right to organize,<sup>80</sup> on the protection of wages,<sup>81</sup> migration for employment,<sup>82</sup> rights to organize and collective bargaining,<sup>83</sup> equal remuneration,<sup>84</sup> abolition of forced labor,<sup>85</sup> plantations,<sup>86</sup> discrimination (employment and occupation),<sup>87</sup> social policy,<sup>88</sup> minimum age,<sup>89</sup> rural workers’ organizations,<sup>90</sup> migrant workers,<sup>91</sup> labor relations (public service),<sup>92</sup> collective bargaining,<sup>93</sup> workers with family responsibilities,<sup>94</sup> working

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<sup>78</sup> ILO, *Decent Work: Report of the Director General*, International Labour Conference, 87th Session.

<sup>79</sup> See *Forced Labour Convention, Convention (No. 29)*, Adopted on 28 June 1930, entry into force 1 May 1932. 173 ratifications [Last visited: 03/31/2009]; *Abolition of Forced Labour Convention (ILO No. 105)*, 320 U.N.T.S. 291, entered into force Jan. 17, 1959 169 ratifications [Last visited: 03/31/2009]

<sup>80</sup> C87, *Convention No. 87 – Freedom of Association and Protection of the Right to Organise Convention*, 1948 149 Ratifications [Last visited: 03/31/2009]

<sup>81</sup> *Convention 95 concerning the Protection of Wages*, entry into force 09/24/52, revised by C173, adopted on 07/01/49. 95 ratifications [Last visited: 03/31/2009]

<sup>82</sup> *C97 Migration for Employment Convention (Revised)*, 1949, entry into force: 01/22/1952. 48 ratifications [Last visited: 03/31/2009]

<sup>83</sup> *Right to Organize and Collective Bargaining Convention, Convention (No. 98)* adopted on 07/01/49, entry into force on 07/18/51. 159 ratifications [Last visited: 03/31/2009]

<sup>84</sup> *Worst Forms of Child Labour Convention, 1999 (No. 182)*, Adopted on 17 June 1999, entry into force: 19 November 2000. 169 ratifications [Last visited: 03/31/2009]

<sup>85</sup> *Abolition of Forced Labour Convention, Convention (No. 105)*, Adopted on 25 June 1957, entry into force, 17 January 1959. 169 ratifications [Last visited: 03/31/2009]

<sup>86</sup> *C110 Plantations Convention, 1958*, entry into force: 01/22/1960, adopted on 06/24/58. 10 ratifications [Last visited: 03/31/2009]

<sup>87</sup> *C111 Convention concerning Discrimination in Respect of Employment and Occupation*, entry into force 06/15/60, adopted on 06/25/58. 168 ratifications [Last visited: 03/31/2009]

<sup>88</sup> *Social Policy (Basic Aims and Standards) Convention, 1962 (No. 117)*, date of entry into force: 04/23/1964. 32 ratifications [Last visited: 03/31/2009]

<sup>89</sup> *Minimum Age Convention, 1973 (No. 138)*, adopted on 26 June 1973, entry into force: 19 June 1976. 151 ratifications [Last visited: 03/31/2009]

<sup>90</sup> *C141 Rural Workers' Organizations Convention, 1975*, entry into force: 11/24/77, adopted on 06/23/75. 40 ratifications [Last visited: 03/31/2009]

<sup>91</sup> *C143 Migrant Workers (Supplementary Provisions) Convention, 1975*, entry into force 12/09/1978, adopted on 06/24/75. 23 ratifications [Last visited: 03/31/2009]

<sup>92</sup> *C151 Labour Relations (Public Service) Convention, 1978*, entry into force: 02/25/81, adopted on 06/27/78. 44 ratifications [Last visited: 03/31/2009]

<sup>93</sup> *ILO Convention No. 154 – Collective Bargaining Convention, 1981* 38 ratifications [Last visited: 03/31/2009]

<sup>94</sup> *C156 Workers with Family Responsibilities Convention, 1981*, entry into force: 08/11/83, adopted on 06/23/81. 40 ratifications [Last visited: 03/31/2009]

conditions,<sup>95</sup> private employment agencies,<sup>96</sup> and worst forms of child labor.<sup>97</sup> The Declaration of Fundamental Principles and Rights at Work of 1998 is a framework of minimum social standards that all States are obliged to promote and protect.<sup>98</sup> It covers four areas, underpinned in the eight core ILO Conventions, as identified by the ILO Conference: freedom of association and the right to collective bargaining, the elimination of forced labor and trafficking, the abolition of child labor; and non-discrimination in employment and occupation.<sup>99</sup> They constitute the core labor standards.

The ILO system also includes relevant Recommendations, such as those on conditions of employment of domestic workers,<sup>100</sup> on migration for employment,<sup>101</sup> on equal remuneration,<sup>102</sup> discrimination (employment and occupation),<sup>103</sup> worker housing,<sup>104</sup> minimum age,<sup>105</sup> migrant workers,<sup>106</sup> workers with family responsibilities,<sup>107</sup> private employment agencies,<sup>108</sup> and worst forms of child labor.<sup>109</sup>

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<sup>95</sup> *C172 Working Conditions (Hotels and Restaurants) Convention*, 1991, entry into force: 07/07/1994, adopted on 05.25/1991 15 ratifications [Last visited: 03/31/2009]

<sup>96</sup> *C156 Workers with Family Responsibilities Convention*, 1981, entry into force 08/11/83; adopted on 06/23/81. 40 ratifications [Last updated: 03/31/2009]

<sup>97</sup> *Worst Forms of Child Labour Convention, 1999 (No. 182)*, Adopted on 17 June 1999, entry into force: 19 November 2000. 169 ratifications [Last visited: 03/31/2009]

<sup>98</sup> Colin Fenwick & Thomas Kring, *Rights at Work: an Assessment of the Declaration's Technical Cooperation in Select Countries*, August 2007. The Declaration (adopted by the IL Conference) includes the following phrase, from which its compulsory character for ILO Member States derives: "Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation."

<sup>99</sup> The Core Conventions are C87, C98, C29, C105, C100, C111, C138, and C182.

<sup>100</sup> International Labour Conference, *ILO: Record of Proceedings*, ILC, 301st Session, 1948, Appendix XVIII: Resolutions adopted by the Conference, pp. 545–546

<sup>101</sup> *Recommendation No. 86 Migration for Employment* (Revised 1949), 07/01/49.

<sup>102</sup> *Recommendation No. 90 Equal Remuneration Recommendation*, 1951, 06/20/1951.

<sup>103</sup> *Recommendation No. 111 Discrimination (Employment and Occupation) 1958*, adopted on 06/25/1958.

<sup>104</sup> *Recommendation No. 115 Workers' Housing Recommendation*, 1961, adopted on 06/28/1961.

<sup>105</sup> *Recommendation No. 146 Minimum Age Recommendation*, 1973, adopted on 06/26/73.

<sup>106</sup> *Recommendation No. 151 Migrant Workers Recommendation*, 1975, adopted on 06/24/75

<sup>107</sup> *Recommendation No. 165 Workers with Family Responsibilities Recommendation*, 1981, adopted on 06/23/81

<sup>108</sup> *Recommendation No.188, Private Employment Agencies Recommendation*, 1997, adopted on 06/19/97.

<sup>109</sup> *Recommendation No. 190 Worst Forms of Child Labour Recommendation*, 1999, adopted on 06/17/99.

In addition to the ILO legal framework, universal human rights treaties contain relevant provisions. They include the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>110</sup> on Civil and Political Rights,<sup>111</sup> on Economic, Social and Cultural Rights,<sup>112</sup> on the Elimination of All Forms of Discrimination against Women,<sup>113</sup> on the Rights of the Child,<sup>114</sup> on Migrant Workers,<sup>115</sup> and on the Rights of Persons with Disabilities.<sup>116</sup> We must further mention some soft law instruments, that is, instruments not strictly binding, but revealing agreement of the international community on some topics, such as the Universal Declaration of Human Rights,<sup>117</sup> the United Nations High Commissioner for Human Rights Principles and Guidelines on Human

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<sup>110</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, GA Res 2106 (XX) of 12/21/65, entry into force 01/04/69. 169 ratifications [Last visited: 03/31/2009]

<sup>111</sup> *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), of 12/16/66, entry into force: 03/23/76. 152 ratifications [Last visited: 03/31/2009]

<sup>112</sup> *International Covenant on Economic, Social and Cultural Rights*, GA Res 2200A (XXI), of 12/16/66, entry into force: 01/03/76. 149 ratifications [Last visited: 03/31/2009]

<sup>113</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981. Article 6 asserts that State parties “shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.” 177 ratifications [Last visited: 03/31/2009]

<sup>114</sup> *Convention on the Rights of the Child*, GA Res. 44/25 of 11/20/89, entry into force: 09/02/90. 192 ratifications [Last visited: 03/31/2009] The obligations include the adoption of all appropriate measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse (Article 19). It recognizes the right to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or harmful to the health or physical, mental, spiritual, moral or social development. Measures to adopt include a minimum age for admission to employment, appropriate regulation of the hours and conditions of employment and definition of penalties or other sanctions (Article 32); prevention of exploitation through the illicit use of narcotic drugs and psychotropic substances, and the use of children in the illicit production and trafficking of such substances (Article 33), protection from sexual exploitation and sexual abuse, including measures as to prevent the inducement or coercion of a child to engage in any unlawful sexual activity; the exploitative use of children in prostitution or other unlawful sexual practices, and in pornographic performances and materials (Article 34); national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children (Article 35); and protection against all “other forms of exploitation prejudicial to any aspects of the child's welfare” (Article 36).

<sup>115</sup> *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, GA Res 45/158, 12/18/1990; entry into force: 07/01/03. Several provisions prevent exploitation: the right to be free to leave any State (Article 8); the prohibition to confiscate, destroy or attempt to destroy identity, visa or residence papers (Article 21); the right to have recourse and assistance to the consular or diplomatic authorities (Article 23); non-discrimination towards nationals on conditions of work; private contracts cannot derogate from the principle of equal treatment and the irregularity in the stay or employment does not relieve from any of these obligations (Article 25); the right to be informed about the rights arising from the present Convention; conditions of admission, rights and obligations under the law and practice of the State concerned (Article 33). 41 ratifications [Last visited: 03/31/2009]

<sup>116</sup> *Convention on the Rights of Persons with Disabilities*, adopted on 12/13/06, GA Res. A/RES/61/106. Article 16 recognizes the right to freedom from exploitation, violence and abuse and the duty of protection and prevention. 50 ratifications [Last visited: 03/31/2009]

<sup>117</sup> General Assembly resolution 217 A (III) of 10 December 1948.

Rights and Trafficking,<sup>118</sup> the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they live,<sup>119</sup> the Vienna Declaration and Programme of Action,<sup>120</sup> the United Nations Declaration on the Elimination of Violence against Women,<sup>121</sup> the Beijing Declaration and Platform for Action,<sup>122</sup> the United

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<sup>118</sup> UN High Commissioner for Human Rights, *Principles and Guidelines on Human Rights and Trafficking*, E/2002/68/Add.1 (2002).

<sup>119</sup> *Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they live*, GA Res 40/144, 12/13/85.

<sup>120</sup> *Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights* in Vienna on 25 June 1993: “[g]ender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated. This can be achieved by legal measures and through national action and international cooperation in such fields as economic and social development, education, safe maternity and health care, and social support ... National and international mechanisms and programmes should be strengthened for the defense and protection of children, in particular, the girl-child, abandoned children, street children, economically and sexually exploited children, including through child pornography, child prostitution or sale of organs... Great importance must be given to the promotion and protection of the human rights of persons belonging to groups which have been rendered vulnerable, including migrant workers, the elimination of all forms of discrimination against them, and the strengthening and more effective implementation of existing human rights instruments. States have an obligation to create and maintain adequate measures at the national level, in particular in the fields of education, health and social support, for the promotion and protection of the rights of persons in vulnerable sectors of their populations and to ensure the participation of those among them who are interested in finding a solution to their own problems. ... The World Conference on Human Rights affirms that extreme poverty and social exclusion constitute a violation of human dignity and that urgent steps are necessary to achieve better knowledge of extreme poverty and its causes, including those related to the problem of development, in order to promote the human rights of the poorest, and to put an end to extreme poverty and social exclusion and to promote the enjoyment of the fruits of social progress. It is essential for States to foster participation by the poorest people in the decision-making process by the community in which they live, the promotion of human rights and efforts to combat extreme poverty.”

<sup>121</sup> A/RES/48/104, *Declaration on the Elimination of Violence against Women*, GA Res 48/104 of 12/20/93, 02/23/94. Violence against women is defined as any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life. The examples include trafficking in women and forced prostitution. Measures to adopt include the promotion of research, data collection, compilation of statistics, and research on the causes, nature, seriousness and consequences of violence against women, and on the effectiveness of measures implemented; adoption of measures directed towards the elimination of violence against women who are especially vulnerable to violence. Moreover, the organs and specialized agencies of the United Nations system should, within their respective fields of competence: (a) Foster international and regional cooperation as to define regional strategies; (b) Promote meetings and seminars with the aim of creating and raising awareness on elimination of violence against women; (c) Foster coordination and exchange within the United Nations system between human rights treaty bodies to address violence against women effectively; (d) Include in analyses prepared by organizations and bodies of the United Nations system of social trends and problems, such as the periodic reports on the world social situation, examination of trends in violence against women; (e) Encourage coordination between organizations and bodies of the United Nations system to incorporate the issue of violence against women into ongoing programs, especially with reference to groups of women particularly vulnerable to violence; (f) Promote the formulation of guidelines or manuals; (g) Consider the issue of the elimination of violence against women, as appropriate, in fulfilling their mandates with respect to the implementation of human rights instruments; (h) Cooperate with non-governmental organizations.

Nations Millennium Declaration,<sup>123</sup> and the Stockholm Agenda for Action.<sup>124</sup> These instruments provide useful standards for any activity or project design. We must underline that some of these instruments actually contain provisions that today are considered customary international law, that is, some of their provisions are actually binding, for instance, the prohibition of slavery.

In the regional systems, there are further relevant treaties. The most important ones are the European Convention on Human Rights,<sup>125</sup> the European Social Charter,<sup>126</sup> the COE Convention on Action against Trafficking in Human Beings,<sup>127</sup> the African

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<sup>122</sup> *Beijing Declaration and Platform for Action, Fourth World Conference on Women*, 09/15/95, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995). The Beijing Declaration includes a commitment to prevent and eliminate all forms of violence against women and girls, and the recognition that poverty can force women into situations in which they are vulnerable to sexual exploitation. Sexual and gender-based violence, including physical and psychological abuse, trafficking in women and girls, and other forms of abuse and sexual exploitation place girls and women at high risk of physical and mental trauma, disease and unwanted pregnancy. States should adopt specific preventive measures to protect women, youth and children from any abuse - sexual abuse, exploitation, trafficking and violence, for example - including the formulation and enforcement of laws, and provide legal protection and medical and other assistance. It recognizes that the effective suppression of trafficking in women and girls for the sex trade is a matter of pressing international concern.

<sup>123</sup> *United Nations Millennium Declaration* General Assembly resolution 55/2 of 8 September 2000. The Millennium Declaration asserts that States “will spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty... “ Apart from the MDGs, the States have resolved to promote gender equality and the empowerment of women as effective ways to combat poverty, hunger and disease and to stimulate development that is truly sustainable; to develop and implement strategies that give young people everywhere a real chance to find decent and productive work; to develop strong partnerships with the private sector and with civil society organizations in pursuit of development and poverty eradication; to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development; to strive for the full protection and promotion in all our countries of civil, political, economic, social and cultural rights for all; to combat all forms of violence against women and to implement the CEDAW; to take measures to ensure respect for and protection of the human rights of migrants, migrant workers and their families, to eliminate the increasing acts of racism and xenophobia in many societies and to promote greater harmony and tolerance in all societies; To encourage the ratification and full implementation of the CRC and its optional protocols.

<sup>124</sup> The *Stockholm Declaration and Agenda for Action*, adopted at the First World Congress against Commercial Sexual Exploitation of Children, Stockholm, Sweden, 27-31 August 1996. The Agenda indicates that “[e]very child is entitled to full protection from all forms of sexual exploitation and sexual abuse... States are required to protect the child from sexual exploitation and sexual abuse and promote physical and psychological recovery and social integration of the child victim.” The Agenda for Action is a global framework for combating sexual exploitation of children, which requires governments, international agencies, non-governmental organizations (NGOs), and other concerned organizations and individuals to direct technical and material resources towards the protection of children.

<sup>125</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocol No. 11 Rome, 4.XI.1950, (ETS No. 155), entry into force on 1 November 1998.

<sup>126</sup> *European Social Charter*, CETS No.: 035, adopted on 10/18/61, entry into force: 02/26/1965

<sup>127</sup> Council of Europe, *Convention on Action against Trafficking in Human Beings (2005)* CETS No.: 197, Entry into force: February 1st, 2008.



Charter on Human and Peoples' Rights,<sup>128</sup> the American Convention on Human Rights,<sup>129</sup> the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights or Protocol of San Salvador,<sup>130</sup> the Inter-American Convention on International Traffic in Minors,<sup>131</sup> and the SAARC Convention on Preventing And Combating Trafficking In Women And Children For Prostitution.<sup>132</sup> Regional soft-law instruments include the OECD Guidelines for Multinational Enterprises,<sup>133</sup> the Charter of Fundamental Rights of the European Union,<sup>134</sup> the OSCE Anti-Trafficking Guidelines,<sup>135</sup> and the ECOWAS Declaration on the Fight against Trafficking in Persons and a Plan of Action.<sup>136</sup>

Some of the most fundamental substantive rules tending to prevent abuses in the labor arena are listed below. We follow the logic of the UN Convention on Economic, Social and Cultural rights, a treaty widely ratified:<sup>137</sup>

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<sup>128</sup> *African Charter on Human and Peoples' Rights*, adopted 06/27/81, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), in force 10/21/86.

<sup>129</sup> *American Convention on Human Rights*, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, in force 07/18/78.

<sup>130</sup> *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador,"* O.A.S. Treaty Series No. 69 (1988), in force 11/16/99.

<sup>131</sup> *Inter-American Convention on International Traffic in Minors*, 03/18/94. OAS, Treaty Series, No. 79, Entry into force: 08/15/87

<sup>132</sup> South Asian Association for Regional Cooperation, *Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*, 2002.

<sup>133</sup> *OECD Declaration on International Investment and Multinational Enterprises*, adopted on 06/21/76, reviewed in 1979, 1984, 1991 and 2000. They cover a wide range of issues including human rights and labor relations. On labor issues, ILO standards underpin the Guidelines including respect for the right to organize and bargain collectively.

<sup>134</sup> Official Journal of the European Communities C 364/1, 18.12.2000 The Charter recognizes the right to respect an individual's physical and mental integrity (Article 3). Article 5 prohibits slavery, servitude, forced or compulsory labor, as well as trafficking in human beings. The right of association is also recognized, as including the right to form and join trade unions (Article 12). The following standards are also included: freedom to choose an occupation and right to engage in work (Article 15), workers' right to information and consultation within the undertaking (Article 27), right of collective bargaining and action (Article 28), right of access to placement services (Article 29), protection in the event of unjustified dismissal (Article 30), fair and just working conditions which respect his or her health, safety and dignity, limitation of maximum working hours, daily and weekly rest periods and to an annual period of paid leave (Article 31), prohibition of child labor and protection of young people at work; protection of children against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education (Article 32), protection of the family and professional life (Article 33), right to social security and social assistance (Article 34).

<sup>135</sup> *OSCE Anti-Trafficking Guidelines*, 2001

<sup>136</sup> *ECOWAS Declaration on Trafficking in Human Beings*,  
[http://www.unodc.org/pdf/crime/trafficking/Declarationr\\_CEDEAO.pdf](http://www.unodc.org/pdf/crime/trafficking/Declarationr_CEDEAO.pdf)

<sup>137</sup> See footnote 112.

- 1) ***Prohibition of discrimination*** on grounds such as race, ethnic origin, gender, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>138</sup>
- 2) ***The right to work***, which includes the right to the opportunity to gain a living by work which he/she freely chooses or accepts (that is, the opposite notion to forced labor),<sup>139</sup> and safeguards to this right through protection against unemployment<sup>140</sup>
- 3) **The right to just and favorable conditions of work** including<sup>141</sup>
  - (a) ***Remuneration*** which provides all workers, as a minimum, with:
    - (i) Fair wages and equal remuneration for work of equal value without discrimination, in particular concerning women;
    - (ii) A decent living for themselves and their families, what includes adequate food, clothing and housing, and to the continuous improvement of living conditions.

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<sup>138</sup> Article 1 and 2 of the UDHR; Article 2.2 of the International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR); Article 2.1 of the ICCPR; Article 1.1 and Article 2.1 of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter ICERD); Article 1 and 2 of the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter CEDAW); Article 2 of the CRC; Article 1 and 14 of the ECHR; Article 1 of the Additional Protocol to the European Social Charter of 1988 (hereinafter APESC); Article 2, American Declaration on the Rights and Duties of Man (hereinafter AD); Articles 1.1 and 24 of the ACHR; Article 3, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (hereinafter APACHR); Article 2, ACHRPR; C111 Convention concerning Discrimination in Respect of Employment and Occupation, entry into force 06/15/60, adopted on 06/25/58; ILO Convention No. 118 – Equality of Treatment (Social Security) Convention, 1962; ILO Convention No. 19 – Equality of Treatment (Accident Compensation) Convention, 1925; ILO Convention No. 100 – Equal Remuneration Convention, 1951; ILO Convention No. 111 – Discrimination (Employment and Occupation) Convention, 1958.

<sup>139</sup> Forced Labour Convention, Convention (No. 29), Adopted on 28 June 1930, entry into force 1 May 1932; Abolition of Forced Labour Convention, Convention (No. 105), Adopted on 25 June 1957, entry into force, 17 January 1959.

<sup>140</sup> Article 23, UDHR; Article 6, ICESCR; Article 5.e.i of the ICERD; Article 11 of the CEDAW; Article 1 of the European Social Charter (hereinafter ESC); Article 14, AD; Article 6, APACHR; Article 15, ACHRPR; ILO Convention No. 2 – Unemployment Convention, 1919; ILO Convention No. 8 – Unemployment Indemnity (Shipwreck) Convention, 1920; ILO Convention No. 158 – Termination of Employment Convention, 1982; ILO Convention No. 168 – Employment Promotion and Protection against Unemployment Convention, 1988.

<sup>141</sup> Articles 23 and 24, UDHR; Article 7, ICESCR; Article 5.e.i of the ICERD; Article 11 of the CEDAW; Articles 2, 3 and 4 of the ESC; Article 15, AD; Article 7, APACHR; Article 15, ACHRPR; ILO Convention No. 12 – Workmen’s Compensation (Agriculture) Convention, 1921; ILO Convention No. 17 – Workmen’s Compensation (Accidents) Convention, 1925; ILO Convention No. 18 – Workmen’s Compensation (Occupational Diseases) Convention, 1925; ILO Convention No. 95 – Protection of Wages Convention, 1949; ILO Convention No. 172 – Working Conditions (Hotels and Restaurants) Convention, 1991.

- (b) *Safe and healthy working conditions*;<sup>142</sup>
  - (c) *Equal opportunity to be promoted subject to no considerations other than seniority and competence*;
  - (d) *Rest, leisure and reasonable limitation of working hours*;<sup>143</sup> *periodic holidays with pay*,<sup>144</sup> *and remuneration for public holidays*
- 4) **The right to form and join trade unions**<sup>145</sup>
- (a) The right of everyone to form trade unions and join the trade union of his choice for the promotion and protection of his economic and social interests.

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<sup>142</sup> ILO, Convention No. 5 – Minimum Age (Industry) Convention, 1919; ILO, Convention No. 6 – Night Work of Young Persons (Industry) Convention, 1919; ILO Convention No. 7 – Minimum Age (Sea) Convention, 1920; ILO Convention No. 10 – Minimum Age (Agriculture) Convention, 1921; ILO Convention No. 33 – Minimum Age (Non-Industrial Employment) Convention, 1932; ILO Convention No. 45 – Underground Work (Women) Convention, 1935; ILO Convention No. 58 – Minimum Age (Sea) Convention (Revised), 1936; ILO Convention No. 59 – Minimum Age (Industry) Convention (Revised), 1937; ILO Convention No. 62 – Safety Provisions (Building) Convention, 1937; ILO Convention No. 112 – Minimum Age (Fishermen) Convention, 1959; ILO Convention NO. 123 – Minimum Age (Underground Work) Convention, 1965; C138, supra note 65; ILO Convention No. 152 – Occupational Safety and Health (Dock Work) Convention, 1979; 155 – Occupational Safety and Health Convention, 1981 Protocol of 2002 to the Occupational Safety and Health Convention, 1981; ILO Convention No. 161 – Occupational Health Services Convention, 1985; ILO Convention No. 162 – Asbestos Convention, 1986; ILO Convention No. 163 – Seafarers’ Welfare Convention, 1987; ILO Convention No. 164 – Health Protection and Medical Care (Seafarers) Convention, 1987; ILO Convention No. 167 – Safety and Health in Construction Convention, 1988; ILO Convention No. 176 – Safety and Health in Mines Convention, 1995; ILO Convention No. 184 – Safety and Health in Agriculture Convention, 2001; ILO Convention No. 187 – Promotional Framework for Occupational Safety and Health Convention, 2006.

<sup>143</sup> See ILO Convention 1 – Hours of Work (Industry) Convention, 1919; ILO Convention No. 14 – Weekly Rest (Industry) Convention, 1921; ILO Convention No. 30 – Hours of Work (Commerce and Offices) Convention, 1930; ILO Convention No. 47 – Forty-Hour Week Convention, 1935; ILO Convention No. 57 – Hours of Work and Manning (Sea) Convention, 1936; ILO Convention No. 79 – Night Work of Young Persons (Non-Industrial Occupations) Convention, 1946; ILO Convention No. 89 – Night Work (Women) Convention (Revised), 1948 -Protocol of 1990 to the Night Work (Women) Convention (Revised), 1948; ILO Convention No. 90 – Night Work of Young Persons (Industry) Convention (Revised), 1948; ILO Convention No. 106 – Weekly Rest (Commerce and Offices) Convention, 1957; ILO Convention No. 153 – Hours of Work and Rest Periods (Road Transport) Convention, 1979; ILO Convention No. 171 – Night Work Convention, 1990.

<sup>144</sup> ILO Convention No. 52 – Holidays with Pay Convention, 1936; ILO Convention No. 54 – Holidays with Pay (Sea) Convention, 1936; ILO Convention No. 72 – Paid Vacations (Seafarers) Convention, 1946; ILO Convention No. 101 – Holidays with Pay (Agriculture) Convention, 1952.

<sup>145</sup> Article 23, UDHR; Article 8, ICESCR; Article 22, ICCPR; Article 5.e.ii of the ICERD; Article 11 of the ECHR; Article 5 and 6 of the ESC; Article 22 of the AD; Article 16 of the ACHR; Article 8, APACHR; Article 26 and 40 of the ICMW; ILO Convention No. 11 – Right of Association (Agriculture) Convention, 1921; ILO Convention No. 87 – Freedom of Association and Protection of the Right to Organise Convention, 1948; 98 – Right to Organise and Collective Bargaining Convention, 1949; ILO Convention No. 154 – Collective Bargaining Convention, 1981.

- (b) The right of trade unions to establish or join national federations, confederations and international trade-union organizations;
  - (c) The right of trade unions to function freely;
  - (d) The right to strike.
- 5) **The right of everyone to social security, including social insurance**<sup>146</sup>

All these standards constitute a minimum, and State parties to the respective instruments are free to recognize more rights than those explicitly recognized.

#### **IV. THE WORLD BANK'S MANDATE AND CONTEMPORARY FORMS OF SLAVERY, INCLUDING TRAFFICKING**

##### **4.1. Introduction**

The question here is whether the Bank's mandate permits the engagement in issues related to contemporary forms of slavery, in particular, human trafficking. Seyersted has asserted that the constitutional limitations of the purposes of an international organization are normally not relevant concerning the question of the competence of the organization to perform any specific type of international acts, but concerning only the question of for what purposes or pursuant to what internal procedures it may perform such acts.<sup>147</sup> According to this perspective, it is necessary to verify whether the performance of the act concerned is precluded and, from an internal perspective, to analyze whether the act is designed to promote an authorized purpose of the organization. No new obligation for Member States should emerge from interpretative work.<sup>148</sup>

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<sup>146</sup> Article 22 of the UDHR; Article 9 of the ICESCR; Article 5.e.iv of the ICERD; Article 11 on the CEDAW; Article 26 of the CRC; Articles 12, 13 and 14 of the ESC; Article 16, AD; Article 9, APACHR; Article 27, ICMW; ILO Convention No. 3 – Maternity Protection Convention, 1919; ILO Convention No. 70 – Social Security (Seafarers) Convention, 1946; ILO Convention No. 71 – Seafarers' Pensions Convention, 1946; ILO Convention No. 102 – Social Security (Minimum Standards) Convention, 1952; ILO Convention No. 103 – Maternity Protection Convention (Revised), 1952; ILO Convention No. 157 – Maintenance of Social Security Rights Convention, 1982; ILO Convention No. 165 – Social Security (Seafarers) Convention (Revised), 1987.

<sup>147</sup> Seyersted, Finn, *Common Law of International Organizations*, Nijhoff, Leiden, 2008. at 385.

<sup>148</sup> Seyersted, Finn, *Common Law of International Organizations*, Nijhoff, Leiden, 2008. at 396-397.

Three reasons have been mentioned as the Bank not to work in the human rights field: 1) political stances of some member States, that do not want that the Bank works in the field of human rights, even though these States are obliged to respect and promote these rights; 2) educational bias of staff, predominantly composed of economists (the problem here is not to admit the ethical component of human rights in the Bank's work; however, it appears that human rights as instruments –not as per se values, are acceptable: if a human rights policy is economically efficient, it could be implemented, but not accepted only because it contributes to the realization of human dignity) 3) doubts about the “right” interpretation of the Bank's mandate.<sup>149</sup> As the first argument is mainly political, and related to the reluctance of some States to avoid the recognition of basic international obligations and the respective rights to their citizens,<sup>150</sup> and the second argument reveals some kind of professional prejudice, requiring perhaps awareness raising and sensibility that is beyond the scope of this paper, we shall particularly address the third problem here. Moreover, the two first problems contradict the basic notion of treaty interpretation: treaties are not interpreted according to political or economic paradigms, but according to juridical rules.<sup>151</sup> This does not mean denying the need of interdisciplinarity which is encouraged.

We shall advance a positive answer to the work of the Bank in these fields, explaining the main constraints which are mostly related to the three problems mentioned above.

The next question is whether the Bank counts with comparative advantage as to deal more adequately with these issues. We shall advance that the Bank's comparative advantage appears to reside in the prevention arena, particularly, as regards the economic causes of these phenomena. Moreover, the Bank is a leading organization in the fight against poverty, and contemporary forms of slavery have clearly an impact on causing poverty.

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<sup>149</sup> Desmond McNeill, Asunción Lera StClair, *Global Poverty, Ethics and Human Rights*, 2009, p. 106.

<sup>150</sup> The paradox here is that Member States interpret the Articles strictly, as to try to impede the Bank to work in this field, by arguing that human rights are “political considerations.” The question is whether Member States are actually acting on political considerations as to argue against the Bank's work in this field.

<sup>151</sup> Reuter, Paul, *Introducción al Derecho de los Tratados*, Fondo de Cultura Económica, 1999, p. 117

The World Bank, as an international organization, is bound by the treaties creating it, i.e. the IBRD and the IDA Articles of Agreement.<sup>152</sup> International organizations can, in principle, only do what the constitutional agreement and other treaties celebrated by the Member States authorize.<sup>153</sup> Acts beyond its mandate may be considered *ultra vires*, and consequently, void. The purposes of the Bank include express provisions of interest: assistance in reconstruction and development through capital investment for productive purposes, promotion of balanced growth in trade and equilibrium in balances of payment by encouraging investment for development of productive resources, thereby raising productivity, *the standard of living and conditions of labor* [emphasis added]. A former Senior Vice-President and General Counsel has underlined that “as the challenges of development have changed the Bank’s mission has also evolved to serve a broader concept of development. The Bank’s mission as currently defined consists of the alleviation of poverty (WDR 2000/2001) through economic growth and social equity (WDR 2006)—*this conception of the alleviation of poverty has an especially strong human rights dimension.*”[Emphasis added]<sup>154</sup> However, though human rights have been mainstreamed in the work of organizations such as the UN, this is not the case of the Bank at the moment of writing these lines.

An important constraint to Bank operations is that they must pay due regard to the effect of investment in business conditions. Article III Section 4(vii) IBRD and Article V Section I (b) of the IDA Articles of Agreement indicate that loans made or guaranteed by the Bank, shall, except in special circumstances, be for the purpose of specific projects of reconstruction or development. Proceeds of loans must be used only for the purpose for which the loan was granted, with due attention to considerations of “economy and efficiency and without regard to political or other non-economic influences or considerations.” The Articles clearly prohibit interference in the political affairs of Member States, or influence by them: “[o]nly economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to

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<sup>152</sup> Shihata, Ibrahim F.I., *The World Bank Legal Papers*, Kluwer, The Hague, 2000, at 219, referring to the Legal Opinion Political Activity prohibited, Legal opinion of the General Counsel, dated July 11, 1995 (SecM95-707, July 12, 1995).

<sup>153</sup> Seyersted, Finn, *Common Law of International Organizations*, Nijhoff, Leiden, 2008. at 29.

<sup>154</sup> Roberto Dañino, “The Legal Aspects of the World Bank’s Work on Human Rights,” *Development Outreach*, November 2007.

achieve the purposes stated in Article I. “ A former Senior Vice-President and General Counsel has interpreted these provisions as follows: “[i]t was felt that any institution with these characteristics would be doomed to failure if its decisions were driven by political interests or prejudices or were not based on economic *and technical considerations*. It would lose the confidence of the markets from which it borrowed and the borrowing countries and other entities to which it lent... The Bank was also meant to be an institution of universal membership encompassing countries as diverse in their political convictions and ideologies.... The Bank's broad acceptability and its continuity required depoliticization of its decisions and impartiality in weighing the economic considerations which alone were to be taken into account. They also required equal treatment of members in similar economic circumstances, regardless of the political character of these members, as well as non-intervention in their political affairs.”[Emphasis added]<sup>155</sup>

First, the issues analyzed in this paper are intrinsically linked to the economic considerations motivating the work of the Bank. The Bank’s purposes expressly include *the improvement of conditions of labor and standards of living*, interpreted as follows: “[t]he Bank has, with the unanimous support of its members, long concerned itself with equitable distribution of income in its borrowing countries as an important aspect of development, as compared to mere growth... Such objectives are consistent with an explicitly reiterated ultimate purpose of the IBRD that is ‘assisting in raising productivity, the standard of living and conditions of labor’ (Article I) and with IDA's similar purposes (Article I). They also respond to the statement in the preamble of IDA's Articles to the effect that ‘an acceleration of economic development which will promote higher standards of living and economic and social progress in the less developed countries is desirable not only in the interests of those countries but also in the interests of the international community as a whole.’”<sup>156</sup> While the six purposes of the Bank included in Article I are similarly instrumental, *this is one of the few clauses of the treaty clearly stating the outcome expected as a consequence of the Bank’s activity*. Employment is, consequently, at the heart of development, and we have already reviewed the links between employment and vulnerability to contemporary forms of slavery. Moreover, the

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<sup>155</sup> See Shihata, Ibrahim F.I., *The World Bank Legal Papers*, Kluwer, The Hague, 2000, at 226.

<sup>156</sup> See *idem*, at 274

same former Senior Vice President and General Counsel has asserted that “[s]ocial equity programs should be seen as falling squarely within the mandate of the Bank.”<sup>157</sup>

Moreover, none of the issues under analysis (improvement of conditions of labor and standards of living) appear to be politically motivated or oriented to discriminate among Member States of the World Bank, but all the opposite: they are considered an essential aspect to development.

#### **4.2. Human rights as technical tools to achieve development**

We have mentioned above that there is some reluctance at the World Bank to accept values per se, as those embodied by human rights, as an orientation of the Bank’s work. However, it is also possible to argue that human rights are technical tools, that, if realized, they lead to development. On the other hand, development implies the realization of human rights. A very clear Legal Opinion was issued on Human Rights and the Work of the World Bank in 2006,<sup>158</sup> where it was underlined that “[d]evelopment is precisely what the World Bank works for and we believe that this work consistently contributes to the progressive realization of human rights in our member countries”<sup>159</sup> The Bank activities clearly may contribute to make human rights a reality.

Moreover, human rights are today technical rather than political considerations,<sup>160</sup> due to the advanced development of this field of law, and the almost universal acceptance of most standards mentioned here, even though implementation is still insufficient. A clear example is the problem under analysis, contemporary forms of slavery, which seriousness reveals that the existent obligations are not respected by States, and more needs to be done by relevant international actors.

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<sup>157</sup> See *idem*, at 522.

<sup>158</sup> Legal Opinion on Human Rights and the Work of the World Bank of the Senior Vice President And General Counsel, January 27, 2006

<sup>159</sup> See Roberto Dañino, “Legal Aspects of the World Bank Work on Human Rights: Some Preliminary Thoughts,” in P. Alston and M. Robinson, *Human Rights and Development: Towards Mutual Reinforcement*, (2005) Oxford, OUP, at 509.

<sup>160</sup> See, for example: Office of the High Commissioner for Human Rights, *Professional Training Series No. 7 Training Manual on Human Rights Monitoring*, United Nations, New York and Geneva, 2001; Commission of Jurists the Faculty of Law of the University of Limburg and the Urban Morgan Institute for Human Rights University of Cincinnati, *Limburg Principles on the Implementation of the International Covenant on Economic Social and Cultural Rights*, 1986; UNDP, *Indicators for Human Rights Based Approaches to Development in UNDP Programming: A Users’ Guide*, March 2006



Those who assert that human rights are “political considerations” probably confuse the legal human rights discourse with the praxis of some States, appropriating the human rights discourse for own political goals.<sup>161</sup> This praxis was well-known during the Cold War. The “misuse” of the legal human rights discourse by some international actors should not discourage any technical intervention by actors not guided by sectarian purposes, such as the World Bank, as human rights are extraordinary tools for improving the life of human beings in dignity and equality. In particular, rights-based approaches are increasingly accepted.<sup>162</sup> Human rights are considered a set of normative principles to guide the way in which development is done, a set of instruments to develop assessments, checklists and indicators against which interventions might be judged, a component to be integrated into programming, and the underlying justification for interventions aimed at strengthening institutions.<sup>163</sup> None of these applications of human rights rules can be qualified as “political,” if respectful of the international obligations assumed by States (that is, based upon the obligations already assumed by States, and without conditionality), and universally implemented (this means, mainstreaming human rights uniformly, without selective application of these rules, according to the political views of the actor involved and the sympathy with the country at stake).

Mainstreaming human rights in the work of the Bank requires dialogue, openness, and interdisciplinary work.

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<sup>161</sup> On the parallel relation between human rights discourse and development, see Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance*, Cambridge University Press, 2003, at 206 et ss., however, against my approach here. See: Anthony J. Langlois, “Human rights: the globalisation and fragmentation of moral discourse,” *Review of International Studies* (2002), 28, 479–496, or the very clear statement of the World Council of Churches: *A Statement on Human Rights*, <http://www.wcc-coe.org/wcc/assembly/hr-e.html>, asserting as a challenge, the “politicization of human rights:” “We deplore the re-politicization of the international human-rights discourse, especially by the dominant major powers. This practice, common in the East-West confrontation during the cold war, has now extended to engage nations in a global ‘clash of cultures’ between North and South and between East and West. It is marked by selective indignation, and the application of double standards which denigrate the fundamental principles of human rights and threaten the competence, neutrality and credibility of international bodies created under the UN Charter to enforce agreed standards.”

<sup>162</sup> See for instance Indicators for Human Rights-based Approaches to Development in UNDP Programming: A User’s Guide, UNDP Oslo Centre, 2006. CRIN, Rights-based Programming with Children: an Introduction, Child Rights Information Network Number 18, March 2005, in particular, the extensive bibliography cited. See also Save the Children, Child Rights Programming Handbook, Save the Children Alliance, 2005.

<sup>163</sup> Celestine Nyamu-Musembi and Andrea Cornwall, “What is the “Rights-based” Approach all about? Perspectives from international development agencies,” IDS Working Paper 234, Institute of Development Studies, November 2004, at 46.

#### 4.3. Poverty and vulnerability to contemporary forms of slavery, including trafficking

The notions of *poverty and vulnerability* have been clearly identified by some studies as *causes* of trafficking and other contemporary forms of slavery.<sup>164</sup> In particular, the lack of economic opportunities and ineffective use of resources have been identified as causes of trafficking. Factors in the operation of land, credit or labor markets, or even in aspects of contemporary globalization have been linked to the persistence or even growth of forced labor practices. Trafficking has moreover being linked to the feminization of poverty. Poverty is a relevant factor that increases vulnerability to trafficking.<sup>165</sup> This includes persons fleeing famine, individuals living in poor rural areas

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<sup>164</sup> “[I]ncreasing women's opportunities to help themselves is a more effective use of resources.” In Francine Pickup, “More Words but No Action? Forced Migration and Trafficking of Women,” *Gender and Development*, Vol. 6, No. 1, [Migration and Mobility], (Mar., 1998), pp. 44-51, at 44: “... global prohibition regimes...are more likely than most other regimes to ignore considerations of costs and consequences... they are instigated and pursued even when alternative approaches appear less costly and more effective...” in Ethan A. Nadelmann, “Global Prohibition Regimes: The Evolution of Norms in International Society,” *International Organization*, Vol. 44, No. 4, (Autumn, 1990), pp. 479-526, at 525. According to the ILO, structural factors in the operation of land, credit or labor markets, or even in aspects of contemporary globalization can explain the persistence or even growth of forced labor practices, in ILO, supra note 33, at 17. Moreover, “[t]he growth in trafficking goes hand in hand with the feminization of poverty worldwide...” in Scott Worden, “E-Trafficking,” *Foreign Policy*, No. 123, (Mar. - Apr., 2001), pp. 92-94; and ADB, *Combating Trafficking of Women and Children in South East Asia*, at 20-21. See also: Ronald Skeldon, “Trafficking: A perspective from Asia,” in *International Migration*, Special Issue 2000/1, at 7 et ss., declaring that the only way to eliminate trafficking is to improve the socio-economic situation of the population. See also World Bank, *Gender, Justice and Truth Commissions*, 2006, at 27: “Women are increasingly vulnerable, and their welfare is threatened by the rise in human trafficking” See also: UNICEF, *Trafficking In Human Beings, Especially Women and Children, in Africa*, 2005, at 5, identifying poverty, discrimination and oppression as essential factors towards trafficking. The OSCE has identified poverty among the structural factors originating trafficking in persons: “The prevention of human trafficking should be viewed in the broad context of globalization, social and economic inequality, migration policies, discrimination and xenophobia, social exclusion and marginalization, corruption, organized crime, weak rule of law, violence against women, and feminization of poverty and so on.” [Emphasis added], in OSCE, *2007: A Platform for Action*, November 2007, at 13 [CIO.GAL/172/07]

<sup>165</sup> Milena Stateva and Nadya Kozhouharova, “Trafficking in Women in Bulgaria: A New Stage,” *Feminist Review*, No. 76, 2004, pp. 110-116, at 112. On the vulnerability of persons migrating to escape famine: Suzanne Miers, “Contemporary Forms of Slavery,” *Canadian Journal of African Studies*, Vol. 34, No. 3, 2000, pp. 714-747 at 720. On the vulnerability of women from poor rural areas and refugee camps: Kathleen Barry, “Sexual Slavery: Understanding the International Dimensions of Women's Oppression,” *Human Rights Quarterly*, Vol. 3, No. 2, (May, 1981), pp. 44-52, at 46; Captive Daughters, *Poverty & Sex Trafficking: How will Warren Buffett's \$30.7 billion donation to The Bill & Melinda Gates Foundation, earmarked to fight poverty, affect global sex trafficking, the cause of which is rooted in poverty?*, 2006; asserting in particular that poverty fuels sex trafficking, opinion shared by USAID and UNICEF reports, with the conclusion that the motives of trafficking are rooted in human needs, in special, lack of employment opportunities in poor areas.

or refugee camps, or suffering lack of economic opportunities in poor urban areas. The international community has already agreed in considering poverty and unemployment as essential factors that increase vulnerability to contemporary forms of slavery, including trafficking.<sup>166</sup> Poverty is linked to trafficking in the Palermo Trafficking Protocol. Similarly, the ILO considers that the overwhelming majority of victims of forced labor are poor in developing countries,<sup>167</sup> an approach that is supported by further reports.<sup>168</sup> Further research on the links between contemporary forms of slavery and poverty by the Bank would be necessary, as poverty is intrinsically linked to the Bank's work: "[f]reedom from poverty is for many people a basic freedom without which no other human right could be fully enjoyed. For the Bank, it is the overarching objective which underlies most of its activities."<sup>169</sup>

#### **4.4. Contemporary forms of slavery as determinant factors of poverty**

On the other hand, the different contemporary forms of slavery, including trafficking, appear *to cause poverty*, to impact negatively on development, and to perpetuate impoverishment. For instance, some studies have linked exploitative

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<sup>166</sup> See for instance: *Communication from the Commission of 11/27/96 on combating child sex tourism*; Donna M. Hughes, "Supplying Women for the Sex Industry: Trafficking from the Russian Federation," in *Sexualities In Postcommunism*, Edited by A. Štulhofer, T. Sandfort, V. Diehl Elias, and J. Elias, 2003, p. 5 et ss.; USAID, *Trafficking in Persons The USAID Strategy for Response*, 2002; Geeta Chowdhry and Mark Beeman, "Challenging Child Labor: Transnational Activism and India's Carpet Industry," *Annals of the American Academy of Political and Social Science*, Vol. 575, May, 2001, pp. 158-175, at 166.

<sup>167</sup> ILO, *A global alliance against forced Labor Report of the Director-General Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, 2005, at 17.

<sup>168</sup> Milena Stateva and Nadya Kozhouharova, "Trafficking in Women in Bulgaria: A New Stage," *Feminist Review*, No. 76, 2004, pp. 110-116, at 112. On the vulnerability of persons migrating to escape famine: Suzanne Miers, "Contemporary Forms of Slavery," *Canadian Journal of African Studies*, Vol. 34, No. 3, 2000, pp. 714-747 at 720. On the vulnerability of women from poor rural areas and refugee camps: Kathleen Barry, "Sexual Slavery: Understanding the International Dimensions of Women's Oppression," *Human Rights Quarterly*, Vol. 3, No. 2, (May, 1981), pp. 44-52, at 46

<sup>169</sup> See Shihata, Ibrahim F.I., *The World Bank Legal Papers*, Kluwer, The Hague, 2000, at 219.

marriages and exploitative child labor to education and health deficiencies.<sup>170</sup> Poverty reduction is clearly an essential goal of the Bank today, and poverty is also strictly related to human rights, as the alleviation of poverty has a strong human rights dimension.<sup>171</sup> Risk and vulnerability analysis is now increasingly mainstreamed into poverty assessments.

As a former Senior Vice President and General Counsel has indicated “social equity, which is at the heart of my conception of poverty alleviation, includes fighting inequality, giving the poor and marginalized a voice (i.e. empowerment) freedom from hunger and fear, as well as access to justice. Social equity has, therefore, with obvious human rights content.”<sup>172</sup>

#### **4.5. Practice as recognized element of treaty interpretation – Human rights obligations of Member States under international law.**

An international treaty, as the Articles of Agreement, is interpreted according to specific methods, which diverge from those concerning interpretation of domestic instruments. Particularly important is Article 31 of the Vienna Convention on the Law of Treaties. Though this treaty was adopted after the adoption of the Articles of Agreement, it embodies rules that are considered today customary international law.<sup>173</sup> Particular importance can be given to Article 31 paragraphs 3 b) and c). Paragraph b refers to “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” Paragraph c concerns “any relevant rules of international law applicable in the relations between the parties.” The Bank is already

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<sup>170</sup> Geraldine Terry, “Poverty Reduction and Violence against Women: Exploring Links, Assessing Impact,” *Development in Practice*, Vol. 14, No. 4, (Jun., 2004), pp. 469-480. See also on the impact of forced/early marriages on health (including maternal and child mortality and morbidity) and education of girls: Naana Otoo-Oyortey and Sonita Pobi, “Early Marriage and Poverty: Exploring Links and Key Policy Issues,” *Gender and Development*, Vol. 11, No. 2, Marriage, (Jul., 2003), pp. 42-51. A study asserting that children's work that is harmful, hazardous, or is in other ways exploitative can create, exacerbate, or perpetuate an intergenerational cycle of poverty, malnutrition, and social disadvantage, see: David L. Parker and Sarah Bachman, “Economic Exploitation and the Health of Children: Towards a Rights-Oriented Public Health Approach,” *Health and Human Rights*, Vol. 5, No. 2, Children's Health and Children's Rights, (2001), pp. 92-118.

<sup>171</sup> See Shihata, Ibrahim F.I., *The World Bank Legal Papers*, Kluwer, The Hague, 2000, at 511

<sup>172</sup> See *idem*, at 514.

<sup>173</sup> See A/CN.4/167 and Add.1-3, Third Report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur, Topic: Law of Treaties Extract from the Yearbook of the International Law Commission:- 1964 , vol. II, p. 61.

working in some of the fields above-mentioned, though the interventions on contemporary forms of slavery are not currently systematic or mainstreamed in the whole Bank policies.<sup>174</sup> The work in areas linked to human rights and some issues related to contemporary forms of slavery can reveal a tacit agreement among member States that these areas are included in the Bank's mandate. As mentioned before, further research may be necessary, as to assess further Bank's activities, in special, from an instrumental perspective. The Bank could review the impact of the different contemporary forms of slavery, including trafficking, in development issues such as poverty, labor markets, educational and health services. In addition, assuming the links between poverty and vulnerability, the Bank could, in the future, mainstream strategically trafficking and other contemporary forms of slavery in the Bank's core operations, with country-led and country specific efforts, identifying the issues important for poverty reduction and growth.

Moreover, and concerning the interpretation rule contained in Article 31 paragraph c), human rights rules are relevant rules of international law binding Member States of the World Bank. Moreover, some of them are currently customary international law. This is a fact, and it would not be logical to ignore or impair the respect of human rights obligations by arguing that they do not directly concern the Bank's work.

Gender and trafficking require particular attention. In the field of gender, some work has already performed concerning contemporary forms of slavery, particularly, trafficking, however, not systematically. The PRSP Sourcebook includes a chapter on gender that refers, without mentioning explicitly trafficking, to violence against women within the security dimension of poverty, together with vulnerability to economic

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174 See, for instance, Demetra Smith Nightingale and Michael Fix, "Economic and Labor Market Trends," *The Future of Children*, Vol. 14, No. 2, 2004, pp. 49-59; Daniel T. Lichter and David J. Eggebeen, "The Effect of Parental Employment on Child Poverty," *Journal of Marriage and the Family*, Vol. 56, No. 3, Aug., 1994, pp. 633-645; Dana L. Haynie and Bridget K. Gorman, "A Gendered Context of Opportunity: Determinants of Poverty across Urban and Rural Labor Markets," *The Sociological Quarterly*, Vol. 40, No. 2, (Spring, 1999), pp. 177-197; World Bank, *Core Labour Standards and the World Bank, Background Document for ICFTU/ITS/World Bank Meetings on Core Labour Standards* Jan. 20, 1998; World Bank, *More and Better Jobs for Shared Growth*, <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21039894~menuPK:34480~pagePK:116743~piPK:36693~theSitePK:4607,00.html>; World Bank, *Labor Market, Job Creation And Growth Joint Proposal For Operationally-Oriented Research Draft Issues Paper HDNSP – PREM Executive Summary*, <http://siteresources.worldbank.org/INTLM/Resources/390041-1141141801867/2275364-1197313956878/JointIssuesPaperProposal.pdf>

risks.<sup>175</sup> The Bank prepares, for each country in which the Bank has an active lending program, a periodic Country Gender Assessment (CGA) analyzing the gender dimensions of development across sectors, and identifying the gender-responsive actions important for poverty reduction, economic growth, human well-being and development effectiveness, and uses it to inform the Bank's country assistance program; develops and implements, as part of the country assistance program, priority policy and operational interventions (if any) that respond to the CGA; and monitors the implementation and results of these policy and operational interventions.<sup>176</sup> For instance, the Cambodia Interim Poverty Reduction Strategy Paper, submitted to the Bank's Board of Executive Directors on December 26, 2000,<sup>177</sup> has mentioned "violence against women and trafficking in women and children" as "serious problems," as well as "gender-related constraints to poverty reduction." Moreover, the CGA on Jordan mentions, among the "International Women's Rights Conventions and Treaties Ratified by Jordan," the Palermo Trafficking Protocol.<sup>178</sup> Another good example is the CGA on Indonesia that contains a section on trafficking.<sup>179</sup> That is, trafficking is mentioned, is considered relevant to the Bank's work, however, the approach is not systematic and does not reveal a clear and consequent policy by the Bank in this regard.

The 2006 WDR has already underlined that "...interventions in the labor market should ensure effective application of the core labor standards across the whole market, implying no slave or indentured work, no dangerous forms of child labor, and no discrimination."<sup>180</sup> Subsequent steps are necessary within the Bank as to mainstream this important finding in all Bank's policies. Situations in which a person is subjected to bonded labor, forced labor, or trafficking, constitute per se a denial of access to decent work, and, consequently, are indicators of poverty.

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<sup>175</sup> [http://siteresources.worldbank.org/INTPRS1/Resources/383606-1205334112622/4221\\_chap10.pdf](http://siteresources.worldbank.org/INTPRS1/Resources/383606-1205334112622/4221_chap10.pdf)

<sup>176</sup> World Bank, *Integrating Gender Into The World Bank's work*, 2002, p. 18

<sup>177</sup> *Id.*, at 43.

<sup>178</sup> The World Bank- Social and Economic Development Group Middle East and North Africa Region (MENA), *The Economic Advancement of Women in Jordan: A Country Gender Assessment*, May 2005.

<sup>179</sup> The Asia Foundation, Asian Development Bank, Canadian International Development Agency, National Democratic Institute, *The World Bank, Indonesia: Country Gender Assessment*, 2006, at 64. [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/10/12/000310607\\_20061012101642/Rendered/PDF/377250IND0Country0gender001PUBLIC1.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/10/12/000310607_20061012101642/Rendered/PDF/377250IND0Country0gender001PUBLIC1.pdf)

<sup>180</sup> IBRD, *World Development Report*, 2006, at 15.

A positive step is the Toolkit developed by the World Bank that permits to diagnose core labor standards in the CAS:<sup>181</sup> “[a]dherence to core labor standards promotes effective labor market institutions that can contribute to economic growth and reduce workplace risks faced by the poor.”<sup>182</sup> They constitute a very important minimum set of standards, and are linked to the most serious issues discussed in this paper (e.g., forced labor, forbidden forms of child labor). Recognizing that “*there is no official World Bank policy on CLS*, the economic, social, and human development issues embedded in the standards make them relevant for Bank work.”<sup>183</sup> [Emphasis added] The Toolkit encourages Bank staff to analyze core labor standards in the Country Assistance Strategies of IDA-eligible borrowers. This means that Bank staff is free to do it or not. Moreover, the Toolkit indicates that “[t]hese core labor standards do not establish a particular level of working conditions, wages, or health and safety standards to be applied internationally. They are not intended to alter the comparative advantage of any country.” This recalls the above-mentioned discussion, concerning whether human rights are instrumental (as indicated here) or values per se for the Bank.

The IFC and MIGA count, moreover, with a Policy Statement on Forced Labor and Harmful Child Labor,<sup>184</sup> and Policy on Social & Environmental Sustainability,<sup>185</sup> respectively. According to the Statement, IFC will not support projects that use forced or harmful child labor, and will incorporate the necessary provisions in its contractual documents to implement this policy. Through its Policy, MIGA puts into practice its commitment to social and environmental sustainability, based on its mission and mandate. Consistent with this commitment, MIGA carries out the actions, including its responsibility to review projects under consideration for political risk insurance.

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<sup>181</sup> See <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALPROTECTION/EXTLM/0,,contentMDK:20224310~menuPK:390633~pagePK:148956~piPK:216618~theSitePK:390615,00.html> [Last visited 09/19/08]

<sup>182</sup> See Id.

<sup>183</sup> See Id.

<sup>184</sup> [http://ifcln1.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol\\_ChildLabor/\\$FILE/ChildForcedLabor.pdf](http://ifcln1.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_ChildLabor/$FILE/ChildForcedLabor.pdf)

<sup>185</sup> [http://www.miga.org/documents/enviro\\_social\\_review\\_021507.pdf](http://www.miga.org/documents/enviro_social_review_021507.pdf)

In the field of procurement, core labor standards have also received some attention.<sup>186</sup> Two CLSs (prohibition of forced or compulsory labor, and prohibition of child labor) are included in the General Conditions of Contract (GCC) as sub-clauses 6.20 and 6.21. Worker's Organizations and Non-Discrimination and Equal Opportunity are found in the Particular Conditions of Contract (PC) of its SBD for Works as sub-clause 6.23 and 6.24. The first two are mandatory for use in the pilots. The other two CLSs are currently proposed by the Bank. The borrowers can delete them if they wish. They are encouraged but are not mandatory. On the other hand, the four CLS are compulsory in the framework of the IFC.

Assuming the links between poverty and lack of implementation of minimum labor standards (that is, higher standards than the core standards), a possible field for further work by the Bank could be to include their assessment in the CAS, as well as in the PRSP Sourcebook, for example, including "lack of access to decent work" as a non-monetary indicator of poverty.<sup>187</sup> Decent work is today understood as a core human right.<sup>188</sup> In such a chapter, issues including contemporary forms of slavery could be analyzed, together with labor standards -from those "core" standards to those understood as basic human rights, mentioned *supra*. Moreover, "decent work growth" could be legitimately included among the targets/goals of poverty reduction. Another possibility could be to use human rights indicators as to measure poverty in non-monetary terms, and social rights could be included among them.<sup>189</sup> The human rights based approach could provide guidance.

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<sup>186</sup> See R2008-003614, *Use of Country Procurement Systems in Bank-Supported Operations Proposed Piloting Program Supplemental Note*, April 2008, at 3.

<sup>187</sup> On nonmonetary indicators of poverty, see: PRSP Sourcebook Poverty Measurement and Analysis, at 32 [http://povlibrary.worldbank.org/files/5467\\_chap1.pdf](http://povlibrary.worldbank.org/files/5467_chap1.pdf) [Last visited: 09/17/08]

<sup>188</sup> Mary Robinson, *Working Out of Poverty: A Decent Work Approach to Development and Growth in Africa*, September 8<sup>th</sup>, 2008 <http://www.realizingrights.org/?option=content&task=view&id=356>, [Last visited: 09/19/08]

<sup>189</sup> See for instance UNDP, *Poverty Reduction and Human Rights - A Practice Note*, 2003;



The need of better integration of economic and social policies as to reduce poverty and promote better social integration has been recommended<sup>190</sup> The same IDA12 Recommendations assert that “[i]n addition to careful analysis of the poverty and macroeconomic situation, CASs need to be grounded in a systematic analysis of key issues with an impact across many economic and social sectors, including governance, gender, environment, core labor standards, and the financial sector. Deputies recommended that CAS diagnostic treatment of these cross-cutting issues should be improved. These analyses should draw as warranted on the expertise and support of the entire World Bank Group, including the World Bank's thematic networks, and of institutions such as the IMF, ILO and World Trade Organization (WTO).[...] Where these are identified as priority issues, they should be addressed in the operational program.”<sup>191</sup> We would like to underline that here there is no intention of converting the Bank in the enforcing arm of the ILO, but to understand that poverty and non-implementation of minimum labor standards or basic social rights appear to be intrinsically linked. The OSCE has, for example, issued a report on compensation to victims of trafficking, that includes the clear recommendation to “[e]nact and enforce legislation to implement international labour standards on forced labour, child labour, discrimination, migrant workers, wages, working time and health and safety and private employment agencies.”<sup>192</sup>

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<sup>190</sup> ILO, *Decent Work and Poverty Reduction in the Global Economy*, 2000, at 10, indicating, e.g., “The overall goal of the global economy should be to provide opportunities for all men and women to obtain decent and productive work in conditions of freedom, equity, security and human dignity. This requires the attainment of four objectives: employment creation; promoting human rights at work; improving social protection; promoting a social dialogue.” See also: Opening Speech at the Decent Work Conference, September 9<sup>th</sup>, 2008, asserting that “If economic progress for some means social decline for others – then we end up in a dangerous gap.”[

[http://www.regjeringen.no/nb/dep/ud/dep/utenriksminister\\_jonas\\_gahr\\_store/taler\\_artikler/2008/decent\\_opening.html?id=525704](http://www.regjeringen.no/nb/dep/ud/dep/utenriksminister_jonas_gahr_store/taler_artikler/2008/decent_opening.html?id=525704)] [Last visited: 09/19/2008]

<sup>191</sup> See

<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALPROTECTION/EXTLM/0,,contentMDK:20310171~isCURL:Y~menuPK:390633~pagePK:148956~piPK:216618~theSitePK:390615,00.html> [Last visited: 09/19/2008]

<sup>192</sup> OSCE/ODIHR, *Compensation for Trafficked and Exploited Persons in the OSCE Region*, May 2008, at 169. Concern on labor rights can also be found in OSCE/ODIHR, *ODIHR Discussion Paper on standards and new developments in labour trafficking*, Warsaw, August 2007, as well as in the Conference Recommendations in OSCE, *Report of the 3rd and 5th Alliance against Trafficking in Persons Conferences on Human Trafficking for Labour Exploitation/Forced and Bonded Labour*, Vienna, 7 and 8 November 2005 Vienna, 16 and 17 November 2006, May 2008, at 29.

#### **4.6.1 Activities recognized under international law in the field of contemporary forms of slavery, including trafficking.**

As to determine, within the Bank's mandate, further additional and possible fields of work compatible with the Bank's mandate, we shall refer to activities that have already been identified and agreed upon by the international community in this arena. Most standards and guidelines, particularly human trafficking, originate in the work of international organizations.

The Bank can follow standards developed by other international organizations. Article V, Section 8 of the IBRD Articles of Agreement asserts that, within the Articles' terms, the Bank "shall cooperate" with the UN and with public international organizations having specialized responsibilities in related fields (for example, the WHO or the ILO). The Bank is authorized to follow standards developed by organizations such as the UN and the ILO, as the Articles assert that "[i]n making decisions on applications for loans or guarantees relating to matters directly within the competence of any international organization of the types specified in the preceding paragraph and participated in primarily by members of the Bank, *the Bank shall give consideration to the views and recommendations of such organization.*" If we read together these provisions with the prohibition of political activity, a systematic interpretation of the Articles implies that "the views and recommendations of such organization" are not "political consideration" in the terms of the Articles. The Bank has always been expressly authorized to give consideration to them.

The Agreement between the UN and the Bank reinforces this interpretation. In this Agreement, the UN has accepted, as sound policy that it should refrain from giving recommendations to the Bank concerning *concrete loans and guarantees*. Consequently, the Bank is empowered by the Articles to "give consideration" to the "views and recommendations of such organization," except those concerning concrete loans and guarantees. The Bank may give consideration to *general* views and recommendations of other international organizations, but is not obliged to follow them, except in the field of international peace and security, upon a decision of the Security Council. The possible areas where such general views are recommendations can be followed include international human rights, labor standards or internationally agreed policies concerning

contemporary forms of slavery. Moreover, the Bank, as a subject of international law (international organization) is obliged to respect those human rights that constitute customary international law (for instance, the prohibition of slavery).<sup>193</sup>

Some international obligations concerning contemporary forms of slavery appear not to permit Bank's activity, as they normally refer to fields still reserved to the domestic jurisdiction of Member States, and perhaps in the Bank's terminology, could amount to political consideration. Among them, we can mention the obligation to criminalize and/or to prohibit certain conducts;<sup>194</sup> to investigate and prosecute traffickers,<sup>195</sup> to permit victims to stay in their territories temporarily or permanently,<sup>196</sup> to repatriate victims,<sup>197</sup> to adopt border measures<sup>198</sup> and measures on security of documents,<sup>199</sup> to adopt measures as to implement human rights rules in domestic legislation,<sup>200</sup> obligation that, in some cases, exists only in relation to the available resources.<sup>201</sup> These issues are essentially linked to State organ activities, requiring legislative or administrative processes, the last ones, normally linked to the Executive branch.

Involvement in the fight against corruption has already been identified by the Bank as one of the fields of work compatible with its mandate. The support for specific issues of governance contributes to intervene against contemporary forms of slavery, including human trafficking:<sup>202</sup> “upon the request of a borrowing member, the Bank may finance projects for purposes of ensuring ... *efficiency of public administration*, such as

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<sup>193</sup> See Seyersted, Finn, *Common Law of International Organizations*, Nijhoff, Leiden, 2008. at 513.

<sup>194</sup> Trafficking Protocol, Article 5; Supplementary Convention, Article 5-6; *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, Approved by General Assembly resolution 317(IV) of 2 December 1949 entry into force 25 July 1951, in accordance with article 24, Article 1-4; Optional Protocol, Article 1 and 3; *Worst Forms of Child Labour Convention, 1999 (No. 182)*, Adopted on 17 June 1999, entry into force: 19 November 2000.

<sup>195</sup> UN High Commissioner for Human Rights, *Principles and Guidelines on Human Rights and Trafficking*, E/2002/68/Add.1 (2002), Principle 2.

<sup>196</sup> Trafficking Protocol, Article 7.

<sup>197</sup> Trafficking Protocol, Article 8

<sup>198</sup> Trafficking Protocol, Article 11.

<sup>199</sup> *Idem*, Article 12-13.

<sup>200</sup> Article 2.1 of the ICCPR; Article 2 of the CERD; Articles 2 and 3 of the CEDAW; Article 2 of the CRC; Article 1 of the ECHR; Article 20 of the European Social Charter (hereinafter, ESC); Article 1 and 2 of the ACHR; Article 1 of the ACHPR.

<sup>201</sup> Article 2.1 of the ICESCR; Article 1 of the APACHR.

<sup>202</sup> See Shihata, *supra*, at 230.

civil service reform, legal and regulatory reform.”<sup>203</sup> Moreover, in investment lending and in support of economic policy reform, the Bank may address further governance issues, if they are deemed to be relevant for the success of the project or program: “[u]nder the rubric of ‘governance’, the Bank is assisting developing countries in a number of areas with clear relevance to their economic development such as their efforts to improve public sector management, address weaknesses in the civil service, and *strengthen legal, regulatory and judicial frameworks*. The Bank has defined governance in this context as ‘the manner in which power is exercised in the management of a country's economic and social resources for development,’ thus limiting its concern for good governance to issues which have undisputed economic implications...The Bank's promotion of good governance in its borrowing members and of a broad array of economic, social and cultural human rights clearly plays a role in paving the way to more democratic forms of government. But the most obvious impact in this direction results indirectly from three areas of the Bank's intervention, which are typically considered to be of an economic or social, not political, nature. These consist of the Bank's support of economic liberalization, its financing of education for all, and its efforts in support of the legal reform, judicial reform and civil service reform in its borrowing countries.”<sup>204</sup> These questions enhance the security of entitlements and the efficiency of economic transactions.<sup>205</sup> The Bank work in these fields contributes to the prevention and fight against contemporary forms of slavery. Perhaps a more integrated approach would be necessary.

Governance Indicators have also been developed by the Bank. They include the notion of voice and accountability, that encompasses, among the concepts measured, whether there are free trade unions and peasant organizations or equivalents, effective collective bargaining; whether there is equality of opportunity, including freedom from exploitation by or dependency on landlords, employers, union leaders, bureaucrats or any

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<sup>203</sup> Id.

<sup>204</sup> Roberto Dañino, “Legal Aspects of the World Bank Work on Human Rights: Some Preliminary Thoughts,” in P. Alston and M. Robinson, *Human Rights and Development: Towards Mutual Reinforcement*, (2005) Oxford, OUP.

<sup>205</sup> Kerry Rittich, “The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social,” 26 *Michigan Journal of International Law* 199 (2005), at 211.

other type of denigrating obstacle to a share of legitimate economic gains.<sup>206</sup> All these issues are relevant to the labor and human rights standards mentioned *supra*. Moreover, the aggregate indicator on the rule of law already includes, as a source, the U.S. Department of State Trafficking in People Report.<sup>207</sup>

The different human rights violations mentioned *supra* appear to be caused, among others, by specific issues of governance, such as corruption, the lack of a legal and regulatory framework preventing them, in particular, insufficient labor market regulation as to permit access to decent work and its compliance. It has been argued that the demand for exploitable labor in sectors where harsh working conditions go undetected creates a pull effect on those already vulnerable.<sup>208</sup> Trafficking and further contemporary forms of slavery are linked to the absence of institutions solid enough as to face these problems with independence and impartiality.<sup>209</sup>

In addition, the Bank has accumulated important experience *in judicial and legal reform projects, creating the legal environment for accountable governance and empowering poor people by increasing their access to justice* through a mix of strategies.<sup>210</sup> Access to justice for victims is essential. Judicial and legal reform projects focus on: (a) improving administrative justice, making administrative decisions accountable and affordable to ordinary citizens; (b) promoting judicial independence and accountability; (c) improving legal education; (d) improving poor people's cultural, physical, and financial access to justice; and (e) public outreach and education.<sup>211</sup>

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<sup>206</sup> D. Kaufmann A. Kraay, and M. Mastruzzi, *Governance Matters IV: Appendices*, at 74. and Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Governance Matters VI: Aggregate and Individual Governance Indicators 1996–2006*, The World Bank, p. 50

<sup>207</sup> Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Governance Matters VI: Aggregate and Individual Governance Indicators 1996–2006*, The World Bank, P. 67

<sup>208</sup> ADB, *Combating Trafficking of Women and Children in South Asia Guide for Integrating Trafficking Concerns into ADB Operations*, April 2003, at 5.

<sup>209</sup> Tom Obokata, “Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law,” *International Journal of Refugee Law*, 2005,403.

<sup>210</sup> See for instance the deficiencies found by the OSCE in the access to right to compensation by victims of trafficking in: OSCE/ODIHR, *Compensation for Trafficked and Exploited Persons in the OSCE Region*, 2008.

<sup>211</sup> World Bank, Access to Justice and Legal Aid, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTEMPowerment/0,,contentMDK:20253937~isCURL:Y~pagePK:210058~piPK:210062~theSitePK:486411,00.html> [Last visited: 05/09/08]; World Bank, *A Framework For Empowerment: Summary Poverty Reduction Group*, World Bank, May 2002, Based on “Empowerment and Poverty Reduction: A Sourcebook,” World Bank, 2002.

Consequently, judicial and legal reform projects and efforts to originate access to justice to victims are within the Bank's framework of work. A clear limitation may exist, as some of the victims face currently problems in access to justice, not only in countries of the Global South, but also in donor countries.<sup>212</sup>

In addition, the international community has already identified some activities where the Bank's role, if proven to have an economic impact, appears to be permissible:

- 1) Assistance and protection to victims.<sup>213</sup> Measures could include the provision of physical, and social recovery (housing, counseling and information, medical, psychological and material assistance, employment, educational and training opportunities), legal and other assistance,<sup>214</sup> compensation to victims of trafficking, and access to legal remedies.<sup>215</sup>
- 2) Identification and outreach to children at special risk,<sup>216</sup> taking account of the special situation of girls.<sup>217</sup>
- 3) International assistance and cooperation.<sup>218</sup>
- 4) To adopt measures as to discourage the demand, such as
  - (a) Research on best practices, methods and strategies;
  - (b) Raising awareness of the responsibility and role of the media and civil society in identifying the demand as one of the root causes of trafficking;

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<sup>212</sup> See for instance the deficiencies found by the OSCE in the access to right to compensation by victims of trafficking in: OSCE/ODIHR, *Compensation for Trafficked and Exploited Persons in the OSCE Region*, 2008

<sup>213</sup> Trafficking Protocol, Article 6; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Articles 8 and 10 paragraph 2; Worst Forms of Child Labour Convention, Article 7 paragraph 2 lit c.; Article 39 of the CRC.

<sup>214</sup> See UN High Commissioner for Human Rights, *Principles and Guidelines on Human Rights and Trafficking*, E/2002/68/Add.1 (2002), Principles 8 and 9.

<sup>215</sup> See *idem*, Principles 16 and 17.

<sup>216</sup> See *Worst Forms of Child Labour Convention*, Article 7 paragraph 2 lit d.

<sup>217</sup> *Idem*, Article 7 paragraph 2 lit e.

<sup>218</sup> Slavery Convention; Supplementary Convention, Article 8; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Article 10 paragraph 1; Article 32, Council of Europe, Convention on Action against Trafficking in Human Beings (2005) CETS No.: 197, Entry into force: February 1st, 2008.

- (c) Target information campaigns involving, as appropriate, inter alia, public authorities and policy makers;
  - (d) Preventive measures, including educational programs for boys and girls during their schooling.<sup>219</sup>
- 5) To prevent and suppress slavery and slave-trade, other institutions and practices similar slavery,<sup>220</sup> the worst forms of child labor,<sup>221</sup> and child labor.<sup>222</sup>
- 6) To prevent trafficking, sale of children, child prostitution and child pornography, as well as the worst forms of child labor,<sup>223</sup> with “comprehensive policies, programs,” including:
- (a) “[I]nformation, awareness raising and education campaigns... for persons vulnerable”<sup>224</sup>
  - (b) “[S]ocial and economic initiatives to prevent and combat trafficking in persons,” including cooperation with “other relevant organizations,” even “through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable ... *such as poverty, underdevelopment and lack of equal opportunity,*”<sup>225</sup>“...*support for social and economic development, poverty eradication programs and universal education.*”<sup>226</sup> The root causes identified include “poverty and underdevelopment, contributing to the vulnerability of children...”<sup>227</sup> [Emphasis added]

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<sup>219</sup> Article 6 of the COE Convention.

<sup>220</sup> Slavery Convention, Articles 2-3; Supplementary Convention, Article 1.

<sup>221</sup> *Worst Forms of Child Labour Convention, 1999 (No. 182), Adopted on 17 June 1999, entry into force: 19 November 2000*, Article 6.

<sup>222</sup> *C138, Minimum Age Convention, 1973 (No. 138) Adopted on 26 June 1973, Entry into force: 19 June 1976.*

<sup>223</sup> Trafficking Protocol, Article 9; Optional Protocol, to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Article 9; Worst Forms Convention, Article 7 paragraph 2 lit. a.

<sup>224</sup> Article 5.2 of the COE Convention.

<sup>225</sup> The following children have been considered vulnerable: children without parental care, mentally and physically disabled children, and those with other “special needs,” children from marginalized groups (minority ethnic, tribal and religious communities), ECPAT, *Protecting Children from Sexual Exploitation & Sexual Violence in Disaster & Emergency Situations*, 2006, p. 21-22.

<sup>226</sup> Worst Forms Convention, Article 8.

<sup>227</sup> Optional Protocol, Article 10 paragraph 3.

(c) Activities of prevention through economic development and “technical assistance to developing countries and countries with economies in transition ... To encourage and persuade other States and *financial institutions* as appropriate to join them in efforts ...by providing more training programs and modern equipment to developing countries...”<sup>228</sup>

- 7) To enhance information exchange and training of law enforcement officers.<sup>229</sup>
- 8) To adopt measures against corruption, including legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials.<sup>230</sup>
- 9) To protect the rights enumerated and to ensure their respect.

Some of the issues mentioned fall squarely within the Bank’s mandate. We have already mentioned in detail many of those linking poverty and contemporary forms of slavery. Prevention activities have normally been limited to awareness-raising and information campaigns.<sup>231</sup> As a “Knowledge Bank,” the Bank can work on the generation of data, research, and evaluation of existing initiatives and programs; identify those vulnerable to contemporary forms of slavery, particularly girls and children, as to focalize effective preventive measures; analyze the relationship between poverty and the different contemporary forms of slavery mentioned *supra*, child labor, labor market discrimination, labor market regulation, conditions of employment of particularly vulnerable groups such as women, youth, ethnic minorities, the disabled; on the role of trade unions and collective bargaining in poverty reduction in low-income countries, and consequently, whether they reduce vulnerability to exploitation, etc. This could permit to develop future and effective interventions, particularly, in the field of poverty reduction.

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<sup>228</sup> Convention on Transnational Organized Crime, Article 30. See also Article 10 paragraph 4 of the Optional Protocol.

<sup>229</sup> Trafficking Protocol, Article 10; Article 29 Convention on Transnational Organized Crime.

<sup>230</sup> Convention on Transnational Organized Crime, Article 9. See also *supra* note 55, Principle 6. See also at Donna M. Hughes & Tatyana Denisova, *Trafficking in Women from Ukraine*, U.S. Ukraine Research Partnership, 2002, at 58; Donna M. Hughes and Tatyana A. Denisova, “The Transnational Political Criminal Nexus of Trafficking in Women from Ukraine,” *Trends in Organized Crime* Vol. 6, No. 3-4: Spr.-Sum. 2001

<sup>231</sup> UN Doc E/CN.15/2008/6, *Strengthening international cooperation in preventing and combating trafficking in persons and protecting victims of such trafficking Report of the Secretary-General*, 29 January 2008, at 9.



In addition, the Bank could use its leadership in gathering efforts for international cooperation for prevention of trafficking and different forms of exploitation and assistance to victims.

With regard to the Bank's involvement in criminal justice issues, such as policing, there is an increasing understanding that the Bank's mandate does not forbid it.<sup>232</sup> A recent legal opinion particularly supports the involvement of the Bank in criminal justice issues, asserting that many activities in this sector could be supported by the Bank with little or no risk of political interference. In particular, specific case enforcement is excluded from those interventions permitted. Coherently with the fields analyzed *supra*, institutional capacity building, technical assistance and activities that address sector or sub-sector wide issues appear to be permissible. Issues such as investigation, prosecution and punishment should be excluded of any intervention, as contradictory to the Bank's mandate and linked to issues still reserved to the domestic jurisdiction of Member States.

#### **4.6. Cooperation with international organizations**

The Bank should, moreover, cooperate with the work of other international organizations, and develop strategies with them, as to profit from the comparative advantage of each organization. In particular, the ILO has devoted important efforts to standard-setting, monitoring and technical assistance. Something similar happens with other institutions of the UN system and specialized organizations such as the WHO,<sup>233</sup> the IOM, the UNHCR, UNICEF,<sup>234</sup> UNIFEM,<sup>235</sup> INSTRAW,<sup>236</sup> UNITAR, and the UNFPA, in their particular fields of action. International and regional human rights mechanisms play, in addition, an important role, for the periodic monitoring of State activities, plus the analysis of individual petitions or cases, before an international body or a court.<sup>237</sup>

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<sup>232</sup> "Legal Opinion on Bank Activities in the Criminal Justice Sector." Senior Vice President and General Counsel, World Bank, Washington, DC, 2006.

<sup>233</sup> WHO, *Development of guiding principles for human organ transplants*, Fortieth World Health Assembly Geneva, 4-15 May 1987; OMS, *Recomendaciones Éticas y de Seguridad de la OMS para Entrevistar a Mujeres Víctimas de la Trata de Personas*, 2003

<sup>234</sup> UNICEF, *Guidelines for Protection of the Rights of Child Victims of Trafficking*, 2003, updated in 2005; Innocenti Insight - *Trafficking in Human Beings, Especially Women and Children*, in Africa, 2005.

<sup>235</sup> [http://www.unifem.org/gender\\_issues/violence\\_against\\_women/](http://www.unifem.org/gender_issues/violence_against_women/)

<sup>236</sup> <http://www.un-instraw.org/en/gps/security-toolkit/introduction.html>

<sup>237</sup> See for instance, *Siliadin v France*, App No 73316/01, Judgment of 26 July 2005 ([2005] ECHR 545. . See *supra* 37, at 408 or at 400. See also: IACHR, *Brazil 11.289 Friendly Settlement*, October 24, 2003, <http://www.cidh.org/annualrep/2003eng/Brazil.11289.htm> [www.tercerainformacion.es/3i/article4495.html](http://www.tercerainformacion.es/3i/article4495.html)

Cooperation with the UN human rights organs could provide the Bank with further insights on the human rights developments in concrete countries, as to develop, in particular, further tools as to design future activities.

However, the international momentum consists of the implementation of the Palermo Trafficking Protocol, particularly, international criminal cooperation and counter-trafficking. The UNODC Global Programme against Trafficking in Human Beings (GPAT) assists countries to combat trafficking, with focus on the criminal justice element.<sup>238</sup> UNODC offers technical assistance and practical help to States in drafting laws and comprehensive national anti-trafficking legislation, including practical tools to encourage cross-border cooperation in investigations and prosecutions, and training for law enforcement officials on investigating and prosecuting trafficking cases, victim and witness protection. This includes assistance in carrying out awareness-raising campaigns and other preventive measures. UNCIPIC has organized an expert meeting to develop of a legislation guide to implement the Palermo treaties. It gives technical assistance under its Global Programme against Trafficking in Human Beings, in cooperation with the United Nations Interregional Crime and Justice Research Institute. The Centre counts with a database on global trends cross national routes, and the volume of trafficking in persons and smuggling of migrants, as well as data on victims and offenders of trafficking, and on responses of criminal justice systems to this criminal activity. CIGP is preparing a tool kit on promising practices against trafficking in persons. INTERPOL has also been very active in this field. In March 2007, UNODC formally launched a Global Initiative to fight Human Trafficking (UN.GIFT).<sup>239</sup>

The role of economic development and prevention appears not to have received the same attention, except, particularly, in the work of the OSCE, which is geographically limited. The World Bank could analyze how to produce strategic impact in these fields. Many civil society groups are calling the attention on the need to intervene to prevent

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Corte Interamericana De Derechos Humanos Opinión Consultiva OC-18/03 De 17 De Septiembre De 2003, Solicitada por los Estados Unidos Mexicanos- Condición Jurídica y Derechos de los Migrantes Indocumentados.

<sup>238</sup> See [//www.unodc.org/unodc/en/human-trafficking/index.html](http://www.unodc.org/unodc/en/human-trafficking/index.html)

<sup>239</sup> [www.ungift.org](http://www.ungift.org)

trafficking and other contemporary slave-like practices.<sup>240</sup> The same has happened with regional and supranational organizations, perhaps with the most important exception, as already indicated, of the OSCE, with engagement not only in counter-trafficking, but also in research on root causes, networks and economic consequences of trafficking.<sup>241</sup> The IOM has also developed important research activity. In addition, the ADB has been working, as a development Bank, in the field of trafficking. The experience is useful, coming from a development institution, though we should underline that the concept of trafficking applied is different to the one of the Palermo Trafficking Protocol, see *supra*. The ADB has prepared a guide for integrating trafficking concerns into ADB Operations entitled “Combating Trafficking of Women And Children In South Asia”<sup>242</sup> The Guidelines target those most vulnerable to trafficking, especially women and children, and recommend to assess the impacts of ADB operations to take up opportunities to prevent, minimize, and mitigate development-induced risks; to rebuild social and human capital among mobile (or potentially mobile) populations through emergency loans and assistance in post conflict reconstruction; to encourage safe migration through, for example, incorporating safe migration messages in social mobilization components of ADB-supported projects in source areas, ensuring that migrants have access to basic

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<sup>240</sup> See for instance Terre des Hommes Foundation, *A handbook on planning projects to prevent child trafficking*, January 2007. Also criticizing the “law and order approach” and the view of trafficking as only as a security issue, see: Global Rights, *Combating Human Trafficking In The Americas: A Guide To International Advocacy*, 2007, at 7. See also: LILA, GAATW, etc, *The Demand Side of Trafficking? A Multi Country Pilot Study*, with many critical insights to current punitive policy making, for example, asserts that immigration control mechanisms that reinforce dependency of migrants on employers or third parties are counter-productive if one is concerned to combat human rights violations of migrants in this sector, and recommendations particularly on education. See also Save the Children, *Trafficking – a demand led problem?*, 2002, asserting that the governments interest in trafficking is “often grounded in concerns about irregular immigration and/or transnational organised crime, which are viewed as a threat to national security. National security and immigration (and associated financial transactions) have been still more explicitly and closely linked post September 11” at page 5 et ss. See also: Global Alliance against Traffic in Women, *Collateral Damage*, 2007, asserting that “it is difficult to believe that most governments know what they are committing themselves to when they agree to use a ‘human rights approach’ or a ‘rights based approach’.” at 18.

<sup>241</sup> See, for instance: OSCE, *Anti-Trafficking Guidelines*, [http://www.osce.org/documents/odihr/2001/06/1563\\_en.pdf](http://www.osce.org/documents/odihr/2001/06/1563_en.pdf); OSCE, *Declaration on Trafficking in Human Beings*, [www.osce.org/item/2313.html](http://www.osce.org/item/2313.html) ; OSCE, *National Referral Mechanisms*, [www.osce.org/documents/odihr/2004/05/2903\\_en.pdf](http://www.osce.org/documents/odihr/2004/05/2903_en.pdf); OSCE, Reference Guide for Anti-Trafficking Legislative Review, [www.osce.org/item/13596.html](http://www.osce.org/item/13596.html)

<sup>242</sup> ADB, *Guide for Integrating Trafficking Concerns into ADB Operations -Combating Trafficking Of Women And Children In South Asia*, April 2003, [http://www.adb.org/Documents/Guidelines/Combating\\_Trafficking/Guide\\_Integrating\\_Trafficking\\_Concerns.pdf](http://www.adb.org/Documents/Guidelines/Combating_Trafficking/Guide_Integrating_Trafficking_Concerns.pdf)

needs such as shelter in urban slum areas, and extending benefits of social protection to mobile populations; and to stem demand for trafficked labor, especially in the informal sector and among small and medium enterprises. These concerns are addressed through mainstreaming trafficking concerns into all levels of ADB operations including regional and sub regional cooperation, country programming in most sectors, project designs, and legal frameworks. The focus countries are Nepal, India and Bangladesh. Some of the sectors analyzed are agriculture, transportation, education, infrastructure, water supply and sanitation, and social protection. The ADB has also adopted a commitment to core labor standards (CLS) as part of its Social Protection Strategy in 2001, particularly in the design and implementation of its investment projects. A Handbook has been developed together with the ILO.<sup>243</sup> Cooperation with the ADB would be an important step as to develop further strategies.

## V. CONCLUSIONS

This paper tries to show the complex of norms of international law that could guide future Bank's activities in the field of contemporary forms of slavery, including trafficking. We have asserted that some existing rules are part of customary international law, such as the prohibition of slavery and forced labor, are today binding for all subjects of international law. However, most of the rules mentioned are included in universal or regional treaties, and every activity or analysis concerning a particular country should be sensitive to the concrete set of rules binding the State at stake.

It has been argued that the Bank, according to its mandate, may intervene in different aspects related to contemporary forms of slavery, including trafficking, excluding issues still reserved to the domestic sphere of States, such as the investigation, prosecution and punishment of perpetrators, issuance of residence titles or border controls.

This paper asserts that the contemporary forms of slavery are originated by poverty related problems: poverty makes persons particularly vulnerable to them. Moreover, those that are victims of contemporary forms of slavery appear to be

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<sup>243</sup> ADB/ILO, *Core Labour Standards Handbook*, 2006, <http://www.adb.org/Documents/Handbooks/Core-Labor-Standards/CLS-Handbook.pdf>

condemned to poverty. More research about the economic impact of contemporary forms of slavery on poverty and the impact of poverty as an essential vulnerability factor that contributes to contemporary forms of slavery are, however, necessary. The balance of economic and social concerns appears to be an important deterrent of contemporary forms of slavery, and lack of access to decent work. As a “Knowledge Bank,” the Bank could work on the generation of data, indicators, research, and evaluation of existing initiatives and programs; identify those vulnerable to exploitation, particularly girls and children, as to focalize effective preventive measures; analyze the relationship between poverty and the different forms of exploitation mentioned *supra*, child labor, labor market discrimination, labor market regulation, conditions of employment of particularly vulnerable groups such as women, youth, ethnic minorities, the disabled; on the role of trade unions and collective bargaining in poverty reduction in low-income countries, and consequently, whether they reduce vulnerability to exploitation, etc. This could permit to develop future and effective interventions.

Mainstreaming the contemporary forms of slavery implies the adoption of several steps, including these issues in the country analysis and strategies, to analyze groups which are particularly vulnerable in any poverty analysis, with special attention to mobile populations, as well as women and children; to develop projects that would directly and indirectly combat and reduce the contemporary forms of slavery, to identify and work with partners, particularly those who would benefit from these policies, as to develop project components; to address the contemporary forms of slavery technical assistant and sector and thematic work), to raise awareness on contemporary forms of slavery, and allowing initiative and participatory approaches by victims and survivors.

Finally, the Bank could use its leadership in gathering efforts for international cooperation for prevention and assistance to victims. The Bank counts with almost universal membership and a paramount leading role in the fight against poverty: the civil society has been claiming the need of further work in the prevention of trafficking. This leading role could represent an extraordinary opportunity for the World Bank.

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### Summary Findings

This paper reviews the international legal framework applicable to the World Bank and Member States on contemporary forms of slavery, in particular, trafficking. The Palermo Trafficking Protocol is specially analyzed. Moreover, the paper refers to the preventive framework constituted by human rights obligations, particularly those of international labor law. The World Bank's mandate appears to permit preventive action. The Articles expressly refer to the goal of improving conditions of labor. On one hand, the Bank's practice includes today work in areas linked to human rights, which reveals tacit agreement by Member States. In addition, human rights obligations have been widely accepted by the international community, though implementation is poor. Moreover, poverty causes vulnerability to slavery-like practices, and they perpetuate poverty. A modest set of recommendations and areas in which further research is needed are included. The paper encourages mainstreaming the issues analyzed strategically in the Bank's core operations (concerning processes and results), with country-led and country specific efforts, identifying the issues important for poverty reduction and growth.

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