

# Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention

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## I. INTRODUCTION

On November 25, 1997, Professor Louis Henkin invited me to talk about constitutionalism in the countries of the Middle East at the Columbia University School of Law. We engaged in a conversation about whether there is a model constitution that may be universally applied. Professor Henkin argued that there is no such model constitution, but that there are elements of constitutionalism that any constitution must reflect.<sup>1</sup>

I believe that the same analysis applies in other areas of the law, including the prevention, suppression, and punishment of trafficking in persons. Any comprehensive and effective antitrafficking legislation must include certain elements that mainly reflect criminalization of the act of trafficking and protection of the victim of trafficking. However,

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1. See generally Louis Henkin, *Elements of Constitutionalism* (Columbia Univ. Ctr. for the Study of Human Rights, Occasional Paper Series, Nov. 1994).

[L]egitimate, acceptable constitutions must reflect respect for constitutionalism including, in particular, respect for individual human rights. . . .

There is no model constitution. Some constitutions are brief and simple, others extensive and complex. States differ as to how they distribute law between constitution and legislation. . . .

No two constitutions are or should be the same. A constitution must reflect the particular society, its geography and history, economy, demography, traditions, culture. But whether a constitution prescribes for a unitary or a federal state, a presidential or a parliamentary system, a socialist, free-market or mixed economy, a constitution that is authentically constitutionalist must secure constitutional legitimacy and constitutional review, authentic democracy, accountable government and one that will respect and ensure individual human rights and secure basic human needs.

In the end, no document, no blueprint of government, no bill of rights is sufficient to guarantee constitutionalism. In the end, constitutionalism depends on political, social and economic stability and a political culture that is committed to constitutionalism. What the constitution provides will reflect, contribute to, and help maintain such a culture of constitutionalism.

*Id.* at 10-11 (citation omitted).

there is no model legislation that may be applied by all countries regardless of the particularities of their individual legal systems.<sup>2</sup>

In this Article, I will argue that there are five basic elements that should be incorporated into any antitrafficking legislation. First, laws must recognize all forms of trafficking as specific crimes that are subject to serious sanctions. Second, these laws must identify the trafficked person as a victim of a crime who is entitled to basic human rights, while taking into consideration the victim, the derivative victim, the vulnerable victim, the potential victim, and the presumed victim. Third, countries should adopt a comprehensive Five P's approach to combating trafficking in persons, including prevention, protection, provision, prosecution, and participation. Fourth, laws must target all actors in the trafficking enterprise, including the natural person, the legal person, the private person, and the public person. Finally, countries should acknowledge trafficking in persons as a transnational crime that warrants transnational policies, especially extraterritoriality, extradition, and the exchange of information.<sup>3</sup>

I will explain these five elements in Parts III through VII, respectively, based upon a comparative study of already adopted antitrafficking laws from various legal systems, whether as a part of the criminal code<sup>4</sup> or a comprehensive act.<sup>5</sup> Many of these laws have been

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2. "The process by which the requirements of the Convention can be fulfilled will vary from State to State. Monist systems could ratify the Convention and incorporate its provisions into domestic law by official publication, while dualist systems would require implementing legislation." U.N. OFFICE ON DRUGS & CRIME, DIV. FOR TREATY AFFAIRS, LEGISLATIVE GUIDES FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO 6, ¶ 6 (2005), available at [http://www.unodc.org/pdf/crime/legislative\\_guides/Legislative%20guides\\_Full%20version.pdf](http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf) [hereinafter U.N. LEGISLATIVE GUIDES].

3. See generally Mohamed Y. Mattar, *Trafficking in Persons, an Annotated Legal Bibliography*, 96 LAW LIBR. J. 669 (2004).

4. In many legal systems, trafficking in persons is merely recognized as a crime in the criminal or penal code. The following criminal codes specifically prohibit the crime of trafficking in persons: CRIM. CODE art. 109 (Alb.); CÓD. PEN. [PENAL CODE] § 145 (Arg.); CRIM. CODE art. 132 (Arm.); Strafgesetzbuch [StGB] [Penal Code] No.217/1974, § 217 (Austria); CRIM. CODE arts. 106, 108, 150, 171, 173, 243-244 (Azer.); PENAL CODE arts. 325, 329 (Bahr.); CRIM. CODE arts. 123-124 (Belr.); Suppression of Trafficking in Human Beings and Child Pornography, Law of April 13 (1995) (Belg.) (amending article 77bis of the 1980 Aliens Law and the sections 379-380 of the Criminal Code); Ley de Protección a las Víctimas de Delitos Contra La Libertad Sexual [Law for the Protection of Victims of Crimes Against Sexual Freedom], No. 2033 (1999) (Bol.) (amending sections 308-310, 312, 317-321 of the Penal Code); CRIM. CODE arts. 185-192 (Bosn. & Herz.); PENAL CODE §§ 149, 153, 250, 252, 256, 260-262 (Bots.); Decreto No. 11.106, de 28 de marzo de 2005, D.O. de 29.03.2005 (Brazil) (amending the Penal Code); PENAL CODE §§ 359-374 (Brunei); CRIM. CODE § IX (Bulg.); CÓDIGO PENAL [PENAL CODE] arts. 405-406 (Cape Verde); CRIM. CODE arts. 198-201 (Cent. Afr. Rep.); PENAL CODE arts. 279-280, 282, 286, 289 (Chad); PENAL CODE arts. 26, 367-368 (Chile); CRIM. CODE arts. 236-238, 240-244, 262,

358-359 (China); PENAL CODE tit. XI, chs. 1-3 (Colom.); PENAL CODE arts. 47, 172, 376-377 (Costa Rica); PENAL CODE arts. 335-338 (Côte d'Ivoire); CRIM. CODE arts. 175, 177-178, 191-192, 196 (Croat.); CÓDIGO PENAL [PENAL CODE] arts. 310-311 (Cuba); trestní zákon [Criminal Code] č.140/1962/2001 Sb. 204, 233, 246 (Czech Rep.); CRIM. CODE arts. 216, 218, 260-262 (Den.); PENAL CODE arts. 394-396, 403-404 (Djib.); CRIM. CODE arts. 594, 604-605, 607 (Eri.); PENAL CODE arts. 602, 604-606 (Eth.); PENAL CODE arts. 152-153, 157-164, 248-257 (Fiji); PENAL CODE ch. 25 (Fin.); PENAL CODE arts. 260-261 (Gabon); CRIM. CODE arts. 1431, 1721 (Geor.); Strafgesetzbuch [StGB] [Penal Code] Nov. 13, 1998, as amended, §§ 180b-181, 236 (F.R.G.); Poinikos Kodikas [P.K.] [Crim. Code] 19:351 (Greece); PENAL CODE arts. 191-194 (Guat.); CRIM. CODE art. 195 (Hond.); Crimes Ordinance, (1991) Cap. 200, § 129 (H.K.); BüntetőTörvénykönyv [BTK] [Penal Code], art. 175/B (Hung.); INDIA PEN. CODE arts. 366-367, 372-374; CRIM. CODE art. 297 (Indon.); Majmua-hi Qava'nini Jaza'l [Code of Crim. Laws] Tehran 1381 [2002] arts. 43, 135, 213 (Iran); Penal Law, 5737-1977, 1 LSI 1, § 203A (2005) (Isr.); Codice Penale [C.P.] [PENAL CODE] art. 602bis (Italy); CRIM. CODE §§ 56-60 (Jam.) KEIHO [PENAL CODE] arts. 225-227 (Japan); CRIM. CODE arts. 310-311 (Jordan); PENAL CODE arts. 142-143, 147-148 (Kenya); PENAL CODE arts. 131-132, 136-142, 149, 241-249 (Kiribati); CRIM. CODE arts. 42, 200-202 (Kuwait); CRIM. CODE art. 124 (Kyrg.); PENAL CODE arts. 69, 92, 122 (Laos); CRIM. CODE §§ 154-1 to 154-2 (Lat.); PENAL CODE arts. 415, 420 (Libya); CRIM. CODE art. 217 (Liech.); CRIM. CODE art. 149 (Lith.); CODE CRIM. PROC. arts. 379-379bis (Lux.); CRIM. CODE arts. 5, 153 (Macau); CRIM. CODE art. 418 (Maced.); PENAL CODE arts. 140-142 (Malawi); CRIM. CODE arts. 180-183, 187, 198-190 (Mali); CRIM. CODE arts. 248A-248E (Malta); CRIM. CODE art. 253 (Mauritius); CRIM. CODE arts. 165-168 (Mold.); CRIM. CODE art. 111 (Mong.); CRIM. CODE art. 201a (Mont.); The Anti Trafficking in Persons Law, No. 5/2005 (2005) (Myan.); MULAKI AIN [HUMAN RIGHTS CRIM. CODE] art. 1 (Nepal); Wetboek van Strafrecht [SR] [Crim. Code] art. 250 (Neth.); Crimes Act 1961, 2005 S.N.Z. No. 126, arts. 98C-98F, 136, 148 (N.Z.); CRIM. CODE arts. 201-203 (Nicar.); CRIM. CODE arts. 291-293 (Niger); CRIM. CODE §§ 222-225, 337, 365, 369 (Nigeria) (governing all the states in the southern part of Nigeria); PENAL CODE §§ 271-272, 277-281 (Nigeria) (governing all the states in the northern part of Nigeria); PENAL CODE §§ 192-199, 206, 222-229 (Nor.); CRIM. CODE arts. 218, 256-261 (Oman); PENAL CODE arts. 231-231G (Pan.); CRIM. CODE arts. 218, 221, 253 (Papua N.G.); CÓDIGO PENAL [PENAL CODE] art. 223 (Para.); CRIM. CODE arts. 179-182 (Peru); CÓDIGO PENAL [PENAL CODE] arts. 159, 169, 176 (Port.); PENAL CODE arts. 190, 194, 205 (Qatar); CRIM. CODE arts. 201-210 (Rom.); Ugolovnyi Kodeks [UK] [Crim. Code] arts. 152, 241 (Russ.); CRIM. CODE arts. 363-375 (Rwanda); CRIM. CODE arts. 120-121, 141, 160, 172 (St. Lucia); CRIM. CODE arts. 64, 104 (Serb.); PENAL CODE arts. 138-141 (Sey.); PENAL CODE arts. 359, 362, 365-367, 370-374 (Sing.); CRIM. CODE art. 246 (Slovk.); PENAL CODE arts. 387-387a (Slovn.); PENAL CODE arts. 360c, 365A-365B (Sri Lanka); PENAL CODE arts. 299-300, 305-307, 334 (Surin.); Schweizerisches Strafgesetzbuch [StGB] [Crim. Code] Dec. 27, 2005, SR 311, art. 196 (Switz.); CRIM. CODE arts. 510, 513 (Syria); CRIM. CODE art. 53 (Taiwan); CRIM. CODE arts. 132, 134, 335 (Taj.); The Measures in Prevention and Suppression of Trafficking in Women and children Act, B.E. 2540 (1997) (Thail.); CRIM. CODE arts. 126-128 (Tonga); PENAL CODE arts. 201a-201b (Turk.); PENAL CODE arts. 241-247 (Tuvalu); PENAL CODE arts. 125-126 (Uganda); CRIM. CODE arts. 146-150 (Ukr.); PENAL CODE arts. 303, 306 (U.A.E.); CÓDIGO PENAL [CRIM. CODE] arts. 280, 283 (Uru.); PENAL CODE art. 102 (Vanuatu); PENAL CODE arts. 119-120 (Vietnam); CRIM. CODE arts. 140-141, 144 (Zambia).

5. Recently, a number of countries have adopted more comprehensive laws. Recent antitrafficking legislation includes: Combating Trafficking in Human Beings Act, No. 46/20 (2003) (Bulg.); Combating of Trafficking in Persons and Sexual Exploitation of Children, No. 3(1) (2000) (Cyprus); THE DANISH GOVERNMENT'S ACTION PLAN TO COMBAT TRAFFICKING IN WOMEN (2002); Law No. 2002-1041 of Aug. 7, 2002, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Aug. 8, 2002; Nomos (2002:3064) Combating Trafficking in Human Beings, Crimes Against Sexual Freedom, Child Pornography, and More Generally on Economic Exploitation of Sexual Life and Assistance to Victims Thereof, Ephemeris tes Kyvernesos tes Hellenikes Demokratias [EKED] 2002, A:248 (Greece) [hereinafter Greek

enacted in the last five years since the adoption of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (U.N. Protocol).<sup>6</sup> I will also refer to the most recent regional convention on trafficking, the Council of Europe Convention on Action Against Trafficking in Human Beings (European Convention).<sup>7</sup> The European Convention goes beyond the U.N. Protocol and, in particular, enhances the protection granted to victims of trafficking.<sup>8</sup> But first, in Part II, I will briefly introduce and examine early antitrafficking laws.

## II. HISTORICAL OVERVIEW OF ANTITRAFFICKING LEGISLATION

On June 28, 1999, Laura Lederer testified before the 106th Congress, stating:

We have found that more than 154 countries currently have legislation that at least minimally target the prosecution of traffickers by prohibiting the procurement of women or children for the purposes of prostitution or forced labor. However, these laws are poorly, if ever, enforced. In fact, we found that the prostitution laws are enforced, but the procurement laws are ignored.

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Antitrafficking Law]; An Act to Institute Policies to Eliminate Trafficking in Persons Especially Women and Children, Establishing the Necessary Institutional Mechanisms for the Protection and Support of Trafficked Persons, Providing Penalties for its Violations, and for Other, Rep. Act No. 9208, (May 26, 2003) (Phil.) [hereinafter Philippines Antitrafficking Act].

The following countries have legislation that comprehensively covers trafficking in persons: Suppression of Trafficking in Human Beings and Child Pornography, Law of April 13 (1995) (Belg.); Trafficking in Persons Prohibition Act of 2003 (2003) (Belize); Portant Définition et Répression du Trafic d'Enfant(s) [Law on Definition & Suppression of Traffic in Children], No. 001-2002/AN (2003) (Burk. Faso); Suppression of the Kidnapping, Trafficking, and Exploitation of Human Persons, KRAM Feb. 29 (1996) (Cambodia); zákon č.140/1962 Sb. (2001) (Czech Rep.); Illicit Traffic of Migrants and Trafficking in Persons, No. 137-03 (2003) (Dom. Rep.); National Forum on the Rights of the Child and Trafficking of Minors (2004) (Eq. Guinea); Tourism Offenses Act, No. 7 (2003) (Gam.); The Prevention and Control of Human Trafficking Ordinance No. LIX (2002) (Pak.); No. 16 (Mar. 31, 2004) (Pan.); Law on the Prevention and Fighting Trafficking in Human Beings, No. 678 (2001) (Rom.); The Prohibiting Trafficking in Human Beings for Sexual Purposes Act (Svensk författningssamling [SFS] 2002:436) (Swed.); Trafficking Victims Protection Act of 2000, 18 U.S.C. §§ 1589-1594, 22 U.S.C. §§ 7101-7110 (2000), as amended by Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003), and Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006) (U.S.); Violencia Sexual Comercial o No Comercial Cometida Contra Niños, Adolescentes o Incapaces, No. 17.815 (2004) (Uru.).

6. *See generally* 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, U.N. Doc. A/55/383 (Nov. 15, 2000) [hereinafter U.N. Protocol].

7. *See generally* Council of Europe Convention on Action Against Trafficking in Human Beings, May 16, 2005, C.E.T.S. No. 197 [hereinafter European Convention].

8. *Compare id.*, with U.N. Protocol, *supra* note 6.

They're rarely invoked. So that the women and children end up in jail and the traffickers go free.<sup>9</sup>

This was the status of antitrafficking legislation in foreign countries prior to the passage of the U.N. Protocol, which supplemented the United Nations Convention Against Transnational Organized Crime (Transnational Crime Convention).<sup>10</sup>

First, most antitrafficking laws were enacted as a part of the Penal Code or Criminal Code rather than as separate comprehensive acts and, as such, they only addressed trafficking, although not specifically, as a criminal offense.<sup>11</sup> Because the function of criminal law is to describe crimes and determine punishments for such crimes, protection of women and children was not part of these laws. However, some laws did attempt to move beyond mere criminalization to a more comprehensive approach.<sup>12</sup>

Second, trafficking in persons was prohibited mainly as a prostitution-related activity.<sup>13</sup> Antitrafficking legislation during this time

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9. *The Sex Trade: Trafficking of Women and Children in Europe and the United States: Hearing Before the Commission on Security and Cooperation in Europe*, 106th Cong. 23 (June 28, 1999) (statement of Laura Lederer, Director, Protection Project), available at [http://commdocs.house.gov/committees/intrel/hfa87997.000/hfa87997\\_0.HTM](http://commdocs.house.gov/committees/intrel/hfa87997.000/hfa87997_0.HTM). Laura Lederer was the founder and former director of The Protection Project. She currently works as a Senior Advisor on Trafficking in Persons to the Office of the Undersecretary for Democracy and Global Affairs. Law.Georgetown.edu, Faculty: Laura J. Lederer, [http://www.law.georgetown.edu/curriculum/tab\\_faculty.cfm?Status=Faculty&Detail=1785](http://www.law.georgetown.edu/curriculum/tab_faculty.cfm?Status=Faculty&Detail=1785) (last visited Apr. 18, 2006).

10. See U.N. Protocol, *supra* note 6; United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex I, U.N. Doc. A/RES/55/383 (Nov. 15, 2000) [hereinafter Transnational Crime Convention].

11. See sources cited *supra* note 4.

12. These laws did not only criminalize trafficking, but also provided, although briefly and inadequately, for the prevention of trafficking and the protection of the trafficking victims. See, e.g., The Sexual Offenses Act (1995) (Ant. & Barb.); Criminal Code Amendment (Slavery and Sexual Servitude) Act, 1999, No. 104 (Austl.); Oppression of Women and Children Act, No. 18 (1995) (Bangl.); Suppression of Immoral Traffic Act, No. VI (1993) (Bangl.); Women and Girls Protection Act, No. XVIII (1993) (Brunei); Combating of Trafficking in Persons and Sexual Exploitation of Children, No. 3(1) (2000) (Cyprus); Immoral Traffic (Prevention) Act, 1956, No. 104, Acts of Parliament, 1957 (India); Child Trafficking and Pornography Act, 1998 (Act No. 22/1998) (Ir.), available at <http://www.irishstatutebook.ie/ZZA22Y1998.html>; Women and Girls Protection Act, No. 14 (1949) (Lesotho); Women and Girls Protection Act, 106 AMD (1973) (Malay.); Sexual Offences Act 23 of 1957 (S. Afr.); The Prostitution Prevention and Suppression Act, B.E. 2539 (1996) (Thail.).

13. Prostitution-related activities include procurement, pandering, establishing a brothel, and living off the profits of a prostitute. For example, procurement is prohibited under the Penal Code of Norway, which provides, "Any person who misleads another person into engaging in prostitution or continuing such an occupation, or who is accessory thereto, shall be liable . . ." PENAL CODE, § 206 (Nor.). Pimping is prohibited under the Penal Code of Georgia, which states that "pimping with pecuniary purposes . . . is punishable." PENAL CODE art. 230 (Geor.). Pandering is prohibited under the Penal Code of Finland, which provides:

was influenced by the “White Slave Traffic” Conventions, in particular the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949 Convention),<sup>14</sup> which replaced the 1904,<sup>15</sup> 1910,<sup>16</sup> 1921,<sup>17</sup> and 1933<sup>18</sup> Conventions. The 1949 Convention mandated:

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

- (1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;
- (2) Exploits the prostitution of another person, even with the consent of that person.<sup>19</sup>

Subsequently, this language was explicitly used in the criminal codes of many countries.<sup>20</sup>

- (1) A person who, in order to gain economic benefit to himself/herself or to someone else,
  - (1) keeps a room or other premises where sexual intercourse or other comparable sexual acts are offered for remuneration;
  - (2) otherwise takes advantage of the performance of such an act by someone else; or
  - (3) entices or intimidates another to such an act, shall be sentenced for *pandering* . . . .

PENAL CODE ch. 20, § 9(1) (Fin.). Establishing a brothel is prohibited under the Criminal Code of Trinidad and Tobago, which provides:

- A person who
- (a) keeps or manages or act or assists in the management of a brothel, or
  - (b) being the tenant, lessee, occupier, or person in charge of any premises, knowingly permits the premises or any part thereof to be used as a brothel or for the purposes of habitual prostitution; or
  - (c) being the lessor or landlord of any premises, or the agent of the lessor or landlord, lets the same or any part thereof with the knowledge that the premises or some part thereof are or is to be used as a brothel . . . is guilty of an offence . . . .

CRIM. CODE art. 22 (Trin. & Tobago). Living on the profits of a prostitute is prohibited under the Crime Act of 1961 of New Zealand, which states, “It is illegal to live on the earnings of the prostitution of another person. . . .” Crimes Act 1961, 2005 S.N.Z. No. 126, art. 148(a) (N.Z.).

14. *See generally* Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271 (entered into force July 25, 1951) [hereinafter 1949 Convention].

15. *See generally* International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 94 U.N.T.S. 19 (entered into force July 18, 1905).

16. *See generally* International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 11 L.N.T.S. 83.

17. *See generally* International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 1922 Austl. T.S. No. 10 (entered into force June 15, 1922).

18. International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 53 U.N.T.S. 49 (entered into force Aug. 24, 1934).

19. 1949 Convention, *supra* note 14, art. 1.

20. For example, section 129 of the Criminal Code of Gambia provides:

Third, trafficking in persons was not recognized as a specific crime. Instead, it was addressed under other related offenses, especially the procurement of prostitution.<sup>21</sup> Other offenses were also considered, such as kidnapping,<sup>22</sup> abduction,<sup>23</sup> illegal confinement,<sup>24</sup> deprivation of liberty,<sup>25</sup> and sexual slavery.<sup>26</sup>

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Any person (b) who procures or attempts to procure any woman or girl to become, either in The Gambia or elsewhere a common prostitute . . . (d) procures or attempts to procure any woman or girl to leave her usual place of abode in The Gambia, with the intent that she may for the purposes of prostitution become an inmate of or frequent a brothel either in The Gambia or elsewhere, is guilty of a misdemeanor.

CRIM. CODE art. 129 (Gamb.). Similarly, article 58 of the Criminal Code of Ireland provides:

- (1) Any person who—
  - (a) procures or attempts to procure any girl or woman under eighteen years of age . . . to have unlawful carnal connection, either within or without this Island, with any other person or persons; or
  - (b) procures or attempts to procure any woman or girl to become, either within or without this Island, a common prostitute; or
  - . . . .
  - (d) procures or attempts to procure any woman or girl to leave her usual place of abode in this Island (such place not being a brothel), with the intent that she may, for the purposes of prostitution, become an inmate of or frequent a brothel within or without this Island, shall be guilty of a misdemeanor.

CRIM. CODE art. 58 (Ir.).

21. Transnational procurement is recognized as a separate criminal offense in a number of criminal codes. *See, e.g.*, CÓDIGO PENAL [C.P.] [PENAL CODE] art. 231 (Brazil) (“Promoting or facilitating the entry into the national territory of women who come for purposes of prostitution, or the exit from the national territory of women to do so abroad shall be punished. . . .”); StGB [Penal Code] § 217(2) (Austria) (“Whoever induces a person with the intent that this person pursue prostitution in a state, of which she is neither a citizen nor a regular resident, through deception, or coerces this person through force or threat of violence to move to another state . . . is to be punished by imprisonment from one to ten years”); CRIM. CODE art. 2 (Benin) (“The same penalties shall apply to the act of smuggling of individuals into the territories of French West Africa and the [French Congo] . . . and to the act of making someone leave, or attempting to make someone leave these territories for purposes of [prostitution].”); CRIM. CODE 1899, § 229G (Queensl., Austrl.) (“A person who—(a) procures another person to engage in prostitution, either in Queensland or elsewhere; or (b) procures another person—(i) to leave Queensland for the purpose of engaging in prostitution elsewhere; or (ii) to come to Queensland for the purpose of engaging in prostitution . . . commits a crime.”); KEIHŌ [PENAL CODE] art. 226(1) (Japan) (“A person who kidnaps or abducts another for the purpose of transporting the same to a foreign country shall be punished with penal servitude for a limited period of not less than two years.”).

22. For instance, the Penal Code of Nigeria imposes a punishment of imprisonment for up to ten years and a fine for kidnapping and abduction of a minor. PENAL CODE § 271 (Nigeria). Similarly, India’s Penal Code prohibits kidnapping or abducting any woman with the intent of compelling her into “illicit intercourse” or with the knowledge that she is likely to be so compelled, forced, or seduced. The code also prohibits kidnapping or otherwise inducing a woman to marry any person against her will. Kidnapping or abducting a person with intent of subjecting such a person to “grievous hurt, slavery, or to the unnatural lust of any person” is punishable by imprisonment for up to ten years and a fine. INDIA PENAL CODE arts. 366-367. Under the Penal Code of Fiji, kidnapping a person “beyond the limits of Fiji” is punishable by



Fourth, criminal sanctions for the procurement of prostitution were limited to a small fine and/or short-term imprisonment, which is not comparable to the gravity of the crime.<sup>27</sup>

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imprisonment for seven years. PENAL CODE arts. 248-249 (Fiji). Abducting a girl younger than eighteen is a misdemeanor. *Id.* art. 255. Kidnapping or abducting a person in order to subject him or her to grievous harm, to slavery, or to the unnatural lust of another person is punishable by imprisonment for ten years. *Id.* art. 252.

23. For example, the Indonesian Criminal Code states that abducting an underage woman to ensure power over her is an offense punishable by imprisonment for up to seven years. Abducting a woman by fraud, force, or threat of force to ensure power over her is punishable by imprisonment for up to nine years. CRIM. CODE art. 332 (Indon.). The Chinese Criminal Code gives imprisonment for five to ten years and a fine for anyone who abducts or traffics women or children. The code further states that “abducting and trafficking women or children refers to abducting, kidnapping, buying, selling, transporting or transshipping women or children.” CRIM. CODE art. 240 (China).

In South Africa, anyone who abducts a child, removes a child, or induces a child to escape from a custody in which a child was lawfully placed; who knowingly harbors or conceals such a child; or who prevents a child from returning to custody from which he was abducted or removed commits an offense. Punishment is imprisonment for up to one year, a fine, or both. Child Care Act 74 of 1983 s. 51 (S. Afr.). Austria prohibits abducting a minor for the purpose of illicit sexual abuse or bringing such a minor into contact with illicit sexual practices. Punishment is imprisonment for six months to five years. StGB [Penal Code] art. 101 (Austria). The Penal Code of Tunisia states that anyone who causes another person to be abducted or led away can be punished by imprisonment for ten years. PENAL CODE art. 237 (Tunis.). The Criminal Code of Sudan criminalizes the abduction of young people; it defines the “perpetrator” as “anyone who abducts any person below puberty . . . by taking or inducing, in order to remove him away from the custody of his lawful guardian without the consent of such guardian.” Punishment is imprisonment for up to seven years, a fine, or both. CRIM. CODE art. 161.1 (Sudan).

24. For instance, the Indonesian Criminal Code says that deliberate removal of an underage person from the protection of his or her legal guardian is an offense punishable by imprisonment for seven years. PENAL CODE art. 332 (Indon.). The Penal Code of Fiji states that anyone who unlawfully confines another person is subject to punishment by imprisonment for one year or a fine. CRIM. CODE art. 256 (Fiji). In the Nigeria “punishment or imprisonment for 5 years, a fine, or both can be imposed on anyone who ‘confines or detains another person in any place against his will or otherwise unlawfully deprives another person of his liberty.’” Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, art. 19(1)(c) (2003) (Nig.).

25. For example, the Criminal Code of China makes unlawful detaining another person or depriving another person of his or her personal freedom and is an offense punishable by imprisonment for up to three years. CRIM. CODE art. 238 (China). The Criminal Code in Indonesia provides that deliberate and illegal deprivation of the freedom of another person is punishable by imprisonment for up to eight years. CRIM. CODE art. 333 (Indon.).

26. For instance, the Papua New Guinea Criminal Code states that “slavery and the slave trade in all their forms, and all similar institutions and practices, are strictly prohibited.” CRIM. CODE art. 253 (Papua N.G.). The Penal Code of Slovenia also criminalizes enslavement. It imposes punishment of imprisonment for one to ten years on anyone who “brings another person into slavery or a similar condition, or keeps another person in such a condition, or buys, sells, or delivers another person to a third party”; brokers any of the above-mentioned acts; or urges a person to sell their freedom or the freedom of one they look after. PENAL CODE art. 387 (Slovn.).

27. The criminal codes of many countries provide for a lesser sentence for trafficking in persons for the purpose of prostitution. For instance, in the countries of the Americas, Chile only provides for a fine for “one who promotes or facilitates the entry or exit of person to or from the country to exercise prostitution in the national territory or abroad.” PENAL CODE art. 367bis

Fifth, the trafficked person was treated as a criminal who was subject to deportation for the commission of the acts of illegal entry, falsification of travel documents, and prostitution. This phase of antitrafficking legislation was marked by inadequate measures in satisfying the special needs of victims of trafficking. As previously indicated, some domestic laws provided limited measure of protection.<sup>28</sup>

Regionally, there have been a number of initiatives calling for drafting comprehensive antitrafficking legislation that criminalizes the trafficking offense, prevents the act of trafficking, and protects the victims of trafficking.<sup>29</sup> In addition, the U.N. Protocol has created an international consensus on how to define trafficking in persons.<sup>30</sup>

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(Chile). Similarly, the Criminal Code of Venezuela only provides for a sentence of three to eighteen months for inducing the prostitution or corruption of minors. The punishment only increases to one to four years if the minor is under the age of twelve, if the act is committed by means of fraud or deceit, or if the perpetrator of the act is a person entrusted with the custody or care of the child. CÓDIGO PENAL [PENAL CODE] art. 388 (Venez.). In Uruguay, the punishment for corruption of minors is imprisonment for six months to three years. Abducting a single woman over eighteen years of age by means of violence, threats or fraud for purposes of contracting marriage or satisfying carnal desire is also prohibited. The punishment for this crime is one to five years imprisonment. CÓDIGO PENAL [PENAL CODE] arts. 266, 274 (Uru.). Likewise in St. Kitts the punishment for procurement is only two years imprisonment and the same punishment applies to cases of procurement that involve false pretense or representation, threats or intimidation, or the use of drugs. Criminal Law Amendment Act, No. 36, art. 7 (1976) (St. Kitts & Nevis). In Haiti, the Penal Code merely prohibits engaging in indecent behavior by habitually instigating, promoting, or facilitating the debauchery of a young person of either sex under the age of twenty-one. The penalty for this offense under the Haitian Criminal Code is only six months to two years imprisonment. CODE PÉNAL [PENAL CODE] art. 282 (Haiti). Finally, El Salvador only provides for a penalty of one to three years imprisonment for the crime of forced prostitution. CÓDIGO PENAL [PENAL CODE] art. 170 (El Sal.).

28. In particular, the 1956 Immoral Traffic (Prevention) Act of India called for "rescue of persons" and "protective homes." 1956, No. 104, Acts of Parliament, 1957. The 1956 Prostitution and Prevention Act of Japan called for taking measures of "rehabilitation" of women in prostitution. No. 118 (1956) (Japan). The 1973 Women and Girls Protection Act of Malaysia provided for the removal of the women in prostitution to "a place of refuge." 106 AMD, § 7 (1973) (Malay.). The 1973 Women and Girls Protection Act of Brunei provided for "care" and "education of women and girls detained under this act." Act No. XVIII, § 25(1) (1993) (Brunei). Also, the Measures in Prevention and Suppression of Trafficking in Women and Children Act of 1997 in Thailand provided for "appropriate assistance" to the trafficked woman or child including, "primary shelter" and repatriation. B.E. 2540 (1997) (Thail.).

29. The 1994 Inter-American Convention on International Traffic in Minors mandates that "[t]he States Parties undertake to adopt effective measures, under their domestic law, to prevent and severely punish the international traffic in minors defined in this Convention." Mar. 18, 1994, 79 O.A.S.T.S., art. 7, 33 I.L.M. 721 (1994). The Joint Action To Combat Trafficking in Human Beings and Sexual Exploitation of Children adopted by the European Council mandates that Member States "review existing law and practice" to classify trafficking as a criminal offense, provide the appropriate penalties for such offense and take the necessary measures that to "ensure . . . appropriate assistance for victims." Joint Action 97/154/JHA, tit. II.A., F., 1997 O.J. (L 63/2) 1, 2-3 (EC). The European Parliament, in a May 19, 2000, resolution, called for "legislative action against trafficking in human beings, including common definition, incriminations and sanctions." *European Parliament Resolution on the Communication from the*

### III. RECOGNIZING ALL FORMS OF TRAFFICKING IN PERSONS AS A CRIME AND PROVIDING FOR SERIOUS SANCTIONS FOR SUCH CRIME

Any antitrafficking legislation must first address how it defines trafficking. The U.N. Protocol offers a comprehensive definition, which many domestic laws have followed.<sup>31</sup> According to article 3(a) of the U.N. Protocol:

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*Commission to the Council and the European Parliament for Further Actions on the Fight Against Trafficking in Women*, COM (1998) 720 (May 19, 2000). The Economic Community of West African States (ECOWAS) Declaration of December 2001 on the Fight Against Trafficking in Persons calls upon Member States to “Adopt, as quickly as possible, such legislative and other measures as that are necessary to establish as criminal offences the trafficking in persons . . . .” *Declaration on the Fight Against Trafficking in Persons*, para. 5, A/DC12/12/01 (Dec. 20-21, 2001). The January 2002 South Asian Association for Regional Cooperation (SAARC) Convention on Prevention and Combating Trafficking in Women and Children for Prostitution mandates that “[t]he State Parties to the Convention shall take effective measures to ensure that trafficking in any form is an offence under their respective criminal law and shall make such an offence punishable by appropriate penalties which take into account its grave nature.” S. Asian Assoc. for Regional Coop. [SAARC], *Convention on Prevention and Combating Trafficking in Women and Children for Prostitution*, art. 3(1) (Jan. 5, 2002), available at <http://www.saarc-sec.org/old/freepubs/conv-trafficking.pdf>. The European Council Framework Decision of July 19, 2002, mandates that member states must take the necessary measures, no later than August 1, 2004, to criminalize trafficking in persons and provide the appropriate penalties, in addition to assisting victims of trafficking. Council Framework Decision on Combating Trafficking in Human Beings, 2002/629/JHA, 2002 O.J. (L 203) 1 (EC) [hereinafter E.C. Framework]. The Organization for Cooperation and Security in Europe (OSCE) Declaration on Trafficking in Human Beings of December 2002 states, “We will consider adopting legislative or other measures that permit victims of trafficking to remain in our territory, temporarily or permanently, in appropriate cases, and giving consideration to humanitarian and compassionate factors.” The Organization for Cooperation and Security in Europe [OSCE], Declaration on Trafficking in Human Beings, 10th sess., 15 (Dec. 6-7, 2002).

30. Earlier international conventions were limited to prohibition. For example, the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery outlawed slavery practices including debt bondage, serfdom, bride price and exploitation of child labor. U.N. Econ. & Soc. Council [ECOSOC] Res. 608(XXI), Apr. 30, 1956, 226 U.N.T.S. 3. The 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) explicitly prohibited “exploitation of prostitution of women” and “all forms of traffic in women.” G.A. Res. 34/180, art. 6, U.N. Doc. A/34/46 (Dec. 18, 1979). The 1989 Convention on the Rights of the Child mandated that state parties must “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.” G.A. Res. 44/25, art. 35, U.N. Doc. A/44/49 (Nov. 20, 1989). The 1999 convention to eliminate the Worst Forms of Child Labour similarly prohibited: “The use, procuring or offering of a child for prostitution.” Int’l Labour Org. [ILO], *Worst Forms of Child Labour Convention*, Gen. Conf. Res. 182 (June 17, 1999).

31. It must be noted, however, that the U.N. Protocol is of limited application. According to article 4, the U.N. Protocol applies to the offenses of trafficking in persons “where those offences are transnational in nature and involve an organized criminal group.” U.N. Protocol, *supra* note 6, art. 4. The U.N. Protocol, therefore, is limited in scope to international trafficking. It does not apply to domestic trafficking, that is, trafficking that takes place within national borders. Moreover, the U.N. Protocol does not apply to individual traffickers, nor to trafficking conducted by only two persons (neither constituting an “organized criminal group”), even though such trafficking may constitute a serious offense. However, it must be noted that the transnational

“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.<sup>32</sup>

Some domestic laws follow the Protocol’s definition of trafficking.<sup>33</sup> Other laws use a definition that references specific forms of sexual exploitation, such as: sexually explicit performance,<sup>34</sup> begging,<sup>35</sup> pornography,<sup>36</sup> use in criminal activities,<sup>37</sup> sex tourism,<sup>38</sup> commercial

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nature of trafficking and the involvement of an organized criminal group are not requirements for the establishment of the offense of trafficking under the domestic law of any particular country.

32. *Id.* art. 3(a). Early drafts of the U.N. Protocol made special references to specific forms of trafficking, such as “forced marriage” or “forced adoption,” *inter alia*. However, the ultimate decision was made against such a list for fear of limiting the proposed protocol’s application. Ad Hoc Comm. on 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*, 4 & n.14, U.N. Doc. A/AC.254/4/Add.3/Rev.7 (Oct. 2-27, 2000).

33. *See, e.g.*, Philippines Antitrafficking Act, *supra* note 5, § 3.

34. Section XXX.01(8) of the United States Department of Justice Model State Anti-Trafficking Criminal Statute defines “Services” as “an ongoing relationship between a person and the actor in which the person performs activities under the supervision of or for the benefit of the actor. Commercial sexual activity and sexually-explicit performances are forms of ‘services.’” U.S. Dep’t of Justice, *Model State Anti-Trafficking Criminal Statute*, § XXX.01(8), available at [http://www.usdoj.gov/crt/crim/model\\_state\\_law.pdf](http://www.usdoj.gov/crt/crim/model_state_law.pdf) [hereinafter U.S. Model Law]. A number of recent federal cases have involved persons being held in servitude for purposes of sexually-explicit performances such as “exotic dancing.” *See, e.g.*, Press Release, U.S. Dep’t of Justice, Alaska Man Sentenced to 30 Months for Immigration Fraud and Transporting Minors from Russia to Dance in an Anchorage Strip Club (Aug. 28, 2001), available at <http://www.usdoj.gov/opa/pr/2001/August/438cr.htm> [hereinafter Justice Dep’t Press Release].

Unlike prostitution, which is typically illegal and involves commercial sexual activity, sexually-explicit performance may be legal, absent any coercion. Inclusion of sexually-explicit performance in the U.S. Model Law recognizes that such activity can have an impact on victims similar to sexual abuse and reflects federal experience in which international traffickers are increasingly placing their victims into strip clubs rather than prostitution. The proposed criminal statutes thus provide expanded coverage for minors who are held in sexual performance as opposed to prostitution.

35. *See, e.g.*, Law on Measures Against Human Trafficking, No. 228, art. 1 (July 16, 2003) (Italy); CRIM. CODE art. 111(b)(1) (Serb.).

36. *See, e.g.*, Illicit Traffic of Migrants and Trafficking in Persons, No. 137-03, art. 1 (2003) (Dom. Rep.).

37. *See, e.g.*, CRIM. CODE arts. 146-150 (Ukr.).

38. *See, e.g.*, Philippines Antitrafficking Act, *supra* note 5, § 4(d).

sex<sup>39</sup>—(as opposed to) and noncommercial sex<sup>40</sup>—exploitation in armed conflicts,<sup>41</sup> illegal bio-medical research,<sup>42</sup> debauchery,<sup>43</sup> economic exploitation,<sup>44</sup> illegal adoption,<sup>45</sup> forced marriage,<sup>46</sup> pornography,<sup>47</sup> child pornography,<sup>48</sup> and nonremunerated work.<sup>49</sup> Other domestic laws adopt a narrower definition than the U.N. Protocol has promulgated.<sup>50</sup> Some laws

39. For a discussion of prostitution as a form of trafficking, see, for example, Jacqueline Cooke & Melissa L. Sontag, *Sixth Annual Review of Gender and Sexuality Law: II. Criminal Law Chapter: Prostitution*, 6 GEO. J. GENDER & L. 459 (2005); Beverly Balos, *The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation*, 27 HARV. WOMEN'S L.J. 137 (2004); Crystal Y. Twitty, *Pretty Pennies for Pretty Faces: Trafficking of Women for the International Sex Trade*, 2 REGENT J. INT'L L. 115 (2003/2004); Mary De Ming Fan, *The Fallacy of the Sovereign Prerogative to Set De Minimis Liability Rules for Sexual Slavery*, 27 YALE J. INT'L L. 395 (2002); Nora V. Demleitner, *Forced Prostitution: Naming an International Offense*, 18 FORDHAM INT'L L.J. 163 (1994); Michelle O.P. Dunbar, *The Past, Present, and Future of International Trafficking in Women for Prostitution*, 8 BUFF. WOMEN'S L.J. 103 (1999–2000); R. Barri Flowers, *The Sex Trade Industry's Worldwide Exploitation of Children*, 575 ANNALS AM. ACAD. POL. & SOC. SCI. 147 (2001); Cheryl Hanna, *Introduction to Symposium on Sexual Slavery: The Trafficking of Women and Girls into the United States for Sexual Exploitation*, 13 HASTINGS WOMEN'S L.J. 1 (2002); Laurie Hauber, *The Trafficking of Women for Prostitution: A Growing Problem Within the European Union*, 21 B.C. INT'L & COMP. L. REV. 183 (1998); Neal Kumar Katyal, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791 (1993).

40. See, e.g., CRIM. CODE, art. 165 (Mold.).

41. See, e.g., CRIM. CODE art. 111(b)(1) (Serb.).

42. See, e.g., Fight Against Human Trafficking, art. 1.0.2 (June 28, 2005) (Azer.).

43. See, e.g., P.K. [Crim. Code] 19:351(1) (Greece).

44. See, e.g., Portant Définition et Répression du Trafic d'Enfant(s) [Law on Definition and Suppression of Traffic in Children], No. 001-2002/AN, art. 3, (2003) (Burk. Faso).

45. See, e.g., CÓDIGO PENAL [PENAL CODE] art. 223 (Para.).

46. See, e.g., Illicit Traffic of Migrants and Trafficking in Persons, No. 137-03, art. 1 (2003) (Dom. Rep.).

47. See, e.g., CRIM. CODE art. 248B (Malta). The E.C. Framework, *supra* note 29, art. 1(1), defines exploitation of the trafficked person to include “[t]hat person’s labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography.”

48. See, e.g., U.S. Model Law, *supra* note 34, § XXX.02(2); [StGB] [Penal Code] § 180b(1)-(2) (F.R.G.).

49. See, e.g., CRIM. CODE art. 201a (Mont.).

50. See, e.g., Trafficking Victims Protection Act of 2000, 18 U.S.C. §§ 1589-1594, 22 U.S.C. §§ 7101-7110 (2000). This U.S. law adopts a narrow definition of what constitutes trafficking in persons to include only sex trafficking and trafficking for labor or services. 22 U.S.C. § 7102(8). The Act broadly defines “sex trafficking” to mean the “recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.” *Id.* § 7102(9). Moreover, only severe forms of trafficking trigger the application of the operative provisions of the act. See generally Mohamed Mattar, *Monitoring the Status of Severe Forms of Trafficking in Foreign Countries: Sanctions Mandated Under the U.S. Trafficking Victims Protection Act*, 10 BROWN J. WORLD AFF. 159-78 (2003). The Act does recognize that “[t]rafficking in persons is not limited to the sex industry. This growing transnational crime also includes forced labor.” 22 U.S.C. § 7101(b)(3). The Act also recognizes that “trafficking for such purposes as involuntary servitude, peonage, and other forms of forced labor has an impact on the nationwide employment network and labor market.” *Id.* § 7101(b)(12).

only define trafficking as only sex trafficking,<sup>51</sup> and some laws define trafficking in relation to forced labor.<sup>52</sup>

Antitrafficking legislation must also distinguish between trafficking in persons and alien smuggling. Smuggling of aliens, or “illegal migrant smuggling,” is defined by the 2000 U.N. Protocol Against Smuggling of Migrants by Land, Sea and Air (Smuggling of Migrants Protocol).<sup>53</sup> Unlike trafficking in persons, which may occur internationally, as well as internally or domestically, alien smuggling is always transnational in nature, since it requires crossing a national border and, as such, involves an “illegal entry” of a person into a country of which such a person does not have legal status.<sup>54</sup> Illegal entry, in this context, means “crossing borders without complying with the necessary requirements for legal entry into the receiving State.”<sup>55</sup>

The criminal offenses involved in alien smuggling are considered to be crimes against the state, while trafficking in persons is a crime against the individual. Moreover, the smuggled alien who consented to be smuggled is treated as a criminal. Conversely, a trafficked person should be considered a victim of the crime of trafficking. Unlike with alien

51. See Penal Law, 5737-1977, 1 LSI 1, § 203A (2005) (Isr.). Currently, the Israeli Parliament is considering similar provisions on labor trafficking. See U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 129 (2005), available at <http://www.state.gov/documents/organization/47255.pdf>.

52. See PENAL CODE art. 201(b) (Turk.).

53. Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex III, U.N. Doc. A/55/383 (Nov. 15, 2000) [hereinafter Smuggling of Migrants Protocol]. Article 3(a) of the Protocol defines “smuggling of migrants” to mean “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.” *Id.* art. 3(a). Article 6(1) of this protocol recognizes the following as criminal offenses:

when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:

- (a) The smuggling of migrants;
- (b) When committed for the purpose of enabling the smuggling of migrants:
  - (i) Producing a fraudulent travel or identity document;
  - (ii) Procuring, providing or possessing such document;
- (c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.

*Id.* art. 6(1).

54. For example, the Dominican Republic Law No. 137-03 on the Illicit Traffic of Migrants and Trafficking in Persons criminalizes both trafficking in persons and smuggling, which is defined, in article 2, as “facilitating the entry, exit or illegal transit of a person in the country, with the purpose of obtaining, directly or indirectly, a financial gain or other forms of benefits.” No. 137-03, art. 2 (2003) (Dom. Rep.).

55. Smuggling of Migrants Protocol, *supra* note 53, art. 3(b).

smuggling, the trafficked person is typically subject to the “threat or use of force or other forms of coercion, of abduction, of fraud or deception, of the abuse of power or of a position of vulnerability.”<sup>56</sup>

I would argue that consent is irrelevant in all cases of trafficking, especially if we define illegal means broadly to include not only *force* but also taking advantage of any position of vulnerability.<sup>57</sup> In my judgment, *every* victim of trafficking is a vulnerable victim who has no choice but to submit; every case of trafficking entails the abuse of a position of vulnerability. I would also argue that consent is a requirement of a continuous nature. A victim may consent to recruitment, but that consent is likely either nonexistent or defective during the exploitation phases of trafficking.<sup>58</sup>

Illegal means must therefore be broadly defined; force should not be required for proof of such means. For instance, the U.S. Trafficking Victims Protection Act of 2000 (TVPA) requires “force, fraud, or coercion,” and defines “coercion” broadly.<sup>59</sup> Previously, in the 1988 United States Supreme Court decision in *United States v. Kozminski*, the defendants were charged with violating the Thirteenth Amendment when two mentally retarded men were found laboring on the defendant’s farm.<sup>60</sup> The Supreme Court held that the term “involuntary servitude” meant a condition of servitude in which the victim was forced to work by the use or threat of physical or legal force.<sup>61</sup> Thus, at this time, the Court concluded that the term “involuntary servitude” did not include mere coercion.<sup>62</sup> The TVPA expanded this definition. Under this act, physical

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56. U.N. Protocol, *supra* note 6, art. 3(a).

57. *See, e.g., id.*

58. *See* Mohamed Y. Mattar, The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: Reflections After Five Years, Speech Delivered at the Concord Center Annual Conference on Disposable People: Trafficking in Persons, (Dec. 22, 2005), *available at* [http://www.protectionproject.org/speeches/israel\\_dec05.pdf](http://www.protectionproject.org/speeches/israel_dec05.pdf).

59. Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7102(8)(A)-(B) (2000). The TVPA defines “coercion” as: “(A) threats of serious harm to or physical restraint against any person; (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or (C) the abuse or threatened abuse of the legal process.” *Id.* § 7102(2)(A)-(C).

60. *United States v. Kozminski*, 487 U.S. 931, 934 (1988). The Thirteenth Amendment to the United States Constitution provides that “(1) Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. (2) Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend XIII.

61. *Kozminski*, 487 U.S. at 952.

62. *Id.*

coercion is not always required in cases of involuntary servitude; any threat of "serious harm" or "physical restraint" will suffice.<sup>63</sup>

Consequently, while governments should adopt measures to protect trafficked persons, including granting such persons residency status, in cases of alien smuggling, the smuggled person becomes subjected to deportation. Therefore, unlike the U.N. Protocol, which mandates that states parties consider granting victims of trafficking temporary or permanent status,<sup>64</sup> the Smuggling of Migrants Protocol calls upon states parties to "facilitate and accept, without undue or unreasonable delay, the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who is its national or who has the right of permanent residence in its territory at the time of return."<sup>65</sup>

Antitrafficking legislation must recognize trafficking as a serious crime.<sup>66</sup> Thus, in any model antitrafficking legislation the crimes associated with trafficking should be viewed as serious crimes and the legislation should carry penalties similar to those of other serious crimes like rape and drug trafficking. Traditionally, the criminal or penal codes of many countries did not consider sex trafficking as grave a crime as other sexual offenses.<sup>67</sup>

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63. See 18 U.S.C. § 7102(2)(A)-(B). Subsection (C) of this Section continues to recognize coercion through threats relating to the legal process. *Id.* § 7102(2)(C).

64. U.N. Protocol, *supra* note 6, art. 7(1).

65. Smuggling of Migrants Protocol, *supra* note 53, art. 18(1). Nonetheless, the smuggled person is entitled to be treated with dignity until such person is deported. This protocol mandates that parties preserve and protect the rights of a smuggled alien, including "the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment." *Id.* art. 16(1). Smuggled aliens should also be afforded "appropriate protection against violence that may be inflicted upon them, whether by individuals or groups, by reason of being the object of conduct set forth in article 6 of this Protocol," in addition to the "appropriate assistance to migrants whose lives or safety are endangered" by such reason. *Id.* art. 16(2)-(3). In the case of their detention, the Smuggling of Migrants Protocol mandates that each state party must "comply with its obligations under the Vienna Convention on Consular Relations, where applicable, including that of informing the person concerned without delay about the provisions concerning notification to and communication with consular officers." *Id.* art. 16(5).

66. Article 2(b) of the Transnational Crime Convention defines a "serious crime" as "an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty." Transnational Crime Convention, *supra* note 10, art. 2(b).

67. Some laws, as demonstrated by those of the countries of the Americas, do not impose similar punishments for trafficking offenses as for other serious crimes, such as rape. For example, in Guatemala, the punishment for rape under the Criminal Code is two to five years in prison, whereas the punishment for trafficking is only one to three years. PENAL CODE arts. 181, 194 (Guat.). Cuba has a strong penalty for rape calling for between four and ten years in prison and elevating to twenty years or even death if the victim is under the age of twelve. However, there is no specific punishment for trafficking in adult women, and in the case of minors the punishment is only between two and five years imprisonment. CÓDIGO PENAL [PENAL CODE] arts. 298, 310 (Cuba).



Prison sentences tend to be shorter in most European countries, including the sentences for trafficking in persons. The European Council Framework Decision of July 19, 2002, mandates that European countries provide penalties for trafficking of at least eight years imprisonment.<sup>68</sup> It must be noted that European domestic laws, as well other legal systems following the civil law model, do not recognize plea-bargaining as a device, which in systems like that of the United States, may result in a lesser sentence. For example, the U.S. TVPA provides for up to twenty years imprisonment, but allows plea-bargaining.<sup>69</sup> In fact, plea-bargaining was used by the defendants in the first case that was decided under the TVPA, *United States v. Virchenko*.<sup>70</sup> In this case, a Russian national recruited six women who agreed to come to the United States and dance in his club, including two who were sixteen years old—minors in that jurisdiction. However, after Virchenko took them to the United States, they all ended up in prostitution. After being caught by the authorities, Virchenko was charged with fraud, obstruction of justice, intimidation of a witness, and transportation of a minor across borders. Yet he plea-bargained and was sentenced to only thirty months in prison.<sup>71</sup>

In comparison, the European Convention imposes upon the states an obligation to

ensure that the following circumstances are regarded as aggravating circumstances in the determination of the penalty for offences established in accordance with Article 18 of this Convention:

- a) the offence deliberately or by gross negligence endangered the life of the victim;
- b) the offence was committed against a child;
- c) the offence was committed by a public official in the performance of her/his duties;

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68. E.C. Framework, *supra* note 29, art. 3(2).

69. The TVPA specifically recognizes the crime of “trafficking with respect to peonage, slavery, involuntary servitude, or forced labor” and punishes it with a fine or up to 20 years of imprisonment. Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7109(a)(1)(B) (2000). Furthermore, in cases of trafficking for forced labor the defendant may be imprisoned for any term of years or life “[I]f death results from the violation of this section [on forced labor], or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse, or the attempt to commit aggravated sexual abuse, or an attempt to kill.” The same sanctions apply in the cases of peonage, slavery, or involuntary servitude. *Id.*

70. Justice Dep’t Press Release, *supra* note 34. For a discussion of this case, see HUMAN TRAFFIC AND TRANSNATIONAL CRIME, EURASIAN AND AMERICAN PERSPECTIVES 134-40 (Sally Stoecker & Louise Shelley eds., 2004).

71. Justice Dep’t Press Release, *supra* note 34.

- d) the offence was committed within the framework of a criminal organisation.<sup>72</sup>

Therefore, rather than allow one's admission of culpability to reduce one's sentence, proof of these factors would enhance the sentence under the European Convention.

Many states have specific provisions in their antitrafficking legislation<sup>73</sup> or criminal codes<sup>74</sup> guaranteeing enhanced penalties in cases

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72. European Convention, *supra* note 7, art. 24.

73. For example, the Philippines Antitrafficking Act, *supra* note 5, section 6, defines aggravated circumstances, or "Qualified Trafficking," which enhance the punishment from imprisonment for twenty years to life imprisonment. In Ireland, the law provides:

Any person who organises or knowingly facilitates—

- (a) the entry into, transit through or exit from the State of a child for the purpose of his or her sexual exploitation, or
- (b) the provision of accommodation for a child for such a purpose while in the State, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life.

The Child Trafficking and Pornography Act, 1998, art. 3(1), (Act No. 22/1998) (Ir.). In addition, this law imposes upon anyone convicted for committing the crime of trafficking under the aggravated circumstances an obligation to pay restitution to the victim. *Id.* art. 4(1). See also article 3(i) of the Prevention and Control of Human Trafficking Ordinance, No. LIX (2002) (Pak.), where the punishment for trafficking increases from up to seven years of imprisonment and a fine to ten years of imprisonment and a fine, if a person, in addition to committing an offence of trafficking a person, kidnaps, abducts, or attempts to kidnap or abduct in connection with an offence of trafficking. Dominican Republic law regarding illegal trafficking of migrants and trade in persons considers aggravated circumstances the following: trafficking in children, physical or mental injury of the victim as the result of trafficking, psychological disability or mental illness of the victim as the result of trafficking, cases when a victim of trafficking suffers serious harm, cases when a trafficker takes advantage of a vulnerable victim, committing the crime of trafficking as an organized group, cases where a perpetrator of a crime is a public person. Illicit Traffic of Migrants and Trafficking in Persons, No. 137-03 (2003) (Dom. Rep.). Consider also *Portant Définition et Répression du Trafic D'Enfant(s)* [Law on Definition & Suppression of Traffic in Children], No. 001-2002/AN, art. 6 (2003) (Burk. Faso) (stating that aggravating circumstances providing for life imprisonment are: if the victim dies as a result of being trafficked or if the victim is mutilated or permanently injured as a result of being trafficked). Another example is provided by Article 12 of Law on the Prevention and Combat of Trafficking in Human Beings in Romania:

- (1) Whoever recruits, transports, transfers, harbours or receives a person, through the use of threats or violence or the use of other forms of coercion, through abduction, fraud or deception, abuse of power or by taking advantage of that person's inability to defend him/herself or to express his/her will or by giving, accepting or receiving money or other benefits in order to obtain the agreement of a person who has control over another person with the intent of exploiting the latter, commits the offence of trafficking in human beings and shall be punished with 3 to 12 years imprisonment and the prohibition of certain rights.
- (2) Trafficking in human beings committed under the following circumstances:
  - a) by two or more persons (acting) together;
  - b) causing serious injury of the corporal integrity or the health of the victim, shall be punished with 5 to 15 years imprisonment and the prohibition of certain rights.

- (3) If the deed has resulted in the victim's death or suicide, the penalty shall be 15 to 25 years imprisonment and the prohibition of certain rights.

Law on the Prevention and Fighting Trafficking in Human Beings, No. 678, art. 12 (2001) (Rom.)

74. For example, article 240 of the Criminal Code of China provides:

Those abducting and trafficking women or children are to be sentenced to 5 to 10 years in prison plus a fine. Those falling into one or more of the following cases are to be sentenced to 10 years or more in prison or to be given life sentences, in addition to fines or confiscation of property. Those committing especially serious crimes are to be sentenced to death in addition to confiscation of property.

- (1) Primary elements of rings engaging in abducting and trafficking women and children;
- (2) those abducting and trafficking more than three women and/or children;
- (3) those raping abducted woman;
- (4) those seducing, tricking, or forcing abducted women into prostitution, or those selling such women to others who in turn force them into prostitution;
- (5) those kidnapping women or children using force, coercion, or narcotics, for the purpose of selling them;
- (6) those stealing or robbing infants or babies for the purpose of selling them;
- (7) those causing abducted women or children, or their family members, to serious injuries or death, or causing other grave consequences;
- (8) those selling abducted women or children to outside the country.

Abducting and trafficking women or children refers to abducting, kidnapping, buying, selling, transporting, or transshipping women or children.

CRIM. CODE art. 240 (China). Austria also provides for aggravated circumstances in its criminal code. The Penal Code of Austria punishes any person who forces a person into prostitution by imprisonment for six months to five years. However, "whoever commits this offence professionally is to be punished with imprisonment from one to ten years." StGB [Penal Code] art. 217(1) (Austria). Article 217 also penalizes any person who through willful deceit, coercion, force, dangerous threats, or exploitation of a victim's mistake brings another into the country for the purpose of prostitution. Punishment for the trafficking of people in this case is imprisonment for between one and ten years. *Id.* art. 217(2). In Brazil, aggravating circumstances for traffickers are also recognized through sentencing. Article 231 of the Criminal Code specifically prohibits promoting or facilitating the entry of women into the country for purposes of prostitution. Use of violence, serious threat, or fraud constitutes aggravated circumstances that amount to an enhanced punishment, which may be up to twelve years in prison. Article 227 provides that such an enhancement of the sentence also applies in cases involving girls who are between the ages of fourteen and eighteen. C.P. [PENAL CODE] arts. 227, 231 (Brazil). See also the Penal Code of Burundi, which recognizes the identity of the trafficker and their relationship to the trafficee as an aggravating circumstance; such as by a parent, grandparent, or servant of the victim; by a person having authority over the victim; or by a public employee or clergyman; as well as other factors, including cases in which the offense is committed against a minor under the age of eighteen, against a non-consenting person, or by threats of violence. PENAL CODE art. 380 (Burundi). The laws of Cambodia recognize both the identity of the victim and the identity of the trafficker as aggravating circumstances, providing for an enhanced penalty of 10 to 20 years of imprisonment when such circumstances arise. This enhanced penalty applies if the offense is committed against a minor younger than fifteen years of age; if the perpetrator uses coercion, violence, or threats; if the perpetrator is a husband, wife, boyfriend, girlfriend, father, mother, or guardian of the victim; or if the pimp either forces the victim to commit prostitution outside the country or forces a foreign victim to commit prostitution in the territory of Cambodia. Suppression of the Kidnapping, Trafficking, and Exploitation of Human Persons, art. 5, KRAM Feb. 29 (1996) (Cambodia). Traffic in women, infants, and young persons is prohibited by the Criminal Code of Ethiopia, which provides that "whosoever, for gain or to gratify the passions of another, (a) traffics in women or infants and young persons, whether by seducing them, by

of trafficking in persons committed under aggravated circumstances, including a crime committed against a child victim;<sup>75</sup> a crime committed by an organized group;<sup>76</sup> a crime of trafficking committed against more than one victim;<sup>77</sup> a perpetrator being a spouse, parent, boyfriend, or girlfriend; a perpetrator abusing one's role as a parent or guardian;<sup>78</sup> a perpetrator abusing one's public position or as a clergyman;<sup>79</sup> causing serious injury or death to a victim;<sup>80</sup> transmitting the HIV virus;<sup>81</sup> adopting a child for the purposes of prostitution, pornography, sexual exploitation, forced labor, slavery, involuntary servitude, or debt

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enticing them or by procuring them or otherwise inducing them to engage in prostitution, even with their consent . . . is punishable with rigorous imprisonment not exceeding 5 years and a fine." The penalty may be increased to three to ten years of imprisonment if the perpetrator makes trafficking a "profession." Aggravated circumstances include ones involving use of fraud, violence, intimidation, or coercion; cases where the victim has been driven to suicide by shame, distress, or despair; or cases where the offender has taken advantage of the physical or mental distress of the victim or abused his or her position as a "protector" of the victim. PENAL CODE arts. 602, 605-606 (Eth.). The Criminal Code of Germany imposes a penalty of a fine or imprisonment for up to five years to any person who, with the knowledge of another person's "helplessness" in a foreign country, causes that person to engage in illicit sexual practices; the punishment increases to up to ten years in cases of force, deceit, threat of harm, or kidnapping. StGB [Penal Code], §§ 180b-181 (F.R.G.). The Penal Code of Madagascar provides for an enhanced penalty of imprisonment for two to five years if the crime involves a minor under the age of eighteen; if the crime is accompanied by force, abuse of authority, or fraud; or if the perpetrator of the crime is the spouse, parent, guardian, or teacher of the victim or is assigned the duty, as part of his or her employment, to fight against prostitution, protect public health, or maintain public order. CODE PÉNAL [PENAL CODE] art. 334 (Madag.). According to the Criminal Code of Niger, an enhanced penalty of two to five years' imprisonment is imposed when the offense is committed against a minor; when it is accompanied by violence, duress, or fraud; or when it involves multiple perpetrators or victims. CRIM. CODE art. 292 (Niger). The Criminal Code of Rwanda enhances penalty if the offense is committed against a minor under the age of eighteen, against a nonconsenting person, or against several persons. Similarly, the enhanced penalty applies if the perpetrator of the offense has authority or position of influence over the victim. CRIM. CODE art. 374 (Rwanda).

75. *See, e.g.*, Combating of Trafficking in Persons and Sexual Exploitation of Children No. 3(1), § 5(2) (2000) (Cyprus); Illicit Traffic of Migrants and Trafficking in Persons, No. 137-03 (2003) (Dom. Rep.); Child Trafficking and Pornography Act, 1998 (Act No. 22/1998) (Ir.); Law on Measures Against Human Trafficking, No. 228, art. 1 (July 16, 2003) (Italy); CÓDIGO PENAL [PENAL CODE] art. 223 (Para.).

76. The Transnational Crime Convention defines an organized criminal group as three or more persons. Transnational Crime Convention, *supra* note 10, art. 2(a); *see also* Illicit Traffic of Migrants and Trafficking in Persons, No. 137-03 (2003) (Dom. Rep.); CRIM. CODE art. 216(a) (Slovk.).

77. *See, e.g.*, CRIM. CODE art. 242 (China); CRIM. CODE art. 375 (Rwanda).

78. *See, e.g.*, Suppression of the Kidnapping, Trafficking, and Exploitation of Human Persons, KRAM Feb. 29 (1996) (Cambodia); PENAL CODE art. 380 (Burundi); CODE PÉNAL [PENAL CODE] art. 334(4) (Madag.).

79. *See, e.g.*, PENAL CODE art. 380 (Burundi).

80. *See, e.g.*, Illicit Traffic of Migrants and Trafficking in Persons, No. 137-03 (2003) (Dom. Rep.).

81. *See, e.g.*, Philippines Antitrafficking Act, *supra* note 5, § 6(g).

bondage;<sup>82</sup> committing a crime of trafficking on a large scale;<sup>83</sup> repeated offenses;<sup>84</sup> kidnapping;<sup>85</sup> causing the victim psychological damage;<sup>86</sup> causing bodily injury to the victim;<sup>87</sup> taking advantage of a vulnerable victim;<sup>88</sup> rape;<sup>89</sup> selling the victim out of the territory of a particular country;<sup>90</sup> committing a crime by force, fraud, deceit, or threat of harm;<sup>91</sup> committing the crime for financial gain;<sup>92</sup> falsifying documents;<sup>93</sup> and for the transnational nature of a crime.<sup>94</sup>

Imprisonment is not the only appropriate criminal sanction that can be imposed on a trafficker. Effective antitrafficking legislation must also provide for the forfeiture of assets.<sup>95</sup> Only some antitrafficking laws provide for such sanctions.<sup>96</sup>

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82. *See, e.g., id.* § 4(f).

83. *See, e.g., id.* § 6(c).

84. *See, e.g.,* Suppression of the Kidnapping, Trafficking, and Exploitation of Human Persons, KRAM Feb. 29, art. 5 (1996) (Cambodia); Law on the Prevention and Fighting Trafficking in Human Beings, No. 678, art. 17(2) (2001) (Rom.).

85. *See, e.g.,* CRIM. CODE art. 166 (Mold.).

86. *See, e.g.,* Illicit Traffic of Migrants and Trafficking in Persons, No. 137-03 (2003) (Dom. Rep.).

87. *See, e.g.,* Greek Antitrafficking Law, *supra* note 5, art. 8.4(f); CRIM. CODE art. 291 (Indon.); Código Penal Federal [C.P.F.] [Federal Criminal Code], *as amended*, Diario Oficial de la Federación [D.O.], 14 Agosto de 1931, art. 205 (Mex.).

88. *See, e.g.,* Illicit Traffic of Migrants and Trafficking in Persons, No. 137-03 (2003) (Dom. Rep.).

89. *See, e.g.,* CRIM. CODE art. 240(3) (China).

90. *See, e.g., id.* art. 240(8).

91. *See, e.g.,* Suppression of the Kidnapping, Trafficking, and Exploitation of Human Persons, KRAM Feb. 29, art. 5(2) (1996) (Cambodia); CODE PÉNAL [PENAL CODE] art. 334(2) (Madag.); CRIM. CODE art. 248A(2) (Malta).

92. *See, e.g.,* StGB [Penal Code] No.217/1974, § 217(2) (Austria); CRIM. CODE art. 246(3) (Slovk.).

93. *See, e.g.,* The Anti Trafficking in Persons Law, No. 5/2005, § 26(2) (2005) (Myan.); CRIM. CODE art. 201a (Mont.).

94. *See, e.g.,* CRIM. CODE art. 292 (Niger); CRIM. CODE art. 374 (Rwanda).

95. Article 12 of the Transnational Crime Convention, “Confiscation and Seizure,” provides:

1. States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:
  - (a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds;
  - (b) Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention.
2. States Parties shall adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

Transnational Crime Convention, *supra* note 10, art. 12(1)-(2).

96. The U.S. TVPA implements this principle by providing:

- (a) Whoever attempts to violate section 1581, 1583, 1584, 1589, 1590, or 1591 shall be punishable in the same manner as a completed violation of that section.

It should be noted that the U.N. Protocol, while calling for the criminalization of trafficking by mandating that “[e]ach State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offenses the conduct set forth in article 3 of this Protocol, when committed intentionally,” it does not address the issue of criminal sanctions.<sup>97</sup> The U.N. Protocol does not explicitly mandate that states parties punish the crime of trafficking by the appropriate and most effective punishment. However, this is the case under article 9 of the

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- (b) The court, in imposing sentence on any person convicted of a violation of this chapter, shall order, in addition to any other sentence imposed and irrespective of any provision of State law, that such person shall forfeit to the United States—
    - (1) such person’s interest in any property, real or personal, that was used or intended to be used to commit or to facilitate the commission of such violation; and
    - (2) any property, real or personal, constituting or derived from, any proceeds that such person obtained, directly or indirectly, as a result of such violation.
  - (c) (1) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
    - (A) Any property, real or personal, used or intended to be used to commit or to facilitate the commission of any violation of this chapter.
    - (B) Any property, real or personal, which constitutes or is derived from proceeds traceable to any violation of this chapter.
  - (2) The provisions of chapter 46 of this title relating to civil forfeitures shall extend to any seizure or civil forfeiture under this subsection.

Trafficking Victims Protection Act of 2000, 18 U.S.C. § 1594(a)-(c) (2000). The U.N. Resolution, Regulation on the Prohibition of Trafficking in Persons in Kosovo, provides:

- 6.1 Property used in or resulting from the commission of trafficking in persons or other criminal acts under the present regulation may be confiscated in accordance with the applicable law. The personal property of the victims of trafficking shall not be confiscated wherever it can be immediately identified by the law enforcement officer as such.
- 6.2 Where there are grounds for suspicion that an establishment, operating legally or illegally, is involved in, or is knowingly associated with trafficking in persons or other criminal acts under the present regulation, an investigating judge may, upon the recommendation of the public prosecutor, issue an order for the closing of such establishment.
- 6.3 A reparation fund for victims of trafficking shall be established by administrative direction and shall be authorised to receive funds from, inter alia, the confiscation of property pursuant to section 6.1.

On the Prohibition of Trafficking in Persons in Kosovo, UNMIK Res. § 6.1-6.3, U.N. Doc UNMIK/REG/2001/4 (Jan 12, 2001) [hereinafter UNMIK Regulation]. Similarly, under Romanian Law: “Money, valuables or any other assets obtained from the commission of . . . or that have been used to commit [human trafficking] . . . are subject to special confiscation.” Law on the Prevention and Fighting Trafficking in Human Beings, No. 678, art. 19(1) (2001) (Rom.).

97. U.N. Protocol, *supra* note 6, art. 5.

Transnational Crime Convention.<sup>98</sup> In the context of corruption, this article provides:

1. In addition to the measures set forth in article 8 of this Convention, each State Party shall, to the extent appropriate and consistent with its legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials.
2. Each State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions.<sup>99</sup>

A similar provision in the context of trafficking in persons would have been advisable in addressing criminalization. In contrast, the European Convention makes it clear that punishment for the crime of trafficking in human beings must be “effective, proportionate and dissuasive.”<sup>100</sup>

#### IV. IDENTIFYING THE TRAFFICKED PERSON AS A VICTIM WHO IS ENTITLED TO BASIC HUMAN RIGHTS

One of the most important elements of any model legislation is recognition of the trafficked person as a victim who is entitled to basic human rights. The U.N. Protocol presents trafficked persons as victims, but it does not define a victim of trafficking.<sup>101</sup> However, the term “victim of a crime” has been defined by the U.N. Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, which states that victims are “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States.”<sup>102</sup> A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted, or convicted.<sup>103</sup> Similarly, the European Council Framework Decision of March 15, 2001, on the Standing of Victims in Criminal Proceedings defines a victim as a “natural person

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98. Transnational Crime Convention, *supra* note 10, art. 9.

99. *Id.*

100. European Convention, *supra* note 7, art. 23(1).

101. *See generally* U.N. Protocol, *supra* note 6.

102. Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, G.A. Res 40/34, art. 1, U.N. Doc. A/RES/40/34 (Nov. 29, 1985) [hereinafter Victims of Crime Declaration].

103. *Id.* art. 2.

who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State.”<sup>104</sup> Apparently, then, this definition could also apply to trafficking victims. As European law relates directly to trafficking in persons, the European Convention provides that “‘Victim’ shall mean any natural person who is subject to trafficking in human beings.”<sup>105</sup>

Recognition of the trafficked person as a victim means adopting a victim-centered approach to trafficking in persons. This means that what I call the “Five V’s” must be taken into account. They are: the “victim,” the “derivative victim,” the “potential victim,” the “presumed victim,” and the “vulnerable victim.”

#### A. *The Victim*

The “victim” of the crime of trafficking in persons is the person who suffered harm, whether physical, mental, or economic harm. More specifically, a victim is anyone subjected to a combination of elements—acts, means, and purpose—as specified in article 3(a) of the U.N. Protocol<sup>106</sup> and article 4(a) of the European Convention.<sup>107</sup> However, when that person is a child, one is regarded as a victim even if none of the means specified in article 3(a) of the U.N. Protocol<sup>108</sup> and article 4(a) of the European Convention have been used.<sup>109</sup>

Recognition of the trafficked person as a victim requires the application of the principle of noncriminalization. That is, the law must excuse the victim from criminal liability for the acts committed as a

104. Council Framework Decision on the Standing of Victims in Criminal Proceedings 2001/220/JHA, 2001 O.J. (L 82) 1, art. 1(a) (EC) [hereinafter E.C. Decision].

105. European Convention, *supra* note 7, art. 4(e). Under Cyprus law, “‘victim’ means any person who is the subject of exploitation or any act prohibited by this Law or other Law or prescribed treaty punishable under this Law.” Combating of Trafficking in Persons and Sexual Exploitation of Children, No. 3(1), § 2(c) (2000) (Cyprus). Moldovan law defines a plaintiff as “any person or legal entity who, by a crime, was caused moral, physical, or pecuniary damages.” CRIM. PROC. CODE art. 58(1) (Mold.).

106. U.N. Protocol, *supra* note 6, art. 3(a).

107. European Convention, *supra* note 7, art. 4(a) (“‘Trafficking in human beings’ 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.”).

108. U.N. Protocol, *supra* note 6, art. 3(c). Under article 3(d), “‘Child’ shall mean any person under eighteen years of age.” *Id.* art. 3(d).

109. European Convention, *supra* note 7, art. 4(c). Under the European Convention, “‘Child’ shall mean any person under eighteen years of age.” *Id.* art. 4(d).



result of being trafficked. Victims of trafficking should be immune from such liability every time they commit an illegal act as long as those acts are related to their trafficking, whether this act is illegal entry, falsification of travel documents, or prostitution.

The principle of noncriminalization of the behavior of the victim of trafficking has been articulated in the United Nations Mission in Kosovo's (UNMIK) Regulation No 2001/4, On the Prohibition of Trafficking in Persons in Kosovo, which states that "a person is not criminally responsible for prostitution or illegal entry, presence or work in Kosovo if that person provides evidence that supports a reasonable belief that he or she was the victim of trafficking."<sup>110</sup>

By comparison, the U.S. TVPA does not explicitly provide for this principle. However, the TVPA does acknowledge that victims of trafficking "are repeatedly punished more harshly than the traffickers themselves," and that the victims should not be "penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation."<sup>111</sup> Further, in providing for a penalty of up to five years imprisonment in cases involving document falsification in furtherance of trafficking, involuntary servitude, and forced labor, the rule does not apply to the conduct of a victim of trafficking "if that conduct is caused by, or incident to, that trafficking."<sup>112</sup>

Another good example is provided by the U.S. Office to Monitor and Combat Trafficking in Persons Model Law to Combat Trafficking in Persons, promulgated in March 2003. The entitled "Victim Immunity [Exemption] from Prosecution," provides that "A victim of trafficking is not criminally liable for any migration-related offense, prostitution, [insert other crimes and references as appropriate], or any other criminal offense that was a direct result from being trafficked."<sup>113</sup> Other similar provisions utilize the language: if the acts were committed "as a result of being trafficked;"<sup>114</sup> if the acts were "directly related to the acts of trafficking . . . or . . . in relation thereto";<sup>115</sup> or if the offense is

110. UNMIK Regulation, *supra* note 96, § 8.

111. Trafficking Victims Protection Act of 2000, 18 U.S.C. § 7101(17), (19) (2000).

112. *Id.* § 1592(b).

113. Office to Monitor and Combat Trafficking in Persons, U.S. Dep't of State, Model Law To Combat Trafficking in Persons, § 208 (Mar. 12, 2003), *available at* [http://www.humantrafficking.com/humantrafficking/toolkits\\_ht3/DOS\\_Model\\_Law.htm](http://www.humantrafficking.com/humantrafficking/toolkits_ht3/DOS_Model_Law.htm) [alteration in original] [hereinafter OMCTIP Model Law].

114. No. 16 (Mar. 31, 2004) (Pan.) ("La víctima de la trata de personas no será responsable penalmente por hechos punibles relacionados con la migración, la prostitución o cualquier otro que sea el resultado directo de la trata de que haya sido objeto.")

115. Philippines Antitrafficking Act, *supra* note 5, § 17.

“nonpossession of valid travel stay or use of false travel or other document.”<sup>116</sup>

However, still interpreting trafficking in persons mainly as a crime against a state and not a threat to individual security, some countries make the application of the principle of noncriminalization contingent upon the victim’s willingness to cooperate with the state law enforcement officials in investigating and prosecuting the trafficking offense and testifying against the traffickers. The Dominican Republic law on trafficking falls into this category and provides for the exemption from criminal liability for victims of trafficking. More specifically, the law provides for the exclusion of victims of trafficking from prosecution for illegal entry, prostitution, illegal presence, unauthorized work, and other criminal acts that a victim might commit as a result of being trafficked.<sup>117</sup> The law, however, conditions this exemption upon collaborating or providing the identity of the person responsible for trafficking.<sup>118</sup>

The Moldovan Criminal Code similarly provides for the principle of noncriminalization of a victim of trafficking. Article 165(4) of the Code provides that “the victim of trafficking in human beings shall be exempted from criminal liability for the offences committed by him/her in connection to this status provided that he/she accepts to cooperate with the law enforcement body on the relevant case.”<sup>119</sup> The Moldovan Law therefore provides another example that makes the application of this principle contingent upon the victim’s “cooperation” with law enforcement authorities. In this regard, “cooperation” should be interpreted broadly to include any type of willingness to comply with any reasonable request for assistance in the investigation and prosecution of a trafficking case. Immunity should not be contingent upon the victim serving as a witness. If testimony is required, though, the state should guarantee the protection of the witness. This is the case of the Moldovan 1998 Law on State Protection of the Victim, of Witnesses and Other Persons Who Provide Assistance in the Criminal Proceedings. According to this law, state protection is granted to people who have informed law enforcement about crimes that have been committed; people who helped uncover, prevent, combat, investigate, or solve such crimes; witnesses; and victims

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116. Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, art. 37 (2003) (Nig.).

117. Illicit Traffic of Migrants and Trafficking in Persons, No. 137-03, art. 8 (2003) (Dom. Rep.).

118. *Id.*

119. CRIM. CODE art. 165(4) (Mold.).

and their legal representatives in criminal proceedings.<sup>120</sup> The law also provides for the protection of a person and the person's residence,<sup>121</sup> for temporary placement in safe locations,<sup>122</sup> for nondisclosure of data about the protected person,<sup>123</sup> for a change of identification documents,<sup>124</sup> and for the person's social protection.<sup>125</sup>

In August 2003, the Kyrgyz Republic became the first country in the region to decriminalize the acts committed by a victim of trafficking in connection with the act of trafficking.<sup>126</sup> However, the Kyrgyz Republic's law also requires victims to cooperate with investigators to be eligible for this benefit.<sup>127</sup>

The law of Romania exempts a victim of the crime of trafficking in persons "if, before the start of the criminal investigation . . . this person has reported the offence to the competent authorities or if, after the start of the criminal investigation or after the identification of the perpetrators, this person facilitates the arrest of those perpetrators."<sup>128</sup> Yet, the victim's immunity from liability for trafficking-related offenses should not be contingent upon the victim serving as a witness on behalf of the state. While the victim's testimony should be encouraged, it should not be required.

Unfortunately, the U.N. Protocol was silent as to the principle of noncriminalization of the behavior of the victim of trafficking.<sup>129</sup> In contradistinction, the European Convention provides that member states should not impose penalties on victims "for their involvement in unlawful activities, to the extent that they have been compelled to do so."<sup>130</sup>

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120. Privind protectia de stat a partii vatamate, a martorilor si a altor personae care acorda ajutor in procesul penal [Law on State Protection of the Victim, of Witnesses, and of Other Persons Who Provide Assistance in the Criminal Proceedings], No. 1458-XIII, art. 1 (1998) (Mold.) [hereinafter *Moldovan Witness Law*].

121. *Id.* art. 9.

122. *Id.* art. 11.

123. *Id.* art. 12.

124. *Id.* art. 13.

125. *Id.* art. 16.

126. CRIM. CODE art. 124, note 1 (Kyrg.).

127. *Id.* For a general discussion of combating trafficking in Central Asia, see Mohamed Y. Mattar, *State Responsibilities in Combating Trafficking in Persons in Central Asia*, 27 *LOY. L.A. INT'L & COMP. L. REV.* 145 (2005).

128. Law on the Prevention and Fighting Trafficking in Human Beings, No. 678, art. 20 (2001) (Rom.).

129. See generally U.N. Protocol, *supra* note 6.

130. European Convention, *supra* note 7, art. 26.

### B. *The Derivative Victim*

The “derivative victim” is one who is related to the victim of trafficking, such as a family member. The term “victim” also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power defines the term victim to include “the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”<sup>131</sup>

Under U.S. law, the derivative victim doctrine is applied in cases of victims seeking residence or seeking protection under the witness protection program. Under the TVPA, for example, an applicant for T-1 visa status may apply for derivative T status for his or her spouse (T-2), or child (T-3), or in the case of a person who is under the age of twenty-one applying for T-1 status, her parent (T-4).<sup>132</sup> U.S. law also allows the siblings of the victim to apply for such a residency status.<sup>133</sup> The TVPA also applies the derivative victim doctrine by including the members of the victim’s family, whenever appropriate, in the witness protection program.<sup>134</sup>

Victims of trafficking must be entitled to the right to privacy, which should extend to members of the victim’s family, in accordance with the derivative victim doctrine. The U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power calls for: “Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation.”<sup>135</sup> These measures must be explicitly recognized in any antitrafficking legislation.<sup>136</sup>

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131. Victims of Crime Declaration, *supra* note 102, art. 2.

132. Trafficking Victims Protection Act of 2000, 18 U.S.C. § 7105 (2000).

133. The application for a derivative status for family members of trafficking victims may be filed at the time of the original T-1 application or at a later date. *Id.*

134. According to a related part of the United States Code, entitled “Witness Relocation and Protection,” “The Attorney General may also provide for the relocation and other protection of the immediate family of, or a person otherwise closely associated with, such witness or potential witness if the family or person may also be endangered on account of the participation of the witness in the judicial proceeding.” 18 U.S.C. § 3521(a)(1).

135. Victims of Crime Declaration, *supra* note 102, art. 6(d).

136. For example, the law of Bulgaria provides that the victims of illegal trafficking in human beings are to be treated with confidentiality and that the law will protect their identity. Combating Trafficking in Human Beings Act, No. 46/20, art. 20 (2003) (Bulg.). Dominican Republic law provides for the government to protect the privacy and identity of victims of

### C. *The Vulnerable Victim*

The “vulnerable victim” is a victim who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct. So, “a child victim” is always a vulnerable victim who should be entitled to special protection under antitrafficking laws. The U.N. Protocol recognized the “special need[s] of children, including appropriate housing, education and care.”<sup>137</sup> The European Convention is more detailed in providing for such special needs. The European Convention calls for a “child-rights approach”<sup>138</sup> and “a child-sensitive approach in the development, implementation and assessment of all the policies and programmes.”<sup>139</sup> In identifying victims of trafficking, the European Convention calls for “taking into account the special situation of . . . child victims,”<sup>140</sup> especially “when the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special protection measures pending verification of his/her age.”<sup>141</sup> Under the European Convention, once an unaccompanied child is identified as a victim, the child should be entitled to representation by a legal guardian or other, and the state must take the necessary steps to establish identity and nationality and unite the child with his or her family.<sup>142</sup> In addition, the European Convention states that the privacy of the child victim must be protected, any residence permit must be issued for a child victim in the best interest of the child,<sup>143</sup> and such child should be allowed this status if it is not in the best interest of the child to return to his/her country of origin based upon “a risk and security

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trafficking. It will also provide legal assistance during criminal proceedings against traffickers. Illicit Traffic of Migrants and Trafficking in Persons, No. 137-03, art. 9 (2003) (Dom. Rep.). Article 20 of the Mexican Draft Law to Prevent and Punish Trafficking in Persons provides for protecting “the identities of victims of trafficking in persons and their families to make sure that the information is not known by the public and to safeguard judicial interventions.” (on file with author) [hereinafter Mexican Draft Law]. For a discussion of this law, see Mohamed Y. Mattar, Executive Dir. of the Protection Project at The Johns Hopkins University School of Advanced International Studies, Remarks on the Anti-Trafficking Law of Mexico, Presented to the Senate of Mexico (Oct. 17, 2005), *available at* [http://www.protectionproject.org/speeches/mexico\\_testimony\\_oct05.pdf](http://www.protectionproject.org/speeches/mexico_testimony_oct05.pdf).

137. U.N. Protocol, *supra* note 6, art. 6(4).

138. European Convention, *supra* note 7, pmbl. ¶ 6.

139. *Id.* art. 5(3).

140. *Id.* art. 10(1).

141. *Id.* art. 10(3).

142. *Id.* art. 10(4).

143. In contrast, the U.S. TVPA does not require a child to cooperate with law enforcement officials to be eligible for a residency status. *See* Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7105 (2000).

assessment.<sup>144</sup> A special protection should also be granted to a child witness,<sup>145</sup> especially during court proceedings.<sup>146</sup> The U.N. Protocol recognizes that trafficking in persons may arise in cases involving “abuse . . . of a position of vulnerability.”<sup>147</sup> The *travaux préparatoires* to the Protocol state that “the reference to the abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.”<sup>148</sup> The European Council Framework Decision of July 19, 2002, On Combating Trafficking in Human Beings, adopts that definition and provides that an act of trafficking is punishable when “there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved.”<sup>149</sup>

It is encouraging that U.S. courts recognize the Vulnerable Victim Sentence Enhancement Doctrine to cases of trafficking to enhance the penalties in cases of trafficking. Two important cases explain this doctrine: *United States v. Castaneda*, in which the owner of the Mood and Music club recruited women from the Philippines to work as waitresses and then made them line up to perform sexual services for clients;<sup>150</sup> and *United States v. Veerapol*, in which the wife of the Thai ambassador recruited Thai nationals to work as domestic servants and then abused them.<sup>151</sup>

In the *Castaneda* case, Circuit Judge Silverman, in his dissent, argued for the application of the Vulnerable Victim Doctrine. He stated:

It is difficult to understand how the majority can equate (1) a woman who is intentionally tricked into leaving her home in a foreign country on the promise of a legitimate job, and then—in the words of the plea agreement—“forced to line up for selection by male customers to accompany them to private . . . rooms” and there, “made to provide sexual services,” with (2) a professional prostitute who willingly agrees to travel across state lines for the purpose of prostitution.<sup>152</sup>

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144. See European Convention, *supra* note 7, art. 10(4).

145. *Id.* art. 28(3).

146. *Id.* art. 30.

147. U.N. Protocol, *supra* note 6, art. 3(a).

148. Interpretative Notes for the Official Records (*travaux préparatoires*) of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, ¶ 63, U.N. Doc A/55/383/Add.1 (Nov. 3, 2000).

149. E.C. Framework, *supra* note 29, art. 1(c).

150. *United States v. Castaneda*, 239 F.3d 978, 979 (9th Cir. 2001).

151. *United States v. Veerapol*, 312 F.3d 1128, 1130 (9th Cir. 2002).

152. *Castaneda*, 239 F.3d at 983 (Silverman, J., dissenting).

In the opinion of Judge Silverman, this case involved much more than ordinary economic vulnerability because the victim in this case was tricked into leaving her country by the promise of a job. Under this deception, she was then stranded in a foreign country and, “‘couldn’t just pack up and go home.’”<sup>153</sup> Moreover, since the victim was an indentured nonresident alien worker under Northern Mariana Islands law, she could not work elsewhere.<sup>154</sup>

Similarly, in the *Veerapol* case, the court used the vulnerable victim sentencing adjustment, stating that the victim was “vulnerable based on her immigrant status and the circumstances in which the immigrant status was exploited . . . . The victim was basically a poor uneducated woman, lacking in sophistication, in the knowledge of the United States laws, and . . . that was also exploited.”<sup>155</sup>

The Vulnerable Victim Enhancement Doctrine is also applied in other countries.<sup>156</sup> It simply means that if the criminal takes advantage of a condition of vulnerability of his victim, his penalty should be enhanced. However, legal systems define “vulnerability” differently.<sup>157</sup>

153. *Id.* at 984 (Silverman, J., dissenting) (quoting the district court judge below).

154. *Id.* (Silverman, J., dissenting).

155. *Veerapol*, 312 F.3d at 1133. In addition, in *United States v. Kedjumnong*, the United States Court of Appeals for the Second Circuit affirmed the decision against defendants who transported women from Thailand to New York City. The defendants in this case held these women prisoners at a brothel and forced them to have sex with hundreds of men, physically threatened them, and prevented them from leaving the brothel except under supervision. The Court stated: “The vulnerability enhancement was clearly warranted because the victims were young, unable to speak English, unfamiliar with their surroundings and fearful of going to authorities for fear of deportation.” 95-1620(L), 95-1654(CON), 1996 U.S. App. LEXIS 13581, at \*2-4 (2d Cir. June 7, 1996).

156. For example, article 7A of the Dominican Republic law provides a five-year enhancement penalty when the trafficker takes advantage of a vulnerable victim. Illicit Traffic of Migrants and Trafficking in Persons, No. 137-03, art. 7A (2003) (Dom. Rep.). Similarly, Greek law provides that the penalty for the crime of trafficking is enhanced if the trafficker misleads the victims taking advantage of that person’s vulnerable position, with promises, gifts, money or other benefits. Greek Antitrafficking Law, *supra* note 5. Australian law provides that in deciding a trafficking case the jury may take into consideration the personal circumstances of the person, including but not limited to: “the person’s ability to speak, write and understand English or the language in which the deception or inducement occurred; and . . . the extent of the person’s social and physical dependence on the alleged offender.” Criminal Code Amendment (Trafficking in Persons Offences) Act, 2005, c.96, § 7, sched. 1 (amending § 270.7(1) of the Criminal Code) (Austl). Finally, Romanian law states that taking advantage of a “person’s inability to defend him-/herself or to express his/her will” is considered an illegal act in the context of trafficking. Law on the Prevention and Fighting Trafficking in Human Beings, No. 678, art. 12(1) (2001) (Rom.).

157. The Criminal Code of Belgium provides for enhanced sentences if the trafficker “abuses a particularly vulnerable situation in which a foreigner finds himself/herself due to his/her illegal administrative or precarious situation, pregnancy, sickness, disability, physical or mental deficiency.” CRIM. CODE art. 77bis § 1(2) (Belg.). Similarly, under the Penal Code of Djibouti procurement is punished “with respect to a person who is particularly vulnerable by reason of that person’s age, illness, infirmity, physical or mental disability, or state of pregnancy,

Nonetheless, regardless of how it is defined, this doctrine should be adopted as a part of all antitrafficking legislation.

#### *D. The Potential Victim*

The “potential victim” is one that has not yet been trafficked, but there is a “danger” or “risk” that such a person may be trafficked. The appropriate legal response here is adopting preventive measures.<sup>158</sup>

#### *E. The Presumed Victim*

The “presumed victim” is one that has been trafficked but has not yet been identified and thus falls outside the protection of the legal system. Without such identification, state actors cannot effectively help those trafficked. Therefore, identification of victims of trafficking is crucial.

#### *F. Rights of Identified Victims*

##### 1. Identifying Victims

While the U.N. Protocol was silent as to the issue of identification of trafficking victims, the European Convention specifically addressed it.<sup>159</sup> In fact, article 10 of this convention imposes upon member states several obligations in regard to the identification of victims of trafficking in persons.<sup>160</sup> First, a state is obligated to provide its authorities with persons trained and qualified to identify victims.<sup>161</sup> Second, states have

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when this circumstance is apparent or known to the perpetrator.” PENAL CODE art. 396(2) (Djib.). Article 3 of the Mexican draft law to Prevent and Punish Trafficking in Persons describes taking advantage of vulnerability as a situation “when the victim of trafficking in persons does not have a reasonable alternative to the labor or services demanded of him or her; [it also includes] among others, taking advantage of the risks involved in the crossing of borders, with or without documentation, pregnancy, any physical or mental disability including substance addiction, and impaired incapacity to make decisions because of age.” Mexican Draft Law, *supra* note 136, art. 3. Finally, the OMCTIP Model Law to Combat Trafficking in Persons defines the abuse of a position of vulnerability as

such abuse that the person believes he or she has no reasonable alternative but to submit to the labor or service demanded on the person, and includes but is not limited to taking advantage of the vulnerability resulting from the person having entered the country illegally or without proper documentation, pregnancy, any physical or mental disease or disability of the person, including addiction to the use of any substance, or reduced capacity to form judgments by virtue of being a child.

OMCTIP Model Law, *supra* note 113, § 108.

158. For examples of preventive measures, see *infra* Part V.

159. European Convention, *supra* note 7, art. 10.

160. *Id.*

161. *Id.* art. 10(1).



an obligation to “adopt such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other parties and relevant support organisations.”<sup>162</sup> In the case of child victims of trafficking, the Convention further establishes that “[w]hen the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special protection measures pending verification of his/her age.”<sup>163</sup> In addition, the Convention imposes an obligation upon the states, as soon as an unaccompanied child is identified as a victim, to provide for representation of the child, to take the necessary steps to establish his/her identity and nationality, and to try to locate the child’s family if in the best interests of the child.<sup>164</sup>

This kind of recognition of the trafficked person as a victim is important because it entitles such a person to basic or fundamental rights.<sup>165</sup> In 2002, I declared a Bill of Rights on behalf of victims of trafficking, arguing that the following ten rights should be guaranteed to trafficking victims in any model legislation: (1) the right to safety, (2) the right to privacy, (3) the right to information, (4) the right to legal representation, (5) the right to be heard in court, (6) the right to compensation for damages, (7) the right to medical assistance, (8) the right to social assistance, (9) the right to seek residence, and (10) the right to return.<sup>166</sup> In addition to these enumerated rights, victims of trafficking should be treated with dignity, fairness, compassion and respect for their human rights.<sup>167</sup> I will discuss three of these rights in detail: the right to safety, the right to compensation, and the right to seek residency.

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162. *Id.* art. 10(2).

163. *Id.* art. 10(3).

164. *Id.* art. 10(4).

165. The European Convention on the Compensation of Victims of Violent Crimes is one such document that provides for the rights of a victim of a crime. Nov. 24, 1983, EUROP. T.S. No. 116. Likewise, the United States Victims of Crime Act of 1984, 18 U.S.C. §§ 3013, 3681-3682, 42 U.S.C. §§ 10601-10605 (2000); the Victims Rights and Restitution Act of 1990, 42 U.S.C. § 10607 (2000); the Victim and Witness Protection Act of 1982 (VWPA), 18 U.S.C. §§ 1512-1514, 3663-3664 (2000); and the Victim Rights Clarification Act of 1997, 18 U.S.C. § 3510 (2000), all provide for the rights of a victim of a crime.

166. Mohamed Y. Mattar, *Establishing a Bill of Rights for Victims of Trafficking in Persons: How it Can Become a Possibility*, in STOP TRAFFICKING IN HUMAN BEINGS—TOGETHER IT’S POSSIBLE: PROCEEDINGS OF THE INTERNATIONAL CONFERENCE “21ST CENTURY SLAVERY—THE HUMAN RIGHTS DIMENSION TO TRAFFICKING IN HUMAN BEINGS,” MAY 15-16, 2002, at 47 (2002).

167. *Id.*

## 2. The Right to Safety

Victims of trafficking should be entitled to the right to safety and included in any state-sponsored witness protection program.<sup>168</sup> As explained above, if the country does require the victim of trafficking to testify against one's traffickers, then the victim should be provided with witness protection as a prerequisite to coming forward and testifying. The safety of the person needs to be protected while one is testifying for the state. However, in most of the European countries that have witness protection laws, the criteria for application of such programs are so strict that victims of trafficking can rarely meet the standard. Moreover, countries such as Belgium, Denmark, Finland, France, Luxemburg, Sweden, and most of the countries in Eastern and Southeast Europe do not have any formal witness protection programs at all.<sup>169</sup> Nonetheless, protection of witnesses is an internationally recognized principle provided for in both the Transnational Crime Convention<sup>170</sup> and the

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168. Such a program does not apply except when a witness is testifying in cases involving serious crimes. For instance, the witness protection program under the U.S. law provides for protection of a witness in proceedings concerning "an organized criminal activity or other serious offense." 18 U.S.C. § 3521(a)(1) (2000). As such, the TVPA had to recognize trafficking as "an organized criminal activity or other serious offense" for the purpose of applying the witness protection program to victims of trafficking. Trafficking Victims Protection Act of 2000, 18 U.S.C. § 1594(d) (2000).

169. Recently, a number of countries enacted special witness protection laws including the law of July 14, 1999, of Portugal, Governing the Enforcement of Measures on the Protection of Witnesses in Criminal Proceedings, No. 93, 1999 (Port.); the legislation of March 2, 2001, of Bosnia and Herzegovina, Law on Special Witness Identity Protection in Criminal Proceedings in the Federation of Bosnia and Herzegovina, No. 17, (2001) (Bosn. & Herz.); *trestní zákon* [Criminal Code] č. 137 (2001) (Czech Rep.); the Moldovan Witness Law, *supra* note 120; and the August 31, 2001, Witness Protection Program Act, 1996, S.C., ch. 15 (Can.). Other legal systems should adopt similar measures to include victims of trafficking in witness protection programs. Examples of countries that have already enacted a witness protection program include Azerbaijan, and Myanmar. The antitrafficking law of Azerbaijan provides:

- 18.2. Security measures applied with regard to persons who suffered from human trafficking shall continue until the danger is completely past including preliminary investigation about crimes connected with human trafficking, court examination, as well as the period after declaring the final decision of the court.
- 18.3. False names can be used with an aim to ensure anonymity of the personality of persons who suffered from human trafficking.

Fight Against Human Trafficking, art. 18.2-18.3 (June 28, 2005) (Azer.). Under the Antitrafficking in Persons law of the Union of Myanmar, if the trafficked victims are women, children, or youths, the court will conduct the trial of offenses of trafficking in persons "not in open Court, but in camera for preservation of their dignity, physical and mental security." The Anti Trafficking in Persons Law, No. 5/2005, art. 11(a) (2005) (Myan.).

170. Article 24 of this Convention, "Protection of Witnesses," provides:

1. Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this

United Nations Convention Against Corruption<sup>171</sup> and should be implemented in all states.

### 3. The Right to Compensation

A victim of trafficking should also be entitled to the right to compensation. While this is an element that should be included in any antitrafficking legislation, the detailed implementation of such an element should be left to the particular legal system. For instance, the U.S. TVPA provides for mandatory restitution to be ordered by the criminal court for any trafficking offense.<sup>172</sup> Restitution under this section is a criminal sanction. The TVPA does not provide for a private civil action for damages, although it allows for such possibility under relevant statutes since § 1593 provides for mandatory restitution “in addition to any other civil or criminal penalties authorized by law.”<sup>173</sup> In

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Convention and, as appropriate, for their relatives and other persons close to them.

2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:
  - (a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;
  - (b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communications technology such as video links or other adequate means.
3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.
4. The provisions of this article shall also apply to victims insofar as they are witnesses.

Transnational Crime Convention, *supra* note 10, art. 24.

171. United Nations Convention against Corruption, G.A. Res 58/4, art. 32, U.N. Doc A/Res/58/4 (Oct. 31, 2003) [hereinafter U.N. Corruption Convention].

172. 18 U.S.C. § 1593. Similarly, the Moldovan Code of Criminal Procedure provides victims of trafficking in persons, among others, with the right “to receive on behalf of the state the compensation of the damage caused as a consequence of a crime” and the right “to receive the compensation of the expenses s/he had in the criminal case as well as of the damage caused as a consequence of illegitimate actions of the criminal investigation bodies.” CRIM. PROC. CODE art. 60(1)(16)-(17) (Mold.). Under article 11 of the Mexican Draft Law To Prevent and Punish Trafficking in Persons, a defendant sentenced for trafficking in persons is ordered to pay damages to victims, consisting of “the cost of psychological or medical treatments, the costs of physical therapy, transportation, temporary housing and daycare costs, missed income, honorarium of victims’ lawyers, damages for emotional distress, pain and suffering, and any other loss suffered by the victim.” Mexican Draft Law, *supra* note 136, art. 11.

173. 18 U.S.C. § 1593. In this context, § 1593, “Mandatory Restitution” provides:

2003, the TVPA was amended by the United States Trafficking Victims Protection Reauthorization Act of 2003 (2003 TVPRA), which now provides, in § 1595, that a victim of a severe form of trafficking

may bring a civil action against the perpetrator in an appropriate district court of the United States and may recover damages and reasonable attorneys fees. . . . Any civil action filed under this section shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim.<sup>174</sup>

Other legal systems also recognize the right of a victim of trafficking to seek damages in a civil court. For instance, according to article 8(1) of Cyprus's Combating of Trafficking in Persons and Sexual Exploitation of Children Law of 2000, "the victims of [trafficking] have an additional right for damages against any person who is responsible for their exploitation, and is liable for damages, special and general."<sup>175</sup>

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- (a) Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any offense under this chapter.
  - (b)
    - (1) The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses, as determined by the court under paragraph (3) of this subsection.
    - (2) An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.
    - (3) As used in this subsection, the term 'full amount of the victim's losses' has the same meaning as provided in section 2259(b)(3) and shall in addition include the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. 201 et seq.).
  - (c) As used in this section, the term 'victim' means the individual harmed as a result of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or a representative of the victim's estate, or another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named such representative or guardian.

*Id.*

174. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(a)(4)(A), 117 Stat. 2875, 2878 (2003) (introducing 18 U.S.C. § 1595).

175. Combating of Trafficking in Persons and Sexual Exploitation of Children, No. 3(1), art. 8(1) (2000) (Cyprus). Article 8 further states:

The above-mentioned general damages must be just and reasonable and in their assessment the Court may take into consideration the following:

- (a) the extent of the exploitation and the benefit the liable derived from such exploitation,
- (b) the future prospects of the victim and the extent to which such prospects were affected by the exploitation,
- (c) the culpability of the offender, and

Some antitrafficking laws explicitly provide for compensating the victims of trafficking for moral damages<sup>176</sup> and paying them restitution.<sup>177</sup> In addition, some laws provide for paying the damages to victims of trafficking out of the property of traffickers.<sup>178</sup>

Further, many member states have introduced confiscation provisions requiring a less challenging evidentiary basis for certain crimes.<sup>179</sup> This is the case of article 12 of the Italian law n.356/1992. This article establishes, in the case of conviction for certain criminal offenses—including trafficking in persons (after law 228/2003), participation in an organized criminal group, and kidnapping—mandatory confiscation of all monies, property, and other pecuniary resources, which are under direct or indirect control of the offender, when their value appears to be out of all proportions to one's income and

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- (d) the relationship or the dominating position or influence of the offender with regard to the victim.

*Id.* art. 8(2).

176. For example, the law of Panama states that in case the traffickers are found guilty, the court will compensate the victims of trafficking for their medical and psychological expenses; transportation and living expenses; loss of earnings; legal expenses; and moral damages. No. 16, art. 20 (2004). Similarly, Dominican Republic law provides that the proceeds of the fines of the crime of trafficking shall be used to compensate the victims of trafficking for material damages as well as moral damages and to establish the programs and projects of protection and assistance that the law provides for the victims of trafficking. *Illicit Traffic of Migrants and Trafficking in Persons*, No. 137-03, art. 2, ¶ II (2003) (Dom. Rep.).

177. Article 38 of an Indonesian Draft Law entitles “every victim or his/her beneficiary, as a result of the crime of trafficking in persons” to receive restitution. *Combat Against the Crime of Trafficking in Persons Draft Law*, art. 38 (Indon.) (on file with author) [hereinafter *Indonesian Draft Law*].

178. For example, the Azerbaijani antitrafficking law provides that “[d]amage to persons who suffered from human trafficking shall be paid off from the property of human traffickers in accordance with the procedural legislation. If this property would not suffice, damages, by court decision, can be paid out from assistance fund for the victims of human trafficking.” *Fight against Human Trafficking*, art. 23.2 (June 28, 2005) (Azer.). This applies to both material and moral damages. *Id.* art. 23.1. Similarly, under Nigerian law, “a trafficked person, irrespective of his immigration status, is entitled to compensation, restitution and recovery.” *Trafficking in Persons (Prohibition) Law Enforcement and Administration Act*, art. 38 (2003) (Nig.).

179. For example, the antitrafficking law of Azerbaijan provides that all the property obtained from human trafficking, including real estate, financial means, securities, and other forms of property will be confiscated if a court so decides and then transferred to a specially established assistance fund for the victims of human trafficking, which will pay for things such as social rehabilitation, medical costs, and other necessary expenses. *Fight Against Human Trafficking*, art. 22 (June 28, 2005) (Azer.). Similarly, the Philippines' antitrafficking law provides for confiscation and forfeiture of the proceeds and instruments derived from trafficking in persons in favor of the government. Under this section, all fines imposed by the court, together with the proceeds or properties confiscated due to use in trafficking, accrue to a trust fund administered by the Interagency Council Against Trafficking. This fund is to be used exclusively for programs that “will prevent acts of trafficking and protect, rehabilitate, [and] reintegrate trafficked persons into the mainstream of society.” *Philippines Antitrafficking Act*, *supra* note 5, § 15.

that person is unwilling or unable to provide a satisfactory explanation.<sup>180</sup> In the case of trafficking in persons, the sums resulting from the confiscation will finance the Fund for Anti-Trafficking Measures, which is designed to finance programs of assistance and social integration in favor of the victims.<sup>181</sup>

Assets confiscated by the state should be utilized to compensate the victim. This concept is expressed in the 2001 European Council Framework Decision on Money Laundering, the Identification, Tracing, Freezing, Seizing and Confiscation of Instrumentalities and the Proceeds of Crime.<sup>182</sup> This follows the March 2001 Council Framework Decision on the Standing of Victims in Criminal Proceedings.<sup>183</sup> This decision, based on Title VI of the Treaty on the European Union, allows crime victims to claim compensation from the offender in the course of criminal proceedings.<sup>184</sup> Similarly, the April 29, 2004, Council Directive Relating to Compensation to Crime Victims provides that "crime victims in the European Union should be entitled to fair and appropriate compensation for the injuries they have suffered, regardless of where in the European Community the crime was committed."<sup>185</sup> This directive sets up a system of cooperation to facilitate access to compensation to victims of crimes in cross-border situations, which should operate on the basis of member states' schemes on compensation to victims of violent intentional crime, committed in their respective territories. Therefore, a compensation mechanism should be in place in all member states. The Directive explains that "[c]rime victims will often not be able to obtain compensation from the offender, since the offender may lack the necessary means to satisfy a judgment on damages or because the offender cannot be identified or prosecuted."<sup>186</sup> Therefore:

- (11) A system of cooperation between the authorities of the Member States should be introduced to facilitate access to compensation in cases where the crime was committed in a Member State other than that of the victim's residence.

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180. *Confisca di Beni ai Sensi Dell'art* [Confiscation of Criminal Assets] No. 356 (1992) (Italy).

181. *Id.*

182. Council Framework Decision on Money Laundering and the Identification, Tracing, Freezing, Seizing and Confiscation of Instrumentalities and the Proceeds of Crime, 2001/500/JHA, 2001 O.J. (L. 182) 1-2 (EC).

183. E.C. Decision, *supra* note 104, art. 9.

184. *Id.*

185. Council Directive Relating to Compensation to Crime Victims 2004/80/EC, *pmb.* ¶ 6, 2004 O.J. (LV 261) 15-18 (EC).

186. *Id.*, *pmb.* ¶ 10.

- (12) This system should ensure that crime victims could always turn to an authority in their Member State of residence and should ease any practical and linguistic difficulties that occur in a cross-border situation.<sup>187</sup>

Similarly, article 15(3) and (4) of the European Convention provide:

- (3) Each Party shall provide, in its internal law, for the right of victims to compensation from the perpetrators.
- (4) Each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims, which could be funded by the assets resulting from the application of measures provided in Article 23 [confiscation of the proceeds of crimes].<sup>188</sup>

The U.N. Protocol also covers the issue of compensation for victims of trafficking. Article 6(6) provides: “Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.”<sup>189</sup>

There is widespread recognition of the fact that crime victims, in many cases, cannot obtain compensation from the offender. This may be the case when the offender remains unknown or cannot be successfully prosecuted, or where the offender lacks the means to compensate the victim. Other sources, such as compulsory or private insurance, may not provide an adequate cover for the losses sustained by the victim. Consequently, victims can be considered as being in a worse situation than other groups who suffer injury or losses of various kinds, for example, due to illness, accidents, or unemployment.

The obstacles for victims to get compensation from the offender are hard to overcome through measures in the area of civil law, civil proceedings, or the enforcement of judgments. For example, at least eleven member states have introduced state-funded compensation schemes with a general scope of application that allow for compensating victims of crime for the injuries suffered.<sup>190</sup>

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187. *Id.*, pmb. ¶¶ 11-12.

188. European Convention, *supra* note 7, art. 15(3)-(4).

189. U.N. Protocol, *supra* note 6, art. 6(6).

190. Christian Bochmann & Kai-Uwe Griesheim, European Inst. for Crime Prevention and Control, *Compensation Practices of States of the European Union Connected to Crimes Against Women* (HEUNI Paper No. 12, 1999) The eleven countries are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Netherlands, Portugal, Spain, and Sweden. *Id.*

#### 4. The Right to Residency

A victim of trafficking must also be entitled to the right to seek residency in the country of destination. The immediate return of the victims to their home countries is unsatisfactory both for the victims and for the law enforcement authorities endeavoring to combat trafficking. For the victims, this means having to start again from scratch—a failure, that in most cases, they will keep quiet about, with the result that nothing will be done to prevent other victims from falling into the same trap. A further factor is fear of reprisals by the traffickers, either against the victims themselves or against family or friends in the country of origin. For law enforcement, if the victims continue to live clandestinely in the country or are removed immediately, they cannot give information for effectively combating such traffic. The greater victims' confidence that their rights and interests will be protected, the better the information they will give. Thus, availability of residence permits is a measure calculated to encourage them to cooperate.

Under the U.S. model,<sup>191</sup> a victim of trafficking is granted immigration status if such person “is or has been a victim of a severe form of trafficking in persons,” “is physically present in the United States,” “has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking or has not attained 15 years of age” and “would suffer extreme hardship involving unusual and severe harm upon removal” from the United States.<sup>192</sup> The United States, therefore, does not require the victim of trafficking to testify to be eligible for a residency status. U.S. law also interprets “extreme hardship” very broadly to include cases where the victim fears reprisal in her country of origin, which includes being penalized by the authorities therein, losing legal access to U.S. courts or medical care provided by U.S. medical facilities, failing to integrate in the society, or fearing the possibility of revictimization.<sup>193</sup> Granting immigration status in this case is contingent upon compliance with any reasonable request by the government to assist in any way in the investigation or prosecution of the act of trafficking.

Unlike the U.S. law, the European Council Directive of April 29, 2004, On the Residence Permit Issued to Third-Country Nationals Who

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191. See generally Tala Hartsough, *Asylum for Trafficked Women: Escape Strategies Beyond the T Visa*, 13 HASTINGS WOMEN'S L.J. 77 (2002); Jennifer M. Wetmore, *The New T Visa: Is the Higher Extreme Hardship Standard Too High for Bona Fide Trafficking Victims?*, 9 NEW ENG. J. INT'L & COMP. L. 159 (2003).

192. Trafficking Victims Protection Act of 2000, 18 U.S.C. § 7105(e)(1) (2000).

193. *Id.* § 7105(c).



Are Victims of Trafficking in Human Beings or Who Have Been the Subject of an Action To Facilitate Illegal Immigration, Who Cooperate with the Competent Authorities, provides for a so-called “reflection period” for the victims to allow them to recover and decide whether to cooperate with law enforcement authorities.<sup>194</sup> Similarly, the European Convention provides for a reflection period as an initial phase in providing a residency status for victims of trafficking.<sup>195</sup> The European

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194. Council Directive On the Residence Permit Issued to Third-Country Nationals Who Are Victims of Trafficking in Human Beings or Who Have Been the Subject of an Action to Facilitate Illegal Immigration, Who Cooperate with the Competent Authorities, 2004/81/EC, 2004 O.J. (L 261) 19-23 (EC). Article 6 of the Directive provides:

1. Member States shall ensure that the third-country nationals concerned are granted a reflection period allowing them to recover and escape the influence of the perpetrators of the offences so that they can take an informed decision as to whether to cooperate with the competent authorities.

The duration and starting point of the period referred to in the first subparagraph shall be determined according to national law.

2. During the reflection period and while awaiting the decision of the competent authorities, the third-country nationals concerned shall have access to . . . treatment . . . and it shall not be possible to enforce any expulsion order against them.
3. The reflection period shall not create any entitlement to residence under this Directive.
4. The Member State may at any time terminate the reflection period if the competent authorities have established that the person concerned has actively, voluntarily and on his/her own initiative renewed contact with the perpetrators of the offences referred to in Article 2(b) and (c) or for reasons relating to public policy and to the protection of national security.

*Id.* art. 6. In addition, article 8(1) provides:

After the expiry of the reflection period, or earlier if the competent authorities are of the view that the third-country national concerned has already fulfilled the criterion set out in subparagraph (b), Member States shall consider:

- (a) the opportunity presented by prolonging his/her stay on its territory for the investigations or the judicial proceedings, and
- (b) whether he/she has shown a clear intention to cooperate, and
- (c) whether he/she has severed all relations with those suspected of acts that might be included among the offences referred to in Article 2(b) and (c).

*Id.* art. 8(1).

195. Article 13 of the convention, entitled “Recovery and Reflection Period” reads:

Each Party shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim. Such a period shall be sufficient for the person concerned to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities. During this period it shall not be possible to enforce any expulsion order against him or her. This provision is without prejudice to the activities carried out by the competent authorities in all phases of the relevant national proceedings, and in particular when investigating and prosecuting the offences concerned. During this period, the Parties shall authorize the persons concerned to stay in their territory.

. . . .

Convention also mandates that states parties grant victims of trafficking a residency status not only in cases of “their co-operation with the competent authorities in investigations or criminal proceedings,”<sup>196</sup> but also when “the competent authority considers that their stay is necessary owing to their personal situation.”<sup>197</sup> By comparison, the U.N. Protocol calls upon countries to “give appropriate consideration to humanitarian and compassionate factors” in considering granting victims of trafficking a resident permit.<sup>198</sup> Unfortunately, the U.N. Protocol does not mandate a state obligation to grant a victim of trafficking residency status. According to the Legislative Guide for the Implementation of the U.N. Protocol:

There is no obligation to legislate measures relating to the status of victims. However, in several countries where measures have been adopted for the temporary or permanent residence for victims of trafficking, such as Belgium, Italy, The Netherlands and the United States of America, such measures have had a positive effect on victims coming forward to testify against traffickers and on non-governmental organizations encouraging victims to whom they provide services to report incidents to the government.<sup>199</sup>

The real question is whether trafficking in persons is to be considered a crime against the state or a crime against the individual. A humanitarian basis should constitute the ground for granting victims of trafficking an immigration status. Deportation is still the norm in most parts of the world, including the countries of the Middle East, Latin America, Africa, and Asia.<sup>200</sup> This reflects a traditional immigration law approach that henceforth should be abolished.

Legal systems differ as to the basis of granting victims of trafficking a residency status.<sup>201</sup> In Belgium, a residency status is

The Parties are not bound to observe this period if grounds of public order prevent it or if it is found that victim status is being claimed improperly.

European Convention, *supra* note 7, art. 13.

196. *Id.* art. 14(1)(b).

197. *Id.* art. 14(1)(a).

198. U.N. Protocol, *supra* note 6, art. 7(2).

199. U.N. LEGISLATIVE GUIDES, *supra* note 2, pt. II, ¶ 68 (discussing article 7 of the U.N. Protocol).

200. See Mohamed Y. Mattar, *Trafficking In Persons, Especially Women And Children, In Countries Of The Middle East: The Scope Of The Problem And The Appropriate Legislative Responses*, 26 FORDHAM INT'L L.J. 721, (2003).

201. Article 14 of the European Convention, entitled “Residence permit” reads:

- (1) Each Party shall issue a renewable residence permit to victims, in one or other of the two following situations or in both:
  - a) the competent authority considers that their stay is necessary owing to their personal situation;

dependent upon the “legal proceedings.”<sup>202</sup> First, a forty-five-day period is granted to allow the victim to decide whether to make statements (a complaint against the trafficker) or to prepare for a return to his or her country of origin. Second, a victim who has made a statement or filed a complaint during the forty-five day period receives a temporary permit valid for three months and a temporary work permit for the same period. Third, if the prosecuting authorities decide to proceed with the case, the residency permit becomes valid for a longer period, usually six months, which may be renewed until legal proceedings are concluded.<sup>203</sup> Then, the victim returns to his/her country of origin.<sup>204</sup>

In Germany, the Aliens Act grants victims of trafficking a grace period of at least twenty-eight days to decide whether to cooperate with the authorities as witnesses or to prepare to return to their country of origin.<sup>205</sup> In Hungary, the Alien Act provides for the possibility of suspending an expulsion order against victims of trafficking if they intend to testify against their traffickers.<sup>206</sup> In Italy, the Immigration Law of 1998 provides victims of trafficking who are aliens a special residency permit for a six-month period, regardless of whether they testify.<sup>207</sup> In

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- b) the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.
  - (2) The residence permit for child victims, when legally necessary, shall be issued in accordance with the best interests of the child and, where appropriate, renewed under the same conditions.
  - (3) The non-renewal or withdrawal of a residence permit is subject to the conditions provided for by the internal law of the Party.
  - (4) If a victim submits an application for another kind of residence permit, the Party concerned shall take into account that he or she holds, or has held, a residence permit in conformity with paragraph 1.
  - (5) Having regard to the obligations of Parties to which Article 40 of this Convention refers, each Party shall ensure that granting of a permit according to this provision shall be without prejudice to the right to seek and enjoy asylum.

European Convention, *supra* note 7, art. 14.

202. Circular Regarding the Issuing of Residence Documents and Work Permits to Migrant Victims of Trafficking in Human Beings (July 7, 1994) (Belg.).

203. *Id.*

204. This is also the rule in Bulgaria. The Bulgarian antitrafficking law states that victims of trafficking declaring their willingness to cooperate for detecting the perpetrators of trafficking are granted a status of special protection until the end of the trial, including a foreign national's permit for long-term stay in the country and prolonging the term of the stay in the shelters. Combating Trafficking in Human Beings Act, No. 46/20, art. 25 (2003) (Bulg.)

205. *Ausländergesetz* [Aliens Act] (Oct. 9, 2000) (F.R.G.).

206. *Aliens Act*, No. 29 (2001) (Hung.).

207. Consolidation Act of the Provisions Concerning the Regulation of Immigration and Law Rules on the Condition of Foreigners, No. 286 of July 15, 1998, art. 18, *Gzz. Uff* No. 191 of Aug. 18, 1998 (Italy).

Spain, a victim of trafficking, under a 2000 Act, is not to be deported if such a victim reports the perpetrators of trafficking to the proper authorities; they are granted temporary work permits, and once the legal proceedings are completed, the government facilitates the return of the victim of trafficking to one's country of origin.<sup>208</sup>

In the Netherlands, expulsion of an illegal alien who is a victim of trafficking may be suspended for three months during which time the victim decides to report the trafficking offense.<sup>209</sup> If the victim decides to report, a residency permit is issued for the complete duration of the investigation, prosecution, and trial. However, a residency permit may also be issued to a victim of trafficking upon the conclusion of the criminal proceedings. Such permit is granted on humanitarian grounds which includes the risk of reprisals against the victim or one's family, the risk of persecution in the victim's country of origin for committing an offense related to prostitution, and the difficulty of social reintegration in the country of origin.<sup>210</sup>

##### 5. The Right to Assistance: The Three R's

Victims of trafficking should be entitled to the right to assistance, in the form of medical, psychological, legal, and social aid.<sup>211</sup> In this

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208. Art. 59 of the Aliens Law (R.C.L. 2000, 4), as amended by (R.C.L. 2000, 8) (Spain).

209. B-9 Regulation (2000) (Neth.)

210. *Id.*

211. For example, the antitrafficking law of Azerbaijan states:

Temporary shelters for accommodating the victims of human trafficking . . . shall be created to provide the victims of human trafficking with decent living conditions, to ensure their security, to provide them with food and medicine, first medical aid, psychiatric, social and legal assistance. The victims of human trafficking shall have the possibility to make phone calls and to use translator's services in shelters. Separate areas shall be allocated for confidential conversations.

Fight Against Human Trafficking, art. 13.1 (June 28, 2005) (Azer.). Another example is provided by Bulgarian law, which provides for the establishment of shelters for victims of trafficking in persons, with the purpose of providing decent conditions for stay and personal hygiene, food and medication, emergency healthcare and psychological assistance, and helping the victims contact their relatives or relevant agencies or organizations. Combating Trafficking in Human Beings Act, No. 46/20, ch. III (2003) (Bulg.). Similarly, Dominican Republic law, victims of trafficking will receive physical, psychological, and social assistance, as well as information regarding their rights. The victims will also receive shelter, medical services, and access to education, vocational training, and employment opportunities. Illicit Traffic of Migrants and Trafficking in Persons, No. 137-03, art. 10 (2003) (Dom. Rep.). Article 15 of the Mexican Draft Law imposes an obligation upon consular offices to "provide assistance to victims to help them understand the laws of the country they have been transported to, to provide necessary help to victims to report the crime and look for compensation or other benefit [and to] issue documentation for the repatriation of victims." Mexican Draft Law, *supra* note 136, art. 15. The 2003 Antitrafficking Act of the Philippines mandates the government of the Philippines to make the following services available to trafficked persons: provision of emergency shelter or appropriate housing, of

context it is important to address what I call the Three R's: rehabilitation, reintegration, and repatriation.

Victims of trafficking must be rehabilitated and reintegrated into society after the abuses they have suffered. Article 16 of the 1949 Convention mandated that "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" should be taken by states parties.<sup>212</sup>

Currently, under article 6 of the U.N. Protocol, "[e]ach State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons."<sup>213</sup> The U.N. Protocol further explains that victims have the right to be granted: "(a) Appropriate housing; (b) Counseling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand; (c) Medical, psychological and material assistance; and (d) Employment, educational and training opportunities."<sup>214</sup>

Rights to assistance must also encompass reintegration, since in many cases the community rejects the victim of trafficking. These victims can face both threats of reprisals by the trafficker and the societal shame for having worked in prostitution. The latter problem is particularly acute throughout the conservative societies of Central Asia, which often simply refuse to accept a woman with a history of prostitution.<sup>215</sup>

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counseling, of free legal services, of medical or psychological services, of livelihood and skills training, and of educational assistance if the trafficked person is a child. Philippines Antitrafficking Act, *supra* note 5, § 23. Finally, under Greek law, protection is offered to victims of trafficking, in particular, the protection of their life, physical integrity, and personal and sexual freedom. Aid is provided for housing, maintenance, living expenses, health care and psychological support, legal aid, and translation services. Greek Antitrafficking Law, *supra* note 5, art. 12.

212. 1949 Convention, *supra* note 14, art. 16.

213. U.N. Protocol, *supra* note 6, art. 6(3). It is important to note that article 34, paragraph 2, of the Transnational Crime Convention provides that legislators must not incorporate elements concerning the transnational nature of or the presence of an organized criminal group into domestic offence provisions. *See* Transnational Crime Convention, *supra* note 10, art. 34(2). Together, these provisions establish the principle that while state parties should establish some degree of transnational activity or involvement in an organized criminal group with respect to most aspects of the U.N. Protocol, domestic prosecutors should not have to prove either in order to obtain a conviction for trafficking in persons or any other offence established under the Transnational Crime Convention or its protocols. In the case of trafficking in persons, domestic offences should apply even where a transnational aspect and the involvement of organized criminal groups do not exist.

214. U.N. Protocol, *supra* note 6, art. 6(3)(a)-(d).

215. *See* Mattar, *supra* note 127, at 197.

Any assistance to victims of trafficking should not be limited to protection within the country of destination, but should also include repatriation, with dignity and respect, to their country of origin.<sup>216</sup> This is what the U.N. Protocol calls for under article 8, which provides that the country of origin “shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.”<sup>217</sup> A country of origin “shall agree to issue . . . such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.”<sup>218</sup>

Consequently, a state has the responsibility to ensure the safe return of trafficked victims. Most notably, this process includes the issuance of travel documents, because, in most cases of trafficking, the trafficker confiscates the travel document of the victim.

#### V. ADOPTING A COMPREHENSIVE FIVE P APPROACH TO COMBATING TRAFFICKING IN PERSONS, INCLUDING PREVENTION, PROTECTION, PROVISION, PROSECUTION, AND PARTICIPATION

A legal system must not only criminalize trafficking in persons, but also provide the necessary measures to prevent the act of trafficking and

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216. Article 43 of the Draft Law of the Republic of Indonesia on the Combat Against the Crime of Trafficking in Persons provides that “in the event that victims abroad who need legal protection as a result of trafficking in persons, the Government of the Republic of Indonesia, through its representatives abroad, will repatriate victims, protecting their interests, and attempt to return them to Indonesia at the expense of the state.” Article 43 further provides that “in the event that victims of trafficking in persons are foreign citizens in Indonesia, the Government of Indonesia will try to provide protection while they are in Indonesia or help for their repatriation to their country of origin.” Indonesian Draft Law, *supra* note 177, art. 43. Under Article 22 of the Mexican Draft Law, repatriation of victims of trafficking in persons is voluntary. Article 23 imposes an obligation upon state authorities to establish policies for assisted repatriation. Mexican Draft Law, *supra* note 136, arts. 22-23. Philippines law provides for the repatriation of the victims of trafficking. Section 25 states that the Department of Foreign Affairs, in coordination with the Department of Labor and Employment and “other appropriate agencies,” is primarily responsible for repatriation of the trafficked persons, “regardless of whether they are documented or undocumented.” Philippines Antitrafficking Act, *supra* note 5, § 25. Under Romanian law: “The Ministry of Foreign Affairs shall issue, within a reasonable period of time and without unjustified delays, through the diplomatic missions and consular offices of Romania, if need may be and with a view to repatriation, identity documents to Romanian citizens victims of trafficking in human beings.” Law on the Prevention and Fighting Trafficking in Human Beings, No. 678, art. 24 (2001) (Rom.). Article 30(4) further provides for a special diplomat to be in charge of implementing the repatriation procedures for Romanian citizen victims of trafficking. *Id.* art. 30(4). In addition, under article 37: “Romania assists foreign citizen victims of trafficking in human beings in returning to their country of origin without undue delay and provides them with full security transportation to the border of Romania, if not otherwise provided in bilateral agreements.” *Id.* art. 37.

217. U.N. Protocol, *supra* note 6, art. 8(1).

218. *Id.* art. 8(4).

to protect the victims of trafficking. The traditional approach to combating trafficking in persons mainly relies on the Three P's analyses, namely prevention, protection, and prosecution. While recognizing this three-phased methodology, I analyze cases of trafficking by distinguishing between protection of a victim of trafficking and provision of services for such victims, and by emphasizing the role of civil society, especially nongovernmental organizations (NGOs), in participating in any comprehensive action plan to eliminate trafficking in persons. Consequently, I adopt a Five P's approach differentiating among prevention, protection, provision, prosecution, and participation. I discussed aspects of prosecution in Part III<sup>219</sup> and protection and provision in the previous Part.<sup>220</sup> In this Part, I will briefly address prevention and participation.

#### A. *Prevention of Trafficking*

The U.N. Protocol provides that “States Parties shall establish comprehensive policies, programmes and other measures . . . to prevent and combat trafficking in persons.”<sup>221</sup> Such measures include, but are not limited to, “research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons,”<sup>222</sup> in order “to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.”<sup>223</sup>

The European Convention calls for similar measures, “in particular for persons vulnerable to trafficking and for professionals concerned with trafficking in human beings.”<sup>224</sup> Under article 5 of the European Convention, each party shall “promote a Human Rights-based approach and shall use gender mainstreaming and a child-sensitive approach in the development, implementation and assessment of all the policies and programmes.”<sup>225</sup> It also states that “[e]ach party shall take appropriate measures, as may be necessary, to enable migration to take place legally.”<sup>226</sup>

Various legal systems have attempted to comply with these international standards. For instance, the Bulgarian antitrafficking law

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219. *See supra* Part III.

220. *See supra* Part IV.

221. U.N. Protocol, *supra* note 6, art. 9(1)(a).

222. *Id.* art. 9(2).

223. *Id.* art. 9(4).

224. European Convention, *supra* note 7, art. 5(2).

225. *Id.* art. 5(3).

226. *Id.* art. 5(4).

provides that the government will implement measures and initiatives for creating equal social and economic conditions for individual at risk of being trafficked, including creating an environment for their integration in the labor market, programs of micro-crediting, and programs for stimulating employers hiring individuals at risk.<sup>227</sup> The government of Bulgaria will also provide public information regarding risk situation for becoming a victim of trafficking, protection for the victims, and penal and administrative measures for combating the illegal trafficking in persons.<sup>228</sup> Finally, the government will implement educational programs for parents and students, for unemployed and illiterate individuals, for risk groups in risk regions, and for victims of trafficking.<sup>229</sup>

The Trafficking in Persons (Prohibition) Law Enforcement and Administration Act of Nigeria imposes an obligation upon every tour operator and travel agent to

- (a) notify its clients of its obligation . . . not to aid, abet, facilitate, or promote in any way the traffic in any person;
- (b) notify its clients of their obligation . . . not to aid, abet, facilitate, or promote in any way any person's pornography and other person's exploitation in tourism;
- (c) insert in contracts with corresponding suppliers in destination countries, clauses requiring them to comply with the obligations stated in the preceding paragraphs of this subsection;
- (d) refrain from utilising messages on printed material, video or the Internet that could suggest or allude to behavior incompatible with the objectives of this Act;
- (e) inform their staff of their obligation under this Act; and

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227. Combating Trafficking in Human Beings Act, No. 46/20 (2003) (Bulg.).

228. *Id.*

229. *Id.* See also the Draft Law of the Republic of Indonesia, which states that the preventive measures undertaken by the government include "developing and implementing programs in economic, cultural, education, legal sectors and carrying out socializations and facilities for accessing information." Indonesian Draft Law, *supra* note 177, art. 27. Similarly, the Mexican Draft Law imposes upon federal authorities an obligation to implement measures to prevent trafficking in persons, including to "inform the population about the risks of sexual tourism, especially against children and women; communicate airlines, hotels and taxis among other, that they must not facilitate trafficking in persons or practices leading to it; warn owners and employees of the industries mentioned above that a crime is committed when having sex with a minor, traveling on sex tours or visiting prostitution houses where women and minors are victims of trafficking; provide measures to guarantee the protection of minors traveling internationally alone;" to establish an inter-agency task force to implement a national antitrafficking plan, and compile and publish periodically statistics information on trafficking in persons. Mexican Draft Law, *supra* note 136.



- (f) include clauses regarding their obligations under this Act to their staff in new employment contracts.<sup>230</sup>

In addition, the Nigerian Law imposes an obligation upon “every airline company [to] promote through every possible means, public awareness of the guiding principle of this Act in in-flight magazines, ticket jackets, Internet units and video on long plane flights.”<sup>231</sup>

In the Philippines, the Migrant Workers and Overseas Filipinos Act provides for travel advisory and information dissemination, so that migrant workers can be aware of the dangers potentially involved in working in a foreign country, and prohibits the illegal recruitment of employees working in countries that do not fully protect the rights of migrant workers.<sup>232</sup>

In addition, public awareness campaigns should warn not only about the danger of trafficking, but also about the danger of prostitution. As a preventive measure in the context of trafficking in persons, this is consistent with the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. The 1949 Convention considers prostitution as “incompatible with the dignity and the worth of the human person and endanger[ing] the welfare of the individual, the family, and the community.”<sup>233</sup> Article 16 of the 1949 Convention provides that states must take “measures for the prevention of prostitution.”<sup>234</sup> Another preventive measure is conducting research on antitrafficking issues that are considered areas of most concern.<sup>235</sup>

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230. Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, art. 30 (2003) (Nig.).

231. *Id.* art. 31

232. The Migrant Workers Overseas Filipinos Act (1995) (Phil.).

233. 1949 Convention, *supra* note 14, pmb1.

234. *Id.* art. 16.

235. The TVPA calls for conducting research and studies on the following topics: investigating the vulnerabilities to human trafficking of commonly affected populations, particularly women and children, generated by post-conflict and humanitarian emergencies; investigating the various forms of trafficking in persons, both internal and transborder, including both sexual and labor exploitations; proposing recommendations to better combat trafficking in persons in conjunction with post-conflict reconstruction and humanitarian emergencies assistance; identifying the best practices for the rehabilitation of victims of trafficking in-group residential facilities in foreign countries; investigating factors relating to the rehabilitation of victims of trafficking in group residential facilities, such as the appropriate size of such facilities, services to be provided, length of stay and cost; investigating the estimated number and demographic characteristics of persons engaged in acts of severe forms of trafficking in persons within the United States; finding the estimated value in dollars of the commercial sex economy, including the estimated average annual personal income derived from acts of sex trafficking in the United States. Trafficking Victims Protection Act of 2000, 22 U.S.C. 2151(f) (2000).

The TVPA also authorizes finding the number of investigations, arrests, prosecutions, and incarcerations of persons engaged in sex trafficking and unlawful commercial sex acts, including

*B. Participation by Civil Society*

During the drafting process of the Trafficking Victims Protection Reauthorization Act of 2005 (2005 TVPRA), I suggested to the United States Congress the following standard for the elimination of trafficking that governments of foreign countries must meet: “whether the government of country cooperates with nongovernmental organizations and other members of the civil society in adopting preventative and protective measure to combat trafficking and protect victims of trafficking.”<sup>236</sup> In addition to protection and empowerment, NGOs play an important role in providing services to victims of trafficking, their repatriation, their reintegration into the society, and preventing their revictimization after returning to their country of origin. Some legal systems recognize such a role. However, each differs in the degree of involving NGOs in government efforts. There are two common model approaches that I call the representation and consultation models.

Some legal systems allow NGOs to be represented in the task force or in other agencies that are responsible for the implementation of government measures. For instance, according to the law of the Philippines, the three representatives from NGOs shall be composed of one representative each from among the sector representing women, the overseas Filipino workers (OFWs), and the children. Each representative must have a proven record of involvement in the prevention and suppression of trafficking in persons.<sup>237</sup> These representatives shall be nominated by the government agency representatives of the Council, for appointment by the President for a term of three years.<sup>238</sup> In contrast, the

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purchasers of commercial sex acts, by States and their political subdivisions within the United States; describing the differences in the enforcement of laws relating to unlawful commercial sex acts across the United States; investigating the interrelationship between trafficking in persons and terrorism, including the use of profits from trafficking in persons to finance terrorism; finding an effective mechanism for quantifying the number of victims of trafficking on a national, regional, and international basis; investigating the abduction and enslavement of children for use as soldiers, including steps taken to eliminate the abduction and enslavement of children for use as soldiers and recommendations for such further steps as may be necessary to rapidly end the abduction and enslavement of children for use as soldiers; investigating the interrelationship between trafficking in persons and global health risks; investigating economic causes and consequences of trafficking in persons; investigating the effectiveness of programs and initiatives funded or administered by Federal agencies to prevent trafficking in persons and to protect and assist victims of trafficking. *Id.*

236. Correspondence Between Author and Congress (on file with author).

237. Philippines Antitrafficking Act, *supra* note 5, § 20(g).

238. *Id.*; *see also* Law on the Prevention and Fighting Trafficking in Human Beings, No. 678, art. 3 (2001) (Rom.) (“In order to combat trafficking in human beings efficiently, the public authorities and institutions . . . the non-governmental organizations (NGOs) and other representatives of the civil society shall engage, separately or in conjunction, as the case may be,

consultation model can be seen in the U.S. TVPA, under which an Inter-Agency task force is obliged to engage in consultation and advocacy with governmental and nongovernmental organizations, among other entities.<sup>239</sup>

The U.N. Protocol mandates that state parties must operate with NGOs in adopting prevention measures to combat trafficking<sup>240</sup> and measures of assistance and protection.<sup>241</sup> This arguably, the U.N. Protocol establishes an international obligation of cooperation. The European Convention addresses the role of civil society more explicitly by providing: “[E]ach Party shall encourage state authorities and public officials, to co-operate with nongovernmental organisations, other relevant organizations and members of civil society, in establishing strategic partnerships with the aim of achieving the purpose of this Convention.”<sup>242</sup> The European Convention in two very significant articles calls upon states to make available to victims of trafficking contact information of NGOs<sup>243</sup> and to protect NGOs offering assistance to victims of trafficking from retaliation or intimidation.<sup>244</sup> Public participation, however, is not limited to NGOs. For participation to be

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in a sustained activity to prevent trafficking in human beings, especially women and children.”). These programs will promote basic education and organize public awareness campaigns on the problem of trafficking and related issues. The National Action Plan for Fighting Human Trafficking in the Republic of Azerbaijan provides for main duties, the participation of various agencies (bodies of executive power, NGOs, international partners and other bodies) in their implementation (and coordination of the activity of these agencies by a National Coordinator), and other activities in the field of fighting human trafficking. Fight Against Human Trafficking, art. 7 (June 28, 2005) (Azer.). In particular, this law provides:

The National Coordinator [on fighting human trafficking] shall establish necessary contacts with bodies of security, border service, police, prosecutor’s office, courts, state bodies and non-governmental organizations with an aim to carry out operation-search activity and criminal persecution in connection with the crimes connected with human trafficking more effectively.

*Id.* art. 7.3.

239. 22 U.S.C. § 7103. See also article 13 of the U.N. Corruption Convention, *supra* note 171, which provides:

Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption.

240. U.N. Protocol, *supra* note 6, art. 9(1)(2).

241. *Id.* art. 9(4).

242. European Convention, *supra* note 7, art. 35.

243. *Id.* art. 16.

244. *Id.* art. 28.

most efficacious, the ordinary citizen must be involved, especially in reporting any suspicious trafficking activities.<sup>245</sup>

#### VI. TARGETING ALL THE PERSONS INVOLVED IN THE TRAFFICKING ENTERPRISE

Any comprehensive response to trafficking in persons must extend liability to all those who are responsible for committing or facilitating the act of trafficking.<sup>246</sup>

##### A. *The Natural Person vs. The Legal Person*

First, I would like to draw a distinction between natural persons and legal persons. As a matter of policy, should “demand” be addressed as a “prosecution” issue or merely as a “prevention” issue? Legal systems differ as to whether to hold the natural person liable for a crime or merely provide for preventive educational measures.

Some legal systems make the purchase of sexual services a crime. The Swedish law prohibits the purchase of sexual services and provides that “a person who obtains casual sexual relations in exchange for payment shall be sentenced . . . to a fine or imprisonment for at most six months.”<sup>247</sup> Few other countries adopt the Swedish approach.<sup>248</sup> The Swedish law is unique in that it makes buying sex—not selling—a

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245. Article 46 of the Indonesian antitrafficking bill, entitled “Public Participation” provides: “The public participates in helping efforts to prevent and combat the crime of trafficking in persons. Public participation . . . is achieved through the actions of providing information and/or reporting the crime of trafficking in persons to law enforcers of the authorities” (on file with author).

246. See *A Comparative Analysis of the Anti-Trafficking Legislation in Foreign Countries: Towards a Comprehensive and Effective Legal Response to Combating Trafficking in Persons, Before the H. Comm. on International Relations Subcomm. on International Terrorism, Nonproliferation and Human Rights*, 106th Cong. 10 (2003) (statement of Mohamed Mattar, Co-Director of the Protection Project, The Johns Hopkins University), available at [http://commdocs.house.gov/committees/intrel/hfa87997.000/hfa87997\\_0.HTM](http://commdocs.house.gov/committees/intrel/hfa87997.000/hfa87997_0.HTM).

247. Brottsbalken [BrB] [Crim. Code] 6:8 (Swed.). The available statistics that I have on those who were charged under this Act are as follows: 1999: 94 clients, 2000: 22 clients, 2001: 86 clients, 2002: 110 clients, 2003: 300 clients. Mohamed Y. Mattar, Executive Director, Protection Project, Remarks at Celebrating Shared Hope International (Nov. 12, 2005), available at [http://www.protectionproject.org/speeches/sharing\\_the\\_hope\\_2005\\_final.pdf](http://www.protectionproject.org/speeches/sharing_the_hope_2005_final.pdf).

248. Similar laws have been enacted in Norway and Finland. However, both laws only criminalize buying sexual services from a person under the age of 18. PENAL CODE ch. 20, § 8 (Fin.); PENAL CODE § 203 (Nor.). The Philippines criminalizes buying or engaging the services of trafficked persons for prostitution. A first-time offender is subject to punishment of six months of community service and a fine. If the offender commits the offense two or more times, that person is subject to punishment of imprisonment for one year and a fine. Philippines Antitrafficking Act, *supra* note 5, § 11. Greek law also provides for the liability of those who accept the work of a victim of trafficking. P.K. [Crim. Code] 18:323 (Greece).

crime.<sup>249</sup> In that sense, it differs from the U.S. law, which recognizes prostitution as a crime and punishes both the purchaser of the sexual service and the woman engaged in prostitution.<sup>250</sup> Knowledge of the status of a woman in prostitution as a victim of trafficking makes the customer liable under the Criminal Code of Macedonia, which provides that “anyone who uses or procures the sexual services of a person with the knowledge that that person is a victim of trafficking in human beings” will be imprisoned for six months to five years.<sup>251</sup>

However, proof of knowledge is not always easy, and an expansive interpretation of it, to include not only actual knowledge but constructive knowledge is required. Recently, the prosecutor in Macedonia convicted a number of offenders under the above law.<sup>252</sup> The European Convention seems to support the Macedonian approach and acknowledges the difficulty of proof of knowledge. However, as the European Convention rightly recognizes, “the difficulty of finding evidence is not necessarily a conclusive argument for not treating a given type of conduct as a “criminal offence.”<sup>253</sup> It calls upon states to consider criminalizing the use of services of a victim with the knowledge that the person is a victim

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249. BrB [Crim. Code] 6:8 (Swed.).

250. Prostitution is a state concern in the United States. Except for Nevada, state laws make prostitution a crime. *Compare* Ala. Crim. Code § 13A-12-120 to -121 (2003) *with* Nev. Rev. Stat. § 201.354 (2002). It is noted that the 2005 TVPRA addresses for the first time the liability of the purchaser of sexual services. This act provides for studying the best methods for investigating and prosecuting exploiters and persons who solicit or purchase an unlawful commercial sex act. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 201, 119 Stat. 3558, 3567-68 (2006) (introducing 42 U.S.C. § 14044). The Act also calls for enhancing state and local efforts to “investigate and prosecute persons who engage in the purchase of commercial sex acts” and to “educate persons charged with, or convicted of, purchasing or attempting to purchase commercial sex acts.” *Id.* § 204, 119 Stat. at 3571 (introducing 42 U.S.C. § 14044c(a)(B-C)).

251. CRIM. CODE art. 418/a(5) (Maced.).

252. A few months ago I sent the Macedonian Ambassador a letter requesting information on the implementation of article 418. On November 1, 2005, I received the following letter:

Dear Mr. Mattar:

In regards to your request for information on the application of Article 418 of the Criminal Code of Macedonia, I can provide you the following statistical data:

1. In 2002: 12 persons indicted; 1 person charged; no person convicted
2. In 2003: 19 persons indicted, 5 persons charged, 5 persons convicted
3. In 2004: 45 persons indicted, 9 persons charged; 9 persons convicted.

Should you have any questions I will be glad to be of your assistance.

Letter from Ambassador of Macedonia to Mohamed Mattar, Co-Director Protection Project, Johns Hopkins University (Nov. 1, 2005) (on file with author).

253. Explanatory Report to the Council of Europe Action Against Trafficking in Human Beings, May 16, 2005, C.E.T.S. No. 197, ¶ 234 [hereinafter Explanatory Report].

of trafficking in human beings.<sup>254</sup> Such services may be sexual, but it may also include labor services or providing a human organ.<sup>255</sup> Regardless, the European Convention mandates that state parties take the appropriate preventive measures to discourage demand<sup>256</sup> and thus advocates the U.N. Protocol provision that “State 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 exploitation of persons, especially women and children, that leads to trafficking.”<sup>257</sup>

The Transnational Crime Convention provides, for the first time, for the liability of the legal person which “may be criminal, civil or administrative,”<sup>258</sup> and which should be maintained “without prejudice to the criminal liability of the natural persons who have committed the offences.”<sup>259</sup> The European Convention adopts a similar rule<sup>260</sup> following

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254. European Convention, *supra* note 7, art. 19. The convention does not make this obligation binding. The explanatory notes state that “[a]ware of the value of a measure such as the one provided for in Article 19, while also acknowledging the problems of collecting evidence, it was considered that this provision should encourage Parties to adopt the measure, without making it a binding provision.” Explanatory Report, *supra* note 253, ¶ 236.

255. The Explanatory Report notes that “[t]he provision targets the client whether of a victim of trafficking for sexual exploitation or of a victim of forced labor or services, slavery or practices similar to slavery, servitude or organ removal.” Explanatory Report, *supra* note 253, ¶ 231. The explanatory notes also make it clear that “[a]rticle 19 is intended not to prevent victims of trafficking from carrying on an occupation . . . . Similarly the provision is not concerned with using the services of a prostitute as such. That comes under article 19 only if the prostitute is exploited in connections with Trafficking of human beings . . . .” *Id.* ¶ 233.

256. European Convention, *supra* note 7, art. 6. Article 6, “Measures to Discourage Demand,” reads as follows:

To discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking, each Party shall adopt or strengthen legislative, administrative, educational, social, cultural or other measures including:

- a) research on best practices, methods and strategies;
- b) raising awareness of the responsibility and important role of media and civil society in identifying the demand as one of the root causes of trafficking in human beings;
- c) target information campaigns involving, as appropriate, inter alia, public authorities and policy makers;
- d) preventive measures, including educational programmes for boys and girls during their schooling, which stress the unacceptable nature of discrimination based on sex, and its disastrous consequences, the importance of gender equality and the dignity and integrity of every human being.

*Id.*

257. U.N. Protocol, *supra* note 6, art. 9(5).

258. Transnational Crime Convention, *supra* note 10, art. 10(2).

259. *Id.* art. 10(3).

260. This provision, “Corporate Liability,” reads in part:

1. Each Party shall adopt such legislative and other measures as may be necessary to ensure that a legal person can be held liable for a criminal offence established

the European Council framework decision on trafficking in persons.<sup>261</sup> A number of recent antitrafficking laws provides for such liability.<sup>262</sup>

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in accordance with this Convention, committed for its benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

- a) a power of representation of the legal person;
- b) an authority to take decisions on behalf of the legal person;
- c) an authority to exercise control within the legal person.

European Convention, *supra* note 7, art. 22.

261. E.C. Framework, *supra* note 29, art. 5. Article 5 provides for sanctions on legal persons that may include: “(a) exclusion from entitlement to public benefits or aid, or (b) temporary or permanent disqualifications from the practice of commercial activities, or (c) placing under judicial supervision, or (d) a judicial winding-up order, or (e) temporary or permanent closure of establishments which have been used for committing the offence.” *Id.*

262. Under the Nigerian antitrafficking law, if a corporate body committed an offence, the Act makes distinctions as to the criminal liability of the legal person itself and the representatives of the legal person. First, the Act imposes a punishment of imprisonment for three years and/or a fine upon a director, manager, secretary or anyone claiming to act in their capacity if it is proven that an offence has “been committed on the instigation or with the connivance of or is attributable to any neglect, on the part of” any one of them. Second, when a corporate body is convicted of a crime under the Act, the corporate body itself is a subject to a fine. In addition, “the court may issue an order to wind up the body and its assets and properties forfeited to the Victims of Trafficking Trust Fund.” Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, art. 28 (2003) (Nig.). Under the Italian law implementing the Transnational Crime Convention, the legal person is subjected to the monetary sanction of 600 to 1,000 shares of the corporate body for the crimes of trafficking in persons and slavery or servitude. Moreover, the legal person is subjected to a two-year freezing of the proceeds of crime. When this is not possible, the judge orders the seizure of money or other properties of the legal person for an amount equal to the proceeds of crime. Under Azerbaijani law, “a legal person (its branch or representative) functioning in the territory of the Republic of Azerbaijan can be liquidated by the court decision in accordance with the legislation of the Republic of Azerbaijan for its ties with human trafficking.” Moreover, “when the legal person, whose ties with human trafficking have been identified, is liquidated, all its means shall be transferred to the account of the assistance fund for the victims of human trafficking.” Fight against Human Trafficking, art. 25 (June 28, 2005) (Azer.). Article 4 of the Dominican republic law specifically provides for the criminal liability of the organizations or corporations involved in trafficking persons and provides a number of penalties, including fines, revocation of license, closure of business and prohibitions of performing any activities because of the involvement of such corporate persons, moral persons, legal persons in trafficking. Illicit Traffic of Migrants and Trafficking in Persons, No. 137-03 (2003) (Dom. Rep.). Article 17 of the Law of the Republic of Indonesia on the Combat against the crime of Trafficking in Persons establishes liability of a legal person in its provision stating that “[t]he crime of trafficking is committed by a corporation if the crime is committed by the people either based on working relationship or other relationship, acted within the setting of the corporation wither alone or together.” Article 17 further states that “in the event that trafficking in persons is committed by or on behalf of, a corporation, charges and sentence of the verdict will be inflicted against the corporation and/or its administrator.” Article 18 provides that “any corporation that is implicated in trafficking in persons may be frozen or have its license revoked and will be declared as an illegal corporation.” The Philippines punishes juridical persons for committing the crime of trafficking in persons. Philippines Antitrafficking Act, *supra* note 5, § 4. “If the offender is a corporation, partnership, association, club, establishment, or any juridical person, the penalty [is] imposed upon the owner, president, partner, manager, and/or any responsible officer who participated in the commission of the crime or who shall have knowingly

Employment agencies, advertisement agencies, adoption agencies, matchmaking organizations, travel agencies, strip clubs, massage parlors, escort services, and other businesses should be held liable for any trafficking activities. They should either be fined, have their business licenses revoked, or be forced to close their business.<sup>263</sup>

### B. *Public Actors vs. Private Actors*

I would also like to draw a distinction between public actors and private actors. While the act of trafficking may be committed by a private individual or an organized group, many cases involve a public official, an immigration officer, a law enforcement agent, a border patrol officer, or other officials who facilitate the act of trafficking or refrain from prosecuting such as act. In such cases, an antitrafficking law must render such an act a crime and provide for an enhanced penalty. Some antitrafficking laws explicitly consider public corruption in the context of trafficking. For instance, the Criminal Code of Moldova recognizes not only “abuse of vulnerability” but also “abuse of power” as an illegal means which give rise to the crime of trafficking.<sup>264</sup> Public corruption is considered an aggravated circumstance that warrants an enhanced penalty in some antitrafficking laws.<sup>265</sup> This approach is consistent with the Transnational Crime Convention, which mandates criminalization of corruption of public officials.<sup>266</sup>

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permitted or failed to prevent its commission.” *Id.* § 10(e). Under the Criminal Code of France, legal persons, with the exception of the State, are “criminally liable for the offences committed on their account by their organs or representatives, according to the distinctions set out in articles 121-4 and 121-7.” Code pénal [C. PÉN.] [PENAL CODE] art. 121-2 (Fr.).

263. Examining U.S. Efforts To Combat Human Trafficking and Slavery: An Assessment of the United States’ Recent Legal Responses to the Problem of Trafficking in Persons on the Federal, State and International Levels, Before the S. Comm. on the Judiciary, Subcomm. on the Constitution, Civil Rights, and Property Rights, 107th Cong. (2004) (statement of Mohamed Mattar, Co-Director of the Protection Project, The Johns Hopkins University).

264. CRIM. CODE art. 165(1)(c) (Mold.); *see also* Indonesian Draft Law, *supra* note 177, art. 12 (punishing “any state administrator who abuses his/her powers to force a person to commit, not commit, or allow something that results in the crime of trafficking persons”).

265. *See supra* note 79 and accompanying text.

266. Transnational Crime Convention, *supra* note 10, art. 8. That article, in part, reads:

Each state party shall adopt such legislative and other measures as may be necessary to establish as criminal offenses, when committed intentionally:

- (a) The promise, offering, or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;
- (b) The solicitation or acceptance by a public officials, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in



It must be noted that the act of trafficking in persons may be committed by an organized criminal group. Many cases of trafficking involve only an individual. Consequently, the involvement in organized criminal activities is not a requirement for the establishment of the crime of trafficking, although it may give rise to an enhanced penalty.<sup>267</sup>

VII. RECOGNIZING TRAFFICKING AS A TRANSNATIONAL OFFENSE THAT REQUIRES TRANSNATIONAL POLICIES, INCLUDING THE THREE X'S: EXTRADITION, EXTRATERRITORIALITY, AND EXCHANGE OF INFORMATION

Trafficking in persons is a transnational crime. In fact, the U.N. Protocol applies only to the offenses of trafficking in persons “where those offenses are transnational in nature.”<sup>268</sup> Trafficking is considered transnational in nature, not only if it is committed in more than one state, but if a “substantial part of its preparation, planning, direction, or control takes place in another state,” if it “involves an organized criminal group that engages in criminal activities in more than one state,” or if it “has substantial effect in another state.”<sup>269</sup> Thus, the transnational nature of the crime warrants transnational policies.

Transnational policies should cover what I call the Three X's of transnational trafficking: extradition, extraterritoriality, and exchange of information.<sup>270</sup>

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order that the official act or refrain from acting in the exercise of his or her official duties.

*Id.* art. 8(1). The Convention further requires that state parties shall “adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials.” *Id.* art. 9(1).

267. See *supra* note 76 and accompanying text.

268. U.N. Protocol, *supra* note 6, art. 4.

269. Transnational Crime Convention, *supra* note 10, art. 3.

270. See generally CarrieLyn Donigan Guymon, *International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention*, 18 BERKELEY J. INT'L L. 53 (2000); Tal Raviv, *Symposium in: International Trafficking in Persons: A Focus on Women and Children—the Current Situation and the Recent International Legal Response*, 9 CARDOZO WOMEN'S L.J. 659 (2003); Amy Fraley, Note, *Child Sex Tourism Legislation Under the Protect Act: Does it Really Protect?* 79 ST. JOHN'S L. REV. 445 (2005); Rodrigo Labardini, *Life Imprisonment and Extradition: Historical Development, International Context, and the Current Situation in Mexico and the United States*, 11 SW. J.L. & TRADE AM. 1 (2005); Heather C. Giordanella, Comment, *Prosecuting United States Nationals for Sexually Exploiting Children in Foreign Countries*, 12 TEMP. INT'L & COMP. L.J. 133 (1998); David P. Warner, *Challenges to International Law Enforcement Cooperation for the United States in the Middle East and North Africa: Extradition and Its Alternatives*, 50 VILL. L. REV. 479 (2005); Roger S. Clark, *The United Nations Convention Against Transnational Organized Crime*, 50 WAYNE L. REV. 161 (2004); Susan W. Tiefenbrun, *Sex Slavery in The United States and the Law Enacted To Stop It Here and Abroad*, 11 WM. & MARY J. WOMEN & L. 317 (2005).

First, trafficking in persons must be recognized as an extraditable offense.<sup>271</sup> It is interesting to note that under article 16(4) of the Transnational Crime Convention, if “a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider the Convention the legal basis for extradition in respect of any offence to which this article applies.”<sup>272</sup>

Second, antitrafficking legislation should also have extraterritorial jurisdiction; this means the application of domestic laws regardless of the place where the act was committed.<sup>273</sup> Both the Council of Europe and

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271. In Cyprus, if criminal activity committed by any individual in a country outside of Cyprus qualifies as an offense under the Combating of Trafficking in Persons and Sexual Exploitation of Children Law of 2000, Cypriot courts can assert jurisdiction. No. 3(1), arts. 14-15 (2000) (Cyprus). Likewise, the criminal code of Niger recognizes international trafficking in persons as an aggravated offense and imposes sanctions upon perpetrators if they commit such a crime within the territory of Niger or in a different country. CRIM. CODE arts. 292-293 (Niger).

The following countries apply this principle in their legislation: The Criminal Code of Macau provides that the criminal law is applicable to acts carried outside of Macau when such acts constitute the crimes of “trafficking in human beings,” “trade in slavery” and such acts are committed by a national or resident of the country. CRIM. CODE art. 5 (Macau). In Thailand, the Penal Code Amendment Act has expanded the territorial jurisdiction of courts to cover “indecent sexual acts” and “trafficking offenses” provided in section 282 and 283 of the Penal Code, irrespective of where such offenses are committed. Penal Code Amendment Act, (No. 14) B.E. 2540 (1997) (Thail.). In New Zealand, the Crimes Act Amendment of 1995 applies to offenses concerning sexual conduct with children committed by nationals abroad. The Act also prohibits assisting persons traveling overseas for the purpose of having sex with children. Crimes Act 1961, 2005 S.N.Z. No. 126, art. 144A (N.Z.). In Ireland, under the Sexual Offenses (Jurisdiction) Act of 1996, persons who are nationals or residents of Ireland may be prosecuted for sexual offenses committed against children abroad. Sexual Offences Act, 1996 (Act No. 33/1996) (Ir.). In Italy, the law of August 3, 1998 amended Article 604 of the Penal Code to extend its application to sexual offenses committed abroad by an Italian national or to the harm of an Italian national or by a foreign national in conjunction with an Italian national sex tour. Law No. 269, art. 144C (1998) (Ital.). Australian law provides for a similar rule. Crimes (Child Sex Tourism) Amendment Act, 1994, c.105 (Austral.).

272. Transnational Crime Convention, *supra* note 10, art. 16(4).

273. European Convention, *supra* note 7, art. 31. In addressing the issues of extraterritoriality, this provision states:

1. Each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over any offence established in accordance with this Convention, when the offence is committed:
  - a) in its territory; or
  - b) on board a ship flying the flag of that Party; or
  - c) on board an aircraft registered under the laws of that Party; or
  - d) by one of its nationals or by a stateless person who has his or her habitual residence in its territory, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State;
  - e) against one of its nationals.

United Nations have addressed these issues with regard to peacekeeping missions. There are currently fifteen U.N. peacekeeping missions operating around the world. Rule 4 of the U.N. peacekeeper Code of Conduct says that U.N. peacekeepers should “not indulge in immoral acts of sexual, physical, or psychological abuse or exploitation of the local population or United Nations staff, especially women and children.”<sup>274</sup> At the same time, U.N. peacekeepers fall under the exclusive criminal jurisdiction of their own national authorities and have immunity from local prosecution.<sup>275</sup> It is up to the U.N. Board of Inquiry to find reasonable grounds for a charge of serious misconduct with a recommendation that the peacekeeper be repatriated for subsequent disciplinary action in his country. However, as I testified before Congress in 2003, of only twenty-four officers repatriated to their countries for misconduct, none has been prosecuted for violating Rule 4

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*Id.* Several countries have also adopted provisions on extraterritoriality in their laws. These include, among others: CODE OF PENAL CONDUCT art. 582 (Alg.); Cód. PEN. [PENAL CODE] arts. 1, 4 and 15 (Arg.); CRIM. CODE art. 15 (Arm.); Action of Criminal Law with Respect to Crimes Committed Outside the Territory of the Azerbaijan Republic, art. 12 (Azer.); StGB [Penal Code] No.217/1974, §§ 64-65 (Austria); CRIM. CODE arts. 6, 8 (Belr.); C.P. [PENAL CODE] arts. 7-9 (Brazil); PENAL CODE art. 4 (Burk. Faso); CRIM. CODE, R.S.C. ch. 46, § 470 (Can.); PENAL CODE arts. 2, 7-8 (Cameroon); PENAL CODE arts. 5-6 (Chile); CRIM. CODE arts. 7-10 (China); PENAL CODE arts. 14-18 (Colom.); CRIM. CODE art. 13 (Croat.); Combating of Trafficking in Persons and Sexual Exploitation of Children, No. 3(1), art. 14 (2000) (Cyprus); trestní zákon [Crim. Code], č.140/1962/2001 Sb. 18. (Czech Rep.); CRIM. CODE art. 8 (Den.); PENAL CODE arts. 49, 60, 75-85 (Dom. Rep.); PENAL CODE art. 5 (Ecuador); PENAL CODE, arts. 2-4 (Egypt); PENAL CODE art. 11 (El. Sal.); PENAL CODE art. 17 (Eth.); PENAL CODE arts. 5-6, 71 (Fiji); PENAL CODE, ch. 1, §§ 8, 11 (Fin.); CRIM. CODE art. 5 (Geor.); StGB [Penal Code] arts. 6-7 (F.R.G.); CRIM. CODE art. 5, (Hond.); BTK [PENAL CODE] arts. 3-4 (Hung.); INDIA PEN. CODE arts. 9-16; KEIHŌ [PENAL CODE] arts. 2-4 (Japan); CRIM. CODE art. 6 (Kyrg.); PENAL CODE arts. 3-5 (Laos); PENAL CODE art. 574.4 (Malay.); C.P.F. [Federal Penal Code] arts. 4-5 (Mex.); CRIM. CODE arts. 11-13 (Mold.); Crimes Act 1961, 2005 S.N.Z. No. 126, art. 6 (N.Z.); SR [CRIM. CODE] arts. 4-5 (Neth.); CRIM. CODE arts. 11-16 (Nicar.); PENAL CODE §§ 12-14 (Nor.); CRIM. CODE arts. 2, 4 (Peru); PENAL CODE arts. 113-115 (Pol.); CÓDIGO PENAL [PENAL CODE] art. 5 (Port.); UK [Crim. Code] art. 12 (Russ.); CODE OF PENAL PROC., arts. 664-665, 667, 669 (Sen.); PENAL CODE art. 3 (Sing.); PENAL CODE art. 122 (Slovn.); Implementation of Rome Statute of the International Court Crime Act, Act 27 of 2002 s. 4 (S. Afr.); CÓDIGO PENAL [C.P.] [PENAL CODE] art. 471 (Spain); BrB [Crim. Code] 2:3, 22:6 (Swed.); MIL. PENAL CODE, art. 2 (Switz.); CRIM. CODE art. 15 (Taj.); CÓDIGO PENAL [PENAL CODE] ch. 2 (Uru.); CÓDIGO PENAL [PENAL CODE] art. 3 (Venez.); Law No. 21/1998, art. 5 (Yemen); Geneva Convention Amendment Act, art. 3 (Zimb.).

274. UNITED NATIONS CIVILIAN POLICE (UNCIVPOL), SELECTION STANDARDS AND TRAINING GUIDELINES FOR UNITED NATIONS CIVILIAN POLICE, ann. E, at 79, *available at* [http://www.un.org/depts/dpko/training/tes\\_publications/books/civilian\\_police/selstand\\_civpol/ann\\_exe.pdf](http://www.un.org/depts/dpko/training/tes_publications/books/civilian_police/selstand_civpol/ann_exe.pdf) (last visited Apr. 19, 2006).

275. *The Role of the Government in Combating Trafficking in Persons—A Global Human Rights Approach, Before the H. Comm. on Gov't Reform, Subcomm. on Human Rights & Wellness*, 106th Cong. (Oct. 29, 2003) (statement of Mohamed Mattar, Co-Director of the Protection Project), *available at* <http://www.protectionproject.org/ctp.htm>.

of the Code of Conduct.<sup>276</sup> On February 23, 2006, Ambassador John Bolton, U.S. Representative to the United Nations, addressed the same issue, stating that “[t]o date the U.N. has investigated 295 personnel resulting in 137 repatriations and 16 dismissals of soldiers, commanders, police and UN staff.”<sup>277</sup>

The U.S. 2005 TVPRA amends section 108 of the TVPA by asking whether a country is taking measures to ensure that its nationals who are deployed abroad as part of a peacekeeping mission do not exploit victims of trafficking and whether the government of the country punishes those who do so.<sup>278</sup>

Another area that should be addressed on an extraterritorial basis is child sex tourism. This was recognized by the United States in the U.S. 2003 TVPRA.<sup>279</sup> This is precisely why the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (Protect Act) makes traveling to engage in illicit sexual activities a crime, the punishment for which is up to thirty years imprisonment.<sup>280</sup>

276. *Id.*

277. John R. Bolton, U.S. Ambassador to the United Nations, Sexual Abuse at the Hands of UN Peacekeepers: Translating Outrage into Action, Address Before the U.N. Security Council (Feb. 23, 2006), *available at* [http://www.un.int/usa/06\\_035.htm](http://www.un.int/usa/06_035.htm).

278. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 201(b), 119 Stat. 3558, 3569 (2006).

279. *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 2, 117 Stat. 2875, 2875 (2003) (“Trafficking in persons continues to victimize countless men, women, and children in the United States and Abroad.”).

280. Pub. L. 108-21, § 105, 117 Stat. 650, 653-54 (2003). This passage of the Protect Act reads as follows:

- (b) TRAVEL WITH INTENT TO ENGAGE IN ILLICIT SEXUAL CONDUCT.— A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.
- (c) ENGAGING IN ILLICIT SEXUAL CONDUCT IN FOREIGN PLACES.— Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

*Id.* § 105(b)-(c), 117 Stat. at 654. National Legislation that applies the principle of extraterritoriality on sex-tourism offences include, among others: Crimes (Child Sex Tourism) Act, 1494, c.104, § 50BD (Austl.); StGB [Penal Code] No. 217/1974, § 217(1)-(2) (Austria); Sexual Offences Against Children, No. 4.1, art. 7 (1997) (Can.); CRIM. CODE art. 7 (Den.); C. PEN. [PENAL CODE] art. 132-16-1 (Fr.); StGB [Penal Code] § 176a (F.R.G.); PENAL CODE ¶ 5 (Ice.); No. 269, arts. 5, 10 (1998) (Italy); SR [PENAL CODE] art. 2 (Neth.); CODE OF MIL. LAW § 4 (Neth.); Crimes Act 1961, 2005 S.N.Z. No. 126, art. 144a (N.Z.); CÓDIGO PENAL [PENAL CODE] art. 5 (Port.); CODE ON INT’L AID IN PENAL MATTERS art. 6 (Switz.); Sexual Offences Act, 1997, art. 7 (U.K.).

However, there are problems in the application of extraterritorial legislation. One is double criminality, where a person's actions have to be acknowledged as criminal offenses both in the country in which one committed the act as well as one's country of citizenship to be convicted.<sup>281</sup> Another problem besides double criminality is double jeopardy.<sup>282</sup>

Today, we may argue for the universality principle. According to the universality principle, certain offenses are recognized by the community of nations as of universal concern so as to establish a universal jurisdiction. These offenses include crimes against humanity, which are defined under article 7 of the International Criminal Court (ICC) statute to include: "enslavement, sexual slavery, enforced prostitution, and any other form of sexual violence of comparable gravity."<sup>283</sup> The ICC defines enslavement to mean "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons in particular women and children."<sup>284</sup>

Third, exchange of information between countries of origin and countries of destination must take place.<sup>285</sup> Bilateral treaties on mutual

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281. For instance, unlike the laws in the United States, Germany, Australia, and Belgium, the laws of Sweden, The Netherlands, and Switzerland will not prosecute a citizen for the crime of sex tourism committed in another country, unless his action constitutes an offense that violates the law in both countries, the country of origin and the country of destination where the crime has been committed. See Mohamed Y. Mattar, Co-Director of Protection Project, Child Sexual Tourism: The Appropriate Legal Response, Remarks at the III Bilateral Conference, "Parallel Worlds" on Child Sexual Tourism and Other Forms of Trafficking, (Aug. 26-27, 2003), *available at* <http://www.protectionproject.org/tul.htm>.

282. The law of Sweden, for example, does not allow a Swedish judge to prosecute a sex tourist who has been prosecuted in the country of destination or to convict such tourist with a sentence that is higher than the sentence imposed for the crime in the country of destination. Conviction for a short sentence or acquittal for sex tourism in a country of destination bars the prosecution of the sex tourist in his country of origin under this interpretation of the doctrine of extraterritoriality. *Id.*

283. Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999, art. 7(1)(g) (entered into force July 1, 2002).

284. *Id.* art. 7(2)(c).

285. U.N. Protocol, *supra* note 6, art. 10. This article calls for an exchange of information by providing:

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

assistance in criminal matters must be a part of any transnational legal response because apprehension of traffickers, investigation of cases of trafficking, and prosecution of the traffickers sometimes require cooperation between countries of origin and countries of destination in matters including request for assistance, search, seizure, attachment and surrender of property, measures for securing assets, service of judicial decision, judgments and verdicts, appearance of witness and expert witnesses, and transmittal of information of records.

The United States Congress explicitly acknowledges that “[t]he United States must work bilaterally and multilaterally to abolish the trafficking industry by taking steps to promote cooperation among countries linked together by international trafficking routes.”<sup>286</sup> Congress also recognizes that “the United States must . . . urge the international community to take strong action in multilateral fora to engage recalcitrant countries in serious and sustained efforts to eliminate trafficking and protect trafficking victims.”<sup>287</sup>

Several countries recognize the need for exchange of information. For example, according to article 19 of the Bulgarian law, the government shall exchange information and conduct programs of coordination with relevant foreign authorities.<sup>288</sup> Similarly, article 13 of the Dominican Republic Law states that the government will use means of international cooperation to develop policies and programs to prevent and combat trafficking in persons.<sup>289</sup>

### VIII. CONCLUSION

Testifying before the Senate of Mexico, I stated that “[l]egislation is one of the primary sources of social change and social regulation. Legislative measures are one of the most effective means of combating a serious problem, such as trafficking in persons.”<sup>290</sup> I believe that a mere amendment in the criminal code recognizing trafficking in persons as a specific offense, while imperative, is insufficient. The more comprehensive approach that I have outlined in this Article is needed.

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- (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 trafficking, and possible measures for detecting them.

*Id.*

286. Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7101(24) (2000).

287. *Id.*

288. Law No. 46/20.05.1002 (Bulg.) (entered into force Jan. 2004).

289. Illicit Traffic of Migrants and Trafficking in Persons, No. 137-03 (2003) (Dom. Rep.).

290. Mattar, *supra* note 136.

The five basic elements that I have argued should be included in effective antitrafficking legislation are based on a recognition that trafficking in persons is not only a crime against the state, but a threat against human security. Consequently, a victim-centered approach should be adopted: acknowledging that a trafficked person is a victim who is entitled to basic human rights. While the European Convention adopts such an approach and enhances the protective measures stipulated in the U.N. Protocol, the European Convention foremost covers some of the missing standards and fills in several gaps left by the U.N. Protocol. Thus, any antitrafficking legislation should take into consideration the international and regional standards set forth in the U.N. Protocol and the European Convention as well as relevant comparative legislation.