

REVISITING THE UN PROTOCOL ON HUMAN TRAFFICKING: STRIKING BALANCES FOR MORE EFFECTIVE LEGISLATION

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ABSTRACT

Human trafficking is a growing global criminal concern. This paper assesses several national and multi-national efforts to combat human trafficking, focusing particularly on the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Protocol). Ultimately, the rise in trafficking offenses compared to the sparse number of convictions strongly suggests the inadequacy of the national and multinational efforts currently in play. This paper will take a fresh look at key provisions of the recent Protocol in light of newly published data on trafficking, and will explore possible modifications to the instrument which may increase its effectiveness. While the Protocol is an important first step, it has failed to fully shed the problems that hindered earlier anti-trafficking instruments. My thesis is that curbing rampant human trafficking requires revamping national and international legislation to stimulate multinational cooperation and motivate States to tackle the problems “root causes,” prosecute offenders, and sponsor new local initiatives for victim prevention, protection and assistance. This paper offers several suggestions as to how the Protocol (or a similar multi-national instrument) can achieve these important legislative goals.

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I. INTRODUCTION

Human trafficking is both a growing global criminal concern and humanitarian crisis. Current estimates indicate that as many as twenty seven million persons are currently “enslaved” as a result of illegal trafficking.¹ Each year upwards of four million individuals are actively trafficked.² Of this number, approximately 800,000 to 900,000 persons are trafficked across international borders.³ Virtually no State has been untouched by human trafficking; nearly every State is a source State, destination State, or transit State.⁴ Moreover, human trafficking is one of most prosperous⁵ and fastest-growing, criminal enterprises.⁶

However, what makes trafficking a humanitarian crisis is not merely its scale, but its purposes and mechanisms, which constitute a direct assault on freedom and dignity.⁷ Trafficking at its core involves the objectification of persons into illicit market commodities—persons who, like chattel, are coercively bought, sold, transported, exploited and ultimately discarded.⁸ In receiving States, trafficked persons are forced to partake in an array of activities ranging from bonded labor to organ harvesting; however, the

¹ See GILBERT KING, *WOMAN, CHILD FOR SALE: THE NEW SLAVE TRADE IN THE 21ST CENTURY* 19 (2004); U.S. DEP'T OF STATE, *THE TRAFFICKING IN PERSONS REPORT 7* (2008) [hereinafter TIP REPORT 2008], available at <http://www.state.gov/documents/organization/105501.pdf> last visited at July 15, 2008 (estimating 4 to 27 million persons).

² TIP REPORT 2008, *supra* note 1; see also Jonathan Todres, *The Importance of Realizing 'Other Rights' to Prevent Sex Trafficking*, 12 *CARDOZO J.L. & GENDER* 885, 887 (2006). R

³ Todres, *supra* note 2; See also KING, *supra* note 1, at 3, 13. R

⁴ Nilanjana Ray, *Looking At Trafficking Through A New Lens*, 12 *CARDOZO J.L. & GENDER* 909, 909 (2006); KING, *supra* note 1, at 4 (quoting an interview of Senator Clinton, who asserts that the sex trade crosses all boundaries). R

⁵ Tal Raviv, *International Trafficking in Persons: A Focus on Women and Children—the Current Situations and the Recent International Legal Response*, 9 *CARDOZO WOMEN'S L.J.* 659, 660; See KING, *supra* note 1, at 21 (quoting a 2004 press release from Senator Brownback). R

⁶ Arlacchi, Press Release, OSCE, “Human Trafficking: Fastest Growing Form of Organized Crime,” (Nov. 1, 2001); Leroy G. Potts, Jr., *Global Trafficking in Human Beings: Assessing The Success of the United Nations Protocol to Prevent Trafficking In Persons*, 35 *GEO. WASH. INT'L L. REV.* 227, 227 (2003).

⁷ *Trafficking in Women and Children in the International Sex Trade: Hearing Before the Subcommittee on International Operations and Human Rights of the Committee on International Relations House of Representatives*, 106th Cong. 8-9 (1999) (statement of Harold Koh, Assistant Sec'y of State, Bureau of Democracy, Human Rights and Labor, United States Department of State) [hereinafter Koh Testimony].

⁸ *Id.* at 9; Ray, *supra* note 4, at 909. R

vast majority of victims endure some form of sexual exploitation (e.g., forced pornography or prostitution).⁹

In recent years the awareness of this growing, criminal trend throughout the international community has risen and anti-trafficking efforts have ratcheted up.¹⁰ One critical document that has been produced at the international level is the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Protocol),¹¹ as a supplement to the Convention on Transnational Organized Crime (Convention).¹² However, despite measures like the Protocol, this illicit activity has proven to be indelible. Recently released data strongly suggest that though the numbers of individuals rescued and perpetrators punished has increased, the number of persons trafficked continues to rise steadily.¹³ Current international efforts appear insufficient to stem the tide and more needs to be done. This paper will take a fresh look at key provisions of the recent Protocol in light of newly published data on trafficking, and will explore possible modifications to the instrument which may increase its effectiveness.

The program of the paper is as follows: section II briefly explores the criminological contours of trafficking offenses. It describes perpetrators, victims, and root causes using new data provided in the US State Department's Trafficking In Persons

⁹ TIP REPORT 2008, *supra* note 1, at 7 (however, note that the TIP Report indicates that when non-transnational trafficking abuses are considered, forced labor is the most popular form of trafficking servitude); *also* FRANCIS T. MIKO, *TRAFFICKING IN WOMEN AND CHILDREN: THE US AND INTERNATIONAL RESPONSE* (Congressional Research Service 2004) [hereinafter Congressional Report], *available at* <http://fpc.state.gov/documents/organization/31990.pdf> (last visited July 6, 2008).

¹⁰ Potts, *supra* note 6, at 227-28.

¹¹ United Nations Convention against Transnational Crime, G.A. Res. 55/25 (Jan. 8, 2001), at 31 [hereinafter Protocol], *available at* www.unodc.org/unodc/en/treaties/CTOC/index.html (last visited Oct. 20, 2008).

¹² General Assembly, *Report of the Ad Hoc Committee on the elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions*, G.A. Res. A/55/383 (Nov. 2, 2000) [hereinafter Convention], *available at* http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf (last visited July 6, 2008).

¹³ *See generally* TIP REPORT 2008, *supra* note 1; Ray, *supra* note 4, at 910; *contra* JULIA O'CONNELL DAVIDSON, *CHILDREN IN THE GLOBAL SEX TRADE*, 8, 23 (Polity Press Ltd., 2005). Davidson argues that the current fascination with reports of abuse is simply a function of the vitriolic feelings of Westerners for such stories driven by insatiable appetite and mass hysteria. These social reactions can be linked to a new socially constructed fetishization of the "Child." She concludes that there is simply nothing new (i.e., no ratcheting up of offenses) about the commercial sexual exploitation of children "except the term itself."

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(TIP) Report of June 2008.¹⁴ Section III investigates the legal landscape preceding the creation of the Protocol; specifically, the perspectives underlying numerous international instruments addressing trafficking. Finally, Section IV assesses the successes and failures of relevant, key provisions in the Protocol, and outlines modifications to increase its overall success for slowing the advancing criminal enterprise of human trafficking.

This paper argues that while the Protocol takes positive steps, it is still plagued by problems, which have burdened other similarly motivated, international anti-trafficking efforts. The primary thesis of the paper is that, ultimately, the Protocol would benefit from adding or strengthening provisions that focus on eradicating the poverty-driven vulnerability of people groups at high risk for trafficking.

II. THE HUMAN TRAFFICKING PROBLEM

US Secretary of State Condoleezza Rice recently described human trafficking as “a modern form of slavery.”¹⁵ Linking trafficking to the historical form of slavery is appropriate. Despite the fact that slavery as the legal ownership of persons has been abolished worldwide,¹⁶ the commodification of persons for market purposes has persisted outside the law. Moreover, while it is still a new object of criminological study, a rough analysis of the people, purposes, and practices of this modern form of slavery is possible and should preface any legal discussion.

An economic sketch of the trafficking problem is perhaps the easiest to convey. Trafficking is driven by economic gain. The trade is surprisingly lucrative, generating twelve billion dollars in profits yearly,¹⁷ and ranking just behind the illicit drug and arms trades.¹⁸ Human trafficking is the process by which niche, typically

¹⁴ TIP REPORT 2008, *supra* note 1.

¹⁵ CONDOLEEZA RICE ET AL., *TRAFFICKING IN PERSONS REPORT: JUNE 2007* 1 (United States Department of Publication 2007); *see also* TIP REPORT 2008, *supra* note 1, at Introduction.

¹⁶ Silvia Scarpa, *Child Trafficking: International Instruments to Protect the Most Vulnerable Victims*, 44 *FAM. CT. REV.* 429 (2006).

¹⁷ *See* KING, *supra* note 1, at 19; *but see* Congressional Report, *supra* note 9, at 2 (estimating seven to ten billion dollars annually).

¹⁸ EUROPOL, 2004 EUROPEAN UNION ORGANIZED CRIME REPORT 12 (Europol 2004), available at http://www.europol.europa.eu/publications/Organised_Crime_Reports-in_2006_replaced_by_OCTA/EUOrganisedCrimeSitRep2004.pdf (last visited July 6, 2008); KING, *supra* note 1, at 21.

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illicit, service-markets are fed. These markets operate according to basic supply and demand principles. The trafficking process is comprised of three parties: customers, victims, and facilitators.¹⁹ Each party fills a market role: customers generate a demand for “services”; victims supply these services; and facilitators meet customer demand by procuring victims.

Customers who comprise the demand side of trafficking can be described as persons who consume the services of trafficked individuals.²⁰ Using this definition, however, a customer’s profile changes radically depending on the particular services consumed. A customer may either be a sex tourist, an aunt using a niece as a domestic slave, a cigarette factory owner who uses bonded slaves, or a guerilla army commander who dragoons captured children into the ranks.²¹

Victims who populate the supply side of the market are generally society’s most vulnerable.²² A number of factors can lead to an individual’s increased susceptibility to trafficking, but the usual suspects are: widespread poverty, poor education or educational opportunities, diminished economic prospects and insufficient aid from state infrastructure.²³ Post-war instability, political unrest, and displacement caused by natural disasters can aggravate these vulnerability factors.²⁴ While men may fall prey to traffickers, women and children make up the vast majority of the victim base—80% are women and up to 50% are minors—as they are commonly the most marginalized persons in source States.²⁵ Victims who are young or from rural areas are especially vulnerable; not only are they generally poor and uneducated, but they often lack the requisite knowledge of legal migration.²⁶ A composite portrait of these factors suggests that the most frequently trafficked persons are

¹⁹ See Virginia Garrard, *Sad Stories: Trafficking in Children—Unique Situations Requiring New Solutions*, 35 GEORGIA J. INT’L & COMP. L. 147, 150 (2006).

²⁰ *Id.* at 151.

²¹ *Id.*

²² Ray, *supra* note 4, at 909.

²³ See generally Todres, *supra* note 2, at 886.

²⁴ Raviv, *supra* note 5, at 661; Stacy Mathews, Comment: *International Trafficking in Children: Will New U.S. Legislation Provide an Ending to the Story?*, 27 Hous. J. INT’L L. 649, 663 (2005).

²⁵ TIP REPORT 2008, *supra* note 1, at Introduction; Ray, *supra* note 4, at 909; KING, *supra* note 1, at 14 (estimating 70 percent of victims are women).

²⁶ Raviv, *supra* note 5, at 662.

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poor, uneducated, young females from rural areas in impoverished, developing countries.²⁷

Facilitators perform all the recruitment, transport, exchange, and detainment functions necessary to make victim services available to consumers. At times, a victim's family can be complicit as facilitators insofar as they knowingly participate in, and/or benefit from, the trafficking of their own family members.²⁸ At the core of the networks, however, facilitators are most often established, professional criminal groups.²⁹ These groups tend to be small and loosely organized,³⁰ relying on modern technology to enhance the effectiveness of communication, transport and trade.³¹

Because trafficking experiences can vary widely, depending in part on the end use of victims,³² care must be taken when describing trafficking practices. However, a few consistent typologies emerge. Typically, traffickers coerce or entice victims out of the protection of homes and communities.³³ If recruitment is involved, a local person may offer false promises of better economic and educational opportunities, or even marriage.³⁴ Newspaper or internet

²⁷ See generally Garrard, *supra* note 19, at 151-57.

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²⁸ Raviv, *supra* note 5, at 662; see also Potts, *supra* note 6, at 229.

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²⁹ See generally Becki Young, *Trafficking of Humans Across United States Borders: How United States Laws Can Be Used to Punish Traffickers and Protect Victims*, 13 GEO. IMMIGR. L.J. 73 (1998); Potts, *supra* note 6, at 230; KING, *supra* note 1, at 9.

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³⁰ AMY O'NEILL, CTR. FOR THE STUDY OF INTELLIGENCE, INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME vii (1999), available at <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/trafficking.pdf>; Potts, *supra* note 6, at 231.

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³¹ TIP REPORT 2008, *supra* note 1, at 13 (describing the use of cell phone "texting" to solicit clients for trafficked prostitutes and arrange meeting places and times); Kathryn Lloyd, *Wives for Sale: The Modern International Mail-Order Bride Industry*, 20 NW. J. INT'L L. & BUS. 341, 345 (2000); Potts, *supra* note 6, at 231.

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³² See generally KING, *supra* note 1 (surveying case histories); SEABROOK, *infra* note 86; DAVID BATSTONE, NOT FOR SALE: THE RETURN OF THE GLOBAL SLAVE TRADE—AND HOW WE CAN FIGHT IT (2007); see also Garrard, *supra* note 19, at 168 (discussing the unique trafficking experience of children as linked to the purposes behind their trafficking).

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³³ TIP REPORT 2008, *supra* note 1, at 11 (noting the phenomenon of "Happy Trafficking" where local girls return to their communities after being trafficked to recruit locals using false reports of positive commercial experiences); Raviv, *supra* note 5, at 662; Potts, *supra* note 6, at 229.

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³⁴ Koh Testimony, *supra* note 7; Potts, *supra* note 6, at 229.

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ads facilitate remote recruitment.³⁵ Where recruitment efforts fail, simple abduction may be utilized to procure victims.³⁶

Once the victim is in a facilitator's custody, they are usually transported to different regions intra-country or across international borders.³⁷ This transit effectively disorients and 'disempowers' the victim. The traffickers then either sell victims to buyer-facilitators or enslave them as "owned" commodities.³⁸ Commonly, traffickers fabricate "debt"; charging the victims exorbitant fees for meals, travel, securing jobs, and buying back confiscated passports or convincing them that they are legally owned commodities.³⁹ Methods used for detaining and gaining long-term compliance of victims include: document confiscation, threats, force, violence, and even plying victims with drugs.⁴⁰ Such means discourage victims from seeking escape and the aid of authorities.

Most commentators agree that a surge in the volume of trafficked persons has occurred in the last twenty years.⁴¹ The causes behind the surge are undoubtedly complex and numerous. Some commentators credit the general influx of persons moving across increasingly porous borders, since the end of the Cold War—a movement that has been precipitated by new communication technologies and affordable transportation possibilities as well as the general interdependence among States.⁴² Other commentators highlight the emergence of international organized crime syndicates alongside the simple rise in the demand—usually from individuals in increasingly richer, Western States—for the goods and services provided by industries which rely on the human trafficking trade.⁴³

Typically the national legal systems of source regions—often including former Soviet States of Eastern Europe, Latin America,

³⁵ Raviv, *supra* note 5, at 662. See Potts, *supra* note 6, at 229.

³⁶ Karen D. Breckenridge, Comment, *Justice Beyond Borders: A Comparison of Australian and U.S. Child-Sex Tourism Laws*, 13 PAC. RIM L. & POL'Y 405, 410-11 (2004).

³⁷ Koh Testimony, *supra* note 7, at 9; Potts, *supra* note 6, at 229.

³⁸ Potts, *supra* note 6, at 229 (citing Koh Testimony).

³⁹ TIP REPORT 2008, *supra* note 1, at 16.

⁴⁰ Potts, *supra* note 6, at 229-30.

⁴¹ Elizabeth Defeis, *Protocol to Prevent, Suppress and Punish Trafficking in Persons-A New Approach*, 10 ILSA J. INT'L & COMP. L. 485, 486 (2004); Cf. DAVIDSON, *supra* note 13.

⁴² Defeis, *supra* note 41.

⁴³ KING, *supra* note 1, at 2, 15.

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and Southeast Asia⁴⁴—are ill equipped to deal with the increase in human trafficking.⁴⁵ The lack of adequate State legislation, shallow political will, limited law enforcement capabilities, and corruption of local law enforcement personnel have combined to embolden traffickers and hamper anti-trafficking efforts.⁴⁶ Financially motivated perpetrators elude capture by continually diversifying trafficking methods.⁴⁷ Indeed, as a high-profit, small expenditure enterprise with a relatively low risk of punishment, trafficking increasingly attracts criminal organizations.⁴⁸ Helping to explain the rapid growth of this illicit trade, commentators note that unlike the one-time profits of drug and arms trafficking, a single human trafficking “investment” generally yields consistent future profits.⁴⁹ Some of these causal themes will be explored in more detail throughout the paper.

III. BACKGROUND TO THE PROTOCOL

The persistence of international trafficking over the years has generated numerous international instruments. Some commentators have argued that each instrument reflects a theoretical perspective or framework on the nature of the trafficking problem.⁵⁰ Understanding these perspectives is essential for appreciating a particular instrument’s successes and failures and ultimately the legacy preceding the Protocol.

Trafficking was first conceptualized mainly as a prostitution-related activity.⁵¹ Trafficking discourse during this time focused on

⁴⁴ The President’s Interagency Council on Women, *Pressing Forward to Stop Trafficking in Women and Children*, U.S. DEP’T OF STATE, Mar. 1, 2000, <http://usinfo.org/wf-archive/2000/000301/epf313.htm>; Potts, *supra* note 6, at 227.

⁴⁵ See Potts, *supra* note 6; see also Defeis, *supra* note 41, at 487; Abigail Schwartz, *Sex Trafficking in Cambodia*, 17 COLUM. J. ASIAN L. 371, 408-11 (discussing the inadequacy of the legal and enforcement institutions to address the problem of sex trafficking).

⁴⁶ See Potts, *supra* note 6, at 234-35; Defeis, *supra* note 41, at 487.

⁴⁷ Potts, *supra* note 6 at 231-32.

⁴⁸ Press Release, OSCE, *supra* note 6; KING, *supra* note 1, at 9 and 21.

⁴⁹ Kathryn E. Nelson, *Sex Trafficking and Forced Prostitution: Comprehensive New Legal Approaches*, 24 HOUS. J. INT’L L. 551, 556 (2002); King, *supra* note 1, at 21 (quoting Kansas Senator Brownback’s 2004 press conference and release).

⁵⁰ See generally Ray, *supra* note 4. I am indebted to Ray’s thoughtful analysis of the underlying perspectives of numerous international instruments addressing the human trafficking problem; see also Garrard, *supra* note 19.

⁵¹ Mohamed Y. Mattar, *Incorporating the Five Basic Elements of a Model Antitrafficking In Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention*, 14 TUL. J. INT’L & COMP. L. 357, 362-63 (2006); see also Raviv, *supra* note 5, at 664-65; Ray, *supra* note 4, at 910-11.

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the “White Slave Traffic,” the abduction and foreign sale of white women for sex work.⁵² The international community responded with the 1904 and 1910 “White Slave Traffic” Conventions, which criminalized the procurement of white women or girls for immoral purposes abroad.⁵³ Under the auspices of the League of Nations, further anti-trafficking Conventions⁵⁴ extended protection to non-white women.⁵⁵ In 1949 the UN created the Convention for the Suppression of the Traffic in Persons and Exploitation of the Prostitution of Others (1949 Convention),⁵⁶ which consolidated previous anti-prostitution instruments. It characterized prostitution as “incompatible with the dignity and worth of the human person” and obligated States to punish persons who procured or exploited “the prostitution of another person, even with the consent of that person.”⁵⁷ The 1949 Convention influenced anti-trafficking legislation, which closely tracked this language.⁵⁸

Though sex work remains the primary mode of exploitation for trafficking perpetrators, trafficking instruments which target only prostitution related activities have significant limitations.⁵⁹ They offer overly narrow descriptions of trafficking that ignore common forms of trafficking which do not have a sexual component.⁶⁰ Further, the instruments are under-inclusive because prostitution is only one category of sexual exploitation.⁶¹ Other significant forms of trafficking that may have a sexual exploitation component, such as trafficking for marriage, domestic servitude, or

⁵² Defeis, *supra* note 41, at 485; Ray, *supra* note 4, at 910.

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⁵³ International Agreement for the Suppression of the “White Slave Trade,” May 18, 1904, 1 L.N.T.S. 83, at 86; International Agreement for the Suppression of the “White Slave Trade,” May 4, 1910, 3 L.N.T.S. 278. See Tal Raviv, *supra* note 5, at 665 (describing the 1910 Treaty as an anti-forced prostitution mechanism); see also Defeis, *supra* note 41, at 485 (referencing 1904 and subsequent League of Nations Treaties which focused on anti-prostitution measures).

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⁵⁴ See Tal Raviv, *supra* note 5, at 665 (describing the 1921 Treaty as an anti-forced prostitution mechanism). See also International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 415; International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431.

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⁵⁵ Ray, *supra* note 4, at 911.

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⁵⁶ Convention for the Suppression of the Traffic in Persons and Exploitation of the Prostitution of Others, Mar. 25, 1950, 96 U.N.T.S. 271, at 272 [hereinafter 1949 Convention].

⁵⁷ *Id.* at 274.

⁵⁸ Mattar, *supra* note 51, at 362-63.

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⁵⁹ Ray, *supra* note 4, at 911.

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⁶⁰ *Id.*

⁶¹ *Id.*

the production of sexually explicit images, are all improperly excluded from the ambit of coverage.⁶² A mail-order bride may find herself in an abusive marriage, exploited as a domestic worker and sexual slave, yet not be cognizable as a victim under an anti-prostitution program.⁶³ This exclusion is misguided given that such women are frequently confined, isolated, and hidden; therefore, violence against them unnoticed and underreported.⁶⁴

Alternatively, anti-prostitution instruments fail to adequately distinguish trafficking from non-trafficking forms of prostitution and are, thereby, over-inclusive. Failure to make such differentiation arguably deprives the trafficking problem of the focused attention it requires.⁶⁵ It also hinders ratification by, and mutual legal cooperation from, States that are unopposed to consensual, non-trafficking forms of prostitution.

Further flaws in the anti-prostitution perspective can be demonstrated by evaluating the 1949 Convention's influence, or lack thereof, on domestic criminal laws. First, "trafficking in persons was rarely recognized as a specific crime[,] [i]nstead it was addressed under other related offenses" (e.g., prostitution, kidnapping, and illegal confinement).⁶⁶ Second, because the primary function of legislation was to criminalize offensive activity, the need for programs addressing victim aid and protection was largely ignored.⁶⁷ Third, "rescued" persons were treated as criminals, subject to punishment for crimes including illegal entry into the recipient State, falsification of travel documents, and prostitution.⁶⁸ Fourth, because enforcement provisions of the 1949 Convention were generally weak, domestic law criminal sanctions for procurement of prostitution services were either rarely enforced or incompatible with the gravity of the offense (i.e., limited to a small fine and/or short-term incarceration).⁶⁹

Another prominent, competing conceptualization emerged from the "violence against women" perspective, according to which trafficking is "an abuse of women's physical and psychological

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Potts, *supra* note 6, at 237.

⁶⁶ Mattar, *supra* note 51, at 362-64.

⁶⁷ *Id.* at 362.

⁶⁸ *Id.* at 368.

⁶⁹ *See id.* at 362, 364-65, and 372.

well-being, as well as an exploitation of their social and economic powerlessness.”⁷⁰ This conceptualization was popularized in the 1970’s as feminist groups organized against “sex tourism, mail-order bride arrangements, and militarized prostitution in Southeast Asia.”⁷¹ It strongly influenced discourse on trafficking during the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which explicitly prohibited trafficking as a distinct criminal category, alongside prostitution.⁷² In addition to appreciating non-prostitution forms of trafficking, this perspective viewed women as victims with the standard, corresponding set of rights.⁷³ Despite such advantages over the anti-prostitution orientation, this approach continued to overlook significant aspects of trafficking. Principally, it neglected men or boys trafficked into situations similar to their female counterparts.⁷⁴ Chronic neglect of trafficked men by State anti-trafficking policies, despite continual NGO reports of abuses, has drawn recent international criticism which will not be rehearsed here.⁷⁵

Perhaps a more subtle and dangerous problem with the CEDAW approach is that by over-emphasizing the powerlessness of trafficked women, it glosses over elements of agency which women exhibit in their own trafficking. Frequently, it supports a false dichotomization between the deceived, “innocent victim” and “those who consented.”⁷⁶ Misunderstanding over the issue of victim consent in trafficking definitions continually hinders anti-trafficking discourse and promotes poor corrective policies. Often victims exhibit varying degrees of knowledge, and hence, consent concerning the specifics surrounding their trafficking.⁷⁷ Com-

⁷⁰ Ray, *supra* note 4, at 912.

⁷¹ *Id.*

⁷² Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, art. 6, U.N. Doc. A/Res/34/180 (Dec. 18, 1979), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/378/07/IMG/NR037807.pdf?OpenElement>.

⁷³ Ray, *supra* note 4, at 912.

⁷⁴ Ray, *supra* note 4, at 911.

⁷⁵ See e.g., TIP Report 2008, *supra* note 1, at 9 (describing under reported instances of men and boys trafficked into commercial sexual exploitation and citing to ILO and UNICEF studies); See also Ray, *supra* note 4, at 911-12 (citing the comments of the Dutch National Rapportuer and an empirical study in the South Indian state of Kerala finding that almost have of approximately 10,000 street-based sex workers were men.).

⁷⁶ Ray, *supra* note 4, at 914.

⁷⁷ In this section the author draws, in part, from his personal observations while working with trafficked persons and surveying victim interviews during the course of a legal internship at an NGO in Chiang Mai, Thailand dedicated to curbing trafficking abuses in Southeast Asia [hereinafter Author Experience]; see also Ray, *supra* note 4, at 914.

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monly, migrant sex workers know they will be prostituted and recruitment is consensual.⁷⁸ Ignorance lies with the exploitative, abusive, slavery-like conditions that accompany the sex work.⁷⁹ The classic deceived-woman profile is unhelpful here. One concern is that it encourages criminalization of sex workers who exhibit some degree of complicity. Another problem is that, in practice, it may put the onus on victims to prove their complete innocence e.g., their lack of knowledge, in order to receive the aid and protection normally afforded crime victims. An approach that straddles victims with antipodal characterizations mishandles a wide swath of *real* victims. The frequency with which this scenario occurs requires that we discard unhelpful legal paradigms, accept the initial decisions of such women, and view their subsequent exploitation as justification for extending to them full victim protection.⁸⁰

IV. KEY PROVISIONS OF THE PROTOCOL

In December 1998, the UN took the initial steps to create a new international document addressing the growing problem of human trafficking.⁸¹ International anti-trafficking instruments in use at that time were diagnosed as both dated, and insufficiently comprehensive to combat a multi-faceted trafficking problem.⁸² Given the analysis above, it is perhaps appropriate to add to these more prominent, published criticisms: misdirection.

Arguably, the Protocol offers the most comprehensive, explicitly articulated international legal framework on human trafficking and overcomes many of the limitations of its predecessors. Among its major accomplishments are: (1) developing a comprehensive trafficking definition, and (2) shedding a strict, traditional law enforcement paradigm to anti-trafficking efforts by setting out a three-pronged approach which takes into account trafficking prevention, punishment of traffickers, and protection of victims.

⁷⁸ Author Experience, *supra* note 77; *see also* Ray, *supra* note 4, at 914.

⁷⁹ Ray, *supra* note 4, at 914.

⁸⁰ *Id.*

⁸¹ U.N. ECON. & SOC. COUNCIL [ECOSOC], COMMISSION ON CRIME PREVENTION AND CRIMINAL JUSTICE, INFORMATION FOR PARTICIPANTS, U.N. DOC. E/CN.15/1998/INF.1 (1998), *available at* <http://www.uncjin.org/Documents/7comm/inf1e.pdf>.

⁸² Informal Note by the U.N. High Comm'r for Human Rights Ad Hoc Comm on the Elaboration of a Convention against Transnational Organized Crime, 4th Sess., at 4, U.N. Doc. A/AC.254/16 (June 1, 1999) [hereinafter Informal Note], *available at* <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/0a7b256cb3e1b897802567a7004a1db0?OpenDocument>.

A. *Defining Trafficking*

Given the numerous documents preceding the formation of the Protocol which address trafficking, it is perhaps surprising that the Protocol is the first international document to offer a comprehensive, legal definition of trafficking.⁸³ Article 3 of the Protocol provides that:

Trafficking in persons shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power 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 or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.⁸⁴

Establishing a comprehensive definition is a significant forward step in the effective criminalization of international trafficking activities. Since the signing of the Protocol, numerous States have adopted some similar definition into their anti-trafficking legislation.⁸⁵ Having a common definition—a common legal denominator—aids State-to-State cooperative law enforcement efforts, including extradition and mutual legal aid during transnational prosecutions. Definitional similarity between the penal codes of States is critical because the trafficking crime so commonly involves offenses, and hence evidence, in multiple States. Moreover, so many States condition law enforcement cooperation (i.e., extradition and mutual legal aid) on the dual criminality requirement—under which an offense must be recognized as criminal activity in both the prosecuting State and the State in which the offense occurred.⁸⁶

There are further advantages associated with establishing a common legal definition. Notably, it closes definitional loopholes for criminals who would exploit them to avoid conviction. Case

⁸³ Kelly E. Hyland, *The Impact of the Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* 2 HUMAN RIGHTS BRIEF 30, 31-32 (2001).

⁸⁴ Protocol, *supra* note 11, Annex II, Article 3.

⁸⁵ Mattar, *supra* note 51, at 368.

⁸⁶ JEREMY SEABROOK, NO HIDING PLACE: CHILD SEX TOURISM AND THE ROLE OF EXTRATERRITORIAL LEGISLATION 5 (2000).

histories are littered with the attempts of captured offenders to evade conviction by asserting a narrow legal interpretation of trafficking-related offenses.⁸⁷ A common, unambiguous legal definition is also vital for NGO's who wish to keep governments accountable in their prosecution efforts. NGO's can both link specific offenses to the legal criteria and also reference the prosecution efforts of other States who employ a similar criminal definition. Finally, it helps State legislative, enforcement, and judiciary institutions to understand more fully what trafficking entails. Raising the awareness of such institutions is critical to prompting prosecutions and convictions.⁸⁸

While there are several clear advantages to setting up a common legal definition, it is important to highlight those particulars of the Protocol's definition that offer substantial gains, especially given the shortcomings of preceding instruments in both conceptualizing and combating the trafficking problem. First, by incorporating forms of trafficking beyond sexual exploitation, the definition surpasses anti-prostitution instruments like the 1949 Convention. Second, the Protocol offers minimum threshold criteria for trafficking, but leaves the definition open-ended, which empowers the Protocol to address other, yet-to-be-conceived, forms of trafficking. This guarantees the instrument's longevity while simultaneously encouraging States to see trafficking exploitation as the Hydra it is. Third, the definition, despite explicitly emphasizing the exploitation of women and children, is gender and age neutral. This approach closes coverage gaps that have plagued instruments like CEDAW. Fourth, the Protocol's relaxed position on consent responds incisively against dichotomization pitfalls, addressing the all-to-common mixed-consent scenarios. Under the Protocol, trafficked persons whose victimhood is complicated by some degree of criminal complicity should receive adequate care, respect, and rights. Finally, some commentators have applauded the Protocol for successfully distinguishing trafficking offenses from both non-trafficking varieties of prostitution and illegal immigration.⁸⁹ Purportedly, one virtue stemming from this flexibility is that the definition will ultimately promote cooperation and, perhaps, Protocol ratification among States that may have a permissive stance on

⁸⁷ *Id.*

⁸⁸ See Potts, *supra* note 6, at 236-37.

⁸⁹ *Id.* at 237.

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“standard” forms of prostitution.⁹⁰ However, as we shall see shortly, this final praise for the Protocol may be mislaid.

As critical as a strong, universal legal definition is to anti-trafficking law and enforcement efforts, the minting of this provision was far from uncontroversial.⁹¹ During negotiating sessions, the term “sexual exploitation” was challenged as dangerously vague and divisive.⁹² The UN Special Rapporteur on Violence Against Women viewed the term as open to a wide range of conflicting interpretations: perhaps encompassing all activities within the sex industry or only forced sex work.⁹³ In the end, the delegate compromise simply fashioned a minimum sexual exploitation threshold.⁹⁴

A related definitional controversy was the role a victim’s consent should play in forming the definition’s parameters. Some States argued that only trafficking involving force should be addressed by the Protocol and, hence, a victim’s consent would remove the act from the ‘ambit of coverage.’⁹⁵ NGOs warned that all prostitution should be addressed since the distinction between forced and free prostitution was meaningless.⁹⁶ This stance seems to be based on the supposition that all persons in the sex industry are in an inherently vulnerable position, which ultimately diminishes the capacity for autonomy. On the other hand, nullifying victim consent could exclude valid defenses and raise constitutional issues for States.⁹⁷ The Protocol compromise permits accused persons to offer victim consent as a defense during the prosecution

⁹⁰ *Garrard*, supra note 19, at 158-59 (discussing the unwillingness of states to ratify treaties which “call upon signatories to punish persons involved in the exploitation of prostitution – a matter traditionally left to domestic policy.”).

⁹¹ See generally U.N. Ad Hoc Comm. for the Elaboration of a Convention against Transnational Organized Crime, *Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, at 2, 11th Sess., U.N. Doc. A/AC.254/4/Add.3/Rev.7 (July 19, 2000), available at <http://www.uncjin.org/Documents/Conventions/dcatoc/11session/4a3r7e.pdf>.

⁹² ANNOTATED GUIDE TO THE COMPLETE UN TRAFFICKING PROTOCOL, GLOBAL RIGHTS 4, available at http://www.globalrights.org/site/DocServer/Annotated_Protocol.pdf?docID=2723 (last visited Sept. 5, 2008). See Potts, supra note 6, at 237-38.

⁹³ Potts, supra note 6, at 237-38.

⁹⁴ See Potts, supra note 6, at 238.

⁹⁵ Defeis, supra note 41, at 488; William J. Bennett et al., *The Clintons Shrug at Sex Trafficking*, WALL ST. J., Jan. 10, 2000, at A26.

⁹⁶ Equality NOW Prostitution Statement, http://www.equalitynow.org/english/actions/action_2301_en.html (last visited July 12, 2008); Defeis, supra note 41, at 488.

⁹⁷ Defeis, supra note 41, at 488.

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proceedings.⁹⁸ However, the victim's consent to initial recruitment does not count as consent to the entire course of trafficking.⁹⁹ Additionally, the defense of victim consent would be unavailable if any of the "coercive" means of trafficking listed in the definition occurred.¹⁰⁰

What is peculiar about this compromise is that among the listed coercive means is taking advantage of "a position of vulnerability."¹⁰¹ This phrasing appears to account for economic vulnerability, making "coercion" an enormously expansive concept—seemingly looping in virtually every allegedly trafficked person.¹⁰² For the most part, non-economically vulnerable persons are simply not effectively lured by the types of bogus promises that trafficking recruiters traditionally offer their victims. Recruiters prey on the economic vulnerability (and the ignorance it can foster) of their victims.¹⁰³

This seemingly straightforward application of the Protocol's "compromise" language appears to favor the NGOs' position and raise the specter of constitutional concerns already noted. A further difficulty with marginalizing victim consent is that it may be too expansive, failing to make a sufficient distinction between a human trafficking crime and *prima facie* non-trafficking, consensual prostitution. Arguably, most ostensibly "consenting," non-trafficked sex workers come from economically disadvantaged backgrounds and turn to prostitution to escape these conditions. Again, this may saddle the Protocol with some of the same problems of its predecessors; namely, misdirecting the instrument, failing to distinguish sex trafficking from "standard" prostitution, thereby putting off those States with more permissive views on prostitution from ratification.

One final, but important, definitional issue concerns how the terms explicitly articulated in the Protocol's definition are affected by its relationship to the Convention. The Protocol is not a "stand

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ U.N. Office on Drugs and Crime, UNODC and Human Trafficking, <http://www.unodc.org/unodc/en/human-trafficking/index.html> (last visited July 12, 2008).

¹⁰¹ Protocol, *supra* note 11, at Annex II, Article 3 § (a).

¹⁰² Mattar, *supra* 51, at 371; Nelson, *supra* note 45, at 570; Linda A. Malone, *Economic Hardship as Coercion Under the Protocol on International Trafficking in Persons by Organized Crime Elements*, 25 *FORDHAM INT'L L. J.* 54, 55 (2001); Hyland, *supra* note 83, at 30.

¹⁰³ See Abigail Schwartz, *Sex Trafficking in Cambodia*, 17 *COLUM. J. ASIAN L.* 371, 411 (2004).

alone” instrument, rather, it was adopted *mutatis mutandis* to the Convention.¹⁰⁴ One significant consequence of this relationship is that the Protocol’s proscriptive reach applies only in those cases where the activities are “transnational” and linked to “organized crime” as defined under the Convention.¹⁰⁵

The “organized crime” proviso imposed by the Convention requires that the Protocol offenses be perpetrated by “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing [a] serious [Convention] crime . . . in order to obtain, directly or indirectly, a financial or other material benefit.”¹⁰⁶ Given the complexity seemingly inherent to even the simplest trafficking offense, this definitional requirement is not likely to pose much of a hurdle where the applicability of the Protocol is concerned.

More debate arises over the transnational limitation on the Protocol. Critics argue that the “transnational” limitation on the instrument is too restrictive, placing the bulk of trafficking offenses beyond the reach of the Protocol.¹⁰⁷ At least one critic argues that international trafficking accounts for a mere subset of the global trafficking problem.¹⁰⁸ Paradoxically, if cross-border transport is considered an integral part of the definition of trafficking, a citizen trafficked internally is afforded less protection than a non-citizen transported in from another State.¹⁰⁹ Finally, according to these critics, if re-trafficking occurs once foreign victims are smuggled into destination States—a common characteristic of trafficking operations—the entire criminal activity would be excluded.¹¹⁰ On this view, many perpetrators would operate with impunity and victims would languish outside the protection of State law.

While the exact ramifications of the Protocol’s *mutatis mutandis* limitation remains uncertain, the critics’ claims on this point appear to overstate the drawbacks. The term “transnational,” as delimited by the Convention, is fairly expansive. Under Article 3(2) of the Convention an offense is transnational if:

¹⁰⁴ Protocol, *supra* note 11, Annex II, Article 1 § 1.

¹⁰⁵ Defeis, *supra* note 41, at 487.

¹⁰⁶ Convention, *supra* note 12, at Article 2 § (a).

¹⁰⁷ See Ray, *supra* note 4, at 918.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

it is committed in more than one State; it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; it is committed in one State but involves an organized criminal that engages in criminal activities in more than one State; or it is committed in one State but has substantial effects in another State.¹¹¹

Arguably, this “limiting” condition incorporates a significant number of ostensibly intrastate trafficking cases; specifically, the “substantial effects” condition works to criminalize activity that would otherwise be characterized as purely domestic, but for its transnational impact. Notably, the term “substantial” is ambiguous as to which effects would count as substantial ones. However, there is some indication that this term will be given an expansive meaning, which would include much of the trafficking activity that concerns critics. It is quite likely that any domestic trafficking activity, no matter how small of an impact it might have when measured individually, if assessed collectively with other like activity, will be of such a scale as to have substantial impact on at least one other State. Such is the extent of the trafficking problem. Importantly, this caveat would probably account for most, if not all, sex tourism cases, even where the victims themselves did not cross State borders.

Of course it may be that not all intrastate cases can be accounted for. Ideally, a multi-lateral anti-trafficking instrument would address all intrastate trafficking. However, it is doubtful that such an instrument could attract as wide agreement among party States, if this required that a ratifying State submit to foreign intervention in a purely domestic criminal problem i.e., one having no substantial impact on another State. If this supposition is correct, then it may be that constraining the reach of the Protocol with the “transnational” limitation was the overall best approach.

Finally, commentators have criticized the Protocol’s definitional format as inappropriately lumping together distinct victim groups.¹¹² They argue that some victim groups have special needs which can’t be adequately managed by the Protocol’s current provisions.¹¹³ Ultimately, according to critics, the needs of some vic-

¹¹¹ Convention, *supra* note 12, at Article 3 § (2).

¹¹² See, e.g., Potts, *supra* note 6, at 244-45 expressing the need to have an anti-trafficking instrument which addresses the special needs of children.

¹¹³ *Id.*

tim groups will be overlooked.¹¹⁴ The special needs of trafficked children are of particular concern.¹¹⁵ Commentators advocate for a “stand alone” document devoted solely to trafficking in children¹¹⁶ or, alternatively, a section of the Protocol devoted solely to this purpose.¹¹⁷

Concerned critics argue that such focused attention is necessary to attend to the needs of children who differ in many respects from adults.¹¹⁸ Moreover, they argue that such a document would provide a forum for NGOs to advocate for additional State legislation needed for child victim welfare.¹¹⁹ Finally, persons advocating for a stand alone legislation point out that the strong international consensus behind the value of protecting children, as indicated in the near-uniform support for the Convention on the Rights of Children, would mean that a child-focused trafficking instrument would receive similar implementation success—avoiding the ratification pitfalls of a more comprehensive document.¹²⁰

However, the force of this critique is mitigated by several considerations. First, the Protocol already takes care to repeatedly raise attention to certain particularly vulnerable groups throughout its text, including children.¹²¹ Second, there is a significant counter-argument that groups commonly have intertwined interests, which are more powerfully addressed when presented together.¹²² For example, the interests of women are best secured by guaranteeing the educational and economic opportunities of girls.¹²³ Conversely, a community’s perspective on the value of girls is enhanced—and social protections secured—if the future economic possibilities of girls are improved by giving anti-discrimina-

¹¹⁴ *Id.*

¹¹⁵ See generally Garrard, *supra* note 19; Potts, *supra* note 6, at 244-46.

¹¹⁶ Garrard, *supra* note 19, at 148 and 167.

¹¹⁷ Mary Robinson, Informal Note by the United Nations High Commissioner for Human Rights, UN GAOR, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, 4th Sess., at 4, U.N. Doc. A/AC.254/16 (1999); Potts, *supra* note 6, at 244.

¹¹⁸ Garrard, *supra* note 19, at 148.

¹¹⁹ Potts, *supra* note 6, at 246.

¹²⁰ See Potts, *supra* note 6, at 245.

¹²¹ See, e.g., Protocol, *supra* note 11, at 6(c), 10(2) and 6(4); see also Potts, *supra* note 6, at 244-45.

¹²² Todres, *supra* note 2, at 891-92.

¹²³ *Id.* at 892 (discussing the backlash of “educational preference” among poor families to send only male children to school).

tion protections to women.¹²⁴ Separating the interests of trafficked persons among separate documents may be counterproductive. At the very least, these two considerations balance against claims that victim groups e.g., children should be independently considered.

B. *The Three Ps*

In addition to establishing a definition for trafficking, the Protocol promoted a comprehensive, three-pronged solution; colloquially named the 3-P approach.¹²⁵ Before exploring this approach in detail, it should be noted up front that the aim of each prong of the 3-P approach, Prosecution, Prevention, and Protection, enjoy considerable overlap. Successful prosecutions which result in incarcerations will not only operate as specific deterrence and, hence, prevent future offenses, but will simultaneously protect victims. Despite this overlap, the Protocol treats these aims separately and so they will be treated as distinct concepts here.

1. *Prosecution*

Arguably, the centerpiece of the Protocol's three-pronged approach is the set of mandatory criminal law enforcement provisions directed at successfully apprehending and prosecuting traffickers. As noted, prior to the Protocol, only a handful of States prohibited trafficking as a distinct criminal activity.¹²⁶ Moreover, the existing amalgam of State penal laws relevant to trafficking activity was not consistently or systematically applied.¹²⁷ Not surprisingly then, at the hub of the Protocol's enforcement scheme is the criminalization provision set out in Article 5, which mandates parties to adopt necessary measures to criminalize conduct that constitutes trafficking under Article 3's definition,¹²⁸ as well as to criminalize persons who direct, organize and abet this activity.¹²⁹

Undoubtedly, mandating criminalization among Member States addresses a serious enforcement need; however, it goes only partway toward successfully combating human trafficking. A sec-

¹²⁴ *Id.*

¹²⁵ Potts, *supra* note 6, at 239.

¹²⁶ Mattar, *supra* note 51, at 363-64. Potts, *supra* note 6, at 241.

¹²⁷ Mattar, *supra* note 51, at 363-64; Laura Lederer, Director, Protection Project (Statement) "The Sex Trade: Trafficking of Women and Children in Europe and the United States," Commission on Security and Cooperation in Europe, 106th Cong. 23 (June 28, 1999).

¹²⁸ Protocol, *supra* note 11, at Annex II Article 5 § 1.

¹²⁹ *Id.* at Annex II Article 5 §§ 2 (a)-(c).

ond leg of successful prosecution requires States to pass adequately stringent legislation. As noted, a principal reason behind the influx of organized criminal activity in the area of human trafficking is that many States are decidedly “soft” on human trafficking perpetrators at the prosecution stage. Despite having criminal statutes that bear on trafficking activities, such statutes impose light penalties on the perpetrator, or worse, misguidedly penalize the victim.¹³⁰ In comparison to other lucrative activities of organized crime (e.g., trafficking drugs and arms), human trafficking has promised comparatively low risk of detection, prosecution and severe penalties. Again, this lack of criminal liability only entices traffickers to offend.¹³¹ Trafficking laws with severe penalties are needed to reverse this trend. However, the Protocol does not discuss sanctions. One way the Protocol could institute more severe penalties is by mandating minimum sentences which reflect the gravity of the crime. Given the similarities in the harm caused by trafficking conduct to the crimes of rape and drug trafficking, comparable penalties seem appropriate. The European Council Framework Convention of 2002 provides an attractive model here, mandating that member European States provide penalties for trafficking of at least eight years imprisonment¹³² complete with a schedule for aggravating factors.¹³³ Alternatively, the Protocol could explicitly mandate that State parties punish the crime of trafficking with sanctions, which both “reflect the gravity of the offence” and are calculated to deter, as required under the Convention.¹³⁴

Yet, having sufficiently stringent legislation in place does not guarantee that prosecutions will ever be initiated or that relevant laws will be consistently applied. In part, this is because many States lack the political resolve to prioritize trafficking enforcement in the first case.¹³⁵ In key supplier States, police and border officials commonly fail to pursue traffickers, or are even complicit in trafficking activities.¹³⁶ Reports consistently indicate that officials routinely accept bribes to ignore violations and/or tip off

¹³⁰ Mattar, *supra* note 51, 363-66; *See generally* Lederer Statement, *supra* note 127.

¹³¹ Scarpa, *supra* note 16, at 429; OSCE Press Release, *supra* note 6.

¹³² Council Framework Decision 2002/629/JHA, Combating Trafficking in Human Beings, art. 3 2002 O.J. (L 203) 1, 1 (EC).

¹³³ *Id.*

¹³⁴ Convention, *supra* note 12, at Article 11 §§ 1-4.

¹³⁵ Potts, *supra* note 6, at 234.

¹³⁶ *Id.*

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facilitators prior to police raids.¹³⁷ Sadly, chronic law enforcement failures create regional pockets where perpetrators find safe havens in which trafficking thrives.¹³⁸

As a matter of practice, this corruption and collusion among officials may be tolerated by States, which depend on the injection of foreign dollars from the industries, which, in turn, heavily rely on trafficking crimes.¹³⁹ Some commentators have gone so far as to describe these tolerant States as complicit in trafficking crimes.¹⁴⁰ Unsurprisingly, States in many of the most plagued regions have failed to sign or ratify the Protocol.¹⁴¹

The problem of collusion among local government officials has no simple answer. One possibility is to take steps to undercut the financial incentive flowing from trafficking crimes, which appears to lull States toward tolerance. Again, recent U.S. legislation holds out a promising strategy—an incentive-based program at the core of the U.S. Victims of Trafficking and Violence Protection Act of 2000¹⁴² (TVPA) (recently expanded under the PROTECT ACT).¹⁴³ At the center of the TVPA's incentive program is the U.S. Department of State's Office to Monitor and Combat Trafficking, which publishes the TIP Report annually.¹⁴⁴ TIP Reports are devices, which compile and analyze information on global traf-

¹³⁷ *Id.*; Janie Chuang, *Redirecting the Debate Over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 HARV. HUM. RTS. J. 65, 71 (1998).

¹³⁸ Chuang, *supra* note 137, at 71.

¹³⁹ *Id.*; Garrard, *supra* note 19, at 171; Karene Jullien, *The Recent International Efforts to End Commercial Sexual Exploitation of Children*, 31 DENV. J. INT'L L. & POL'Y 579, 603 (2003).

¹⁴⁰ Aaron Sachs, *The Last Commodity: Child Prostitution in the Developing World*, WORLD WATCH, Jul. 1, 1994; James Petras & Tienchai Wongchaisuwan, *Thailand: Free Markets, AIDS, and Child Prostitution*, Z MAGAZINE, Sept. 1993, at 35-36.

¹⁴¹ See UNITED NATIONS OFFICE ON DRUGS AND CRIME, SIGNATORIES TO THE CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME TRAFFICKING PROTOCOL, available at <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html> (last visited July 14, 2008).

¹⁴² Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 [hereinafter TVPA Act] (codified as amended at 22 U.S.C.A. (2003)).

¹⁴³ Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 [hereinafter PROTECT Act] (codified as amended at 22 U.S.C. § 7106 (2006)).

¹⁴⁴ Susan W. Tiefenbrun, Symposium Issue: 2001 Women and the Law Conference: Women as Workers: *Sex Sells but Drugs Don't Talk: Trafficking of Women Sex Workers and an Economic Solution*, 24 T. JEFFERSON L. REV. 161, 161 (2002); TIP REPORT 2008, *supra* note 1, at 5.

ficking, and source this data to the U.S. Congress, partner agencies, foreign States, and the NGO community.¹⁴⁵

In addition to providing data on trafficking, TIP Reports have been implemented by the State Department as a mechanism to hold States responsible and implement change.¹⁴⁶ The format of the Reports is to rate States according to three criteria: (1) the number of trafficking abuses within the State; (2) degree of State compliance to the TVPA “minimum standard” guidelines; (3) and the State’s ability to address trafficking abuses.¹⁴⁷ States are placed on a tier scheme, which forms the principal basis for doling out various incentives and disincentives.¹⁴⁸ For incentives, the program provides financial assistance to States, demonstrably invested in combating trafficking.¹⁴⁹ The TVPA offers assistance directly to States or indirectly through international NGO programs, which provide aid to victim survivors and high risk populations.¹⁵⁰ From the inception of the legislation in 2001, through 2007, the U.S. dispensed approximately \$528 million in foreign “programmatic” aid.¹⁵¹ States willing to forgo trafficking-related funds and crack down on offenses have access to these monies. Disincentives within the TVPA program include not only economic sanctions, but the notoriety which accompanies States that maintain a tarnished human rights record.¹⁵²

The publication of the first TIP Report precipitated progress toward the State Department’s key goals among several States identified as having trafficking problems. Poorly rated States per-

¹⁴⁵ TIP REPORT 2008, *supra* note 1, at 4.

¹⁴⁶ *Id.* at 5, 15 (citing introductory letters of Secretary of State Condoleezza Rice and Ambassador Mark P. Lagon).

¹⁴⁷ *See generally id.* at 10-15, 35; *see also id.* at 44, for State placement on the tiers. For a detailed discussion of the TIP Report tiering system and the various criteria used to evaluate States, *see* Tiefenbrun, *supra* note 144. *See also* Susan W. Tiefenbrun, *Updating the Domestic and International Impact of the US Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?*, 38 CASE W. RES. J. INT’L L. 249. For a list of TVPA minimum standards, *see* TIP Report 2008, *supra* note 1, at 286; TVPA Act, *supra* note 142, at § 108(a).

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¹⁴⁸ TIP REPORT 2008, *supra* note 1, at 11-15 (referencing the introductory letter by Ambassador Mark P. Lagon and noting the total aid dispense throughout TVPA operations since the program began).

¹⁴⁹ *Id.*; *see also* TVPA, *supra* note 142, at § 105.

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¹⁵⁰ TVPA, *supra* note 142, at § 107; *see* Tiefenbrun, *supra* note 144; *Id.* at 180-85.

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¹⁵¹ TIP REPORT 2008, *supra* note 1 (introductory letter by Ambassador Mark P. Lagon).

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¹⁵² *Id.* at 13, 5; *see* U.S. Dep’t of State, Conference to Stop Child Trafficking: Modern-Day Slavery (June 3, 2003), *available at* http://www.usis.it/file2003_06/alia/A3060506.htm (remarks by Paula J. Dobriansky, Under Sec’y of State for Global Affairs).

ceiving the threat to their international standing and economic well being (e.g. , international trade, tourism, and aid) redoubled their commitment to eradicating systemic trafficking offenses.¹⁵³ Several States took advantage of assistance funds specially designated by the US to facilitate the implementation of anti-trafficking programs and policies.¹⁵⁴ For the most part, States showed significant progress in their government responses to trafficking offenses which was evidenced by elevated ratings in subsequent Reports.¹⁵⁵ Only in a few cases did third-tier States make insufficient progress, resulting in the infliction of sanctions.¹⁵⁶

Equipped with similar 'carrot and stick' provisions, the Protocol may successfully orchestrate multi-lateral incentives/disincentives programs that spur States (currently tolerant of trafficking) to combat this crime. By linking aid/sanctions to official efforts to eradicate trafficking abuses, the Protocol could effectively offset the allure of trafficking-related monies, which now foment informal policies of toleration. Trafficking havens may slowly shed their financial ties to those segments of industry that are tainted by trafficking. Similarly, the multi-lateral nature of these coordinated incentives/disincentives would likely result in an even more dramatic curative response than the one generated by the unilateral TVPA legislation. They may even motivate some States, which are currently unwilling to endorse the Protocol, toward ratification. Further, the moral opprobrium which stems from an official, multi-lateral denunciation, is certainly more potent and, importantly, more secure, than a unilateral one. Purportedly, some recent international policy decisions backed by the current US administration have deteriorated its moral authority in the global community. In contrast, a similar tiering program aimed at offending States uniformly backed by Protocol Members would send a moral message which would be unshaken by subsequent, 'questionable' behavior committed by any one Member. Finally, because sanctions punctuate the path for reconciliation with the international community, they can often provide leverage for foreign and domestic change agents, i.e., NGOs. This is particularly true when these agents par-

¹⁵³ See Tiefenbrun, *supra* note 144, at 168.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ TIP REPORT 2008, *supra* note 1, at 13, 15.

ticipate in reporting programs which form the basis for determining sanctions and aid.¹⁵⁷

In addition to these international programs, there is another category of policies/legislation open to the Protocol which would help to root out financial incentives which kindle State toleration of human trafficking and stunt prosecution. Numerous States have adopted legislation that would criminalize persons traveling abroad with the intent to partake in commercial sexual exchanges with trafficked persons in a destination State. For example, under the United States PROTECT Act, criminal liability adheres if the accused traveled with the intent to engage in sexual conduct with a minor.¹⁵⁸ Other domestic legislation targets persons or organizations that facilitate this activity, like so-called sex tour operators, who operate within the borders of the prosecuting State.¹⁵⁹ Recently, the British government enacted legislation¹⁶⁰ targeting domestic persons “who organize sex tours or who encourage others” to sexually exploit children.¹⁶¹ Similarly, both Australia and New Zealand have legislation targeting operator activity.¹⁶² Australia criminalizes persons who act “with the intent of benefiting from or encouraging” sex crimes against children.¹⁶³ New Zealand prohibits conduct that facilitates these offenses such as making travel arrangements or printing or publishing promotional information.¹⁶⁴

¹⁵⁷ See Tom Malinowski, Human rights and U.S. Strategy in Burma, Human Rights Watch, Mar. 25, 2004, available at http://hrw.org/english/docs/2004/03/25/usint8228_txt.htm.

¹⁵⁸ PROTECT Act, *supra* note 143, at § 105.

¹⁵⁹ For a detailed argument favoring the extension of U.S. criminal liability to sex tour operators, see Jonathan Todres, *Prosecuting Sex Tour Operators in U.S. Courts in an Effort to Reduce the Sexual Exploitation of Children Globally*, 9 B.U. PUB. INT. L. J. 1 (1999).

¹⁶⁰ Sexual Offences (Conspiracy and Incitement) Act 1996, Ch. 29 §§ 1 and 2 (U.K.) (as amended by the Sexual Offences act of 2003) [hereinafter British Sexual Offences Act 1996], available at http://www.opsi.gov.uk/acts/acts1996/Ukpga_19960029_en_1 (last visited at Nov. 12, 2007).

¹⁶¹ HOME OFFICE, ACTION AGAINST THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN 10 (London: Home Office Communication Directorate 1996).

¹⁶² C. Michael Hall, *The Legal and Political Dimensions of Sex Tourism: The Case of Australia's Child Sex Tourism Legislation*, in SEX TOURISM AND PROSTITUTION: ASPECTS OF LEISURE, RECREATION AND WORK (Martin Oppermann ed. 1998).

¹⁶³ Crimes (Child-Sex Tourism) Amendment Act 1994, No. 105 §§ 50DA, 50DB (Austl.) [hereinafter, Australia 1994 CST Amendment], available at [http://www.childwise.net/uploads/Crimes_\(Child_Sex_Tourism\).pdf](http://www.childwise.net/uploads/Crimes_(Child_Sex_Tourism).pdf) (last visited Nov. 12, 2007).

¹⁶⁴ Crimes Act 1961, 1961 S.N.Z. No. 43 § 144(c) (N.Z.), available at http://legislation.govt.nz/act/public/1961/0043/latest/DLM329270.html?search=ts_act_Crimes+Act+1961 (last visited Apr. 10, 2007).

While most legislation of this sort seems to focus on sexual offenses involving trafficked minors, there is no reason that States couldn't pass similar laws which target the domestic activities of consumers and facilitators which involve other industries linked to human trafficking. Such legislation would ideally work to deter customers who utilize the services of trafficked persons, close avenues of exploitation, curb the demand side of the economic equation, and, most importantly, constrict the flow of monies that tempt States toward complacency. Protocol provisions recommending or requiring member States to adopt such measures may do much to limit systemic corruption and close down regional hotspots of trafficking.

Finally, even where there is State willingness to give anti-trafficking legislation affect, there may be insufficient resources to pursue prosecution. To a large extent, source countries and recipient countries break down along traditional North/South East/West divides that separate developed States from underdeveloped ones.¹⁶⁵ Speaking directly to the economic gap that makes States vulnerable to rampant trafficking, President Chissano of Mozambique asserted during the Convention negotiations, that “[c]ombating transnational organized crime can only be successful and effective if we bring together our efforts and resources. The richest nations must support . . . disadvantaged nations by providing them . . . [with] technologies and know-how.”¹⁶⁶ Infrastructure and expertise to combat trafficking often requires financial assistance. Currently, the Protocol does not directly advocate financial assistance to close the deficits which hinder successful enforcement. Though some wealthier countries have gone beyond the Protocol to offer such assistance,¹⁶⁷ a provision within the Protocol encouraging this support would be another forward step.

2. *Prevention*

The Protocol contains several provisions explicitly directed at preventing further trafficking offenses. A number of these provi-

¹⁶⁵ Potts, *supra* note 6, at 247.

¹⁶⁶ Press Release, UNITED NATIONS INFORMATION SERVICE, MORE THAN 120 NATIONS SIGN NEW UN CONVENTION ON TRANSNATIONAL ORGANIZED CRIME, AS HIGH-LEVEL MEETING CONCLUDES IN PALERMO, U.N. Doc. UNIS/CP/392 (Dec. 15, 2000).

¹⁶⁷ See Potts, *supra* note 6, at 241-42 (discussing the Italians commitment to share State forfeiture proceeds with disadvantaged countries); TIP REPORT 2008, *supra* note 1, at Introduction (discussing aid to various States and in-State NGO's for trafficking victims).

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sions focus on State law enforcement action. Article 9, in general, calls upon States to develop comprehensive programs to combat and prevent trafficking.¹⁶⁸ In Article 10, law enforcement cooperation is required between member States.¹⁶⁹ Such cooperation includes information sharing about offenders, trafficked persons, their documentation, and trafficking methodologies.¹⁷⁰ It provides for the training of investigators, enforcement officers and victim support personnel.¹⁷¹ It also emphasizes training for law enforcement and immigration professionals with respect to prosecution, prevention, and protection of victims.¹⁷²

In addition to preventative measures concerning improving law enforcement efforts, the Protocol has a number of “victim-focused” prevention provisions. Article 9 requires the formation of comprehensive programs, policies and measures to protect victims from re-victimization.¹⁷³ Alternatively, Article 9 requires States to “endeavor to undertake,” among other things, “mass media campaigns and social and economic initiatives to prevent and combat trafficking.”¹⁷⁴ This Article also requires that States take on or strengthen measures “to alleviate factors” that make persons vulnerable to trafficking; naming in particular “underdevelopment, poverty, and lack of equal opportunity.”¹⁷⁵

Undoubtedly, victim-focused prevention measures are essential to any successful, comprehensive initiative aimed at curbing a growing trafficking problem. They can reinforce law enforcement programs and, in particular, constrict the “supply side” of an illicit market that is continually stoked by chronic poverty. Commentators widely agree that aggressive prevention programs that address the “root causes” of victim vulnerability will severely inhibit trafficker recruitment efforts.¹⁷⁶ The focus on re-victimization appears to indicate that the Protocol’s negotiating parties were aware of the deep ‘revolving door’ problems in human trafficking situations. Many ‘rescued’ victims who return home are stigmatized and ostracized by their communities. This community response places the

¹⁶⁸ Protocol, *supra* note 11, at Annex II, Article 9 § 1(a).

¹⁶⁹ *Id.* at Annex II, Article 10.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at Annex II, Article 10 §2.

¹⁷² *Id.*

¹⁷³ *Id.* at Annex II, Article 9 § 1(b).

¹⁷⁴ *Id.* at Annex II, Article 9 § 2.

¹⁷⁵ *Id.* at Annex II, Article 9 § 4.

¹⁷⁶ *See generally* Todres, *supra* note 2; *see also* Mattar, *supra* note 51.

rescued individual in an even more vulnerable predicament and often cycles them back into trafficking situations. Creating comprehensive programs for rescued victims of trafficking would help weave a much needed social safety net to end the re-trafficking cycle.

Though the prevention measures articulated in the Protocol indicate a strong State understanding concerning the role of preventive measures—indeed it is the first instrument to recognize the prominence of poverty as a contributing cause—commentators have expressed concern over how these victim-focused Member obligations are playing out in practice.¹⁷⁷ Significantly, while all of the prevention measures that are law-enforcement focused carry mandatory obligations; several of the provisions for prevention programs that are more victim-focused carry diminished, soft obligations.

Ultimately, it is unclear what substantive obligations are generated by requiring States to “endeavor to undertake” what would undoubtedly be key economic recovery programs directly aimed at ending the cycle of vulnerability.¹⁷⁸ To date, the result is that most victim-focused prevention programs are shelved.¹⁷⁹ Where programs are instituted, they are almost uniformly in the form of mass-media education programs.¹⁸⁰ Though educational campaigns can be an important step, other measures aimed at root causes must be instituted for systemic change to take hold. Making measures mandatory may spur States to act. Moreover, mandating measures would probably not inhibit Party commitment to the Protocol because, for the most part, widely-ratified human rights documents already hold similar obligations.¹⁸¹ It is likely that mandatory Protocol provisions would simply refocus the Member State’s commitment to victims, further solidify and define existing State obligations, and elevate the discourse between interest groups and participating governments. Clearly this was a missed opportunity for the Protocol to assert human rights-based prevention programs in a trafficking context.

¹⁷⁷ Garrard, *supra* note 19, 163-66; Defeis, *supra* note 41, at 490; Todres, *supra* note 2, at 886-87. R

¹⁷⁸ Protocol, *supra* note 11, at Annex II, Article 9 § 2.

¹⁷⁹ Todres, *supra* note 2, at 886-87. R

¹⁸⁰ *Id.*

¹⁸¹ *See generally id.*

3. Protection

Finally, a key component of any anti-trafficking legislation program is a set of strong provisions for protection of trafficked victims. The first step in forming such provisions is establishing the principle of non-criminalization; i.e., immunizing trafficked persons from liability for criminal acts committed in the course of trafficking.¹⁸² Many of the criminal statutes stemming from the 1949 Convention do not uphold this principle.¹⁸³ In contrast, the Protocol presents trafficked persons as victims; though it does not explicitly define this term.¹⁸⁴ While some critics may challenge the omission, the legislative link between the Protocol and the UN Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power strongly indicates that the Protocol incorporates this non-criminalization principle.¹⁸⁵ Perhaps, however, given the strong, historic trend of States to criminalize victims, an explicit non-criminalization clause in the Protocol would have been advisable. Arguably, an explicit non-criminalization provision within the Protocol would give NGOs a firmer basis for insisting that governments treat victims of trafficking differently from undocumented illegal migrants i.e., cease arresting, imprisoning and deporting victims. The Human Rights Caucus (HRC) blames the gap in protection on “government reluctance to make any commitments to provide services and protection to undocumented [persons] even if they are victims of a horrific crime.”¹⁸⁶ Government unwillingness to distinguish trafficking victims from undocumented illegal immigrants would, according to the HRC, create for NGO’s “obstacles in advocating the inclusion of mandatory protection in their domestic trafficking laws.”¹⁸⁷

Though negotiating parties generally appear to have agreed—if only implicitly—to take the first step of assigning rescued trafficked persons ‘victim status;’ taking the second step of establishing a uniform degree of protection over victims in recipient countries

¹⁸² Mattar, *supra* note 51, at 380-81.

¹⁸³ *Id.* at 381-82.

¹⁸⁴ See generally Protocol, *supra* note 11; see also Mattar, *supra* note 51, at 379.

¹⁸⁵ Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, U.N. GAOR, 96th plen. mtg., ¶ 1, U.N. Doc. A/Res/40/34 (Nov. 29, 1985).

¹⁸⁶ Sutthida Malikaew, UN HUMAN TRAFFICKING PROTOCOL ENDORSED, PREDA FOUNDATION, INC., available at <http://www.preda.org/archives/research/st/link1100-0101.html> (last visited July 12, 2008); see Defeis, *supra* note 41, at 490.

¹⁸⁷ *Id.*

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has proven to be more contentious. A principal consideration for strong victim protection is that trafficker prosecution often requires victim cooperation, particularly in their role as witnesses.¹⁸⁸ However, victims are commonly intimidated by traffickers who threaten reprisal if victims seek assistance of local authorities.¹⁸⁹ Consequently, rescued persons who fear injury to themselves or families are reluctant to testify against their handlers during criminal trials.¹⁹⁰ To alleviate the hesitance of victims to testify, rescuing authorities need the proper legal backing and policies in play to ensure adequate protection for victims.¹⁹¹ The Protocol includes several provisions responsive to the need to ensure victim protection for purposes of securing reliable witnesses. Article 6 focuses principally on protections and assistance for victims as witnesses to trial.¹⁹² Article 6(1) mandates protecting the privacy and identity of victims by making legal proceedings confidential.¹⁹³ Article 6(2) requires that States provide victims with relevant information and legal assistance during any criminal proceedings against offenders.¹⁹⁴ Article 6(5) adds further that each Party “shall endeavor to provide for” the physical safety of victims of trafficking while they are within its territory.¹⁹⁵ Finally, Article 6(6) mandates legislation affording victim compensation, which generally provides additional incentives for victims to cooperate with the prosecution.¹⁹⁶

While several commentators have applauded the Protocol as offering both a balanced approach to protecting victims as witnesses and “an end in itself,”¹⁹⁷ others have criticized the protection measures as being overly-oriented toward a victim’s utility as a witness.¹⁹⁸ A cursory review of the Article 6 measures strongly supports the latter view. In contrast to the strong obligations laid upon States by those provisions which are focused on witness utility, Articles which de-emphasize the witness role like 6(3) carry markedly diminished State obligations.¹⁹⁹ Article 6(3) requires

¹⁸⁸ Potts, *supra* note 6, at 239-40.

¹⁸⁹ *Id.* at 240-41.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Protocol, *supra* note 11, at Article 6.

¹⁹³ *Id.* at Annex II, Article 6 § (1).

¹⁹⁴ *Id.* at Annex II, Article 6 § (2).

¹⁹⁵ *Id.* at Annex II, Article 6 § (5).

¹⁹⁶ *Id.* at Annex II, Article 6 § (6).

¹⁹⁷ *Defeis*, *supra* note 41, at 488.

¹⁹⁸ Ray, *supra* note 4, at 918-19.

¹⁹⁹ Protocol, *supra* note 11, at Article 6 § (3).

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only that States “consider” measures aimed at the “physical, psychological and social recovery of victims.”²⁰⁰ Though the Article contemplates victim needs like housing, legal counseling, medical, employment, educational and training opportunities, State obligations directed at meeting these needs are decidedly weak.²⁰¹ Though some States have responded to the non-mandatory provisions of the Protocol by putting measures in place to provide fairly extensive support services,²⁰² most have not.²⁰³ Again, this seems like another missed opportunity for the Protocol to offer substantial victim protection.

One legislative route that promises to simultaneously increase the security of victims and their willingness to testify is to enhance their legal status in recipient States. A recipient State may, for example, permit trafficked persons to reside temporarily or even permanently in-State. However, one persistent concern for Protocol delegates representing developed countries was the proposal of making resident status mandatory under the Convention.²⁰⁴ Delegates voiced fears over a serious backlash; that is, making the Protocol an inadvertent means of illegal migration and equipping it with incentives to engage in trafficking.²⁰⁵ Generally, countries whose nationals were more likely to be trafficked sought as much protection and legal status for victims as possible.²⁰⁶ Ultimately, the drafters compromised with Article 7, which requires States to “consider adopting” measures, which permit victims to remain in-country temporarily or permanently “in appropriate cases.”²⁰⁷

States inspired by Article 7 to adopt progressive measures, which seemingly protect victims from deportation against their will have a variety of legislative options. Currently, U.S. law provides for a special nonimmigrant “T” visa category for trafficking victims who wish to remain in the U.S.²⁰⁸ “T” visas ideally will “strengthen

²⁰⁰ *Id.* at Annex II, Article 6 § (3).

²⁰¹ *Id.* at § (3) (a)-(d).

²⁰² Potts, *supra* note 6, at 240-41

²⁰³ Todres, *supra* note 2, at 886-87.

²⁰⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention against Transnational Crime, 11th Sess., U.N. Doc. A/AC.254/4 (1999) [R. 21.7.2], revised by U.N. Doc. A/AC.254/4 (2000) 7 [hereinafter Revised Protocol]; Potts, *supra* note 6, at 240; Defeis, *supra* note 41, at 489.

²⁰⁵ Defeis, *supra* note 41, at 489; Potts, *supra* note 6, at 240.

²⁰⁶ *Id.* at 489.

²⁰⁷ Protocol, *supra* note 11, Article 7, at §§ 1-2.

²⁰⁸ TVPA Act, *supra* note 142, at 107 § (e) (4) (2003); see Press Release, U.S. Department of Justice, Department of Justice Issues T Visa To Protect Women, Children and All

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the ability of law enforcement to detect, investigate, and prosecute trafficking offenses [by recruiting key witnesses] while simultaneously offering a temporary safe haven to victims.”²⁰⁹ Supplemental legislation provides for permanent residence to be awarded where humanitarian concerns arise.²¹⁰

Overall, the “T” visa program is principally designed to assist prosecutions against traffickers, not simply victims as ends-in-themselves, as assistance is clearly conditioned on the victim’s cooperation with the State’s case.²¹¹ The U.S. law does not make clear exactly what circumstances may give rise to permanent residency. Cooperative victims who successfully demonstrate that repatriation promises “extreme hardship involving unusual and severe harm,” may be spared speedy deportation.²¹² Such victims might be awarded permanent residency after three years in “T” Visa status.²¹³

Moreover, to date, most States, including the U.S., routinely deport “rescued” victims after they have expended their usefulness as prosecution witnesses.²¹⁴ At the very least, the Protocol should require that temporary residency be extended where deportation presents clear hazards to the trafficked person or where that person is a child. This minimal enhancement would help allay both protection and illegal migration concerns while simultaneously meeting the prosecuting State’s desire to have reliable witnesses.

Lurking behind many of the citizenship/repatriation concerns is the thorny problem of re-victimization. Sending victims back to their countries of origin may place them in danger; possibly exposing victims to retaliatory measures by traffickers who escaped apprehension or attained early release. This seems particularly likely if perpetrators were local. When family is complicit in trafficking activities and victims are vulnerable (e.g., children), returning the

Victims of Human Trafficking, (June 24, 2002) [hereinafter T Visa Press Release], available at http://www.usdoj.gov/opa/pr/2002/January/02_crt_038.htm (last visited July 19, 2008).

²⁰⁹ T Visa Press Release, *supra* note 208; The Trafficking of Women and Children: Hearing Before the U.S. Senate Foreign Relations Committee’s Subcomm. on Near Eastern and South Asian Affairs, 106th Cong. 1 (2000) (statement of William Yeomans, Chief of Staff, Civil Rights Division); Potts, *supra* note 6, at 240.

²¹⁰ Potts, *supra* note 6, at 240.

²¹¹ T Visa Press Release, *supra* note 208.

²¹² TVPA Act, *supra* note 142, at § 107(e).

²¹³ *Id.*

²¹⁴ Ray, *supra* note 4, at 920.

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victim home can hardly be considered responsible State action and must be avoided.

Again, in all cases, if the complex social circumstances (e.g., poverty, limited advancement opportunities) precipitating a victim's trafficking remain unaddressed, then repatriation devolves into a revolving door situation. The Protocol provisions that deal with victim repatriation inadequately address the majority of these concerns. By and large the Protocol's principal concerns with repatriation, as itemized under Article 8, are that States respond sensitively to prosecutorial proceedings, and that repatriation efforts be both timely and documented.²¹⁵ At most, Article 8 requires both that recipient States give victims "due regard" during repatriation processes and that repatriation should be voluntary, if possible.²¹⁶ For such shortcomings, NGOs have roundly criticized the Protocol for failing to require States to provide basic victim services.²¹⁷

V. CONCLUSION

Human trafficking has finally gained the attention of the global community; however, sufficient resources and political resolve are required if the trajectory of the crisis is to be curbed. The Protocol is an important first step. It gives the States the basic building blocks to revamp domestic penal codes, enhance State-to-State cooperation, and look to constructing meaningful victim protection/prevention programs. However, the Protocol has still failed to completely shed the definitional problems that hindered earlier instruments. It must refine its conceptualization of the trafficking problem, so that it can properly distinguish trafficking offenses from non-trafficking ones. Additionally, the Protocol must be altered to institute stiff penalties for trafficking crimes and stimulate the political will of States which have become havens for trafficking crimes. This later goal can best be accomplished by orchestrating economic incentive/sanction programs among Protocol Members. Ultimately, perhaps the most glaring flaw of the Protocol is the lack of strong obligations on States to institute programs to address root causes and properly assist rescued victims. Without addressing root causes or granting at least temporary residency to victims, the Protocol's current victim protection program will likely

²¹⁵ Article 8, *supra* note 11, at §§ 2, 3, 4.

²¹⁶ Article 8, *supra* note 11 at § 2.

²¹⁷ Malikaew, *supra* note 186; see Defeis, *supra* note 41, at 490.

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be ineffective. Member States must consider if they are indeed “rescuing” victims and looking to the long game in meeting the trafficking problem. Admittedly, all proposals must be assessed according to the probability of generating sufficient State support. However, the magnitude and sinister nature of this global problem mandates the most stringent measures possible. According to the suggestions offered above, States should seek to either amend the Protocol with strengthened provisions, or to craft a new instrument containing more robust obligations.