THE FLETCHER SCHOOL OF LAW AND DIPLOMACY

The Transnational Crime of Human Trafficking:

Positing the Anti-Trafficking Framework on Human Rights

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I. INTRODUCTION

Human trafficking is a lucrative international business. Although exact profit figures on this illicit trade are impossible to obtain due to its clandestine nature, estimates for profits generated by female trafficking for forced prostitution alone range from seven to twelve billion dollars each year.[1] By holding trafficked victims under situations of slavery-like conditions, specifically forced labor or services, domestic servitude, or other types of debt bondage, traffickers benefit from what seems to be a continuous pool of cheap labor. Traffickers can withhold food, wages, adequate shelter, and health care to their victims, while they can easily acquire new victims. Illustrating the lucrative nature of this trade, one trafficking operation in New York was able to transport women from Thailand, enslave them to work in brothels under madams, and continue to hold the women under debt bondages ranging from $30,000 to $50,000 per person. Before the operation was caught by law enforcement, the traffickers already had made a profit of $1.5 million in a little over fifteen months.[2]

At the same time, human trafficking, at its very core, is a series of human rights violations. Traffickers frequently exercise complete control over their victims through physical abuse, or seizing their travel and identification documents, withholding their wages,

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[1] Susan W. Tiefenbrun, "Sex Sells But Drugs Don't Talk: Trafficking of Women Sex Workers," *Thomas Jefferson Law Review* 23 (2001): 209.

[2] Amy O'Neill Richard, *International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime (November 1999).* An Intelligence Monograph from the Center for the Study of Intelligence (accessed 18 March 2002); available from http://www.odci.gov/csi/monograph/women/trafficking.pdf. Page 19.

restricting or banning their freedom of movement, prohibiting their communication with family and friends, selling and trading them to another owner, or threatening family members.[3] Most often, a combination of these components is used to achieve their compliance. As a result, victims can suffer both physically and psychologically.

The purpose of this paper is threefold: to examine human trafficking as an international human rights issue; to trace the development of an international judicial and law enforcement framework that addresses it as a transnational crime; and, finally, to consider what are some of the most important elements of an effective anti-trafficking strategy at the domestic level. Where appropriate, the paper will draw upon the author's own field experiences in India. Human trafficking, especially the trafficking of women and girls for forced prostitution, is a serious problem in India and neighboring countries of Nepal and Bangladesh. Therefore, India's model of dealing with this extensive trade in women and girls for forced prostitution provides many important insights as to how a developing country can adequately respond to this challenge.

This paper is organized into six parts. After the introduction, the second chapter seeks to clarify some of the conceptual ambiguities surrounding human trafficking. To do so, it will first distinguish between the two separate but related phenomena of alien smuggling and human trafficking. It will also look at some of the earlier efforts to establish a working definition of human trafficking from a human rights perspective. The third chapter will

[3] Kelly E. Hyland, "The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children," *Human Rights Brief* 8 (2001): 30.

examine human trafficking as an issue under international human rights law, which has its roots in early twentieth century conventions on slavery and forced prostitution. The fourth chapter will focus on how the international community has attempted to address this issue as a pressing challenge for law enforcement. Gradually, the international consensus on what constitutes human trafficking has expanded to include elements of forced labor, women's rights, and rights of the child. Emphasis will be given to the current anti-organized crime and anti-trafficking frameworks as established by the United Nations Convention against Transnational Organized Crime in addition to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. The fifth chapter will consider some of the most important components for anti-trafficking efforts at the domestic level. Finally, the paper will conclude with some observations on the importance of reintegrating trafficked victims and challenges in mobilizing public awareness on this illicit trade in humans.

II. Conceptual Clarifications

Within recent years, advocacy groups such as the Anti-Slavery League and other human rights groups have successfully brought the issue of human trafficking to the forefront of international politics. The United Nations Commission on Human Rights has consistently adopted a resolution each year since 1995 which "*[u]rges* Governments to take appropriate measures to address the root factors, including external factors, that encourage trafficking in women and children, in particular girls, for prostitution and other forms of commercialized sex, forced labour…[and] *[i]nvites* Governments to take steps to ensure for victims of trafficking the respect of all their human rights and fundamental freedoms." This same resolution also encourages Governments, intergovernmental and non-governmental organizations, the human rights treaty bodies, the Special Rapporteur on women, on children, and on the rights of migrants to actively contribute to the work of the Working Group on Contemporary Forms of Slavery in 2001.[4] This human rights-based approach of viewing the trafficking cycles is echoed by the International Organization for Migration (IOM), the global leading agency on migration and migratory research, which has listed human trafficking as one of its main priorities and advocates for a rights protective approach towards trafficked victims. Brunson McKinley, Director General of IOM, stated in May 2000: "The human rights of migrants deserve greater attention…IOM is [therefore] dedicated to assisting migrants in distress."[5]

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[4] Commission on Human Rights resolution 2001/48 adopted without a vote on 24 April 2001.

[5] *IOM Mission Statement.* International Organization for Migration (accessed 20 February 2002); available from http://www.iom.int/en/who/main_mission.shtml.

The proliferation of these intense discussions on the issue of human trafficking at the international level, coupled with effective public mobilization campaigns for non-governmental organizations, has raised the level of public sympathy for trafficked victims. At the same time, however, the term 'human trafficking' has become a catch-all phrase for all illicit activities involving people as a commodity or factor of production, without any clear conceptual distinction between the two phenomena of alien smuggling and human trafficking. Such ambiguity in the usage of the term "human trafficking" is also seen in discussions at the highest international political level, where the terms 'trafficked victim' and 'migrant' are used often in the same paragraph, at times interchangeably, leading to further confusion on the matter. One example of this confusion can be found in the following statement by the Director-General of IOM:

> Trafficked migrants are routinely exploited, mistreated or even killed. Migrant workers often find themselves without protection or recourse, either from their own governments or in the country where they are working.[6]

Inevitably, it leads one to wonder what exactly is the nexus between "trafficked migrants" and "migrant workers?" Do both terms refer to the same thing? Or are they only referring to illegal immigrants? Or legal immigrants? And does it make a difference if a migrant consents to be illegally smuggled?

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[6] *Ibid*.

This section on conceptual clarifications examines these questions by first distinguishing between the phenomenon of alien smuggling and human trafficking. While these two separate occurrences may often share similar migratory routes, they differ in the amount of coercion exerted on the migrating individual. It is this element of coercion that fundamentally distinguishes human trafficking from other forms of migration. The section also examines a working definition of human trafficking, based on international human rights law. Lastly, this section illustrates various forms of human trafficking, as to rebut the notion that all trafficked victims are prostitutes or that all prostitutes have been trafficked. There are other forms of human trafficking with different exploitative practices, such as the use of forced labor in a sweatshop and child labor for domestic servitude. However, regardless of the particular form of exploitation, the element of coercion remains.

A. Alien Smuggling and Human Trafficking

Within the past few years, episodes of immigrants undertaking extremely perilous journeys in order to illegally enter developed countries have generated intense public discussions on the merits of open versus closed borders. Public opinions, however, range from sympathy for these illegal immigrants – who often put their lives at risk as they are transported in frozen food trucks, overcrowded boats, or by other precarious means – to outright frustration at perceived failures of a fortressed border approach to control illegal immigration. Such polarization of the issue only narrows the range of the public debate on migration. For instance, a casual examination of a domestic immigration policy often fails to distinguish between regular migration, such as skilled worker recruitment and family

reunification, and other types of illegal migratory patterns. Consequently, this results in an oversimplification of the immigration issue as one of overwhelming supply of migrants without an equal emphasis on the demand dynamics driving migration.

Secondly, illegal migration is a broad category that includes visitors who overstay their visas, as well as alien smuggling and its related phenomenon known as human trafficking. Fundamentally, what separates these different types of illegal migration is the element of criminality and coercion. Whereas overstaying one's visa is often viewed as a victimless crime since the individual jeopardizes only his chance for re-entry, both alien smuggling and human trafficking are often characterized by elements of criminal collusion and different levels of coercion on the migrant. Alien or people smuggling occurs when those smuggled are migrants who have willingly paid for the chance to work abroad. Therefore, alien smuggling comes with a voluntary element and some knowledge on the part of the migrant on her impending illegal entry, at least at the onset of the journey. The primary goal of an alien smuggler is to provide a limited migratory service out of a sending country, as described:

> Most of the organizational activity takes place on the sending side, and the contract is terminated once the migrant has arrived at the destination… Such migrant exporting schemes are often characterized by highly irregular, often short-lived criminality, much of it

> opportunistic…[O]nce the migrant is integrated by crossing the border, the activity is complete.[7]

Alien smugglers are commonly known as 'coyotes' in the Americas, who physically lead the migrants across the U.S.-Mexico border and charge anywhere from $700 to $1500 per person for their services.[8] At the smugglers' disposal is a well-established and sophisticated network of Central American and Mexican contacts and safe houses, where the migrants can stay without detection. At the same time, smugglers can use forged passports and entry visas to bring the migrants directly into the receiving country. In comparison, Chinese smugglers, known as 'snakeheads,' are known for transporting their migrants as cargo in freight carriers or on over-crowded boats – frequently leading to disastrous consequences. For instance, in the *Golden Venture* incident of 1993, a freighter carrying nearly 300 illegal immigrants from Southern China ran aground in New York and led to the death of ten passengers.[9]

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[7] David Kyle and John Dale, "Smuggling the State Back In: Agents of Human Smuggling Reconsidered," in *Global Human Smuggling: Comparative Perspectives*, eds. David Kyle and Rey Koslowshi (Baltimore, Maryland: The John Hopkins University Press, 2001): 33.

[8] Richard, *see supra* note 2, at 9.

[9] The alleged mastermind of the operation, Cheng Chui Ping, known as "Sister Ping" was arrested and charged in Hong Kong on 17 April 2000 after years of investigation in connection with the 1993 Golden Venture. She also stands accused of other crimes relating to alien smuggling in the United States. News Release on April 19, 2000: *Statement by U.S. Consul General Michael Klossen on the Arrest in Hong Kong of Cheng Chui Ping.* Distributed by the Office of International Information Program, U.S. Department of State (accessed on 24 March 2002); available from http://www.usinfo.state.gov.

As opposed to alien smuggling, the goal of human trafficking is to import labor for ongoing enterprises by criminal organizations or even semi-legitimate businesses in the receiving country. Hence, human trafficking is a continuous cycle of criminal activity since organized crime groups can profit both from the victims' initial trafficking fees and their subsequent labor. Within this criminal structure, migrants may be held for weeks, months, or years in conditions of forced labor, including prostitution, in communities where they often do not speak the language. As a result, those trafficked are extremely reluctant to seek help from local authorities due to their illegal immigration status. Moreover, trafficked victims may even be repeatedly sold and exchanged, while taking on new 'owners' and incurring more debts that they themselves must repay with their labor.[10]

Therefore, what sets human trafficking apart from alien smuggling is the element of coercion and the degree in which the migrant's freedom of movement is deprived, despite the fact that the individual initially might have given his or her consent to migrate. It is of fundamental importance to point out that the prohibition against slavery outlaws anyone from selling himself or herself into bondage. For such reasons, if a person desires to stop

[10] Known as debt bondage, this system of holding a trafficked victim seems even more despicable within the context of human trafficking forced prostitution. For instance in India, the 'selling price' of a trafficked woman or girl depends on her age, the lightness of her skin, her physical attributes, and virginity. The highest price would be for a young virgin, who is also a light-skin beauty. In order to pay off her debt as a forced prostitute, she needs to take on more costumers, which, in turn, increases her likelihood of catching sexually-transmitted diseases. Her ability to earn would be short-termed, as there remains a constant supply of young trafficked victims from elsewhere. In addition, the system of debt bondage is extremely manipulative, as the brothel madam is often the only person who keeps the figure on how much was paid. The madam can adjust the figure, often at her whim, without informing the victim, who may continue to hope to pay off her debt. From an interview with a social worker in Bombay (now Mumbai), India during the author's field research to India during August-September 2001. The same source said that the going rate for a young light-skinned prostitute was about 100 Indian Rupees (about two U.S. dollars) per session and half that amount for a 'normal' prostitute.

performing the work, and then is forced to remain and work against his or her will, then the work is involuntary and slavery-like, regardless of the victim's initial and purported consent.[11] Therefore, within the context of human trafficking, the issue of consent makes no legal difference so long as the individual is held in conditions of forced labor and servitude.

Nonetheless, this preoccupation on the issue of consent has contributed noticeably to the confusion that exists between alien smuggling and human trafficking. Consequently, it has generated a rather simplified view of trafficked victims as entrepreneurs who undertake certain risks in order to seek a more prosperous life. This position is echoed by a recent policy paper, which criticized anti-trafficking education as being based on the over-optimistic assessment that potential physical risks are enough to deter potential migrants from seeking economic betterment. Citing a rural Ecuadorian woman who had started to take birth control pills in the event that she would be raped during her clandestine journey into the U.S., the report underscores the fact that she was a voluntary migrant – someone who not only understood the risks, but also someone who had believed that she would never become a victim of trafficking.[12] Such simplification, however, not only understates the amount of human rights abuses inherent in the trafficking dynamic, it also abridges the entire trafficking process to only those methods at recruitment. Indeed, a woman who has agreed to be illegally smuggled may remain, nonetheless, extremely vulnerable to various forms of physical exploitation. Forced prostitution is only one of many potential dangers facing an illegal

[11] Richard, *see supra* note 2, at vi.

[12] David Kyle, *Human Trafficking Policies: Ships Passing in the Night (August 2001).* A Global Affairs Commentary from Foreign Policy in Focus (accessed 20 February 2002); available from http://www.fpif.org.

female migrant, who often lacks education and cannot speak the language of the receiving community. She can find herself in a situation of forced domestic servitude, where her freedom of movement is severely restricted and her rights violated with impunity.

B. A Working Definition of Human Trafficking

Noting the ease in which the voluntary nature of migration can precariously change, non-governmental organizations have long advocated a working definition of human trafficking that includes human rights abuses that are likely to occur from the time of initial recruitment to arrival and living in the receiving community. At the same time, the definition must also be applicable to the wide-ranging set of circumstances that drive this illicit activity. For example, some trafficked victims are sold by their economically desperate parents, kidnapped, or tricked into fake marriages and trafficked by criminal elements through transit countries by using coercion, violence, and threats to ensure compliance.[13] Meanwhile the definition also needs to consider the dynamic: where the victims begin their journey voluntarily, lured by the promises of better jobs abroad, and then fall into the trafficking

[13] The author also found that in the red-light districts of Bombay (now Mumbai), India, some husbands have encouraged their wives to prostitute themselves for money in a complete reversal of family roles. Husbands stay home to take care of the children, while, in some cases, they also act as pimps. This occurs most frequently amongst women from Bangladesh, who are brought from their villages in rural Bangladesh to Bombay's red-light districts by their husbands. Husbands also warn their wives not to say anything about their stay in India when they return home, usually in a year. Many women accept this arrangement because they feel as if they have no other choice but to obey their husband's decisions. It is unclear what happens to the women once they return home, whether they are brought back again for prostitution, disowned, or can successfully reintegrate. It is also unclear as to how valid some of these marriages are. It may very well be that marriages are used as a facade for female trafficking operations. In comparison, most Nepali women in Bombay's red-light districts, for one reason or another, often do not know that they have been sold into forced prostitution. From an interview with a social worker in Bombay (Mumbai), India during the author's field research to India during August-September 2001.

network and forced into situations that they had not envisioned. Despite the diversity and complexity of the phenomenon of trafficking in human beings, it is in all cases exploitative and dangerous and is essentially based on one or more of the elements of deception, coercion, and debt bondage. For all intents and purposes, it is this non-consensual and coercive nature of trafficking that distinguishes it from other forms of illegal migration.

One of the earliest attempts to define and delineate the crime of human trafficking from a human rights perspective was in 1998 at the Roundtable on "The Meaning of 'Trafficking in Persons': A Human Rights Perspective." This conference was organized by the International Human Rights Law Group and included human rights activists, scholars, and professionals, who saw the urgent need for a contemporary and more responsive understanding of the content of trafficking in order for the phenomenon to be adequately addressed and prevented.[14] At this early attempt to formulate an analytical and conceptual framework for crafting appropriate responses to human trafficking, the conference participants decided that trafficking in persons consists of all acts involving the following elements:

- Within or across borders;
- Whether or not for financial or other gains;
- In which material deception, coercion, force, direct or indirect threats, abuse of authority, fraud, or fraudulent non-disclosure is used;

[14] Ali Miller and Alison Stewart, "Report From the Roundtable on the Meaning of "Trafficking in Persons": A Human Rights Perspective," *Women's Rights Law Reporter* 20, no. 1(1998): 11.

- For the purpose of placing a person forcibly, against the individual's will or without consent;
- In exploitative, abusive or servile situation, such as forced prostitution, sweatshop labor, domestic servitude or other abusive forms of labor or family relationships, whether for pay or not.[15]

In January 1999, the Global Alliance Against Traffic in Women, a group of international and domestic non-governmental organizations working on this issue, adopted the following definition for trafficking:

> All acts and attempted acts involved in the recruitment, transportation within or across borders, purchase, sale, transfer, receipt or harbouring of a person involving the use of deception, coercion (including the use or threat of force or the abuse of authority) or debt bondage for the purpose of placing or holding such person, whether for pay or not, in involuntary servitude (domestic, sexual, or reproductive), in forced or bonded labour, or in slavery-like conditions, in a community other than the one in which such person lived at the time of the original deception, coercion or debt bondage.[16]

[15] *Ibid.*, 16.

[16] *Human Rights Standards for the Treatment of Trafficked Persons*. Global Alliance Against Traffic in Women, Foundation Against Trafficking in Women, and International Human Rights Law Group (accessed 19 February 2002); available from http://www.inet.co.th/org/gaatw/SolidarityAction/SMR99.htm.

This definition covers the four operative elements inherent in a trafficking cycle: procurement, coercion, transportation, and exploitation. The initial element of procurement may include purchase, sale, and transfer of the trafficked individual, but it should be noted that procurement methods are not limited to these particular methods. An individual may start as a voluntary migrant, who is later sold when the other elements of coercion, transportation, and exploitation come into play.

The element of transportation, either within national or across international boundaries, often results in the increased vulnerability of the trafficked persons, as it is likely that the trafficked person is a foreigner who does not understand the language of the receiving community. Exploitation is the end purpose in the trafficking cycle, which places individuals in slavery-like conditions, forced or bonded labor, and involuntary servitude that violates their fundamental human rights. This definition also lists the various elements of coercion, including the direct use or the mere threat of force. By including the abuse of authority in its description on the coercive nature of human trafficking, this definition recognizes the extent of the problem of official corruption and of state agent profiting from colluding with traffickers. Henceforth, the elements of coercion and exploitation, coupled with the transportation of individuals into an unfamiliar environment, remain the most important characteristics of the human trafficking cycle, and it is these two elements of exploitation and coercion that set it apart from alien smuggling.

The following testimony of two Ukrainian girls trafficked into Bosnia and Herzegovina exemplifies the various operative elements of coercion and human rights abuses

involved in this illicit activity and illustrates how coercion and other means of physical intimidation can result in the absence of the trafficked victim's informed consent at any point of the trafficking process:

> [T]he two girls explained that they had voluntarily left the Ukraine with a Russian soldier and his girlfriend, knowing they were going to work as dancers in a bar. In fact they worked at another bar in the RS [Republika Srpska, the Serbian entity of Bosnia-Herzegovina] for several days where the owner, whom the girls believed was a police officer, informed them they had been sold to him by the soldier and that he was in turn selling them to the man identified in the instant matter as the waiter in the Doboj bar.
>
> Later the waiter in question was brought to the police station. After questioning by the local police and confrontation by one of the girls, he admitted that he had hit the girl and forced her to go upstairs with one of the clients. He indicated his belief that these women were property when he indignantly asked what right the two other men had had to "take" them. According to IPTF [the International Police Task Force of the UN Peacekeeping Mission in Bosnia and Herzegovina], it was also clear that the women fully accepted the premise that they could be bought and sold.[17]

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[17] *Trafficking in Human Beings in Bosnia and Herzegovina: A summary report of the joint project of the UN Mission in Bosnia-Herzegovina and the Office of the High Commissioner for Human Rights*

The testimony of the two Ukrainian trafficked women above and many other similar accounts of trafficked victims for forced prostitution worldwide have resulted in human trafficking for forced prostitution being labeled as a contemporary form of sexual slavery.[18] In some of these cases of female trafficking, traffickers move victims, who are sometimes sold by their economically desperate parents, through transit countries by using coercion, violence, and threats to ensure their compliance in a process known as "seasoning." During this process, acute physical and psychological violence are used until the victim's will to resist is broken, and she acquiesces to her new profession.[19]

C. Different Forms of Human Trafficking

While forced prostitution may be the most visible form of human trafficking, it is not the only form of exploitation. Similar to any business operation, human trafficking is based on

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(2000). United Nations Mission to Bosnia and Herzegovina (accessed 19 February 2002); available from http://www.unmibh.org/news/hrrep/humantraf.htm. Pages 6-7.

[18] Some activists have even compared the human trafficking in women and girls for forced prostitution to the Japanese military enslavement of young Korean, Chinese, Taiwanese, and Indonesian women as "comfort women" during World War II. See Linda A. Malone, "Essay: Twelfth Annual Philip D. Reed Memorial Issue The Balkans Region: Legal Perspectives and Analyses Economic Hardship as Coercion under the Protocol on International Trafficking in Persons by Organized Crime Elements," *Fordham International Law Journal* 25 (2001): 72-3. It is the opinion of the author that while certain elements of exploitation may be similar between the current form of female trafficking for forced prostitution and sexual enslavement of Korean "comfort women" at Japanese military camps during World War II, such comparison is not legally correct and obfuscate any in-depth understanding of these two separate experiences. Fundamentally, sexual enslavement during wartime falls under the rubric of another separate international legal regime on humanitarian law or law of war. Confusing these two distinct, albeit related, international legal regimes can undermine the protection available to victims of trafficking during times of peace. In addition, it is of crucial importance to note that the Japanese enslavement of young women for sexual exploitation places a heavier burden on the state responsibility and culpability of Japan's wartime government.

[19] Louise Brown, *Sex Slaves: The Trafficking of Women in Asia* (London: Virago Press, 2000), 98.

human beings as its fluid capital, whose physical exploitation is the commercial product. The distribution of trafficked humans is similar to an extensive domestic and international product distribution strategy. As the commercialization of human trafficking has become one of the fastest growing and most lucrative criminal enterprises in the world, there are other forms of this exploitation trade beyond forced prostitution. Therefore, discussions on this topic need to be conceptually clear on what is exactly meant by invoking the term 'human trafficking.' As one author has noted, human trafficking to the United States can be as diverse in practice as the following:

> Latvian women threatened and forced to dance nude in Chicago; Thai women brought to the United States for the sex industry but then forced to work as virtual sex slaves; ethnically Korean-Chinese women [and men] held as indentured servants in the Commonwealth of the Northern Mariana Islands; and hearing-impaired and mute Mexicans brought to the US, enslaved, beaten, and forced to peddle trinkets in New York City.[20]

Inevitably, as the most widespread form of human trafficking is for the purpose of forced prostitution, which has become synonymous with 'female trafficking' and 'sex trafficking,' most researchers and analysts of human trafficking tend to focus on this particular form of trafficking for forced prostitution. This is also due, in part, to the fact that in most cases, it is easier to spot brothels or at least know where the red-light areas are than it is to find sweatshops using forced labor. Moreover, women remain the predominant targets of

[20] Richard, *see supra* note 2, at v.

the traffickers and are likely to suffer harm of a different nature and degree than their male counterparts.

It is also necessary to treat trafficking for forced prostitution as two different sets of protective regimes – one for adult and another for children. Under both international and domestic laws, children receive different kinds of rights and protections than adults, as children exercise less decision-making control in order to fully exercise their rights. Children, especially girls, are increasingly becoming more vulnerable to fall prey to the network of traffickers and brothel owners, who are facing a growing demand for younger sex workers, whose inexperience is perceived as a disease-free guarantee. Because having sexual intercourse with minors is a criminal offense under many domestic laws, exact figures on human trafficking of children for forced prostitution are very difficult to establish. Not only do brothels go to extraordinary measures to conceal their child prostitutes, national governments also can be very reluctant to disclose the extent of this problem within its borders. The United Nations Children's Fund (UNICEF) estimates that the number of children exploited for commercial sex is about 200,000 in Thailand, over 650,000 in the Philippines, 400,000 in India, between 100,000 and 300,000 in the Unite States, and between 200,000 and 500,000 in Brazil.[21] The following account of a Nepali prostitute in Bombay, India illustrates this exploitative element of trafficking in children for prostitution:

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[21] Phil Williams, "Emerging Issues: Transnational crime and its control," in *Global Report on Crime and Justice*, ed. Graeme Newman (New York: Oxford University Press, 1999), 226.

> Most of the time you never see the very young girls – the children. They are kept separate from the rest. For a long time I never saw any really young ones but then I began to see them sometimes at night. I could hear them. They were allowed to go and play on the roof. I could hear their voices and they were just little girls. Whenever we asked about them we were told that there was no one there and that we had made a mistake…Then another time there was a girl with us who was young – about eleven. She was always kept inside and if the [owner] thought there was going to be a raid she was squeezed into a little hold under the roof. She was told that she would be killed if she made a noise.[22]

Young boys also can be trafficked for forced prostitution, although there is very little verifiable information on the extent of this problem due to the shame that societies often attach to homosexuality. It is reported that Calcutta, India alone has eight major concentration centers of male sex-workers, catering to the demand of homosexual men, but even these are viewed as "informal social groups" where concrete data is hard to obtain.[23] In this sense, male sex workers, especially those that are minors, are even more of an invisible group than their female counterparts. Needless to say, trafficking in children for forced prostitution is an even more abhorrent trade, as the children are extremely vulnerable to sexual diseases due to the fact that their bodies have yet to mature. Furthermore, because of their extreme vulnerability

[22] Brown, *see supra* note 19, at 101.

[23] Carolyn Sleightholme and Indrani Sinha, *Guilty Without Trial: Women in the Sex Trade in Calcutta* (New Brunswick, New Jersey: Rutgers University Press, 1997), 152-153.

to both physical and psychological abuses inherent in forced prostitution, their successful reintegration and rehabilitation can also be very difficult.

In addition to human trafficking for forced prostitution, there is human trafficking for commercial forced labor. For example, a recent *New York Times* article describes how Youssouf, a boy around the age of 15, from Mali was transported into the Ivory Coast to work on a coca plantation for one year, six days a week, from sunrise to sunset. For one year of hard labor, where Youssouf was prohibited to leave, he was paid a total of $102.[24] The following passage describes the operative elements of exploitation and coercion involved in this particular form of human trafficking, where the practice bears an overwhelming resemblance to slavery:

> If Youssouf had spoken French, he would have known that the men had just agreed to a purchase price for him of 33,000 Central African francs – the equivalent of $45…If he had been able to read, and had been allowed to look at the robed man's little book, he would have seen, written in blocky letters, in blue ink, the words *le transport*, *le kaxeur* and *la police*. Next to each word he would have seen a number. And he would have known that the $90 paid for the two boys included $17 for transportation

[24] Michael Finkel, 'The Journey of a 15-Year-Old From Mali Who Sold Himself Into Bondage (18 November 2001)" in *New York Times Sunday Magazine* (accessed 18 November 2001); available from http://www.nyt.com.

> costs, $42 for the trafficker fee and $31 to send the police officer home happy.[25]

The article also describes how Youssouf was prevented from leaving the coca plantation and return to his home village in Mali.

> [O]ne of the older boys sat next to Youssouf and told him a story. He said that sometimes, when the work was too hard, a boy would try and run away from the plantation. When a boy tries to run, Youssouf was told, the owner and his family chase after him. People who grow up in the forest know the paths very well, and they can always catch the boy. When they catch him, they bring him back to the plantation. They take off all his clothes. They tie him arms together and his legs together. They whip him with a tree branch until he is bloody from head to toe. Then they leave the boy outside, all night, still tied up, and the mosquitoes feast on him and the ants crawl into his wounds. The older boy admitted to Youssouf that he had never actually seen such a thing with his own eyes, but he had heard the story many times and was very sure it was true. Youssouf believed him.[26]

It is estimated that about 90 percent of the 600,000 plantations in the Ivory Coast use slave labor and perhaps around thousands, and possibly tens of thousands, of boys have been

[25] *Ibid.*

[26] *Ibid.*

beaten or otherwise physically abused.[27] The degrading conditions and the slavery-like practices on these plantations in the Ivory Coast, which is a major exporter of the world's cocoa supplies, have led many human rights groups and business operations to propose a plan where the working conditions at these cocoa plantations would be closely monitored. In turn, companies only would buy cocoa from certified plantations, where no under-age workers are hired.

Another particular form of human trafficking is the trafficking of young boys as camel jockeys into countries in the Middle East. While little is known for certain as to the extent of this illicit activity, it has been reported that there are as many as hundreds of under-age camel jockeys working in the region who are subjected to harsh conditions. The most recent Human Rights Report released by the U.S. Department of State cited a press report that claims that as many as 2,000 boys have been trafficked into the United Arab Emirates (UAE) over the last two years.[28] Although this figure is hard to substantiate and may be inflated, the U.S. State Department report levies a specific charge against the state of Abu Dhabi Emirate, which is home to the country's largest camel racing tracks and also has the largest concentration of under-age camel jockeys. The report describes:

> Credible sources report that almost all camel jockeys are children under the minimum employment age. Reports indicate that small, organized

[27] *Ibid*.

[28] *Country Reports on Human Rights Practices 2001: United Arab Emirates*. U.S. Department of State, Bureau of Democracy, Human Rights, and Labor (accessed 12 March 2002); available from http://www.state.gov/g/drl/rls/hrrpt/2001/nea/8306.htm.

> gangs provide the stables with the young boys, who generally are between the ages of 4 and 10. The gangs obtain the youths, usually from poor families in Pakistan and Bangladesh, by kidnaping or, in some instances, buying them from their parents or taking them under false pretenses, and then smuggling them into the country. The boys are often underfed and subjected to crash diets to make them as light as possible. Boys of 4 to 5 years of age are reported to be preferred, although older boys aged 6 to 8 also are used, depending on their size. Some children have reported being beaten while working as jockeys, and others have been injured seriously during races.[29]

Despite the hidden nature of the trade of child trafficking for camel jockeying in the Middle East, there have been several reported cases, most of which came to light only when serious injuries were sustained by the child jockeys. One such example occurred in May 2001, when a newspaper in the UAE reported that a six-year old Pakistani boy, who had been trafficked to the country along with his family, died of severe head injuries allegedly caused by "a fall" – a common excuse sometimes given to hospital personnel when injuries are sustained from camel jockeying. The newspaper reported that the boy's father claimed that an agent had promised them an attractive salary and brought the family to the UAE. Upon arrival, the family allegedly was informed that a childless family would adopt their children

[29] *Ibid*.

for the sum of $600 (1,000 dirhams). After the incident, the family reportedly approached the Pakistani Embassy, which facilitated their subsequent repatriation.[30]

In light of all these testimonies on the various forms of human trafficking and specifically on the exploitation of children for forced labor, slavery-like servitude, and prostitution, international organizations increasingly have listed efforts to combat human trafficking as their top priority. On the International Day for the Abolition of Slavery on 2 December 2000, the United Nations Secretary-General Kofi Annan noted: "Despite the many efforts made to abolish all forms of slavery, it is not dead. It exists, and is even on the rise in some parts of the world. This is an affront to every free man and woman, indeed to all of humanity. New forms of slavery, such as sexual exploitation of children, child labour, bonded labour, serfdom, migrant labour, domestic labour, forced labour, slavery for ritual or religious purposes and trafficking pose a great challenge to all of us."[31] In this context, the United Nations Office of the High Commissioner for Human Rights (OHCHR) established a Trafficking Program, whose objective is to work towards the integration of a human rights perspective into international, regional, and national anti-trafficking initiatives.

[30] *Ibid*.

[31] *United Nations Press Release: Message for International Day Notes New Challenges Involving Children, Sexual Exploitation, Migrant Workers, Forced Labour, Human Trafficking (2 December 2000)*. United Nations Office of the High Commissioner for Human Rights (accessed 14 March 2002); available from http://www.unhchr.ch.

III. International Human Rights Law

Many legal scholars have emphasized that the sudden proliferation of human rights treaties during the second half of the twentieth century marks the single most important international legal development since the Peace of Westphalia in 1648. This enthusiasm is not unfounded, as evidenced by the predominance of human rights treaties in what United Nations Secretary-General Kofi Annan heralded as a core group of twenty-five multilateral treaties in his Millennium Report to the General Assembly. Under this multilateral treaty framework, thirteen were human rights treaties.[32] This progress seen by codification efforts on human rights is coupled with another set of fundamental values on rights of the individual. Labeled as peremptory rules, or *jus cogens*, in Articles 53 and 64 of the Vienna Convention on the Law of Treaties, this new category of general international rules came into being by prohibiting states from derogating from certain peremptory norms even if states are not legally bound to do so through treaties or customary rules. Judge Antonio Cassese, President of the International Criminal Tribunal for the Former Yugoslavia from 1993-97, states: "It follows that *jus cogens* is hierarchically superior to all the other rules of international law."[33]

Nonetheless, even though most states and legal scholars alike have agreed that certain peremptory norms and the principle of *jus cogens* should be given a higher status than bilateral or multilateral treaty relations, debates have centered on exactly what these norms

[32] *Multilateral Treaty Framework: Core Group of Multilateral Treaties Deposited with the Secretary-General Representative of the Organization's Key Objectives (2000).* The Millennium Summit of the United Nations General Assembly (accessed 15 February 2002); available from http://www.un.org.

[33] Antonio Cassese, *International Law* (New York: Oxford University Press, 2001), 118.

are and where the parameters of *jus cogens* lie. While Professor Cassese refers to one view on peremptory norms that includes people's right to self-determination, the prohibition of aggression, genocide, slavery, racial discrimination, and racial segregation or apartheid, others may or may not expand these boundaries.[34] On the other hand, the Human Rights Committee, which is the treaty- monitoring body for the International Covenant on Civil and Political Rights (ICCPR) has a much more inclusive definition of customary law and peremptory norms. The Committee not only lists *jus cogen* norms under international customary law but also those norms which, *a fortiori*, have the character of peremptory norms. This results in a working definition of peremptory norms that includes prohibitions on slavery, torture, cruel, inhuman or degrading treatment or punishment; to arbitrarily arrest and detain individuals or to deprive them of their lives; to deny freedom of thought, conscience, and religion; to presume a person guilty unless he proves his innocence; to execute pregnant women or children; to permit the advocacy of national, racial, or religious hatred; to deny to persons of marriageable age the right to marry; or to deny to minorities the right to enjoy their own culture, religion, and language.[35] What remains significant, however, despite these different definitions of peremptory norms, is that there is little disagreement over the prohibition on slavery. In this sense, slavery and the slave trade have obtained a unique status in international human rights law, where the moral opprobrium attached to it is so strong that the prohibition exists regardless of a country's obligations under international treaty or customary law. As a

[34] *Ibid*., 110-111.

[35] *Human Rights Committee, General Comment 24: General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocol thereto, or in relation to declarations under article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).* Adopted by the Human Rights Committee at its 1382nd meeting (fifty-second session) on 2 November 1994.

result, much of the international community's initial efforts to address human trafficking within the human rights framework have centered on the development of it as a contemporary form of slavery, with the component of forced labor and servitude. Increasingly, within the last twenty years, human trafficking is also being examined from the human rights perspective of those who are the most vulnerable to this illicit trade – women and children.

A. Prohibition on Slavery and Slave Trade

Since the establishment of the United Nations in 1945, the prohibition on slavery has been articulated as a fundamental human right. The 1948 Universal Declaration of Human Rights ("Universal Declaration"), proclaimed: "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."[36] Nonetheless, this prohibition has its roots prior to the foundation of the United Nations. Coordinated multilateral action to address slavery and the slave trade started as early as the nineteenth century. In 1885, the General Act of the Berlin Conference on Central Africa unequivocally found trading in slaves to be forbidden in conformity with principles of international law.[37]

[36] The 1948 Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71, Article 4 [hereinafter Universal Declaration].

[37] The 1885 General Act of the Berlin Conference on Central Africa. The Conference met at Berlin from November 1884 through February 1885 and was attended by representatives of Great Britain, Austria-Hungary, France, Germany, Russia, U.S.A., Portugal, Denmark, Spain, Italy, the Netherlands, Sweden, Belgium and Turkey. Chapter II, art. IX: "Seeing that trading in slaves is forbidden in conformity with the principles of international law as recognized by the Signatory Powers, and seeing also that the operations, which, by sea or land, furnish slaves to trade, ought likewise to be regarded as forbidden, the Powers which do or shall exercise sovereign rights or influence in the territories forming the Conventional basin of the Congo declare that these territories may not serve as a market or means of transit for the trade in slaves, of whatever race they may be. Each of the Powers binds itself to employ all the means at its disposal for putting an end to this trade and for punishing those who engage in it."

Four years later, in 1889, parties to the Brussels Conference condemned slavery and also agreed on a set of measures to suppress the slave trade. Known as the General Act of the Brussels Conference Relative to the Africa Slave Trade, these measures included the granting of reciprocal rights of on-board search and seizure of slaves.[38]

Following these two international agreements, an important objective of the League of Nations when it was established in 1920 was to develop an effective multilateral legal framework to combat the slave trade. In this regard, the League of Nations created a special committee to study the question of slavery, which later drafted the Slavery Convention of 1926 ("Slavery Convention").[39] The Slavery Convention defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised,"[40] and the slave trade as:

> [A]ll acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.[41]

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[38] The General Act of the Brussels Conference Relative to the Africa Slave Trade of 26 February 1885. The reciprocal rights of on-board visit, search, and seizure of slaves, however, were restricted to specified maritime zones, delimited by art. XXI, and did not extend to all international waters.

[39] The 1926 Slavery Convention, adopted by the Plenipotentiaries of the League of Nations on 25 September 1926, entered into force 9 March 1927. [hereinafter the Slavery Convention].

[40] The Slavery Convention, art. 1(1)

[41] *Ibid.*, art. 1(2).

It further imposes obligation on each Contracting Party to take necessary steps to "prevent and suppress the slave trade;" and "bring about…the complete abolition of slavery in all its forms."[42] By this time, the prohibition of slavery already had attained some characteristics of peremptory norms under international law. For example, the Council of the League of Nations required the Ethiopian Government to undertake special efforts to abolish slavery and the slave trade before it was allowed to join the organization in 1923. Thus, the example of Ethiopia's membership demonstrates that the issue of slavery was not considered to be outside the purview of the League of Nations and that the organization had a right to intervene in matters relating to slavery and the slave trade, notwithstanding the absence of explicit treaty obligations.[43]

After the transfer of the League of Nations' assets and responsibilities to the United Nations (UN) in 1946, multilateral actions for the protection of human rights, especially those pertaining to slavery and slavery-like practices have taken place under the aegis of the UN. In 1957, the UN General Assembly adopted the 1957 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery ("Supplementary Convention").[44] The Supplementary Convention became the first

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[42] *Ibid.*, art. 2.

[43] Richard B. Lillich and Hurst Hannum, *International Human Rights: Problems of Law, Policy, and Practice* (Aspen, Colorado: Aspen Law & Business, 1995), 4.

[44] The 1957 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 30 April 1957 [hereinafter the Supplementary Convention]. It currently has 118 ratifications.

international treaty to offer comprehensive definitions on practices outside the traditional concept of African slave trade. It described *debt bondage* as:

> [T]he 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;[45]

serfdom, as:

> [T]he condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;[46]

practices of *gender discrimination*, as where:

> 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

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[45] The Supplementary Convention, art. 1(a).

[46] *Ibid.*, art. 1(b).

> 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
>
> A woman on the death of her husband is liable to be inherited by another person;[47]

and relating to the protection of the child:

> 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 labour.[48]

With these explicit provisions, the Supplementary Convention incorporated more prohibited practices within the multilateral framework on slavery. More importantly, by calling on all State Parties to abolish progressively, and as soon as possible, practices and institutions similar to slavery, the Supplement Convention was able to broaden the *jus cogens* concept to practices not explicitly related to the African slave trade, but whose operative element of exploitation, nonetheless, presented a very compelling case for barring them under the characterization of contemporary forms of slavery. In time, one of these practices under the

[47] *Ibid.*, art. 1(c)i-iii.

[48] *Ibid.*, art. 1(d).

rubric of 'contemporary forms of slavery' would become the trafficking in women and girls for forced prostitution, once known as the 'white slave trade'.

B. Emergence of the Trafficking in Women – *White Slave Trade*

Around the early twentieth century, early feminist activists coined the term 'white slave trade' to highlight the growing phenomenon of the trade in women for prostitution during the second half of the nineteenth-century. This problem was particularly widespread on the west coast of the United States during the time of the gold rush. Missionaries, who received runaway 'white slaves' at rescue homes in San Francisco and Berkeley, documented cases where foreign women, mostly Chinese girls, were sold by their families, bought as brides, brought into the United States, and later sold into forced prostitution. The account below describes the pervasiveness of this 'white slave trade,' while comparing it with trade in African slaves:

> A white slave market soon grew around Dupont Street in San Francisco. There, Chinese white slaves were directly brought from ships to endure a humiliating physical examination by potential buyers. In an apartment called the "Queen's Room," young girls were subjected to the kind of dehumanizing objectification that Africans had experienced upon landing in the hands of southern auctioneers. Many of these girls, often as young as eleven and twelve, ended up as slaves of the infamous crib system – viewed by one reformer as the worst form of American sexual slavery. He described the cribs as 'small rooms opening into inner passages by

> means of a barred window and door, which is kept locked by the manager…Within these little cells, scantily furnished, are kept young girls, most of them Chinese and Japanese, but some of them European and Americans. They have little light or air, are rarely allowed to leave their rooms, and the manager receives the money.'
>
> Thus, in many respects, Chinese white slaves became virtual chattel…In other words, unless a woman, like a black slave in the nineteenth century, could buy her freedom – and legend has it that some did – she remained the property of her procurers.[49]

Public outcry over the so-called white slave trade ultimately led to the codification of the 1904 International Agreement for the Suppression of the White Slave Traffic ("1904 Agreement"), which was the earliest treaty addressing the issue of trafficking in women for prostitution.[50] Most significantly from a human rights perspective, the 1904 Agreement laid the basis for future development of a victim-oriented strategy to deal with human trafficking by recognizing the rights of trafficked victims to return to their place of origin. Article 3 of the Agreement obliged contracting parties to "undertake, within legal limits, and as far as can be done, to entrust temporarily, and with a view to their eventual repatriation, the victims of a criminal traffic when destitute to public or private charitable institutions, or to private

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[49] Mary Becker, Cynthia Grant Bowman, and Morrison Torrey, *Cases and Materials on Feminist Jurisprudence: Taking Women Seriously, Second Edition* (St. Paul, Minnesota: West Group, 2001), 431-2.

[50] The 1904 International Agreement for the Suppression of the White Slave Traffic, signed in Paris on 18 May 1904 [hereinafter the 1904 Agreement].

individuals offering the necessary security." In the case where the victim herself, or charitable institutions, cannot pay for her repatriation, the Agreement states: "[T]he cost of repatriation shall be borne by the country where she is in residence as far as the nearest frontier or port of embarkation in the direction of the country of origin, and by the country of origin as regards the rest."[51]

The 1904 Agreement, however, came to be viewed as largely ineffective, as European countries had enacted it to address, specifically, only the trafficking of European women and girls. The term 'white slave traffic,' therefore, was taken quite literally, as opposed to how some early feminists had used it to label all non-African slavery-like practices, including the forced prostitution of Chinese girls in western California. As a result, frustrations over the ineffectual Agreement led to another codification attempt six years later, resulting in the 1910 International Convention for the Suppression of the White Slave Traffic ("1910 Convention").[52] Affirming the strong prohibition against slavery and slavery-like practices, which includes the notion that no one can give his or her consent to be enslaved, the 1910 Convention rejects the notion that the consent of a trafficked victim is relevant for any normative discussion on human trafficking for forced prostitution. It states:

[51] The 1904 Agreement, art. 4.

[52] The 1910 International Convention for the Suppression of the White Slave Traffic and Final Protocol, signed in Paris on 4 May 1910 [hereinafter the 1910 Convention]. Both the 1904 Agreement and the 1910 Convention were amended by a single protocol on 4 May 1949, which transferred treaty functions previously given to the French Ministry of Foreign Affairs to the United Nations. The 1949 Protocol amending the International Agreement for the Suppression of the White Slave Traffic of 18 May 1904 and the International Convention for the Suppression of the White Slave Traffic of 4 May 1910, entered into force 4 May 1949.

> Whoever, in order to gratify the passions of another person, has procured, enticed, or led away, even with her consent, a woman or girl under age, for immoral purposes, shall be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries.[53]

Furthermore, the 1910 Convention was the first international agreement to establish a framework for transnational cooperation in criminal prosecution of traffickers of women and girls for forced prostitution, which will be discussed in more detail in the following section on human trafficking as a transnational crime.

The establishment of the League of Nations in 1920 provided another normative forum in which the moral prohibition on slavery and the trafficking of women and girls for forced prostitution could be maintained. In fact, the issue of trafficking in women and children became an important focus of the activities of the League of Nations. On 30 June 1921, the League hosted its first International Conference on the Traffic in Women and Children in Geneva, Switzerland. This was followed by the Conference of Central Authorities of Eastern Countries on the Traffic of Women and Children in Bandoeng, Java from 2 to 15 February 1937. The emphasis given to this single issue by the League resulted in two more codification efforts to combat this trade: the 1921 International Convention for the Suppression of the Traffic in Women and Children ("1921 Convention")[54] and the 1933

[53] The 1910 Convention, art. 1.

International Convention on the Suppression of the Traffic in Women of Full Age ("1933 Convention").[55] Both of these treaties, in particular the 1921 Convention, have a strong human rights element in the protection of trafficked victims. For instance, the 1921 Convention obliges the following from its signatories:

> The High Contracting Parties undertake in connection with immigration and emigration to adopt such administrative and legislative measures as are required to check the traffic in women and children. In particular, they undertake to make such regulations as are required for the protection of women and children traveling on emigrant ships, not only at the points of departure and arrival, but also during the journey, and to arrange for the exhibition, in railway stations and in ports, of notices warning women and children of the danger of the traffic and indicating the places where they can obtain accommodation and assistance.[56]

On 2 December 1949, the UN General Assembly approved the adoption of the 1949 International Convention for the Suppression of the Traffic in Persons and of the Exploitation

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[54] The 1921 International Convention for the Suppression of the Traffic in Women and Children, adopted by the Plenipotentiaries of the League of Nations on 30 September 1921, entered into force 15 June 1922 [hereinafter the 1921 Convention].

[55] The 1933 International Convention on the Suppression of the Traffic in Women of Full Age, adopted by the Plenipotentiaries of the League of Nations on 11 October 1933, entered into force 24 August 1934 [hereinafter the 1933 Convention].

[56] The 1921 Convention, art. 7.

of the Prostitution of Others ("1949 Convention").[57] The 1949 Convention consolidated earlier trafficking treaties and significantly changed the multilateral anti-trafficking framework. Notably, from a human rights perspective, the 1949 Convention was the first international agreement to view trafficking in gender-neutral terms and focused on the end element of exploitation for forced prostitution.

C. Forced Labor

As a result of the two separate legal developments in slavery and the trafficking in women and children for forced prostitution, the modern concept of human trafficking is a convergence of elements from traditional trafficking and slavery definitions. As such, trafficking involves the elements of enticement, procurement, deception, and transportation from traditional trafficking, and the elements of exploitation and forced labor from traditional slavery and slavery-like practices.[58] Thus, one of the most important elements of the modern concept of human trafficking is forced labor, and it is this exploitative element that characterizes human trafficking as a contemporary form of slavery. Under the human rights mechanism of the United Nations, the Working Group on Contemporary Forms of Slavery has consistently examined human trafficking within the legal framework of the prohibition on slavery. In its 1999 report on contemporary forms of slavery, the Working Group considered trafficking in persons to be one of the "new insidious forms of slavery." The report

[57] The 1949 International Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, G.A. res. 317(IV) of 2 December 1949, entered into force 25 July 1951 [hereinafter the 1949 Convention]. It currently has 74 ratifications.

[58] Hyland, *see supra* note 3, at 30.

unequivocally "[r]eaffirms once again that forced labour is a contemporary form of slavery,"[59] and, above all, in relations to bonded child labor, the report:

> [u]rges States that have not yet done so to ratify the relevant International Labour Organization conventions, in particular the Forced Labour Convention, 1930 (No. 29), the Minimum Age Convention, 1973 (No. 138) and the new Worst Forms of Child Labour Convention, 1999 (No. 182).[60]

Seen through this prism of forced labor and bonded labor, human trafficking thus has become an important issue for the International Labour Organization (ILO). The ILO has increasingly become more involved in this issue of human trafficking and has adopted numerous conventions, recommendations, and other normative tools in order to protect the human rights of individuals when it comes to forced labor practices.

The two main ILO instruments dealing with forced labour as their principle subject are the 1930 Forced Labour Convention (C029)[61] and the 1957 Abolition of Forced Labour

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[59] *Contemporary Forms of Slavery, Report of the Report of the Working Group on Contemporary Forms of Slavery on its twenty-fourth session*, E/CN.4/Sub.2/1999/17 of 20 July 1999. Report submitted to the Commission on Human Rights' Sub-Commission on Prevention of Discrimination and Protection of Minorities at its Fifty-first session, para.13(1).

[60] *Ibid.*, para.12(2).

[61] The 1930 Forced Labour Convention of the International Labour Organization (C029), adopted on 28 June 1930 at the 14th Conference Session and entered into force 01 May 1932. It currently has 160 ratifications.

Convention (C105). [62] Under the Forced Labour Convention, the term *forced* or *compulsory* labor is defined as:

> [A]ll work or services which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.[63]

Moreover, it prohibits the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations.[64] The 1930 Forced Labour Convention, however, only was intended as a tool for each signatory of the ILO to "suppress the use of forced or compulsory labour in all its forms within the shortest possible period."[65] On the other hand, in 1957, the Abolition of Forced Labour Convention referred to the human rights principles articulated by the Universal Declaration and proclaimed forced or compulsory labor to be a human rights violation.[66] Most importantly, this convention calls for the complete elimination of forced or compulsory labor requiring each Contracting Party to undertake all effective measures to secure for its immediate and complete abolition.[67]

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[62] The 1957 Abolition of Forced Labour Convention of the International Labour Organization (C105), adopted on 25 June 1957 at the 40th Conference Session and entered into force 17 January 1959. It currently has 157 ratifications.

[63] The 1930 Forced Labour Convention, art. 2.

[64] *Ibid.*, art. 4.

[65] *Ibid.*, art. 1.

[66] The 1948 Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71.

[67] The 1957 Abolition of Forced Labour Convention, art. 2. Any form of forced or compulsory labour is specified, in art. 1: "(a) as a means of political coercion or education or as a punishment for holding

To emphasize the special prohibitive status of child forced labor, the ILO adopted a separate convention on this subject, resulting in the 1999 Worst Forms of Child Labour Convention (C182).[68] The convention not only obliged Contracting Parties to "take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency,"[69] but it also expanded the definition of forced labor to practices that disproportionately affect children. Therefore, for the purpose of this Convention, the phrase "the worst forms of child labour" comprises traditional as well as contemporary forms of slavery, "such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour" and also the "forced or compulsory recruitment of children for use in armed conflict."[70] Moreover, within the context of trafficking in children, the definition of "worst forms of child labour" also includes "the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances,"[71] as well as any "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."[72]

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or expressing political views or views ideologically opposed to the established political, social or economic system; (b) as a method of mobilising and using labour for purposes of economic development; (c) as a means of labour discipline; (d) as a punishment for having participated in strikes; (e) as a means of racial, social, national or religious discrimination."

[68] The 1999 Worst Forms of Child Labour Convention of the International Labour Organization (C182), adopted on 17 June 1999 at the 87th Conference Session and entered into force 19 November 2000. It currently has 117 ratifications.

[69] The 1999 Worst Forms of Child Labour Convention, art. 1.

[70] *Ibid.*, art. 3(a).

[71] *Ibid.*, art. 3(b).

[72] *Ibid.*, art. 3(d).

Illustrating the urgency in which a separate international labor convention was needed to address the issue of bonded child labor, the 1999 Worst Forms of Child Labour Convention was met with speedy ratification by 117 signatories and entered into force one year later.

D. Women's Rights

Within the context of women's rights, the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW")[73] provides the international legal framework for provisions contained in the Declaration on the Elimination of Discrimination Against Women.[74] In addition, CEDAW contributes extensively to the interpretation of articles on non-discrimination and gender equality in the two core human rights treaties of 1966 – the International Covenant on Civil and Political Rights ("ICCPR")[75] and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").[76] Indicating the importance in which the drafters of these two treaties viewed discrimination and gender quality, both treaties have a similar article on the prohibition of discrimination in the domestic implementation of these human rights without discrimination of any kind "as to race, colour,

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[73] The 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 3 September 1981 [hereinafter CEDAW]. It currently has 165 ratifications.

[74] Declaration on the Elimination of Discrimination against Women, Proclaimed by General Assembly resolution 2263(XXII) of 7 November 1967. .

[75] The International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976 [hereinafter ICCPR]. It currently has 144 ratifications.

[76] The International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force 3 January 1976 [hereinafter ICESCR]. It currently has 142 ratifications.

sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[77] Furthermore, Article 3 in both treaties articulates the obligation of the state "to ensure the equal right of men and women to the enjoyment of all…rights set forth in the present Covenant."[78] Accordingly, CEDAW places a broad obligation on State Parties

> [To] take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.[79]

CEDAW is also the only other multilateral treaty besides the early international conventions for the suppression of the white slave trade and traffic in persons to directly address issues relating to the trafficking in women for forced prostitution. For instance, article

[77] ICCPR art. 2(1): "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." ICESCR, art. 2(2): "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[78] ICCPR, art. 3: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant." ICESCR, art. 3: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant." The only other common article present in both treaties is the provision on the right of self-determination, which is textually identical in both ICCPR and ICESCR, arts. 1(1): "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

[79] CEDAW, art. 3.

6 required State Parties to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."[80]

The separation of the phrases "all forms of traffic in women" and "exploitation of prostitution" in Article 6 has been interpreted to include, within the convention's protections, victims of trafficking for purposes other than forced prostitution, which may include trafficking for forced domestic labor and forced marriage.[81]

On October 6, 1999, the UN General Assembly adopted the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, which contains a right-to-petition procedure for individuals and groups whose governments have signed and ratified CEDAW and its Optional Protocol.[82] This procedure allows the Committee on the Elimination of Discrimination against Women ("the Committee") to receive and consider individual communications on alleged violations of CEDAW.[83] Under the Optional Protocol, the Committee is empowered to conduct inquiries into the abuse of

[80] *Ibid.*, art. 6.

[81] Janie Chuang, "Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts," *Harvard Human Rights Journal* 11 (1998): 78.

[82] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, adopted and opened for signature, ratification and accession by the General Assembly resolution 54/4 of 6 October 1999. G.A. res. 54/4, annex, 54 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/54/49 (Vol. I) (2000), entered into force Dec. 22, 2000 [hereinafter CEDAW Optional Protocol]. It currently has 33 ratifications.

[83] CEDAW Optional Protocol, art. 1. This procedure is similar to the Optional Protocol to the International Covenant on Civil and Political Rights where the treaty monitoring body, the Human Rights Committee, can receive and decide on individual communications of alleged violations of civil and political rights against states.

women's human rights in countries that have ratified the Optional Protocol.[84] It is envisioned that victims of all forms of female trafficking would be able to submit individual complaints to the Committee, alleging a state's failure "to suppress all forms of traffic in women and exploitation of prostitution of women," if their state has ratified both CEDAW and the Optional Protocol.

E. Rights of the Child

Reflecting the trend in international human rights law where separate legal frameworks are codified to protect vulnerable populations, the UN General Assembly adopted the 1989 Convention on the Rights of the Child ("CRC").[85] Recognizing that children, in general, exercise less decision-making control over their rights as compared to adults, the CRC aimed to establish a comprehensive regime to protect children's rights. It also protected them "against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."[86]

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[84] CEDAW Optional Protocol, art. 8(2): "Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory."

[85] The 1989 Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force 2 September 1990. It nearly has universal ratification, as only two countries in the world – Somalia and the United States – have yet to ratify this treaty.

[86] CRC, art 2(2). Although there is no agreed upon age or maturity level which delineates children from adults, the age of 18 is a bright line for many purposes. The Convention on the Rights of the Child denotes eighteen as the age of majority but uses a standard of "evolving capacity" in some of its provisions for these under eighteen. This notion of evolving capacity may prove useful in evaluating certain rights that may be implicated in trafficking, such as rights to access to information and education, sexual autonomy rights, as well as workers' rights (e.g. child labor laws) in the context of

Although the CRC is very detailed on both civil and political rights as well as the progressive economic and social rights of the child, provisions directly relating to the issue of trafficking in children and exploitation were left very general as compared to other articles.[87] On the issue of a state's obligation to prevent trafficking in children, Article 35 merely prescribes: "State Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form." Article 36 broadens the scope of a state's preventive obligations to include "all other forms of exploitation prejudicial to any aspects of the child's welfare." In addressing the issue of trafficking in children for forced prostitution or other illicit sexual activities, Article 34 places a wide obligation on Contracting Parties to "protect the child from all forms of sexual exploitation and sexual abuse" by taking measures to prevent: (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or other unlawful sexual practices; and (c) the exploitative use of children in pornographic performances and materials. Therefore, in relation to trafficking in children for other forms of exploitation, as in the earlier example of children working as camel jockeys in the United Arab Emirates, only Article 32 would apply:

> State Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to

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prostitution. Children under eighteen unable to consent. There is also some understanding in domestic and international law that there is an age at which a child cannot legally consent to sex of any kind, implicitly including sex work. Miller, *see supra* note 14, at 13.

[87] *Ibid.*, arts. 32-36.

> the child's health or physical, mental, spiritual, moral or social development.

These broad provisions dealing with the exploitation of children either for forced prostitution or other types of labor have led many to criticize the CRC for being ineffective in dealing with the pervasiveness of the traffic in children. In 1995, one author writing for the relief organization *Save the Children* criticized the lack of a binding international instrument prohibiting all forms of child trafficking as being partly responsible for the difficulty in countering international trafficking in children. In order to bring the trafficking in children in all its forms within the rubric of one single treaty, the UN General Assembly adopted the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitutes and Child Pornography ("CRC Optional Protocol").[88] The CRC Optional Protocol, however, just entered into force in January 2002, and it remains to be seen how effective it will be as a rights-based approach to offer children more protection from trafficking than adults.[89] In the meantime, the most comprehensive framework on the subject of trafficking in children is contained in ILO's Worst Forms of Child Labour Convention, which focuses on the end element of exploitation based on bonded child labor, including child prostitution and pornography, and already has been in force for the past two years.[90]

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[88] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitutes and child pornography, G.A. res. A/RES/54/263 of 25 May 2000, entered into force 18 January 2002 [hereinafter the Optional Protocol CRC].

[89] One criticism is that as trafficking often affects girl children differently from boy children, it may not be useful or effective to collapse girl children and boy children into one category of trafficking victims. Due to the gendered nature of trafficking, girls represent the overwhelming majority of all children trafficked into the sex industry for prostitution or pornography. Miller, supra note 14, at 14.

[90] *See supra* note 37.

F. Rights of Migrant Workers

Beyond the special protective regimes for the human rights of women and children as trafficked victims, significant efforts also have been invested to extend protection to all migrants, regardless of gender and age. Within the ILO, two separate conventions have been adopted on the issue of migrant labor – the 1949 Migration for Employment Convention (C097)[91] and the 1975 Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (C143).[92] The 1975 Convention requires State Parties to "adopt all necessary and appropriate measures, within their jurisdiction and in collaboration with other member States, (a) to suppress clandestine movements of migrants for employment and illegal employment of migrants, and (b) against the organizers of illicit or clandestine movements of migrants for employment…"[93] In addition, the UN General Assembly, in 1990, adopted the International Convention on the

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[91] The 1949 Convention concerning Migration for Employment of the International Labour Organization (C097), adopted on 1 July 1949 at the 32nd Conference Session and entered into force 22 January 1952. It currently has 42 ratifications.

[92] The 1975 Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (also known as the 1975 Migrant Workers Supplementary Provisions Convention) of the International Labour Organization (C097), adopted on 24 June 1975 at the 60th Conference Session and entered into force 09 December 1978. It currently has 18 ratifications.

[93] *Ibid.*, arts. 2-4.

Protection of the Rights of All Migrant Workers and Members of Their Families, which established a comprehensive, nine-part, legal framework for the protection of migrants.[94]

All these international treaties on migrants, however, do not have wide state participation, due to the reluctance of the more developed countries to frame migration within a human rights framework. In fact, more than ten years after the General Assembly adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention still has not entered into force. This raises the critical question of whether efforts to codify more human rights or forced labor treaties, such as an International Convention against Sexual Exploitation,[95] could halt the globalization of human trafficking – which is, at its very core, a crime of recruiting, trading, and exploiting human beings.

The following chapter examines past and current international judicial and law enforcement frameworks to control and prosecute human trafficking as a criminal offense. Particular emphasis will be placed on the various human rights components of this international strategy, especially as they pertain to the rights of the trafficked victims.

[94] The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158 of 18 December 1990, not yet entered into force. It currently has 19 ratifications and needs 20 to enter into force.

[95] Idea of an International Convention Against Sexual Exploitation has been in existence since the First World Congress against Commercial Sexual Exploitation of Children in Stockholm during August 1996. The meeting was attended by 122 participating governments, non-governmental organizations, and intergovernmental agencies who are working on issues relating to child prostitution and sexual exploitation.

IV. The International Anti-Trafficking Framework

Compared to other forms of human trafficking as noted in Chapter Two, the specific phenomenon of trafficking in women for forced prostitution has long been a source of international indignation and action. Consequently, the modern-day international judicial and law enforcement framework to control human trafficking as a whole has its roots in the early conventions that only dealt with the trafficking of women for forced prostitution, starting with the 1904 International Agreement and the 1910 International Convention for the Suppression of the White Slave Trade. As human trafficking includes other forms of exploitation besides the forced prostitution of women and girls, the international anti-trafficking judicial regime consistently has expanded its concept of human trafficking to encompass other coercive practices. Also, it has given greater responsibility to national law enforcement, in terms of cross-border investigation of alleged trafficking operations and efforts to prevent the initial recruitment of trafficked victims.

Developments in international human rights law have had a significant impact on the expansion of the parameters of human trafficking from the earlier gendered focus on prostitution to the modern concept of human trafficking as practices that incorporate traditional trafficking and slavery definitions.[96] The emergence of this new concept is in response to the diversity of trafficking practices worldwide and the recognition that earlier attempts to form a comprehensive multilateral plan had not been effective to remove or

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[96] Hyland, *see supra* note 3, at 30.

contain this illicit trade. In fact, due to the ease in which individuals currently could be sold and transported within a country or across international borders, human trafficking has proliferated to the point where some estimates have placed it to be the third most profitable transnational criminal activity – third only to the trafficking in drugs and arms.[97]

This next chapter on the international anti-trafficking framework begins with an examination of these earlier attempts to formulate a coherent multilateral response to human trafficking, including efforts to broaden the scope of law enforcement in order to address the less visible criminal operative elements of a trafficking cycle. The last two sections of the chapter will focus on the current framework in place to address human trafficking specifically as a transnational crime – the International Convention against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children.

A. Earlier Attempts

As described earlier, the 1904 Agreement for the Suppression of the White Slave Traffic ("the 1904 Agreement") was the first international treaty to address the issue of trafficking in women for forced prostitution. Despite its narrow focus on European women and girls in prostitution, the 1904 Agreement was instrumental in posting any anti-trafficking strategy on the two crucial elements of (1) transnational law enforcement cooperation and

[97] *Ibid*. The International Organization for Migration estimates that profits from human trafficking are around U.S. $7 billion.

information sharing;[98] and (2) holding those trafficked as 'victims' who have a right to be repatriated to their country of origin.[99] The 1904 Agreement, however, was very weak in terms of criminalizing the actual traffickers, for it only referred to cross-border sharing of information "likely to lead to the detection of criminal traffic,"[100] and it contained no provision on the prosecution and punishment of those found to be guilty of trafficking. Therefore, the 1904 Agreement's emphasis on the victim's repatriation, without any provisions on concrete measures to suppress trafficking in women and children, led to another codification effort six years later – the 1910 International Convention for the Suppression of the White Slave Trade ("the 1910 Convention").[101] The 1910 Convention contained specific

[98] The 1904 International Agreement for the Suppression of the White Slave Traffic, *see supra* note 19, art. 1: "Each of the Contracting Governments undertakes to establish or name some authority charged with the coordination of all information relative to the procuring of women or girls for immoral purposes abroad; this authority shall be empowered to correspond direct with the similar department established in each of the Contracting States."

[99] Notwithstanding any specific rights-based language referring to the victim's right to return, such state obligation right can be implied in several provisions on victims' reparation.[99] The 1904 Agreement, art. 3(1): "The Governments undertake, when the case arises, and within legal limits, to have the declaration taken of women or girls of foreign nationality who are prostitutes, in order to establish their identity and civil status, and to discover who has caused them to leave their country. The information obtained shall be communicated to the authorities of the country of origin of the said women and girls, with a view to their eventual repatriation." Art. 3(3): "The Governments also undertake, within legal limits, and as far as possible, to send back to their country of origin those women and girls who desire it, or who may be claimed by persons exercising authority over them. Repatriation shall only take place after agreement as to identity and nationality, as well as place and date of arrival at the frontiers. Each of the Contracting Countries shall facilitate transit through its territory." Art. 4: "Where the women or girl to be repatriated cannot herself repay the cost of transfer, and has neither husband, relations, nor guardian to pay for her, the cost or repatriation shall be borne by the country where she is in residence as far as the nearest frontier or port of embarkation in the direction of the country of origin, and by the country of origin as regards the rest."

[100] *Ibid*., art. 2(1).

[101] The 1910 International Convention for the Suppression of the White Slave Traffic, *see supra* note 21.

provisions on the criminal act of procurement and recognized that the crime is, in essence, of a transnational nature:

> Whoever, in order to gratify the passions of another person, has procured, enticed, or led away, even with her consent, a woman or girl under age, for immoral purposes, shall be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries;[102]

and

> Whoever, in order to gratify the passions of another person, has, by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion, procured, enticed, or led away a woman or girl over age, for immoral purposes, shall also be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries.[103]

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[102] The 1910 Convention, art. 1. By specifically referring to "women or girl under age," this provision recognized that a different regime of rules and protection must exist for minors. More significantly, this provision in the 1910 Convention is also the earliest reference to the issue of consent and exploitation in human trafficking dynamics. Essentially, a minor cannot give his or her consent to being trafficked. Thereby, the issue of consent is irrelevant for the criminal prosecution of individuals who procure minors for forced prostitution.

[103] *Ibid*., art. 2. It is interesting to note that this provision contains, in most part, what are recognized today as some of the operative elements at the initial stage of procurement. For instance, the NGO-proposed definition of human trafficking in 1999, as mentioned above in Section II.B, also lists these operative procurement elements as those "involving the use of deception, coercion (including the use or threat of force or the abuse of authority) or debt bondage."

Both the 1904 Agreement and the 1910 Convention, however, have been criticized for their failure to address the exploitative purpose of trafficking because such matters were considered to fall within a country's domestic jurisdiction and outside the purview of these international treaties.[104] The Final Protocol of the 1910 Convention explicitly states: "The case of detention, against her will, of a woman or girl in a brothel, could not, in spite of its gravity, be dealt with in the present Convention, seeing that it is governed exclusively by internal legislation."[105] Thus, a serious shortcoming of the 1904 Agreement and the 1910 Convention was their piecemeal approach to only focus on the process of recruitment or transportation and not address the exploitative element of the trafficking cycle.

The same criticism can also be levied against the two subsequent treaties on trafficking in individuals for forced prostitution under the codification efforts of the League of Nations. The 1921 International Convention for the Suppression of the Traffic in Women and Children ("the 1921 Convention") [106] and the 1933 International Convention on the Suppression of the Traffic in Women of Full Age ("1933 Convention")[107] continued to consider the end purposes of trafficking to be a matter of domestic jurisdiction. Notwithstanding this limitation, the 1921 Convention was significant in expanding the

[104] Chuang, *see supra* note 81, at 74.

[105] The 1904 Agreement, Final Protocol D.

[106] The 1921 International Convention for the Suppression of the Traffic in Women and Children, *see supra* note 23.

[107] 1933 International Convention on the Suppression of the Traffic in Women of Full Age, *see supra* note 24.

emphasis of female trafficking from a regional, Europe-centered, emphasis to an issue of international concern. Contrary to the 1904 Agreement and the 1910 Convention, Contracting Parties for the 1921 Convention were not limited to European countries and included, among others, countries such as Brazil, China, Cuba, Japan, and Siam (now Thailand). In addition, the 1921 Convention also brought to the forefront the issue of exploitation of under-aged boys, as well as girls and women, for forced prostitution by expanding the scope of protective measures to children of either sex.[108] In the 1933 Convention, the protective framework was extended to trafficked women of full age, defined as those over the age of 21.[109] The 1933 Convention required the punishment of persons who trafficked in women or girls of full age, where even their consent would not exempt the traffickers from criminal prosecution. Furthermore, the 1933 Convention broadened the scope of punishable acts to include attempted offenses and acts associated with the preparation of procurement.[110]

After 1945, the United Nations, in an effort to consolidate previous trafficking treaties and to continue the work of the League of Nations in this regard, adopted the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the

[108] Many legal scholars have criticized the framework of the 1921 Convention. They believe that the 1921 Convention encouraged states to take a domestic approach to the trafficking problem by mandating them to take "legislative or administrative measures regarding licensing and supervision of employment agencies and offices, to prescribe such regulations as are required to ensure the protection of women and children seeking employment in another country" [art. 6]. This, as one author has argued, "Confused signatories, due to the difficulty of distinguishing between international trafficking and commercialized prostitution." In Michelle O. P. Dunbar, "Comment: The Past, Present, and Future of International Trafficking in Women for Prostitution," *Buffalo Women's Law Journal* 8(1999/2000):109-110.

[109] The 1921 Convention, art. 5 refers to women or girls under "twenty-one completed years of age" as those falling into the category of 'under-age victims.'

[110] *Ibid*., art. 1(2).

Prostitution of Others ("1949 Convention").[111] The 1949 Convention significantly changed the multilateral anti-trafficking framework. It became the first international agreement to conceive of trafficking in gender-neutral terms, while it penalized the act of procurement, irrespective of consent, in both international and domestic trafficking.[112] As opposed to the earlier treaties on trafficking, the basic aim of the 1949 Convention was to successfully prosecute and punish traffickers and individuals who profit from forced prostitution. The Convention obliged Contracting Parties to punish any person who

> 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.[113]

As well as an individual who

> 1. Keeps or manages, or knowingly finances or takes part in the financing of a brothel;

[111] The 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, *see supra* note 26.

[112] Chuang, *see supra* note 81, at 75.

[113] The 1949 Convention, art. 1.

2. Knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others.[114]

Henceforth, the 1949 Convention overcame criticisms of earlier treaties, such as the 1904 Agreement and the 1910 Convention, by adopting a more comprehensive approach to target the exploitative elements of trafficking, and addressing, for the first time, profits made from forced prostitution. This approach went beyond the initial dynamic of recruitment or transportation and expanded the parameters of criminalization associated with trafficking.

In essence, the 1949 Convention established three general types of state obligations.[115] Foremost, it bound states to a general anti-trafficking principle and obliged them to work for the abolition of trafficking for prostitution.[116] Second, the Convention also established a series of wide-ranging mechanisms to facilitate cross-border law enforcement cooperation, including extensive provisions on extraditable offenses and the process of extradition;[117] inter-

[114] *Ibid*., art. 2.

[115] Chuang, *see supra* note 81, at 76.

[116] Interestingly, one of these anti-trafficking principles was the de-regulation of prostitution. The 1949 Convention, art. 6 states: "Each Party to the present Convention agrees to take all the necessary measures to repeal or abolish any existing law, regulation or administrative provision by virtue of which persons who engage in or are suspected of engaging in prostitution are subject either to special registration or to the possession of a special document or to any exceptional requirements for supervision or notification."

[117] The 1949 Convention, art. 8-10. It is important to note that although earlier treaties on trafficking also had included provisions on the issue of extradition, the 1949 Convention had, by far, the most extensive section on this matter. For instance, the 1933 Convention had no article on extradition, and the 1921 Convention, art. 4 only states that Contracting Parties agree to "take all measures within their power to extradite or provide for the extradition of persons accused or convicted."

state communications and requests relating to prosecutorial efforts;[118] and sharing of information on traffickers.[119] Third, beyond provisions on state obligations in repatriating victims of trafficking,[120] the 1949 Convention underscored the importance of prevention and rehabilitation for trafficked victims:

> The Parties to the present Convention agree to take or to encourage, through their public and private educational, health, social, economic and other related services, measures for the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution and of the offences referred to in the present Convention.[121]

The 1949 Convention established a multilateral framework in which forced prostitution affecting women and children was considered an issue of international law, rather than a matter solely for the domestic jurisdiction of Contracting Parties. Most notably, the 1949 Convention was also the first international instrument to have an expansive view on the various operative elements of a trafficking cycle. It extended the focus of previous conventions on the criminalization of recruitment and transportation to an emphasis on joint cross-border investigation and sharing of intelligence. It also demonstrated a commitment to a strategy of prevention and the subsequent social reintegration of rescued and repatriated

[118] The 1949 Convention, art. 13. Inter-state communication can either be those transmitted directly between judicial authorities, Ministers of Justice, or diplomatic or consular representatives.

[119] *Ibid*., art. 15.

[120] *Ibid*., art. 18-19.

[121] *Ibid*., art. 16.

victims. The significance of the 1949 Convention cannot be understated, for it would take another fifty years for the international community to codify another treaty on the issue of human trafficking. That time, in 2000, the focus was on the issue of organized crime and how transnational criminal elements increasingly profit from this trade in humans for forced prostitution and other forms of forced labor.

B. International Convention Against Transnational Organized Crime

Within the last fifteen years, the globalization of economic systems and technological advancement in transportation and communications, coupled with the breakdown of the former Soviet Union and intense armed conflicts in several regions of the world, all have contributed to new forms of transnational cooperation between organized criminal networks. Countries where the rule of law had to be completely re-established have emerged as havens as well as transit routes for organized criminal activities. Acknowledging a growing linkage between organized crime and other types of crimes not related to the established organized criminal activities of drug trafficking, the Millennium General Assembly of the United Nations adopted the UN Convention against Transnational Organized Crime in November 2000 "(the Convention").[122] The purpose of the Convention, foremost, is "to promote cooperation [in order] to prevent and combat transnational organized crime more effectively."[123] To do so, State Parties to the Convention commit themselves to:

[122] The United Nations Convention Against Transnational Organized Crime, G.A. res. 55/25 of 2 November 2000, U.N. Docs. A/45/49 (Vol. I), not yet entered into force [hereinafter the Convention]. It currently has 7 ratifications.

[123] The Convention, art. 1.

- Criminalizing offences committed by organized crime groups, including money laundering and corruption;[124]
- Institute a comprehensive domestic regulatory body to combat money laundering;[125]
- Widen the reaches of extradition;[126]
- Protecting witnesses in criminal proceeding against organized criminal groups,[127] as well as assisting and protecting victim of transnational organized crime;[128]
- Tightening cooperation to seek out and prosecute suspects;[129] and
- Enhance efforts aimed at prevention of organized criminal activities at both the national and international levels.[130]

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[124] *Ibid*., art. 5 on the criminalization of participation in an organized criminal group; art. 6 on the laundering of proceeds of crime; and art. 8-9 on corruption.

[125] *Ibid*., art. 7(1). Furthermore, the Convention obliged States Parties "to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering."

[126] *Ibid*., art. 16.

[127] *Ibid*., art. 24. The protection of witnesses extends to "their relatives and other persons close to them" [art. 24(1)]. Furthermore, art. 24(3) provides an inter-state mechanism for witness protection and relocation program: "State Parties shall consider entering into agreements or arrangements with other States for the relocation of persons."

[128] *Ibid*., art. 25. In addition, art. 25(2) contains a provision on compensations and restitution for victims of organized criminal activities: "Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention."

[129] *Ibid*., art. 18 on mutual legal assistance in cross-border investigations, prosecutions and judicial proceedings; art. 19 on establishing codified arrangement to facilitate joint investigation; art. 20 on the use of special investigative techniques; and art. 26 and 27 on measures to enhance cooperative between cross-border law enforcement authorities.

[130] *Ibid*., art. 31(1): "State Parties shall endeavor to develop and evaluate national projects and to establish and promote best practices and policies aimed at the prevention of transnational organized crime."

Furthermore, State Parties are obliged to create four new offenses unless they already exist under domestic laws: (1) Participation in organized criminal group activities, including the "organizing, directing, aiding, abetting, facilitating or counseling" serious crimes involving organized criminal groups;[131] (2) Activities relating to money laundering, including the transfer of property which is the proceeds of crime;[132] (3) Corruption where there is a link to transnational organized crime;[133] and (4) Obstruction of justice, including the use of corrupt or coercive means, to influence testimony, other evidence, or the action of law enforcement or justice official also must be criminalized.[134]

Although the Convention itself does not specifically target organized criminal activities related to human trafficking, it does establish a number of important criteria that are very applicable to the profiteers and other profit-making aspects of this illicit trade in humans. Foremost, the Convention sets a low threshold for what can constitute an 'organized criminal group,' which is defined as:

> a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in

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[131] *Ibid*., art. 5.

[132] *Ibid*., art. 6.

[133] *Ibid*., art. 8.

[134] *Ibid*., art. 23.

> order to obtain, directly or indirectly, a financial or other material benefit.[135]

While the definition may not fit with the notion of a large and well-established mafia ring, it reflects the changing nature of transnational organized crime, where communication and technological advancement have made it easier for criminals to specialize and to coordinate their activities with other organized groups from other countries. Therefore, by focusing on the intent and impact of these transnational organized groups, the Convention recognizes that an effective international strategy to combat these illicit activities must take into account the ability of a small, but well-organized and well-equipped, criminal group to frequently commit and profit from serious crimes.[136] This definition of an 'organized criminal group' is extremely useful in terms of law enforcement measures to combat human trafficking. Most of the criminal elements involved in various operative elements that characterize human trafficking are networks of separate and independent organized criminal groups, which stretch between the country of origin, countries of transit, and the country of destination. Although they may not fit into the traditional concepts of large and well-financed criminal families, their ability to commit serious crimes and to elude law enforcement and intelligence as a conglomerate of independent criminal groups cannot be underestimated. In one of very few articles written and published on the international trafficking of women as an

[135] *Ibid*., art. 2(a).

[136] The Convention, art. 2(b) defines a serious crime as "conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty."

intelligence analysis, the author comments on this broader definition of an organized criminal group as it directly relates to the issue of female trafficking:

> In reviewing the major trafficking cases in the United States since 1990, the perpetrators tended to be smaller crime groups, smuggling rings, gangs, loosely linked criminal networks, and corrupt individuals who tended to victimize their own nationals. None of the traffickers' names were found in the International Criminal Police Organization's database indicating that these traffickers were not under investigation for trafficking or other illicit activities in other countries. This contrasts with Europe and Asia where there are more indications of large, hierarchical structures involved in trafficking women and children and numerous other illegal activities.
>
> The size or structure of the criminal group, however, has no bearing on the violence, intimidation, and brutality that is commonly perpetrated on the trafficking victims, as many small trafficking rings are extremely vicious. Moreover, technology has made size irrelevant in terms of a crime group's ability to establish commercial or business-like structures. The traffickers have easily established businesses in the US and abroad to conceal their activities and illicit proceeds from law enforcement as well as to deceive the women.[137]

[137] Richard, *see supra* note 2, at vii.

As mentioned earlier, one of the most important goals of the Convention was to combat money laundering and to decrease, if not to eliminate completely, the profit motive of organized criminal activities. In this regard, the strict requirement that the Convention places on States Parties to develop and institute a comprehensive domestic regulatory and supervisory regime to deal with money laundering is crucial in decreasing the profit motive of the human traffickers. In turn, this would hamper the ability of the traffickers to bribe officials, prosecutors, and investigators to use their color of authority to not obstruct or even to facilitate human trafficking. In addition to formulating national anti-money laundering plans, State Parties are also required "to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering."[138] Moreover, as the principle purpose of the Convention was to promote more inter-state cooperation, this sense of joint mutual legal assistance extends to all aspects of cross-border law enforcement cooperation and preventive measures.[139]

In order to target the specific forms of organized criminal activities and also to give State Parties to the Convention maximum flexibility in negotiation and ratification, the Convention was drafted with three additional Protocols. Once a state ratifies the Convention, it can decide whether to ratify additional Protocols. However, a state cannot sign or ratify any of the Protocols before the Convention. At present, the three Protocols are:

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[138] Convention, art. 7(1).

[139] The Convention, art. 31(7), defines preventive measures to include "social development that alleviate the circumstances that render socially marginalized groups vulnerable to the action of transnational organized crime."

- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children;

- Protocol against the Smuggling of Migrants by Land, Air and Sea; and

- Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition.

In December 2000, at an international conference in Palermo, Italy, the Convention and its Protocols were opened for signature. Attended by 149 State representatives at the conference, 123 States signed the Convention; 91 signed the human trafficking protocol; 87 signed the migrant smuggling protocol; and only 5 States signed the firearms protocol. Within this framework of combating transnational organized crime and specifically for the purpose of combating human trafficking, the importance of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ("The Protocol") cannot be understated. The protocol is the first comprehensive international anti-trafficking agreement which obliges a State Party to the parent Convention and the Protocol to a comprehensive list of judicial and law enforcement obligations, spanning from the moment of recruitment or the intent to recruit, to the social reintegration of trafficked victims and protection of witnesses in criminal prosecution against traffickers. The following section examines the Protocol in detail and assesses its strengths and potential weaknesses.

C. The Protocol to Prevent, Suppress and Punish Trafficking in Persons

Definition of Human Trafficking

First and foremost, the Protocol's main strength comes from its comprehensive definition of human trafficking, as:

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[140]

The Protocol is the first international instrument to define human trafficking, and its comprehensive definition represents the very first international consensus on what constitutes trafficking in persons. In comparison with the working definition on human trafficking previously proposed by non-governmental organizations in 1998 [see Chapter II.B], the Protocol expanded the definition even further by including the trafficking in persons with the intent to remove their organs. This comprehensive definition on human trafficking, therefore, forms the basis for a concerted international anti-trafficking strategy.

[140] Protocol, art. 3

Criminalization

Second, the Protocol places strong obligations on State Parties to criminalize all aspects of trafficking, including attempted trafficking, by passing new laws to ensure that offenders are punished under domestic law. These criminal offenses relate to the various operative elements of human trafficking, including the intent to traffic humans as well as the acts of participating as an accomplice, or organizing or directing other persons to commit any of these offenses.[141] In addition, Governments need to adopt new measures aimed to detect traffickers and their victims through a series of border control procedures, which include regulations to prevent commercial transport from being used to facilitate human trafficking. The Protocol also calls for measures to oblige commercial carriers to ascertain that all passengers are in possession of valid travel documents as required for entry, and that individuals implicated in trafficking offenses should be denied a visa entry.[142]

Protection of Trafficked Victims

Another strength of the Protocol is in its provisions on the protection of trafficked victims, which has been largely ignored in the past outside the context of repatriation. The protocol obliges nations, where appropriate, to:

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[141] Protocol, art. 5 on criminalization: "1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally. 2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences: (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article; (b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and (c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

[142] Protocol, art. 11 on border measures.

- Implement measures to provide for the physical, psychological and social recovery of victims, including: appropriate housing; counseling and information; medical psychological and material assistance; and employment, educational and training opportunities;[143]
- Take into account the age, gender, and other special needs of the victims, especially the needs and care of children;[144]
- Provide for the physical safety of the victims while they are within its territory;[145]
- Ensure that its domestic legal system contains measures that offer victims the possibility of obtaining compensation for damage suffered;[146]
- Adopt measures that permit victims to remain in its territory, temporarily or permanently and while giving particular consideration to humanitarian and compassionate factors;[147]
- Accept and aid, without undue or unreasonable delay, the return of trafficking victims who are nationals or residents of that nation;[148]

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[143] Protocol, art. 6(3).

[144] Protocol, art. 6(4).

[145] Protocol, art. 6(5).

[146] Protocol, art. 6(6).

[147] Protocol, art. 7 on the status of trafficked victims in receiving states.

[148] Protocol, art. 8(1).

Preventive Measures

Recognizing the importance of prevention measures, the Protocol emphasizes that Governments should seek to prevent trafficking, in addition to focusing on the criminal prosecution of human traffickers. It calls for Contracting Parties to establish comprehensive policies, programs and other measures, such as research, information and mass media campaigns, to prevent trafficking. Nations are also urged to stage information campaigns about human trafficking to warn potential victims. These campaigns can also deter potential traffickers by informing them of the penalties for trafficking. Article 9 of the Protocol addresses these prevention measures in detail, citing media campaigns, close cooperation with non-governmental organizations, and the creation of social and economic incentives to alleviate poverty, underdevelopment, and the lack of equal opportunity which may render individuals vulnerable to trafficking.[149] Examples of such incentives may include micro-credit lending programs, social advancement of women, job training, or tax incentives to start small businesses.[150]

Potential Weaknesses

Despite the Protocol's successes in establishing a framework for combating human trafficking through prevention, cross-border law enforcement cooperation, protection, and repatriation of victims, several of its weaknesses have been noted. Foremost, provisions on the protection of trafficked victims are qualified by progressive obligations, such as: (1) State

[149] Protocol, art. 9 on the prevention of trafficking in persons.

[150] Hyland, *see supra* note 3, at 31.

Parties "shall endeavor to," (2) State Parties "shall consider in appropriate cases," and (3) "to the extent possible." For example, Article 6(1) of the Protocol obliges Contracting Parties to protect the privacy of trafficked victims only "[i]n appropriate cases and to the extent possible under its domestic law."[151] Although there were discussions about creating mandatory protection and assistance provisions while the Protocol was being drafted, in the end concerns over their financial burden on the state prevailed and led to these general obligations.[152] In addition, the Protocol provides no explicit protection from prosecution and summary deportation for the acts that trafficked victims are forced to undertake, such as prostitution, working without a permit, or having false identification and residential documents.[153] Most importantly, the Protocol contains no article on the social reintegration of trafficked victims in their home countries after their repatriation. In this regard, the Protocol only refers to inter-state cooperation to repatriate the victims, whereas, in practice, repatriation alone has proven to be insufficient in ensuring that repatriated victims are not trafficked again due to the lack of other possibilities, or as a result of intense intimidation by trafficking rings against themselves or their families.

The Protocol represents a significant law enforcement accomplishment and provides a judicial framework to deal with human trafficking as a transnational crime. At the international level, specialized agencies on issues related to the control of transnational crimes have prioritized human trafficking as one of their program objectives. For example, the

[151] Protocol, art. 6(1).

[152] Hyland, *see supra* note 3, at 31.

[153] *Ibid*.

United Nations Office of Drug Control and Crime Prevention (ODCCP) recently launched its second global television campaign to help create awareness on human trafficking with a video spot focused on the trafficking of women for purposes of sexual exploitation and forced labor. The first video spot was released in January 2001, and it has been broadcast on national networks in more than 35 countries, as well as on global and regional networks.[154] This effort is paralleled by recent developments within INTERPOL, the global police organization. At the Second World Congress on the Commercial Sexual Exploitation of Children in Yokohama, Japan in December 2001, INTERPOL stated unequivocally, "Interpol has re-prioritised its activities to counter trafficking in human beings as one of its four most important crime programs.[155] As the only global policing organization, INTERPOL has undertaken the responsibility of coordinating an international response to the trafficking in human beings, in particular the trafficking in children for commercial sexual exploitation and the exchange of child pornography over the internet – where the law remains undeveloped and challenging to enforce.

Efforts by ODCCP and INTERPOL are very significant developments for many reasons. First, they add to the current international efforts underway to distinguish between the dynamics driving alien smuggling and human trafficking. They also set a normative framework in which the definition of human trafficking is not restricted to incidents of forced

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[154] *United Nations Press Release: Fight Against Human Trafficking Gains Awareness-Raising Tool in Global Television Campaign.* United Nations Office of the High Commissioner for Human Rights (accessed 19 February 2002); available from http://www.unhrhc.ch

[155] *Interpol Statement.* INTERPOL (accessed 23 January 2002); available from http://www.interpol.int/Public/ICPO/speeches/200111219.asp.

prostitution, which was a problem faced by the earlier conventions on trafficking in women and children. Also at the international level, the Protocol is an extremely useful instrument to clarify many of the conceptual ambiguities surrounding the issue of human trafficking, which is, in its essence, a lucrative criminal market driven by frequent human rights violations of its victims. Insofar as the usage of the term 'human trafficking' is fraught with conceptual ambiguities, it disallows for a meaningful discussion on the different types of abnormal migratory patterns and how countries can best respond to these various challenges. There needs to be more usage consistency when it comes to describing the coercive migration pattern of human trafficking and the individuals who become trafficked victims. By limiting the protective regime of the Protocol to individuals of a certain gender or age, states will remain incapable of controlling the illegal trafficking of men, women, and children for various exploitative purposes.

Notwithstanding the progress in addressing the issue of human trafficking at the international level, the ultimate success can only be assessed by considering how many components of this international judicial and law enforcement strategy each state chooses to incorporate into its own domestic anti-trafficking framework. Equally important are the issues of implementation and enforcement. For example, on the issue of trafficked victim protection, one author has noted that:

> The ultimate judgment of its impact, however, will be determined by the level of victim protections State Parties choose to incorporate into their domestic law. State Parties should recognize that the victim assistance

> outlined by the Protocol is not exhaustive of the services that victims require. To the contrary, the Protocol establishes minimum requirements that State Parties are free to supplement and augment through their domestic law. Therefore, State Parties must be urged to enhance victim assistance and protection when creating their trafficking laws to better protect trafficking victims' human rights.[156]

Within this context, the following chapter will examine some of the main elements essential to the implementation and enforcement of a successful anti-trafficking plan at the domestic level, using the example of India.

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[156] Hyland, *see supra* note 3, at 38.

V. Elements Essential to a National Anti-Trafficking Plan: The Case Study of India

The importance of positing the anti-trafficking framework on human rights cannot be understated, for it exploits individuals in a manner that renders any anti-trafficking strategy ineffective if it does not incorporate the normative aspects of human rights law, especially as it pertains to the contemporary forms of slavery, forced prostitution, other forms of forced labor, women's and children's rights. From this perspective, organizations and agencies that work on issues relating to human trafficking have long concluded that "[h]uman rights are not a separate consideration or an additional perspective; the application of human rights standards is the appropriate and, indeed, most effective means of combating the problem."[157] This emphasis on human rights, therefore, forms the basis for a comprehensive and multifaceted anti-trafficking strategy as established by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ("the Protocol"). However, the complexity of what is truly required to effectively control human trafficking is often not examined. For example, the police can raid brothels and fine customers, but it is much more difficult to find information on sweatshops, situations of domestic servitude, the established but 'invisible' chain of transporting trafficked victims from one community to another. In addition, economic and social development is regularly seen as the panacea to human trafficking, thereby inviting a silent acceptance of this phenomenon as an ever-present evil in an unequal world of resource distribution.

[157] *Trafficking in Human Beings in Bosnia and Herzegovina*, *see supra* note 17, at 10.

This chapter will examine five elements essential to an effective national anti-trafficking plan. It is by no means an exhaustive list of all of the components needed for an effective anti-trafficking strategy at the national level. Nonetheless, it is comprised of most of the elements needed for an effective criminal justice framework to address human trafficking as a crime, while still basing this approach on the respect for human rights norms and standards. Therefore, this chapter will focus on areas where the issue of human rights intersects with elements of domestic law enforcement. In order to illustrate the challenges of incorporating international human rights law and components of the international anti-trafficking framework into domestic law, particularly those challenges faced by a developing country, this analysis will use India's response to human trafficking as a case study.

A. Background on Human Trafficking in India

India is considered both a country of origin and a country of destination for human trafficking. Although there is a lack of accurate data in India, the volume of trafficking in women and girls in India is disproportionately high, and forced prostitution remains the primary goal for traffickers of women and girls into India. A survey sponsored by the Central Social Welfare Board of India in 1991 in six metropolitan cities indicated that the population of women and children in sex work is between 70,000 and 1 million. Thirty percent of them are below 18 years old, and seventy percent are illiterate.[158] A separate estimate by the Indian

[158] Statistics are from the *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, on Her Mission to Bangladesh, Nepal and India on the Issue of Trafficking of Women and Girls (28 October-15 November 2000).* United Nations Economic and Social Council, E/CN.4/2001/73/Add.2 (accessed 20 February 2001); available from http://www.unhchr.ch. Page 9.

Association for the Rescue of Fallen Women, however, provides a much higher figure. The organization estimates in 1992 that there were 8 million brothel workers in India and another 7.5 million call girls. The average age of recruitment in the 1990s was between 10 and 14 years old.[159]

Major international flows of female trafficking to India involve girls from Nepal and Bangladesh. As a result, South Asia has emerged alongside Southeast Asia as a major center for regional and international trafficking in women and children for the purpose of forced prostitution. UNICEF estimates that there are about 400,000 children trafficked for forced prostitution in India.[160] While some of the children are from the poorer regions of India, such as Karnataka and Gujarat, the largest identifiable source of child prostitutes in India is Nepal. Therefore, the anti-trafficking strategy of India must address domestic human trafficking as well as trafficking across international borders.

By one estimate, about 5,000 to 7,000 Nepali girls are trafficked to India every day, and, in total, there are currently about 100,000 to 160,000 prostitutes of Nepali-origin in India's brothels.[161] Nepali girls, especially virgins, sell for at least 6000 Indian Rupees, or about 130 U.S. Dollars, in Indian brothels on their first night. Virgins are prized because of the prevalent myth that sleeping with virgins can cure sexually transmitted diseases, such as

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[159] *Ibid*.

[160] Williams, *see supra* note 21, at 226.

[161] *Ibid*. According to the same report, about 45,000 Nepali girls are working in the brothels of Mumbai (Bombay), and there are about another 40,000 in Calcutta.

gonorrhea and syphilis. Fear of AIDS has also raised the demand for virgins, and India-based traffickers often increase their 'supplies' of virgins from neighboring Nepal by offering young girls jobs across the border. In 1995, Human Rights Watch released a report on the trafficking of women from Nepal to India. This report, entitled *Rape for Profit: Trafficking of Nepali Girls and Women to India's Brothels*, describes how most of these Nepali trafficked victims were tricked by fraudulent marriage offers, sold by families, and some even abducted to enter the sex trade in India.[162] Together, the two countries of Bangladesh and Nepal are the main sources of trafficked children in South Asia.

The most common form of coercion for the female victims of human trafficking in India is debt bondage. Women are told that they must work without wages until they have repaid the purchase price advanced by their employers, an amount far exceeding the cost of their travel expenses. Even for those women who know they would be in debt, this amount is invariably higher than they expected and is routinely changed with arbitrary fines and dishonest account keeping. Employers also maintain their power to resell indebted women to

[162] The following is one of testimonies from a Nepali trafficked victim in India interviewed for the Human Rights Report: "When she was fourteen, 'Neela's' stepfather took her from their village…[to] Kathmandu, where a friend of his got her a job in a carpet factory. A few months later…a young male co-worker…suggested that they leave [for] a town on the Indian border, where, he claimed, working conditions were better and they could earn more money. Neela agreed, and was taken out of the factory by her stepfather, her stepfather's friend and this young man. After six days, traveling by bus and by train, they arrived in Bombay. Neela was taken to a house that she later discovered was the home of the brothel manager…Because she was so young, Neela was taken to a separate 'training' room where she was kept for three months, after which she was told she had been sold for Rs.15,000 [$500] and would have to work there until she paid off her debt. Her first customer was a middle-aged man who paid Rs.5,000 [$166] for her because she was a virgin. Neela said the manager always charged more money for new girls, but she was never told how much the regular customers paid; all the money was given directly to the owner. Nor was she told how long it would take to repay her debt…After about a year in the brothel Neela was picked up in a police raid and taken to an ashram, a shelter, for children because she was underage. In the ashram she tested positive for HIV…She now lives in a shelter." In *Rape for Profit: Trafficking of Nepali Girls and Women to India's Brothels, 1995*. Human Rights Watch (accessed 2 May 2001); available from http://www.hrw.org.

other brothels. In some cases, women find that their debts only increase and can never be fully repaid. A form of debt bondage in Calcutta, India is known as *chukri*.[163] Some women are eventually released from debt bondage, but only after they have become sick or after they have served an extended period of physically and mentally abusive labor. Most trafficked women are afraid to escape because, as illegal migrants from Nepal or Bangladesh, they do not speak the local language and are unfamiliar with their new surroundings. Also, they fear arrests and mistreatment by Indian law enforcement authorities. These factors are compounded by other coercive tactics, such as constant surveillance, isolation, and threats of retaliation against the woman and her family members at home. Often, the traffickers or the brothel owners confiscate trafficked women's passports and other forms of identification.

B. Element One: Getting the Definition Right

Setting a Comprehensive Definition for Human Trafficking

Due to all of the conceptual ambiguities surrounding the issue of human trafficking, the most crucial component of an effective anti-trafficking strategy must be in its definition of what constitutes this crime. Although the crime of human trafficking has been defined very

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[163] Louise Brown describes this system in *Sex Slaves: the Trafficking of Women in Asia*, *see supra* note 19, at 116: "Some of the worst examples of debt bondage are found in South Asia. In Calcutta, a system known as *chukri* operates among new entrants to the profession. A brothel owner buys a girl from an agent. The girl then comes under the complete control of this owner. The owner pays for all of the girl's requirements – her food and clothes and general living expenses. These costs are added to the girl's debt together with various other unspecified sums that are at the discretion of the owner. The new prostitute must then repay this nebulous debt by serving customers. The trouble is that she will rarely know how much she owes, how much will be deducted per client and how much will be added for her expenses and the 'gifts' which the brothel owner will give her. It is not uncommon, for example, for a girl to be given some cheap jewellery that she will then have to pay for with the sale of her body. The *chukri* system is [in fact] sexual slavery."

comprehensively by the Protocol, many national laws do not take such an expansive view. For example, Article 23(1) of the Indian Constitution of 1950 placed a prohibition on human trafficking and forced labor but only stated: "Traffic in human beings and begging and other forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law." Because human trafficking in India is mainly for prostitution, most of the provisions in the Indian Penal Code of 1860 related to human trafficking are mainly those that focus on forced prostitution. Section 366 of the Penal Code on kidnapping or abducting women can be applied to traffickers, even without its specific reference to the illicit trafficking in women and girls for forced prostitution:

> Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.[164]

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[164] The Indian Penal Code of 1860, Section 366.

Following the ratification of the 1949 Convention, the Indian Government passed the Suppression of Immoral Traffic in Women and Girls Act of 1956 (SITA).[165] This Act was amended in 1986 and is now known as the Immoral Traffic in Persons (Prevention) Act, or commonly referred to as the PITA Act. SITA, however, was confined only to the trafficking in women and girls for forced prostitution, and it excluded males from its protective regime.[166] The PITA Act did not have a definition of human trafficking, even though it called on the central government to establish special trafficking police to investigate any offenses relating to the sexual exploitation of persons committed in more than one State. Similar to SITA, the PITA Act focused on the issue of prostitution, although it did extend the protective regime to include trafficking in boys, and made penalties more stringent for convicted traffickers.

In early 2002, the seven member states of the South Asian Association for Regional Cooperation (SAARC), including India, signed the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution.[167] Even though the SAARC Convention represents an important step in terms of contributing to more cross-border

[165] SITA went beyond the scope of the 1949 International Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others by penalizing the prostituted woman in certain cases. Hence although India's stand was not prohibitionist when it comes to commercial prostitution, SITA did not benefit trafficked victim groups of forced prostitution.

[166] Section 2(f) of SITA defined prostitution as "the act of a female who offers her body for promiscuous sexual intercourse for hire, whether in money or in kind, and whether offered immediately or otherwise, and the expression prostitute shall be construed accordingly."

[167] The SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution. Signed by representative of Bangladesh, India, Nepal, Bhutan, Maldives, Pakistan, and Sri Lanka on 5 January 2002 [hereinafter the SAARC Convention].

cooperation in South Asia to combat human trafficking, it has been severely criticized for its lack of conceptual clarity with regards to its definition of human trafficking. First of all, the SAARC Convention limits the protective regime to only women and children by defining trafficking as "the moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking."[168] Furthermore, the SAARC Convention only defines 'persons subjected to trafficking' as "[w]omen and children victimised or forced into prostitution by the traffickers by deceptions, threat, coercion, kidnapping, sale, fraudulent marriage, child marriage, or any other unlawful means."[169] This definition of trafficked victims also excludes the component of "the abuse of power or of a position of vulnerability"[170] as one of the dynamics driving trafficking, which is in marked contrast to the Protocol. Thus, these concerns have led many human rights lawyers to view the SAARC Convention as a protective regime that is actually weaker than the new international standard on human trafficking.[171] As such, some have even argued for the PITA Act to continue to remain in force in India, albeit with amendments, until a more progressive regional or domestic framework that parallels the Protocol at the international level can be established.[172]

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[168] The SAARC Convention, art. 1(3).

[169] *Ibid*., art. 1(5)

[170] The abuse of power is one component of the definition of human trafficking from the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

[171] *Report of the Special Rapporteur on Violence Against Women, see supra* note 158, at 33.

[172] *Ibid*., 30.

De-Link Trafficking from the Issue of Consent to Migrate

An effective anti-trafficking strategy also needs to be de-linked from the issue of the initial consent to migrate, since an essential part of international human rights law is the idea that no one can consent to slavery, slavery-like practices, or forced labor. Trafficking may begin as voluntary migration when a woman is recruited with promises of a good job in another country or province, and she agrees to leave her community due to the lack of better options. A girl may also be lured by a false marriage. After she or her family agrees to the marriage, a trafficker makes arrangements for her travels and obtains an escort to accompany the girl. Once the arrangements have been made, the woman is escorted to her destination and delivered to an employer or to another intermediary who brokers her employment. Despite what the girl is initially led to believe, she has no control over the nature or place of her work, or the terms of her employment. Many women learn only afterwards when they cannot escape that they have been deceived about the nature of the work they enter. By then, they are in a coercive and exploitative situation from which escape is often not possible. The UN Special Rapporteur on the Violence Against Women has noted:

> [I]n the present context of globalization and migration, fewer victims are being kidnapped or abducted. In fact, an overwhelming majority are being trafficked through deception and false promises and are therefore "active participants" in their own trafficking, at least at the beginning of the process which includes recruitment and transportation.[173]

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[173] *Ibid*., 9.

In light of these reasons, an effective anti-trafficking response in accordance with international human rights law must be de-linked from the issue of initial consent to migrate. In practice, this is not often done, as there is a common perception of trafficked victims that assumes that they must have known of the dangers and potential risks involved. Consequently, they cannot be labeled as 'victims' if they were willing to undertake, in the first place, such risks in search of a better life elsewhere. This attitude is a result of the conceptual misunderstandings surrounding human trafficking, and, at the same time, it perpetuates more confusion on the topic as a whole. In reality, such strict adherence to the requirement of either the abduction or kidnapping of the victim does not reflect the reality on the ground. The recruitment and transportation of victims are based upon a variety of efficient instruments that virtually render abduction or kidnapping unnecessary so long as these tactics remains effective:

> [t]he 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 [in order] to achieve the consent of a person having control over another person, for the purpose of exploitation.[174]

Therefore, any effective anti-trafficking framework at the domestic level must be conceptually clear about what constitutes 'human trafficking' and how it distinguishes from

[174] Definition of human trafficking from the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

other forms of voluntary migration. If human trafficking cannot be successfully de-linked from the issue of initial consent to migrate, then the protective regime can only extend to a very limited number of individuals and would remain a disappointment for the overwhelming majority of trafficked victims.

C. Element Two: Penalize the Traffickers, Not the Trafficked

Prosecution of Traffickers Must Be Based Upon Adequate Criminal Provisions

In essence, any successful prosecution of traffickers must be based upon adequate criminal provisions that seek to punish traffickers and do not provide any legal lacunae under which a conviction would be made more unlikely. In this regard, the Indian Penal Code provides a good example of the types of legal lacunae that the defense for the alleged traffickers could use to evade criminal prosecution. India's Penal Code has strict provisions intended to punish the traffickers of girls into the sex trade. Section 366A of the Penal Code punishes domestic traffickers, who transport girls from one part of India to another, while Section 366B makes it an offense for anyone to import into India girls below the age of twenty-one years for the purpose of prostitution:

> Whoever, by any means whatsoever, induces any minor girl under the age of eighteen (18) years to go from one place [within India] or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person

> shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.[175]
>
> Whoever imports into India from any country outside India or from the State of Jammu and Kashmir any girl under the age of twenty-one (21) years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person, shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.[176]

Both Sections 366A and 366B, however, are not strict prohibitions against trafficking because they require the intention or knowledge that such girls will be forced or seduced to have illicit intercourse with a person. It is possible that if a girl, even if she is not yet 18, is forced to prostitution and is coerced, encouraged, or assisted by someone to continue to stay in the trade due to the lack of other options, then the original trafficker has not committed an offense under this section. This is because this law could be interpreted to mean that the trafficker, who 'only' procured and transported the girl, acted without the explicit intent and knowledge that she will be forced or seduced to illicit intercourse.[177] In reality, the absolute link of intent between traffickers and the brothels owners can be extremely difficult to establish, as the money is frequently transferred clandestinely and without witnesses. At the

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[175] The Penal Code of India, Section 366A.

[176] The Penal Code of India, Section 366B.

[177] *Legislation of Interpol Member States on Sexual Offenses Against Children*, India. INTERPOL (accessed 2 May 2001); available from http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaIndia.asp.

same time, the network of organized criminal groups may be sophisticated enough to have different contact persons as the victim is transported from her original community to the place of commercial sexual exploitation. For these cases, the prosecution of traffickers may be hampered by the difficulty and certainty in which the allegation of intent can be proven.

Furthermore, the dynamics of trafficking are such that it may not be necessary for the traffickers to ever come in contact with the 'buyer' of the girls. For example, a common tactic used in the city of Bombay (now Mumbai), India, is to convince a potential victim, most often an under-age girl, to travel outside her community with a trafficker, who may have led the girl to believe that he is her boyfriend, husband, or employer. After she arrives at the Bombay train or bus station, her companion disappears and leaves her completely disoriented and vulnerable to people who are enticing her to work in various types of legitimate establishments around the city. It is only afterwards that she finds out that the employment promised to her at the station does not reflect the work she is forced to undertake. Even if a case could be made against the person who initially procures and transports the girl, his defense could rely on the fact that his only 'offense' was to have left her at the station, and he did not know that the desertion would lead her to forced prostitution. This exemplifies the prosecutorial difficulties involved in obtaining successful convictions against traffickers when such loopholes exist in the law.

No Criminalization Based on Revictimization

The domestic implementation of anti-trafficking legislation is made more difficult by challenges faced by law enforcement in detecting and understanding the dynamics of a trafficking operation, which can change rapidly in response to particular weaknesses in law enforcement. For example, traffickers can change their trafficking route in response to the level of corruption at particular border checks. If a trafficking operation is disturbed because one check point has been 'cleaned' of corrupt officials, traffickers can just as easily find another border crossing point. It has been reported by anti-trafficking organizations that at some of these checkpoints "men accompanying girls and women across the border was a common sight, and that these men did not even bother with forged documents, they handed over the money quite openly as they came across the border" into India.[178] Consequently, due to the amorphous nature in which the act of trafficking is regularly carried out, law enforcement actions often have been misdirected at the crime that could be seen, such as prostitution, or for illegally residing in a community without having proper immigration status.

It is important here to note the legal context in which commercial prostitution operates in India. Prostitution is legal in India provided that the prostitute is not under sixteen and is working independently. A large proportion of prostitutes do begin prostitution when they are under sixteen, and much of the trade takes place in brothels in well-known city or town districts. SITA also made brothel keeping, pimping, and soliciting criminal offenses, but

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[178] Carolyn Sleightholme and Indrani Sinha, *see supra* note 23, at 42.

offenders can be released by the court on probation of good conduct or after due admonition. Despite the official tolerance of sex work in the country, prostitutes cannot solicit near a public place without risking arrest and detention for doing so. While Article 7 of the PITA Act criminalizes the act of prostitution in or in the vicinity of public places, Article 8 is a very general provision against seducing or soliciting for purpose of prostitution.[179] Article 8 even could be interpreted very widely to include any form of legalized prostitution. It states:

> Whoever, in any public place or within sight of, and in such manner as to be seen or heard from, any public place, whether from within any building or houses or not –
>
> (a) by words, gestures, willful exposure of his person (whether by sitting by a window or on the balcony of a building or house or in any other way), or otherwise tempts or endeavours to tempt, or attracts or endeavours to attract the attention of, any person for the purpose or prostitution; or
>
> (b) solicits or molests any person, of loiters or acts in such manner as to cause obstructions or annoyance to persons residing nearby or passing by such public place or to offend against public decency, for the purpose of prostitution,

[179] The PITA Act, art. 7 on prostitution in or in the vicinity of public places. Violation of Article 7 of the PITA Act and can be imprisonment for up to three months.

> shall be punishable on first conviction with imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees, or with both, and in the event of a second subsequent conviction, with imprisonment for a term which may extend to one year, and also with fine which may extend to five hundred rupees.[180]

The broad and vague provisions contained in Article 8 give Indian law enforcement much discretionary power in determining who they want to arrest and detain for seducing or soliciting, including those, who simply by sitting on the balcony in a supposedly "inappropriate manner," are determined to have "offended against public decency." As a result, Article 8 can be easily abused by law enforcement officials, who can use it to arrest practically any one suspected of engaging in prostitution. One study conducted by an Indian anti-trafficking organization has found that "[b]y far the majority of arrests in India, under SITA [and the subsequent PITA Act], have been of women charged under Sections 7 and 8." In a study done on the implementation of SITA and the later amended PITA Act in Bombay from 1980 to 1987, it was found that 596 brothel-keepers were arrested during the period compared to 9240 sex-workers. Only 304 procurers were arrested from 1980 to 1984, while not one pimp or landlord of a brothel was arrested during those four years. Looking at the number of arrests under the Bombay Police Act sections dealing with 'indecent' behaviors, the study found that only 1395 pimps were held, as opposed to 53,866 sex-workers between 1980 and 1987.[181]

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[180] The PITA Act, art 8 on seducing or soliciting for purpose of prostitution.

[181] Carolyn Sleightholme and Indrani Sinha, *see supra* note 23, at 58.

What these criminal provisions on seducing, soliciting, and prostitution and statistics indicate is an environment of impunity, in which traffickers frequently escape the attention of law enforcement officials. More often, authorities criminalize potential trafficked victims for acts that they are forced to perform, such as prostitution, or for their illegal immigration or residential status without further investigation into their circumstances. Even when confronted with clear evidence of trafficking and forced labor, authorities can still target the women as undocumented migrants and prostitutes, as opposed to intervening to address violations of their fundamental human rights. As a result, this leads to what is known as 'revictimization,' where trafficked victims are prosecuted for crimes that they have little, if any, control over. This prevents more trafficked victims from seeking protection and escaping from an exploitative environment. Therefore, an essential component of any domestic anti-trafficking strategy must be the rejection of any form of criminalization that would lead to revictimization. Instead of making trafficked victims the target of law enforcement efforts, more attention should be devoted to how punishing the traffickers without exacerbating the victims' vulnerability to further abuse.

This unequal application of the law to predominately target the sex workers as opposed to the brothel-keepers, procurers, and pimps has contributed to the inadequate response of the police on the issue of human trafficking for forced prostitution in India. One Bombay police officer has privately noted that "it is senseless to arrest sex workers for violating Article 8 of the PITA Act because it is not catching the real criminals."[182] In

[182] From an interview with an Indian police officer in Bombay (now Mumbai), near the red-light district of Kamathipura, during the author's field research to India during August-September 2001.

addition, he observed that it also feels very "wrong" to fine a sex worker, who might have been trafficked into the trade, when one knows that she would have to pay for the fine out of her future earnings from prostitution. Therefore, this policeman comments that most of the time, they refrain from doing anything. Consequently, the traffickers continue to escape criminal prosecution entirely, or just face minor penalties for their involvement in illegal migration or commercial prostitution. The government only exacerbates the victims' vulnerability to abuse and deters them from turning to law enforcement officials for assistance and protection. By allowing traffickers to engage in slavery-like practices without penalty, the government encourages the abuses to continue with impunity when more could be done to combat human trafficking as a crime, such as gathering better intelligence on traffickers and their organized criminal activities.

Punishment Must Be Enough to Decrease the Incentive to Traffic

Prostitution is legal in India provided that the prostitute is not under sixteen and is working independently. As stated above, prostitutes cannot solicit near a public place, even though much of the trade takes place in brothels in well-known city or town districts. Despite the official tolerance of sex work in the country, India's Penal Code has strict provisions intended to punish the individual traffickers of children[183] and minors[184] into the sex trade. Sections 372 and 373 of India's Penal Code are intended to punish the individuals who profit from the trade of children and minors for prostitution:

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[183] The PITA, art. 2(aa). A child is defined as a person who has not completed the age of 16 years.

[184] The PITA, art. 2(cb). A Minor is defined as a person who has completed the age of 16 but has not completed the age of 18 years.

Whoever sells, lets to hire, or otherwise disposes of any person under the age of eighteen (18) years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.[185]

Whoever buys, hires or otherwise obtains possession of any person under the age of eighteen (18) years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purposes, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.[186]

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[185] The Penal Code of India, Section 372, Explanation Two, defines 'illicit intercourse' as: "means sexual intercourse between persons not united by marriage, or by any union or tie which, though not amounting to a marriage, is recognized by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a quasi marital relation."

[186] The Penal Code of India, Section 373.

In addition to these penal provisions, the PITA Act prescribes stringent action against those procuring, inducing, or taking children and minors for prostitution. If the offense is committed against a child, the punishment is imprisonment for a term not less than seven years and may extend to life.[187] If the victim is a minor, then the punishment is between seven to fourteen years.[188]

Together, these sections seek to rigorously punish both the procurer as well as the receiver of a person under age eighteen for prostitution, and, in letter, they decrease the financial incentives for traffickers to engage in this illicit activity. However, the problem is one of enforcement and implementation of these criminal provisions on the ground. Many human rights organizations working on the issue of human trafficking in India have argued that these laws are applicable only in letter and not in practice. Overall, the enforcement of these domestic laws to combat female trafficking has been considered to be completely inadequate, in that it does not decrease the financial incentives driving this illicit activity. This problem of enforcement will be examined in greater detail in the section below on police corruption.

[187] The PITA Act, art. 5(d)i.

[188] *Ibid*., art. 5(d)ii.

C. Element Three: Professionalize the Police

Face the Issue of Police Corruption

No other single issue besides corruption within the police causes as much disaccord between authorities and non-governmental organizations and generates as much controversy. There are even allegations that some police officers directly patronize brothels where trafficked women work, despite their knowledge of the coercive conditions under which this trade is conducted.[189] There also have been serious allegations that some officers are on the direct payroll of brothels and are receiving *haftas,* or bribes, from brothel owners. One author describes it as an official tolerance that allows human trafficking to continue with impunity, as "many brothels set aside a significant proportion of their income to pay off the police."[190] One survey conducted in Delhi on behalf of the Indian National Commission for Women found that police authorities took around 20% of the fee that customers paid to brothel owners for each session.[191]

There also have been allegations that the Indian police seldom investigate cases of clandestine cross-border trafficking in women and girls. The basic structure of this exploitative system continues to flourish, and trafficked women and children remain vulnerable to corruption within law enforcement. Consequently, female trafficking in India

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[189] *In Rape for Profit*. Human Rights Watch, *see supra* note 162.

[190] Brown, *see supra* note 19, at 201-202.

[191] *Ibid*.

persists as a large organized operation, involving regional criminal groups with links to law enforcement agencies. As described by the UN Special Rapporteur on Violence Against Women:

> Police corruption in the trafficking process was an issue that was constantly raised by women's groups and women victims of trafficking. One of the victims described how, having escaped from a brothel in Calcutta, she went to complain to the police. The police called the brothel owner, who paid the police a substantial sum in front of the girl. She was taken back to the brothel and beaten till she was nearly senseless. She still suffers from injuries resulting from that episode. Other victims said that many policemen were clients of the brothels and on good terms with the traffickers, owners and pimps. Victims and women's groups in all three countries [of India, Nepal, and Bangladesh] recounted many cases of police corruption and many felt it was endemic, something that was taken for granted.[192]

At the same time, it seems very difficult to generate enough political will from the top of the police command to examine these serious allegations of police collusion with human traffickers or brothel owners. In part, this is due to a sense of frustration felt within the Indian police that the PITA Act in itself is inadequate to control human trafficking. Furthermore, the application of the Act seems to condone, as opposed to punish, the criminals for human trafficking, since about four times as many women in the sex trade are arrested under the

[192] *Report of the Special Rapporteur on Violence Against Women, see supra* note 158, at 15-16.

PITA Act, but procurers, guardians, pimps and clients are barely touched.[193] When one police officer was asked about corruption within the Indian police, specifically about the allegation that police have been known to return or sell rescued trafficked victims back to their pimps or brothel owners, she replied:

> Police corruption may be there, but this particular allegation that police sell them back to the pimps, brothel owner, madam, is not correct. Because once we rescue them under Indian law, within 24 hours, they have to be produced before the court. If they are major, the court lets them out and releases them under fine. If they are minor, they have to be reported to the Junior Welfare Board. Under the Junior Welfare Board, it keeps them in the protective home. So, this particular allegation that police sell them back does not hold water. Maybe with major girls, police turn a blind eye and may accept money from her. But with minor girls – No.[194]

The underlying view of her reply seems to represent a prevalent sentiment that police corruption exists and will always exist. So long as the result of corruption does not harm minor girls, then it could be tolerated. However, this sentiment reflects the problem mentioned in the above section regarding what happens when the protective regime is only extended to certain trafficked victims and not others – in this case, only minor girls for forced

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[193] *In Rape for Profit*. Human Rights Watch, *see supra* note 162.

[194] From an interview with a Senior Police Officer in Bombay (now Mumbai) during the author's field research to India during August-September 2001.

prostitution. It also seems to represent the absence of a clear directive from the top that corruption or official collusion with traffickers or brothel owners and pimps will not be tolerated. Unless such action is taken at the very top of the police structure, there will not be any serious, functioning, internal disciplinary board to investigate allegations of police corruption and to recommend punitive sanctions against police officers who profit from this illicit activity.

Provide Training on Human Trafficking Issues

Empowering law enforcement to effectively deal with human trafficking will not be very successful unless there are first appropriate guidelines and training procedures in place. This is ever so important considering the fact that human trafficking, as an issue, is fraught with popular conceptual ambiguities that can affect the protective regime of the various international conventions on the subject. It has been suggested that such police guidelines should contain detailed instructions on how to handle cases involving traffickers, pimps, brother owners, and the trafficked victims. The guidelines also should contain information on the various international human rights norms related to the topic of human trafficking and relevant domestic criminal provisions in place to prosecute those who profit from this trade.

Generally, human rights education needs to be an integral part of basic police training. If it is properly taught, it can be extremely effective. As long as the trainings are well-focused and can give clear rules on how law enforcement should deal with the various offenders of trafficking, they can alleviate some of the concerns that police tend to criminalize the victims

and not the traffickers. In addition, these types of trainings should not be limited to the police. Border control officials also need to be informed of what constitutes human trafficking as an issue of transnational crime and human rights violations. In addition, border control officials need to be trained on how to recognize potential victims of trafficking and learn how to intervene on their behalf.

It is of essential importance to note that the police do not operate in a vacuum. They reflect the independence of the judiciary and the commitment of the government to respect the rule of law. Therefore, it is significant that efforts to reform the police do not take place through a one-dimensional strategy. An equally important element is a functioning and independent judiciary.

D. Element Four: Make the Judiciary More Responsive

Priority Must Be to Reduce the Backlog of Human Trafficking Cases

Whereas the chief criticism against the police in India is corruption, the judiciary in India is, in turn, criticized by the police for being unresponsive to its cases on human trafficking. One senior police officer in Bombay expressed her frustration at the length of time a case of human trafficking takes to appear before the court:

> It can take up to 10 to 12 years [for a human trafficking case to appear before the court]. It takes such a lot of time by the time the case appears before the court. By that time, a girl who had been raped is now grown

> up, and she gets married and is now a mother. And she does not want to appear in court to say that she was raped by this man; she wants to bury the hatchet.[195]

A positive aspect, however, is that the judiciary in India is not plagued by allegations of corruption. It generally enjoys a widely-held reputation of being independent and acting as a strong advocate for human rights, especially as it pertains to economic and social rights and women's rights.[196] The problem, as this senior police officer admits, is that there are not enough judges to deal with all the cases that appear before the court. Consequently, cases linger before the court for anywhere between five to twelve years, thus rendering it impossible for police to provide witness protection to the trafficked victims and other witnesses for such a lengthy period of time. Due to the inability of the court to expedite these cases, most cases relating to human trafficking result in acquittals, as it becomes more difficult with each passing year for the prosecution to secure testimonies from victims and witnesses against alleged traffickers.

Moreover, this problem is exacerbated by the difficulties in identifying the whereabouts of these traffickers after cases are prepared against them and submitted to the court. Traffickers can change their names and addresses and continue to recruit more victims

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[195] *See supra* note 194.

[196] *Country Reports on Human Rights Practices 2001: India*. U.S. Department of State, Bureau of Democracy, Human Rights, and Labor (accessed 10 April 2002); available from http://www.state.gov/g/drl/rls/hrrpt/2001/sa/8230.htm. It describes: "When legal procedures [in India] function normal, they generally assure a fair trial, but the process often is drawn out and inaccessible to poor persons."

in other cities and regions. The police then cannot trace and bring them back to stand trial for alleged trafficking offenses committed sometimes more than a decade ago. These testimonies point to the urgent need in which human trafficking cases must be expedited through the judicial process. If this is not done, then the perceived unresponsiveness of the judiciary to prosecute human trafficking cases will remain and will discourage serious efforts by law enforcement officials to investigate alleged incidents of human trafficking.

Protective Custody Must Be Reconsidered

When trafficked victims are rescued in India, they are often sent to government homes for protective custody until their cases are heard or until they are repatriated. In many cases, because cases take so long to appear before the court, the rescued victims often "languish for many years in these homes, forgotten by everyone."[197] One description of these government homes claims that it is "only marginally better than being in prison" and described the living conditions there as extremely unsatisfactory. One report gives an account of trafficked women at these government homes as:

> being kept with mentally ill patients, deaf and dumb women and destitute women. Records with regard to the women in the home were not properly kept and information on the women was scanty and not properly taken. All the women…were deeply unhappy and wanted to be released. There were very few activities and many victims…said they did nothing

[197] *Report of the Special Rapporteur on Violence Against Women, see supra* note 158, at 18.

> for the whole day. They had done nothing wrong and therefore their "protective custody" seemed particularly cruel.[198]

Although the trafficked victim is considered a victim by the court, her stay in a government home under protective custody is by court order and is not voluntary. This only compounds victims' fear of revictimization by discriminatory application of the PITA Act and suspicion of police authorities. It further leads to the perception of a judiciary that seeks to punish and imprison trafficked victims under protective custody while the traffickers are released on bail. Therefore, the use of protective custody as an effective or proper witness protection program must be reconsidered, for it decreases the willingness of rescued victims to testify against those who had either procured them or who had profited from their forced prostitution. Within the larger context, the use of protective custody that borders on "imprisonment" of the trafficked victims discredits the judiciary and its efforts to prosecute and punish the human traffickers, who profit enormously from this illicit trade and continue to act with much impunity.

E. Element Five: Establishing a Human Rights Normative Framework

Ratify International Human Rights Treaties

The most serious problem confronting human trafficking in terms of national law enforcement is that often it does not operate within a human rights framework. As described above, trafficked victims are often revictimized when they are arrested, detained, and

[198] *Ibid*.

prosecuted as those who have violated the laws of the country. If the victims are from abroad, then they are even more likely to be charged with an immigration offense. What this points to is that countries frequently do not have a strong human rights normative framework in place to combat human trafficking. Even if anti-trafficking laws are in place, as in the case of India, they may not adhere to international norms, or they are poorly enforced on the ground. In this context, even for countries that have signed and ratified important international human rights treaties related to human trafficking as mentioned in Chapter 3, they may have entered reservations to these treaties in a way that impedes their effective implementation at the domestic level. One such example is the case of India and the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"), which India ratified in 1993.[199]

CEDAW provides a strong normative framework of non-discrimination for India's efforts against the trafficking of women and girls for forced prostitution. Article 6 of CEDAW required State Parties to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."[200] However, when India ratified CEDAW, it entered into a reservation on the articles relating to discrimination within cultural and customary practices,[201] and to equality in marriage and family relations.[202] On these two important provisions dealing with gender discrimination in the private sphere of a woman's family life, India entered into a reservation stating that "it shall abide by and

[199] *See supra* note 73 on CEDAW.

[200] CEDAW, art. 6.

[201] *Ibid*., art. 5(a).

[202] *Ibid*., art. 16(1).

ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent."[203] Therefore, many human rights organizations have questioned the impact of CEDAW on the situation of gender inequality in India if its domestic legislations incompatible with CEDAW cannot be challenged under the protective framework of an international human rights treaty. Many have argued that, with its reservations on articles 5 and 16 of CEDAW, the Indian Government has adopted a strategy of passive inaction on discrimination in women's private lives.[204] At the same time, India's reservations also undermine the goals of CEDAW for Contracting Parties to eliminate all "prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."[205]

Nonetheless, despite these reservations, CEDAW has emerged as an important normative framework for India's domestic laws on gender equality. In 1997, the Supreme Court of India reached a landmark decision in *Visakha v. State of Rajasthan*, concerning sexual harassment in the workplace. In this case, the Supreme Court decided that, in the absence of domestic legislation to protect women from sexual harassment in the working environment, it could base its decision on CEDAW and general provisions in the Indian

[203] *Ibid*., art. 5(a).

[204] *Bringing Equality Home: Implementing the Convention on All Forms of Discrimination Against Women*. UNIFEM (accessed on 15 February 2002); available from http://www.unifem.undp.org/cedaw/cedawe10.htm.

[205] CEDAW, art. 5(a).

Constitution that deal with equality, human dignity, the right to life and trafficking.[206] By using CEDAW as the judicial framework on matters relating to gender inequality in the workplace, the Supreme Court held that CEDAW was an essential component of India's domestic law. This decision, therefore, points to the importance of state ratifications to international human rights treaties. Notwithstanding problems in the implementation of treaty obligations, these human rights treaties do establish a platform, which judges, lawyers, non-governmental organizations and others could use to challenge the very existence of state reservations.[207] More importantly, as CEDAW has established for India, human rights treaties do provide a basic normative framework in which international standards and norms relating to human rights can be incorporated into domestic law and used as a point of reference for human rights advocates.

[206] D. Nagasaila and V. Suresh, *Harassment at Work*. People's Union for Civil Liberties (accessed on 11 April 2002); available from http://www.pucl.org/reports/National/2001/harassment.htm. "For its ruling in Visakha v. State of Rajasthan, the Supreme Court of India directed that all institutions should set up complaint mechanisms to deal with complaints of sexual harassment at work places. This should consist of a committee headed by a woman. The majority of members should be women. In order to ensure an unbiased enquiry, the Court directed that the committee should consist of an NGO member with expertise in women's issues because in most cases, the accused is likely to be a person in authority."

[207] For example, one Indian human rights organization, the Women's Action Research and Legal Action for Women has petitioned the Supreme Court of India in 1994. "The petition asks the court to order the Government to state exactly how it intends to determine whether communities want the personal laws changed — and to state exactly how the Government intends to include the voices of women from these communities when making its assessment. In effect, WARLAW is challenging the static model of community that is implicit in the Government's reservation. WARLAW is taking the position that the Government cannot simply assume that communities want discriminatory traditions to continue unchanged, or that male community leaders necessarily speak for the women in their communities." In *Bringing Equality Home, see supra* note 204.

Protecting the Rights of Vulnerable Populations

Protecting girls and women from being trafficking into forced prostitution means that India must address the inequality in status and opportunity that makes them more vulnerable to trafficking in the first place. It is not enough to claim extreme poverty as the sole cause for trafficking cases, even though, at initial glance, most people believe that it is acute poverty alone that drives people to situations of exploitation. In reality, the nexus between poverty and human trafficking is not absolute and is affected by other socioeconomic factors.[208] There are many poor communities and families who would never send a child, or traffic them, into sex work or other forms of exploitative labor.[209] The actual link between poverty and the trafficking of females, however, is far more complicated. Poverty only leads to trafficking when the effects of poverty are exacerbated by other socioeconomic factors, such as gender discrimination or discrimination against people of the lower caste. Therefore, this underscores the importance of protecting the rights of vulnerable populations within a human rights framework to combat human trafficking.

Other factors that may compound the existing poverty faced by families include natural disasters, recurrent droughts, community and family disintegration, marital desertion, and widowhood. Any combination of these factors can make girls and women more

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[208] Siriporn Skrobanek, Nataya Boonpakdee, and Chutima Jantateero, *The Traffic in Women: Human Realities of the International Sex Trade* (New York: Zed Books Ltd, 1997), 31-2.

[209] *Report of the Special Rapporteur on Violence Against Women, see supra* note 158, at 9. On the link between poverty and human trafficking., the Special Rapporteur notes: "poverty was a major factor and that many of these women were either sold into prostitution or left their homes to escape poverty. However, it was also pointed out that the poorest areas of Nepal were not the areas from which women are being trafficked."

vulnerable to being trafficked into commercial sexual exploitation. For instance, two-thirds of the girls and women who enter prostitution in India come from areas that are drought-prone.[210] Another significant factor in the linkage between poverty and trafficking is literacy and education. Generally, throughout the less-developed regions of Asia, the majority of girls who sell sex are poor and often illiterate. Hence, they are more vulnerable to human traffickers because their youth and lack of education make them easier to control, deceive, and manipulate. At some point in their lives, most of those who end up in the sex trade have faced a social or economic crisis, which has compelled them to leave their 'normal' life. As described below by a local anti-trafficking non-governmental organization in Mumbai (Bombay), India:

> Women who have…a sense of accomplishment do not find themselves in prostitution…This being the dominant reality of the Indian situation, it is incorrect to state that women in India willingly join prostitution or give consent to being trafficked into prostitution…[211]

At its core, female trafficking in India is a problem of gender inequality, which increases women's vulnerabilities to exploitative situations. For such reasons, it is exactly this discrimination of women in the private sphere that drives many women into trafficking operations. Women often are without access to any economically secure household. Widows

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[210] Brown, *see supra* note 19, at 45.

[211] Priti Patkar and Pravin Patkar, *Prerana's Intervention for the Protection of the Rights of The Victims of Commercial Sexual Exploitation & Trafficking in India* (Mumbai, India: Anti-Trafficking Centre Prerana, 2000) 9.

and single or separated women are commonly seen as easy prey to sexual harassment and exploitation by others because they are not the 'property' of any man. To sum, it is not the group identity of poverty alone that drives women of lower socioeconomic status into trafficking. Other outside factors, such as discrimination, natural disasters, dowry, and level of education also overlap to make a poor woman either more or less prone to the deception and coercion tactics involved in trafficking. Therefore, in light of the above, an effective national anti-trafficking strategy must make a strong commitment towards protecting the rights of these vulnerable populations, as opposed to viewing anti-trafficking mainly as an issue of overall economic development. If not, economic development that does not take into consideration the vulnerabilities and rights of specific populations will fail to halt the extensive human trafficking in South Asia.

VI. CONCLUSIONS

Addressing human trafficking truly requires a comprehensive and multi-faceted strategy, which includes efforts aimed at the rehabilitation and social reintegration of trafficked victims. Otherwise, the strategy will not be successful in the long run. The author has seen situations where the victims of forced prostitution in the Balkans were repatriated and accorded all the rights and protections of "trafficked victims," only to return a second time. These victims certainly knew the risks involved in illegal immigration and dealing with potential traffickers, but somehow they chose to return. Whereas the victims were forced into exploitative situations the first time, it was not so straightforward the second time. Overall, these situations were particularly difficult because they raised doubts as to how sustainable any anti-trafficking strategy could be if social reintegration of the victims is not considered as one of the most important priorities. In this context, criminal justice elements essential to a national anti-trafficking strategy, as described in the previous chapter, must be implemented in tandem with rehabilitation and reintegration efforts – for it is exactly these two elements that test a society's commitment towards non-discrimination, tolerance, and gender equality.

In 1990, an Indian anti-trafficking organization sent approximately 1,000 sex-workers from Bombay (Mumbai) back to their home states in South India. Two years later, it was found that more than 500 were known to have returned to prostitution.[212] While no reasons were given for why more than half of the women eventually returned to commercial sex work,

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[212] Carolyn Sleightholme and Indrani Sinha, *see supra* note 23, at 124-5.

it does underscore the fact that the physical act of returning trafficked victims to their home communities is not enough. It is the author's own experience from conducting field interviews for this research in India that the divide between what society perceives as a "good v. bad woman" is extremely pronounced. In one Indian town, the author was even prevented by pimps from walking through the red-light district and speaking to some of the women who worked there. The pimps shadowed the author and, at one junction, blocked the author and translator and repeatedly said: "You are good women, you shouldn't enter. This is not a place for you." If this stigma against "bad women" could even affect someone who has otherwise no connections to the region and community, then it must be unimaginable what a trafficked victim goes through in a community that suspects or knows her previous status. It is then of no surprise that many of those victims eventually do decide to return.

Much of the literature on domestic anti-trafficking focuses on fostering a sense of state responsibility. For example, a report on Bosnia-Herzegovina's response to human trafficking criticized the country for the absence of a sense of state responsibility to address this issue. It states:

> At present the protection of the rights of those trafficked is being done almost entirely by the IC [International Community] with little or no element of state responsibility…[O]bstruction, obfuscation and simple passivity permeates the law enforcement and policy apparatus of the State at every level, a statement that can be generalized beyond BiH [Bosnia and Herzegovina]. Accordingly, solutions to the problem of

> trafficking in persons can only be found in the active participation of government authorities in every sector…[213]

While state responsibility for human trafficking must be the foundation upon which other elements are to be added, the issue of international responsibility is just as important. It would be entirely unrealistic to expect countries mired in extreme poverty, such as India, and countries under post-conflict reconstruction, as in the case of Bosnia-Herzegovina, to be able to effectively address human trafficking without active international assistance. Very few developing countries where human trafficking originates have social welfare structures in place to deal with this extensive problem. As such, they not only need international assistance in establishing these welfare programs, but also international expertise on how to do it right. Therefore, if the international community is seriously committed to the human rights protection of trafficked victims, then it must devote more resources towards their rehabilitation and reintegration. Beyond contributing funds to assist in victim repatriation, international efforts need to be more directed towards understanding and establishing effective rehabilitation schemes. As of now, not much scholarly attention has been given to what makes a rehabilitation scheme viable.[214] This is partly due to the fact that the interface between physical rehabilitation, psychological counseling, and economic training is very complex. As in situations of domestic abuse and violence, it is not easy to convince women to leave this cycle of physical or mental abuse, and to start anew. On the other hand, without

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[213] *Trafficking in Human Beings in Bosnia and Herzegovina*, *see supra* note 17, at 10.

[214] Priti Patkar and Pravin Patkar, *Frequently Asked Questions on Commercial Sexual Exploitation and Trafficking* (Mumbai, India: Anti-Trafficking Centre Prerana, 2000) 88.

these rehabilitation and reintegration efforts, victims will continue to be revictimized, either through their reluctance to seek protection or their consent to return.

Ultimately, successful anti-trafficking efforts at both the international and domestic fronts depend heavily on wide public support and awareness of the issue. Due to all the conceptual ambiguities surrounding human trafficking, it is interesting to see how organizations have decided to advocate this issue. For instance, Anti-Slavery International, an organization based in the United Kingdom, addresses human trafficking as a contemporary form of slavery and advocates for the abolition of all forms of bonded labor. In comparison, some organizations focus on female trafficking for forced prostitution, while others address child trafficking for forced prostitution and child pornography. While all these efforts seek to raise public awareness on the exploitative dynamics of human trafficking and their effects on various vulnerable groups, there seems to be little coordination between all the different organizations. As a result, they are not maintaining the conceptual clarity that is urgently needed to address this phenomenon.

For example, it is of crucial importance to stress that human trafficking is not just for prostitution, nor are all prostitutes victims of trafficking. In the realm of public discourse, human trafficking and prostitution are often mentioned in the same sentence. It leads one to wonder if the organization, in reality, is taking a prohibitionist position on all forms of commercial sex work. Another example is how human trafficking is often linked to incidents where alien smuggling has gone wrong, as in the case in June 2000 when 58 Chinese migrants suffocated in a food truck as they attempted to cross the Dover Channel into the United

Kingdom.[215] While this generates public sympathy for the plight of the world's migrants, who expose themselves to enormous risks in search of better lives, it is not a correct issue linkage. This paper has consistently argued for human trafficking to be conceptually distinguished from alien smuggling for the very reason that an effective anti-trafficking framework must be de-linked from an individual's initial consent to migrate.

Moreover, some organizations, in their zeal to promote public awareness for their cause, make claims and use sensationalist tactics to the detriment of others who base their advocacy work on good research, solid data, and conceptual clarity. One such example is a non-governmental organization that has tried to raise public support for its efforts against the trafficking of children for sexual exploitation by labeling this practice as "the Millennium Holocaust."[216] While there is no doubt that child trafficking for sexual exploitation is abominable, the term "Millennium Holocaust" implies that trafficked children are "exterminated" and left without any hope for their successful rehabilitation and social reintegration, even after their rescue. This is outrageously untrue. Furthermore, this misconception cannot be allowed to justify a policy position that assumes the futility of any strategy to reintegrate trafficked victims – for it will be exactly this component of social reintegration that determines the long-term viability of any anti-trafficking strategy.

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[215] "Dying To Leave (5 April 2001)" in *BBC News* (accessed 14 April 2002); available from http://news.bbc.co.uk/hi/english/audiovideo/programmes/correspondent/.

[216] Christine Dolan, *Recommendations. A Shattered Innocence, the Millennium Holocaust.* International Humanitarian Campaign Against the Exploitation of Children (accessed 19 March 2002); available from http://www.helpsavekids.org.

In essence, at the very core of any anti-trafficking strategy must be an unwavering commitment from individual countries and other multilateral actors to address human trafficking at every stage of this cycle, from prevention to recruitment, transportation to bonded labor, and from rescue to reintegration. Without this commitment, anti-trafficking efforts will be fundamentally unable to intervene on behalf of the trafficked victims whose human rights violations form the backbone of this exploitative trade.

[Annex One]

List of Relevant International Human Rights Treaties

Slavery

1885 General Act of the Berlin Conference on Central Africa

1990 Act of Brussels

1926 Slavery Convention

1953 Protocol amending the Slavery Convention

1957 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery

"White Slave Trade" or Trafficking for Forced Prostitution

1904 International Agreement for the Suppression of the White Slave Traffic

1910 International Convention for the Suppression of the White Slave Traffic

1921 International Convention for the Suppression of the Traffic in Women and Children

1933 International Convention on the Suppression of the Traffic in Women of Full Age

1949 International Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others

International Labour Organization (ILO)

1930 Forced Labour Convention of 1930 (No. 29)

1957 Abolition of Forced Labour Convention (No. 105)

1949 Migration for Employment Convention (No. 97)

1975 The Migrant Workers (Supplementary Provision) Convention (No. 143)

1999 Worst Forms of Child Labour Convention (No. 182)

Other Human Rights Treaties

International Covenant for Civil and Political Rights (ICCPR)

International Covenant for Economic, Social and Cultural Rights (ICESCR)

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Convention on the Rights of the Child (CRC)

Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

[Annex Two]

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. 55/25, annex II, 55 U.N. GAOR Supp. (No. 49) at 60, U.N. Doc. A/45/49 (Vol. I) (2001).

Preamble

The States Parties to this Protocol,

Declaring that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights,

Taking into account the fact that, despite the existence of a variety of international instruments containing rules and practical measures to combat the exploitation of persons, especially women and children, there is no universal instrument that addresses all aspects of trafficking in persons,

Concerned that, in the absence of such an instrument, persons who are vulnerable to trafficking will not be sufficiently protected,

Recalling General Assembly resolution 53/111 of 9 December 1998, in which the Assembly decided to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration of, inter alia, an international instrument addressing trafficking in women and children,

Convinced that supplementing the United Nations Convention against Transnational Organized Crime with an international instrument for the prevention, suppression and punishment of trafficking in persons, especially women and children, will be useful in preventing and combating that crime,

Have agreed as follows:

I. General provisions

Article 1

Relation with the United Nations Convention against Transnational Organized Crime

1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.

2. The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein.

3. The offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention.

Article 2

Statement of purpose

The purposes of this Protocol are:

(a) To prevent and combat trafficking in persons, paying particular attention to women and children;

(b) To protect and assist the victims of such trafficking, with full respect for their human rights; and

(c) To promote cooperation among States Parties in order to meet those objectives.

Article 3

Use of terms

For the purposes of this Protocol:

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

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) "Child" shall mean any person under eighteen years of age.

Article 4

Scope of application

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.

Article 5

Criminalization

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

(a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;

(b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and

(c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

II. Protection of victims of trafficking in persons

Article 6

Assistance to and protection of victims of trafficking in persons

1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.

2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

(a) Information on relevant court and administrative proceedings;

(b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:

(a) Appropriate housing;

(b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;

(c) Medical, psychological and material assistance; and

(d) Employment, educational and training opportunities.

4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.

5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.

6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

Article 7

Status of victims of trafficking in persons in receiving States

1. In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.

2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.

Article 8

Repatriation of victims of trafficking in persons

1. The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.

2. When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.

3. At the request of a receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.

4. In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

5. This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party.

6. This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.

III. Prevention, cooperation and other measures

Article 9

Prevention of trafficking in persons

1. States Parties shall establish comprehensive policies, programmes and other measures:

(a) To prevent and combat trafficking in persons; and

(b) To protect victims of trafficking in persons, especially women and children, from revictimization.

2. States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.

3. Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

4. States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.

5. States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.

Article 10

Information exchange and training

1. Law enforcement, immigration or other relevant authorities of States Parties shall, as appropriate, cooperate with one another by exchanging information, in accordance with their domestic law, to enable them to determine:

(a) Whether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel documents are perpetrators or victims of trafficking in persons;

(b) The types of travel document that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons; and

(c) The means and methods used by organized criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such rafficking, and possible measures for detecting them.

2. States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. The training should focus on methods used in

preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers. The training should also take into account the need to consider human rights and child- and gender-sensitive issues and it should encourage cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

3. A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use.

Article 11

Border measures

1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.

2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of offences established in accordance with article 5 of this Protocol.

3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.

5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.

Article 12

Security and control of documents

Each State Party shall take such measures as may be necessary, within available means:

(a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and

(b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use.

Article 13

Legitimacy and validity of documents

At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for trafficking in persons.

IV. Final provisions

Article 14

Saving clause

1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

Article 15

Settlement of disputes

1. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Protocol through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Protocol, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 16

Signature, ratification, acceptance, approval and accession

1. This Protocol shall be open to all States for signature from 12 to 15 December 2000 in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.

2. This Protocol shall also be open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Protocol in accordance with paragraph 1 of this article.

3. This Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Protocol is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Protocol. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

Article 17

Entry into force

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph 1 of this article, whichever is the later.

Article 18

Amendment

1. After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. The States Parties to this Protocol meeting at the Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Protocol present and voting at the meeting of the Conference of the Parties.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.

3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Protocol and any earlier amendments that they have ratified, accepted or approved.

Article 19

Denunciation

1. A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

2. A regional economic integration organization shall cease to be a Party to this Protocol when all of its member States have denounced it.

Article 20

Depositary and languages

1. The Secretary-General of the United Nations is designated depositary of this Protocol.

2. The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Protocol.

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