

2004

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Elizabeth M. Bruch

Valparaiso University School of Law

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Recommended Citation

Elizabeth M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 Stan. J. Int'l L. 1 (2004).

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Models Wanted: The Search for an Effective Response to Human Trafficking

ELIZABETH M. BRUCH*

Although slavery has been formally abolished from the world, the trade in human misery continues . . . rough estimates suggest that between 700,000 to 2 million women are trafficked across international borders annually.

—United Nations Population Fund¹

INTRODUCTION

Human trafficking,² especially trafficking in women,³ has been a subject that has both attracted and repelled the international community for over a

* Professor of Law, International Human Rights Law Clinic, Washington College of Law, American University. I am grateful to Nancy Polikoff and members of the clinic faculty scholarship group for early discussions on this Article and to Vivian Hamilton, Johanna Bond, and Muneer Ahmad for providing valuable advice and critique at various stages. I also appreciate the research and editing assistance provided by Shiva Aminian, Betsy Gregory, and Diana Smirolto. Finally, I am thankful to Dave Gage for his support and encouragement (and sense of humor) through the writing process.

¹ United Nations Population Fund, *Trafficking in Human Misery*, available at <http://www.unfpa.org/gender/trafficking.htm> (last visited Feb. 10, 2003) (“Statistics about trafficking are unreliable for a number of reasons, including the clandestine nature of the activity. However, rough estimates suggest that between 700,000 to 2 million women are trafficked across international borders annually. Adding domestic trafficking would bring the total much higher, to perhaps 4 million persons per year.”).

² This Article uses the term “human trafficking” and “trafficking in persons” interchangeably. There was no agreed international definition of trafficking until 2000, when the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, was adopted. It defines “trafficking in persons” as:

[T]he 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.

See 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, U.N. GAOR, 55th Sess., Annex 2, Supp. No. 49, at 60, U.N. Doc. A/45/49 (2001) [hereinafter Protocol]. See also *infra* notes 88–99 and accompanying text (discussing issues related to the definition of trafficking such as the role of consent); Lois Chang, *Trafficking in Women*, in WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW: INTRODUCTION TO WOMEN’S HUMAN RIGHTS ISSUES 321 (Kelly D. Askin & Dorian M. Koenig eds., 1999) (providing an overview of trafficking in women).

century. Tales of sex and violence, strangers and innocents, have appealed to both the better instincts and the worst prurience in activists, the public, and political decisionmakers since international attention first turned to the issue of “white slavery”⁴ in the early 1900s. The stories of abuse are both intriguing and horrifying—tales of young women, lured with false promises and carried away to foreign lands for immoral purposes.⁵ In both the early response to “white slavery” and the later attention to human trafficking, emotional public reaction has led to calls for immediate action.⁶ States have responded by drafting a flurry of international statements and agreements intended both to protect “innocent” women and to apprehend and punish traffickers.⁷

The early response to the problem grew out of the anti-prostitution movement at the time and focused on the trafficking of white women and children for the purpose of prostitution or sexual exploitation.⁸ Reformers

³ Historically, international attention to human trafficking has focused on trafficking of women and girl children, rather than the trafficking of all persons. To a large extent, this remains true today.

⁴ The terms “white slavery” and “white slave traffic” were used in early international agreements. See International Agreement for the Suppression of the White Slave Traffic, U.N. Sales No. 1950.IV.1 (1904) [hereinafter IASWST]; International Convention for the Suppression of the White Slave Traffic at Final Protocol, United Nations Sales No. 1450.IV.2 (1910) [hereinafter ICSWST at Final Protocol]. See also International Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253, available at <http://www1.umn.edu/humanrts/instree/flsc.htm> (last visited Nov. 14, 2003); International Labour Organization Convention Concerning Forced or Compulsory Labour (No. 29), June 28, 1930, 39 U.N.T.S. 55 [hereinafter ILO Forced Labour Convention (No. 29)]. This view reflected the perception that the problem arose from “foreigners” abducting white women from Europe and North America to be sold as slaves, usually sexual slaves, abroad. See Jo Doezema, *Loose Women or Lost Women: The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women* (paper presented at the 40th Annual Convention of the International Studies Association, Feb. 16–20, 1999), available at <http://www.ciaonet.org/isa/doj01/doj01.html> (last visited Nov. 14, 2003) (explaining that abolitionists used the “white slave” and “evil trafficker” images to arouse public sympathy for victims). See also Nora V. Demleitner, *Forced Prostitution: Naming an International Offense*, 18 FORDHAM INT’L L.J. 163, 165–67 (1994) (providing a history of the “white slavery” terminology).

⁵ For example, a treatise on white slavery written at the time of the early scares provides the following narrative:

On a trip to Brussels, an English businessman visited a brothel and was “allocated” a nineteen-year-old English woman. In the privacy of the room, the woman burst into tears and explained her story. She was a domestic servant in a London home, where she met a Belgian man; the man asked her hand in marriage and invited her to Brussels. Once in Brussels, he abandoned her at a hotel, which was in reality a brothel, and she had been a prisoner there since his departure.

See GLEN PETRIE, *A SINGULAR INIQUITY: THE CAMPAIGNS OF JOSEPHINE BUTLER*, 209–210 (1971).

⁶ See DAVID PIVAR, *PURITY CRUSADE, SEXUAL MORALITY AND SOCIAL CONTROL: 1868–1900* 137 (1973) (noting that, on a second attempt, “new abolitionists stirred a public outcry of moral indignation”). See also Laura Reanda, *Prostitution as Human Rights Question: Problems and Prospects of United Nations Action*, 13 HUM. RTS. Q. 202, 214 n.42 (1991) (describing the revival of interest in trafficking in the 1970s).

⁷ See IASWST, *supra* note 4; ICSWST at Final Protocol, *supra* note 4; International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 53 U.N.T.S. 39, 42 [hereinafter ICST in Women and Children]; International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 53 U.N.T.S. 49 [hereinafter ICST in Women of Full Age]; Convention for the Suppression of the Trafficking of Persons and the Exploitation and Prostitution of Others, Dec. 29, 1949, 96 U.N.T.S. 272 [hereinafter CSTPE and Prostitution of Others] (providing examples of international agreements targeted at trafficking). See also *infra* text and accompanying notes at pp. 11–13 (describing treatment of trafficking in the Convention on the Elimination of All Forms of Discrimination Against Women and statements at the World Conferences on Women).

⁸ See, e.g., IASWST, *supra* note 4, art. 2 (stating that providing “effective protection” to women and girls against the white slave traffic is one of the agreement’s objectives and calling for governments to monitor ports for persons in charge of “women and girls destined for an immoral life”); ICST in

gave little consideration to other aspects of human trafficking, such as trafficking for purposes of forced labor and keeping otherwise voluntary workers in slavery-like conditions. Despite their focus on sexual exploitation, the early agreements on human trafficking reflect some ambiguity towards its relationship to prostitution. These responses emphasized warning potential victims, discouraging their migration, criminalizing the conduct of their traffickers, and promoting international cooperation.⁹ However, there was essentially no discussion of the rights, needs, or interests of the trafficked women themselves or of trafficked men.

In more recent years, human trafficking has again become a significant international concern due in part to the large number of people involved and its enormous financial impact.¹⁰ The early emphasis on protecting white women now seems obviously racist and sexist. Yet that emphasis has continued to pervade the current discussions of, and policy towards, human trafficking.¹¹ Governments, intergovernmental organizations, nongovernmental organizations ("NGOs"), and activist groups have embraced trafficking as a cause, yet discussions continue both to focus on and construct "innocent" victims—ignoring those, like laborers, migrants, or sex workers, who present a more complex profile—and to play on and respond to public fears about immigration and prostitution.¹² As a result of these biases, the current approaches to human trafficking replicate many of the flaws of earlier approaches—namely, a focus on victimization, a fruitless cycle of debate on the role of prostitution, problematic definitional questions, and a process of decisionmaking that excludes critical voices.

Women and Children, *supra* note 7, art. 7 (requiring members to undertake regulations "required for the protection of women and children traveling on emigrant ships").

⁹ See IASWST, *supra* note 4, pmb., arts. 1–2 (discussing the definition of the crime and how to prosecute it); ICSWST at Final Protocol, *supra* note 4, art. 3 (discussing the possibility of allowing charities to care for indigent women and the repatriation of women who want to return home); ICST in Women and Children, *supra* note 7, art. 7 (discussing the need to provide safety on ships and warn women and children of the danger of being abducted).

¹⁰ Although actual figures are difficult to determine and estimates are controversial, U.N. bodies estimate up to four million persons are trafficked and profits of \$5–7 billion are generated annually. *Trafficking in Human Misery*, *supra* note 1.

¹¹ See Contribution of the Committee on the Elimination of Discrimination against Women to the preparatory process and the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, para. 8, CEDAW/C/2001/I/CRP.3Add.9 (Jan. 29, 2001) (stating that "[c]ontemporary phenomena, such as . . . selective immigration controls and commercial sexual exploitation of women and girls in cross-border trafficking also intensify discrimination against women as well as racism, racial discrimination, xenophobia and related intolerance"). Jo Doezema, *Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy*, in GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION 34, 44–45 (Kamala Kempadoo & Jo Doezema eds., 1998) [hereinafter GLOBAL SEX WORKERS] (discussing parallels between early response to the "white slave trade" and current anti-trafficking campaigns).

¹² See *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, Radhika Coomaraswamy, on *Trafficking in Women, Women's Migration and Violence Against Women*, U.N. Doc. E/CN.4/2000/68, 29, para. 72 (2000) [hereinafter *Special Rapporteur's Report*] ("Feeding off and feeding into anti-immigration sentiments of highly industrialized countries, governments, non-governmental organizations and the media reveal increasingly growing numbers of women who are being trafficked."). See also Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1 (2002) [hereinafter Kapur, *Victimization Rhetoric*] (discussing the "hegemonic victim subject"); Ratna Kapur, *Post-Colonial Economies of Desire: Legal Representation of the Sexual Subaltern*, 78 DENV. U. L. REV. 855 (2001) [hereinafter Kapur, *Economies of Desire*] (discussing how international responses to sex workers as victim-subjects foster repressive domestic legal and non-legal responses and reinforce the "imperial" perspective towards the "native" subject).

This Article argues for a more principled theoretical response based upon fundamental concepts of international law. It also argues for a more nuanced understanding of the complexities of human trafficking and draws upon expanded notions of individual agency to counter the current fixation on victimization and sexual exploitation. Finally, it urges integration of existing norms of nondiscrimination to eradicate the inherent sexism and racism of the anti-trafficking movement.

Part I of this Article provides an overview of the international responses to human trafficking since this phenomenon first appeared as an issue of international concern. The focus of international attention to human trafficking, both traditionally and currently, has been on trafficking in women and, to some extent, children. However, the gendered nature of trafficking has typically been assumed rather than examined. This Article considers primarily the trafficking of adults, begins to examine some of the implications of focusing primarily on women, and argues for a broader consideration of the issue. Accordingly, Part I traces the history of addressing human trafficking in international documents, beginning with the first treaty in 1904, and it notes not only the connection between the perception of the problem as that of “white slave traffic”¹³ and national concerns regarding prostitution and increased migration, but also the resulting ambiguity of the international response. It structures the international response as reflective of three different (though sometimes overlapping) perspectives—a law enforcement framework, a labor rights framework, and a human rights framework.¹⁴

Part II expands the analysis of the three frameworks and discusses the advantages and disadvantages of situating a response to human trafficking in each of them. Although the human rights and labor communities¹⁵ have been increasingly active, the predominant approach has come from a law enforcement perspective, emphasizing criminalization of trafficking and

¹³ PIVAR, *supra* note 6, at 6 (noting that although a campaign began in the late 1860s against prostitution and the white slave traffic, the women’s movement shrank from this reform, and by the 1880s focused on the campaign against prostitution). Abolitionists reembraced the objective of eradicating prostitution and white slave traffic, but they changed their focus to child rearing and education upon encountering the “fallen women.” *Id.* at 7. Although the white slave traffic was thought to be a widespread problem at the time, subsequent research has shown that those claims were largely exaggerated. See generally Doezenia, *supra* note 4 (discussing overstatement of white slavery cases in the nineteenth century).

¹⁴ These are not necessarily fully distinct from one another nor an exhaustive list of past or potential approaches for addressing human trafficking. They are intended to reflect the primary emphases of the dominant mechanisms within the international system. However, there are other potential frameworks for analysis. For example, threaded through the three frameworks addressed in this Article is also a “migration” framework, reflecting concerns about illegal immigration and the migration of women. See *Special Rapporteur’s Report*, *supra* note 12, paras. 61–67 (stating that “[t]he Special Rapporteur is concerned by the apparent link between protectionist, anti-immigration policies, and the phenomenon of trafficking”). In addition, trafficking and the related issue of forced prostitution may be considered under a humanitarian law approach. See Demleitner, *supra* note 4, at 179–185 (providing an overview of the humanitarian approach to forced prostitution).

¹⁵ I do not mean to suggest that there is a universal or monolithic agenda in either the human rights community or the labor community. Nor do I intend to suggest that these are groups that can be precisely defined within a membership or an identity. References to the “international community” (or various subcommunities) are common in international literature, particularly in international advocacy. While these references are problematic, they provide a useful shorthand for referring to the range of international actors—state and governmental representatives, international organizations and their representatives, international experts, scholars, and activists—involved on a particular issue.

cooperation among countries in prosecuting traffickers.¹⁶ This Part also considers the ongoing debates over what should be included in a definition of the term “trafficking”—for example, whether the focus should be on sexual exploitation or include other forms of exploitation. Other issues include whether to address only forced prostitution or all forms of prostitution, whether to include or distinguish illegal migration, and whether to focus only on the trafficking of women and children. Part II also accounts for the feminist critique, which asserts that the past and present debates on human trafficking have been centered on white, Western women, first as potential victims of “white slavery” and later as advocates on behalf of trafficking “victims.” Part II discusses how these debates and the absence of the voices of those actually trafficked have affected progress in combating human trafficking, which in turn raises questions about the legitimacy of existing responses.

Part III of this Article proposes a more integrated and principled approach to the problem of human trafficking. It suggests ways in which the existing mechanisms could be more effective in addressing human trafficking. It concludes that while institutional change is important for the long-term, there are also short-term changes in both attitude and approach that could be immediately beneficial to trafficked persons, especially women. These changes should include a more inclusive approach to policy, especially to the incorporation of the voices and visions of those most directly affected. This new approach should be more balanced—prioritizing labor and human rights concerns, but also respecting legitimate law enforcement needs. Most importantly, it should be based on an agreed set of principles that reflect shared values at the international level—an appreciation for the complexity of the problem, respect for individual autonomy, and a commitment to nondiscrimination in responding to human trafficking.

¹⁶ This is also true at the national level. See, e.g., Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101–7110 (2002). Law enforcement in Thailand, for example, has become far more vigilant in recent years. See The Prevention and Suppression of Prostitution Act B.E. 2539 (1996), available at <http://203.152.23.33/law/text/lawpub/314102539/text.html> (replacing the Prostitution Suppression Act of 1960). The new Thai law is much more stringent and penalizes the customer, but still fails to define key terms. The only treaty to comprehensively address human trafficking since 1949 is an explicitly law enforcement focused agreement. See Protocol, *supra* note 2. However, human trafficking is also mentioned in the Convention on the Elimination of All Forms of Discrimination Against Women and in a few labor rights agreements. See Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Agenda Item 75, U.N. Doc. A/RES/34/180 (1980) [hereinafter CEDAW] (stating in Article 6 that “States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women”); ILO Forced Labour Convention (No. 29), *supra* note 4, art. 2 (stating that “forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”); Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, art. 3, 38 I.L.M. 1207, available at <http://ilolex.ilo.ch:1567/cgi-lex/convde.pl?C182> [hereinafter Convention on Child Labour] (stating that, for the purposes of this convention, the term “the worst forms of child labour” comprises all forms of slavery or practices similar to slavery, such as the sale and trafficking of children).

I. THE INTERNATIONAL COMMUNITY RESPONDS TO HUMAN TRAFFICKING

Human trafficking has risen to prominence as an issue of international concern twice over the last century. It was first a subject of international concern in the late nineteenth and early twentieth centuries, before the modern human rights movement had arisen.¹⁷ At that time, reformers described the problem as “a practice that, in arrant villainy and rascality, surpasses all that we know of any other trade in human beings in any part of the world in ancient or modern times.”¹⁸ The early agreements, which were multilateral cooperation agreements signed primarily among European countries, focused on trafficking in women for “immoral purposes” or prostitution.¹⁹

As the international community became more organized, first through the League of Nations²⁰ and then through the United Nations,²¹ it also became somewhat more sophisticated in its attempts to address the problem of human trafficking. In addition to the documents specifically addressing trafficking in women for purposes of prostitution or sexual exploitation, there were also international agreements addressing slavery²² and forced labor,²³ each of which theoretically comprise or overlap with trafficking. Despite the potential applicability of the slavery and forced labor agreements, efforts to eliminate human trafficking were generally confined to the narrow area covered by the trafficking agreements. Little was done beyond those agreements.

With the emergence of the modern human rights movement²⁴ and the development of a women’s human rights community,²⁵ there was a second

¹⁷ Although the concept of a universal set of human rights goes back much further, most scholars agree that the modern human rights movement has its origins in the atrocities of World War II and the Holocaust, and a commitment by states and activists to establish an international system to prevent similar events from occurring in the future. *But see* OSCAR SCHACTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 331 (1991) (commenting that provisions on human rights were included in the U.N. Charter mainly due to the assumption that Hitler’s human rights violations were one of the causes of the war, but that the concept of human rights goes back much further).

¹⁸ Lord Dalhousie, Remarks to a Select Committee of the Lords, British Parliament (May 1881), *quoted in* CHARLES TERROT, *TRAFFIC IN INNOCENTS: THE SHOCKING STORY OF WHITE SLAVERY IN ENGLAND* 124–25 (1960).

¹⁹ *See, e.g.*, IASWST, *supra* note 4, art. 1 (“Each of the Contracting Governments undertakes to establish or name some authority charged with the coordination of all information relative to the procuring of women or girls for immoral purposes abroad; this authority shall be empowered to correspond direct [sic] with the similar department established in each of the other Contracting States.”).

²⁰ The League of Nations was created in 1920 by the Covenant of the League of Nations. *See* LEAGUE OF NATIONS COVENANT, art. 1, para. 1.

²¹ The United Nations was created in 1948 by the Charter of the United Nations. It assumed many of the functions of the League of Nations. U.N. CHARTER, art. 1 (stating that one of the purposes of the United Nations is “[to] achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and . . . [to] promot[e] and encourag[e] respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”).

²² *See* Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, art. 3, 46 Stat. 2183, 60 L.N.T.S. 253 [hereinafter *Slavery Convention*] (stating that members must adopt “appropriate measures with a view to preventing and suppressing the embarkation, disembarkation and transport of slaves”).

²³ *See* ILO Forced Labour Convention (No. 29), *supra* note 4, art. 1 (mandating members to undertake to suppress forced or compulsory labor).

²⁴ *See supra* note 17 (discussing the concept of a universal set of “human rights” before the adoption of the Universal Declaration of Human Rights).

wave of attention given to trafficking. This renewed prominence of human trafficking as an international concern stems, at least in part, from the high numbers of persons and dollars involved.²⁶ U.N. bodies estimate that between seven hundred thousand to four million people are trafficked per year, generating profits of five to seven billion dollars annually.²⁷ Concern about issues of women's independence and fears about increasing globalization have increased attention to the trafficking problem.²⁸

Throughout the history of addressing human trafficking in international documents, governments, international agencies, and activists have debated what and who should be included in a definition of the term "trafficking." In many ways, this debate reflects a set of broader issues centered around whether trafficking is primarily a law enforcement issue, a labor issue, or a human rights issue. Though the predominant approach has focused on the law enforcement context, labor and human rights concerns have become increasingly prominent at the international level. The need to balance and resolve the tensions among these concerns has pervaded the international response to human trafficking.

A. The First Wave: Responding to the "White Slave Traffic"

The first wave of consideration of human trafficking began at the end of the nineteenth century in response to reports of an increasing phenomenon of "white slavery."²⁹ Although reports of the white slave trade abounded, the actual number of such cases was very small.³⁰ This first response was characterized by an explicit intention to rescue the victims of white slavery and

²⁵ The United Nations declared 1970 the International Year of the Woman. The first World Conference on Women was held in 1970 in Mexico City. It was followed by similar World Conferences in 1975 in Copenhagen, in 1985 in Nairobi, and in 1995 in Beijing. See *infra* Part I.B. (discussing the second wave of heightened attention to trafficking in persons as part of the global movements for women's human rights). The Convention on the Elimination of All Forms of Discrimination Against Women was adopted in 1979. See CEDAW, *supra* note 16.

²⁶ But see Kamala Kempadoo, *Introduction: Globalizing Sex Workers' Rights*, in GLOBAL SEX WORKERS, *supra* note 11, at 1, 15 (discussing both inaccuracies in estimates of the numbers of trafficked persons and uncritical acceptance of claims that trafficking has intensified).

²⁷ See United Nations Population Fund, *supra* note 1; U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT (2003), available at <http://www.state.gov/documents/organization/21555.pdf> (last visited October 8, 2003) [hereinafter TRAFFICKING IN PERSONS REPORT]; UN Crime and Justice Information Network, at <http://www.uncjin.org/CICP/Folder/traff.htm> (last visited October 8, 2003).

²⁸ See TRAFFICKING IN PERSONS REPORT, *supra* note 27; INTERNATIONAL ORGANIZATION FOR MIGRATION RESEARCH SERIES, COMBATING TRAFFICKING IN SOUTH-EAST ASIA: A REVIEW OF POLICY AND PROGRAMME RESPONSES (2000), available at <http://www.iom.int/documents/publication/en/mrs%5F2%5F2000.pdf> (last visited Jan. 22, 2002) (noting that "[t]he forces of globalization have often been connected to the rising levels of migration around the world as well as an increasing prevalence of abusive and irregular forms of migration, among them trafficking"). See also *Special Rapporteur's Report*, *supra* note 12, para. 59 (discussing relationship between globalization and trafficking).

²⁹ See Doezenia, *supra* note 4 (discussing overstatement of white slavery cases in the nineteenth century); Demleitner, *supra* note 4, at 165–67 (providing a history of the white slavery terminology).

³⁰ See Doezenia, *supra* note 4 (quoting the studies of Walkowitz, Bristow, Rosen, Corbin, and Guy, which all concluded that only a small number of actual white slavery cases existed). The increasing numbers of women, including prostitutes, migrating to find work triggered stories of white slavery. See generally FREDERICK K. GRITNER, WHITE SLAVERY, MYTH, IDEOLOGY, AND AMERICAN LAW (1990) (describing the evolution of the white slavery mythology and panic in the United States). Through as late as 1960, this version of the white slave trade was given credibility. See generally TERROT, *supra* note 18 (a traditional account of English white slavery published in 1960).

prostitution.³¹ A typical narrative of the problem from that time painted a picture of helpless innocents drawn into the lurid world of sexual slavery:

Eliza was a parlourmaid who fell ill and then, instead of going home to her mother, rather foolishly took a room in London with a friend. One day while the two girls were out together, they met a man and a woman who got into conversation with them They talked about the wonderful positions they could get for the girls in France. Of course the young women were flattered. They were quite ready to go out to dinner with their prospective employers and agreed that they would like to work in Paris. The man got "passports" for them . . . and eventually they crossed the Channel and arrived in Lille. Here they were taken to the house of a Madame Cleavier It was only then that they realized they had landed up in a brothel. In this house the customers paid five francs downstairs and ten francs if they were upstairs for more than half an hour. Tickets were given out for this, but Madame always told the girls that they were in her debt. They were never allowed out by themselves.³²

Such stories were used by reformers to mobilize political interest and opposition to both prostitution and the newer specter of "white slave traffic."³³

The international community responded with a series of anti-trafficking treaties that focused primarily on trafficking in women for purposes of prostitution or sexual exploitation. The first treaties, the 1904 International Agreement for the Suppression of the White Slave Traffic ("1904 Agreement") and the 1910 International Convention for the Suppression of White Slave Traffic ("1910 Convention"), emphasized the coordination of information among the states parties and discussed steps to repatriate the victims of the "white slave traffic." The Agreements did not define trafficking but referred to "the procuring of women or girls for immoral purposes abroad."³⁴ Although

³¹ The early campaigns in England, led by activists such as Josephine Butler, took place amidst attempts to reform England's morality laws. She and others protested efforts to legalize and regulate prostitution, rather than abolish it, because they believed these efforts endorsed the exploitation of women. This work evolved to encompass "white slavery" as a consequence of its relationship to prostitution. See generally PETRIE, *supra* note 5 (describing the campaigns of Josephine Butler); PIVAR, *supra* note 6 (describing the genesis and the evolution of the Purity Reform).

³² ANN STAFFORD, *THE AGE OF CONSENT* 101–02 (1964). Stafford and Petrie both describe the story of the nineteen-year-old English girl that inspired Alfred Dyer, a publisher, to become involved in the anti-trafficking movement at the end of the nineteenth century, and the story of Adeline Tanner who was drugged by a gentleman she met at the train station and woke to find herself undergoing a medical examination regarding her suitability for prostitution. *Id.* at 85–86, 92–93. See also PETRIE, *supra* note 5, at 209–210, 219–221.

³³ Doezenia has described the myths of white slavery as "grounded in the perceived need to regulate female sexuality under the guise of protecting women. They were indicative of deeper fears and uncertainties concerning national identity, women's increasing desire for autonomy, foreigners, immigrants and colonial peoples." Doezenia, *supra* note 4 (citing DONNA J. GUY, *SEX AND DANGER IN BUENOS AIRES: PROSTITUTION, FAMILY AND NATION* (1991)).

³⁴ IASWST, *supra* note 4, arts. 1, 3 (calling for the "co-ordination of all information relative to the procuring of women or girls for immoral purposes abroad" and discussing the repatriation of victims). See also Demleitner, *supra* note 4, at 165–67 (explaining that the 1904 Agreement was considered ineffective and that there was need for an additional agreement in 1910); Stephanie Farrior, *The International Law on Trafficking in Women and Children for Prostitution: Making It Live Up to Its Potential*, 10 HARV. HUM. RTS. J. 213 (1997) (providing a background on the development of treaties addressing trafficking).

these initial attempts to combat trafficking were not widely adopted, international concern persisted.

When the League of Nations was created in 1920, it was given supervision over the execution of the existing agreements concerning trafficking in women and children.³⁵ In addition to these agreements, the League made two other attempts to address the problem of human trafficking, with a continuing emphasis on women and children. The 1921 Convention for the Suppression of Traffic in Women and Children was intended to “secure more completely the suppression of the Traffic in Women and Children” described in the 1904 Agreement and the 1910 Convention,³⁶ and the 1933 International Convention for the Suppression of the Traffic in Women of Full Age (“1933 Convention”) was also intended to “complete” the earlier agreements. The 1933 Convention defined an offender as anyone who “in order to gratify the passions of another person, has procured, enticed or led away even with her consent a woman or girl of full age for immoral purposes to be carried out in another country,”³⁷ and the parties agreed to criminalize this offense.³⁸ The League’s failure to prevent the outbreak of World War II and its subsequent dissolution ended its plans for additional work on the issue.³⁹

The United Nations became active on the specific issue of trafficking shortly after its creation in 1945. While the U.N. Charter makes no specific mention of trafficking as an issue of concern, the U.N. did adopt the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others in 1949 (“1949 Convention”).⁴⁰ The 1949 Convention was the most comprehensive treaty addressing trafficking to date. It intended to consolidate and supplement the previous agreements, and emphasized the anti-prostitution and law enforcement approach. It sought to punish “any person who, to gratify the passions of another . . . procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person [or] exploits the prostitution of another person, even with the consent of that person.”⁴¹ The 1949 Convention also reiterated state obligations to warn potential victims about the risk of being trafficked and to

³⁵ Trafficking is specifically mentioned in the text of the Covenant of the League of Nations. LEAGUE OF NATIONS COVENANT art. 23, para. 1(c) (stating that the League has “general supervision over the execution of agreements with regard to the traffic in women and children . . .”). This concern with trafficking has been linked to the renewed international migration by prostitutes after World War I. Doezeema, *supra* note 4, at 47 n.9 (citing NICKIE ROBERTS, WHORES IN HISTORY: PROSTITUTION IN WESTERN SOCIETY (1992)).

³⁶ ICST in Women and Children, *supra* note 7, pmbl. (reaffirming the goals of prior international agreements addressing trafficking).

³⁷ *Id.* art. 1; ICST in Women of Full Age, *supra* note 7, art. 1.

³⁸ ICST in Women of Full Age, *supra* note 7, art. 2 (stating that parties must agree to take the necessary steps to ensure that offenses related to trafficking shall be punished in accordance with their gravity).

³⁹ See Demleitner, *supra* note 4, at 171–72. See also Reanda, *supra* note 6, at 208–09 (discussing the efforts of the League to address trafficking).

⁴⁰ CSTPE and Prostitution of Others, *supra* note 7. Seventy-four states are now parties to the convention.

⁴¹ *Id.* art. 1. The parties also agreed to punish anyone involved with a brothel or other building used for purposes of prostitution. *Id.* art. 2.

assist with the repatriation of victims of trafficking.⁴² It was the first anti-trafficking treaty to provide some measures for implementation, but they were quite weak and were generally considered ineffective.⁴³ The 1949 Convention was the last attempt by the international community to address human trafficking by treaty for the next fifty years.⁴⁴

However, in addition to the anti-trafficking treaties—with their focus on sexual exploitation—there was another series of treaties during the same period that addressed the related issues of slavery⁴⁵ and forced labor.⁴⁶ Although the anti-trafficking movement used the terminology of “white slavery,” it limited its focus to sexual exploitation of women. There was no real attempt to use the broader slavery and labor treaties that existed to respond to the problem of trafficking.⁴⁷

⁴² See *id.* art. 17(2) (obligating states to “undertake to arrange for appropriate publicity warning the public of the dangers of the aforesaid traffic”).

⁴³ Article 21 of the 1949 Convention required parties to report annually to the U.N. Secretary General on measures taken by them to implement the Convention. The Secretary General was to periodically publish the information received. *Id.* art. 21. See Reanda, *supra* note 6, at 211–16 (describing the implementation machinery and the search for effective measures); *Special Rapporteur’s Report*, *supra* note 12, para. 26 (discussing weak enforcement mechanisms of the 1949 Convention).

⁴⁴ There was, however, reference to trafficking in CEDAW. See *infra* Part I.B. (discussing the reemergence of trafficking in persons as a part of the growing global movement for women’s rights).

⁴⁵ See Slavery Convention, *supra* note 22, art. 1 (defining slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”). See also Protocol Amending the Slavery Convention of 1926, opened for signature Dec. 7, 1953, 7 U.S.T. 479, 182 U.N.T.S. 51 (clarifying that the functions given to the League of Nations by the 1926 Convention were to be continued by the U.N.); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956, 266 U.N.T.S. 40 (expanding the Convention to include other practices, such as debt bondage, serfdom, certain servile forms of marriage, and the exploitation of children). See also Farrior, *supra* note 34, at 213–223 (describing the weak enforcement mechanisms). Although the Slavery Convention is not explicitly a “human rights treaty,” it is the closest of the early attempts to prohibit trafficking and related violations. Other mainstream human rights documents—such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights—also specifically address these issues. Both documents prohibit slavery, the slave trade, and servitude. See International Covenant on Civil and Political Rights, art. 8, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, opened for signature Dec. 16, 1966, entered into force Mar. 23, 1976, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 [hereinafter ICCPR]; Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948), available at <http://www.un.org/Overview/rights.html>.

⁴⁶ See Convention (No. 105) Concerning the Abolition of Forced Labour, opened for signature June 25, 1957, 320 U.N.T.S. 291, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C105> [hereinafter Convention on Abolition of Forced Labor]; ILO Forced Labour Convention (No. 29), *supra* note 4. These conventions generally address forced labor required by a state party rather than by private persons, but they reflect a general consensus that forced labor and other slavery-like practices should be abolished. They also provide a structure that could be extended to encompass human trafficking. The International Labor Organization (“ILO”) also prepared treaties addressing migration for employment and migrant workers. See Migrant Workers (Supplementary Provisions) Convention, June 24, 1975, 1120 U.N.T.S. 323, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C143> (addressing legal migration for employment purposes). While these agreements would not directly apply in the context of trafficking, they also present a framework for addressing similar issues.

⁴⁷ Perhaps this reflected a view that the conduct envisioned as “white slavery” was purely sexual in nature and therefore different from other slavery. But see Pamela D. Bridgewater, *Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE RACE & ETHNIC ANCESTRY L.J. 11, 11 (2001) (noting that “while forced labor is the commonly thought of and protected against aspect of slavery, the institution also consisted of reproductive exploitation via forced sex and forced reproduction”). At least one anti-slavery NGO, Anti-Slavery International, has drawn the connection between human trafficking and slavery. See Anti-Slavery International, *Human Trafficking Q&A*, at <http://www.antislavery.org/homepage/antislavery/trafficking.htm#qanda> (last visited Nov. 13, 2003) (“Trafficking is the fastest growing means by which people are forced into slavery.”). It may also reflect the reluctance to see prostitution as a form of labor; Demleitner, *supra* note 4, at 191–95 (arguing that at least “forced prostitution” should be treated differently than slavery and slavery-like practices). See also

Thus, the first wave of international attention to the problem of human trafficking reflected and addressed only a narrow vision of trafficking, focusing on trafficking in women and children for the purpose of sexual exploitation or prostitution. The international agreements took a predominantly abolitionist approach to prostitution and were typically limited to issues of law enforcement and cooperation.⁴⁸ The anti-trafficking movement essentially ignored other aspects of trafficking, such as forced labor and slavery-like practices. Instead, these issues were addressed by a separate track of international activity, situated in the international human rights and labor rights spheres, which similarly ignored the issue of human trafficking. However, these various approaches—the trafficking, the slavery, and the forced labor agreements—were generally inadequate in responding to even those aspects of human trafficking they purported to address. They were not broadly adopted or implemented by states.⁴⁹ To the extent they had enforcement mechanisms, the mechanisms were weak and states lacked the political will to make them stronger. Moreover, the provisions of the treaties were neither rights-based nor substantively strong.⁵⁰ As the “white slavery” scare subsided, interest in improving the international legal regime on trafficking also ebbed and international attention turned elsewhere.

B. The Second Wave: “Trafficking in Persons, Especially Women and Children”

Trafficking in persons reemerged as an issue in the 1970s as a part of the growing global movement for women’s human rights.⁵¹ Since then, human trafficking, particularly trafficking in women, has remained a significant focus of international attention.⁵² In contrast to the first wave of international

Jo Bindman, *An International Perspective on Slavery in the Sex Industry*, in *GLOBAL SEX WORKERS*, *supra* note 11, at 65, 66–67 (arguing that existing human rights and slavery conventions are adequate in theory to eliminate slavery-like practices in sex work, but noting that efforts to use them are held back by the distinction between sex workers and other workers).

⁴⁸ See Farrior, *supra* note 34, at 218–19 (criticizing the 1949 Convention for failing to take a “rights-based” approach).

⁴⁹ For example, there are only seventy-four parties to the 1949 Convention. Sixteen of those parties signed in 1990 or later. *CSTPE and Prostitution of Others*, *supra* note 7.

⁵⁰ See Farrior, *supra* note 34, at 213–15, 218–19, 220–21 (noting the lack of effective enforcement measures and describing the mechanism for reporting to ECOSOC that was later established for the 1949 Convention).

⁵¹ After the 1949 Trafficking Convention, there were no further international agreements directly addressing the issue until the 1979 Convention on the Elimination of All Forms of Discrimination Against Women. See CEDAW, *supra* note 16, art. 6 (addressing trafficking for forced prostitution). See also Reanda, *supra* note 6, at 211–14 (describing the focus on “social defense” strategies for addressing trafficking); Demleitner, *supra* note 4, at 174–76 (describing a 1959 U.N. study on the effectiveness of the 1949 Convention, which may have discouraged further action). However, the inclusion of trafficking in CEDAW was a result of increased attention given to the issue by women’s human rights advocates, beginning with the first world conference on women in 1975. See Reanda, *supra* note 6, at 214 n.42 (describing the revival of interest in the issue in the 1970s).

⁵² In contrast to the earlier panic about white slavery, the revived concern about human trafficking seems to be based on a more well-documented and extensive understanding of the problem. However, given the difficulty of accurately assessing the scope of trafficking, there are still some concerns that the problem is overstated. See *Special Rapporteur’s Report*, *supra* note 12, para. 72 (noting estimates that up to four million persons are trafficked each year, but also noting that such figures are unreliable). See generally Doezeema, *supra* note 4 (discussing responses to white slave traffic during the nineteenth century).

response, most of this revived attention and activism has occurred in the relatively new human rights and women's rights fora. The Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") adopted in 1979 prohibits trafficking,⁵³ and the initial World Conference on Women in 1975 mentioned it in the context of "prevention of the exploitation of women and girls."⁵⁴ Human trafficking appeared as a concern in the final documents from the next two world conferences on women, explicitly linked to prostitution under the rubric of "exploitation of the prostitution of others and traffic in persons" at the 1980 Copenhagen Conference and under the rubric of "women victims of trafficking and involuntary prostitution" at the 1985 Nairobi Conference.⁵⁵ The World Conference on Human Rights in 1993, noted for the significant attention given to women's human rights, also called for the elimination of trafficking,⁵⁶ and at the Fourth World Conference on Women in Beijing in 1995, human trafficking was featured primarily as an issue of violence against women, but also as an issue of human rights.⁵⁷

⁵³ CEDAW, *supra* note 16, art. 6 (stating that "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women"). The Convention mentions trafficking as part of the initial section of the treaty together with the overview provisions, not as one of the specific rights enumerated in the other sections. In marked contrast to the other substantive provisions of CEDAW, there are no reservations to Article 6. See *Report by the Secretariat: Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. GAOR Comm. On Elimination of Discrimination Against Women, 16th Sess., Provisional Agenda Item 8, CEDAW/C/1997/4 (1996) (discussing the pattern of reservations to CEDAW).

⁵⁴ U.N. REPORT OF THE WORLD CONFERENCE OF THE INT'L WOMEN'S YEAR at 79, para. III.7, U.N. Doc. E/CONF 66/34, U.N. Sales No. E.76.IV.I (1976) (reaffirming support for the CSTPE and Prostitution of Others and urging governments to take actions to end forced prostitution and the traffic in women). The Report also took a strong anti-prostitution position, declaring that "prostitution is one of the most grievous offences against the dignity of women." *Id.*

⁵⁵ U.N. REPORT OF THE WORLD CONFERENCE OF THE U.N. DECADE FOR WOMEN: EQUALITY, DEVELOPMENT AND PEACE at 103, U.N. Doc. A/CONF 94/35, U.N. Sales No. E.60.IV.3 (1980) (considering that "traffic in women and children forced into prostitution remains a continuing evil" and calling for further action by governments); U.N. REPORT OF THE WORLD CONFERENCE TO REVIEW AND APPRAISE THE ACHIEVEMENTS OF THE U.N. DECADE FOR WOMEN: EQUALITY, DEVELOPMENT AND PEACE at 70, paras. 290-91, U.N. Doc. A/CONF 116/28/Rev.1, U.N. Sales No.E.85.IV.10 (1986) (stating that "prostitution is a form of slavery imposed on women" and urging implementation of the 1949 CSTPE and Prostitution of Others, as well as further measures to combat trafficking).

⁵⁶ U.N. WORLD CONFERENCE ON HUMAN RIGHTS, VIENNA DECLARATION AND PROGRAMME OF ACTION, at 33-34, para. I.18, U.N. Doc A/CONF157/23 (1993) (stating that "[g]ender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated"). However, the conference, in calling for the elimination of international trafficking through legal measures and national action, addressed trafficking in the context of violence against women and did not address prostitution explicitly. See also *Vienna Plus Five Global NGO Forum on Human Rights*, at <http://www.hri.ca/vienna+5/final-report.shtml> (last visited Nov. 14, 2003) (recommending the strengthening of human rights protections for trafficked women and girls). That same year, the U.N. General Assembly adopted the Declaration on the Elimination of Violence Against Women, which specifically mentions trafficking as an aspect of violence against women. See *Declaration on the Elimination of Violence Against Women*, U.N. GAOR, 48th Sess., 85th plen. mtg., art. 2(b), U.N. Doc. A/RES/48/104 (1993) (stating that "violence against women" includes "trafficking in women and forced prostitution"). The following year, the U.N. Commission on Human Rights appointed a Special Rapporteur on Violence against Women. Res. 1994/45, U.N. Commission on Human Rights, 50th Sess. at para. 6 (1994). As part of her mandate, the Special Rapporteur has written several reports addressing human trafficking. See, e.g., *Report on Violence in the Community*, U.N. Doc. E/CN 4/1997/47 (2000); *Report on Visit to Poland*, U.N. Doc. E/CN 4/1997/47/Add 1 (2000); *Report on Trafficking in Women, Women's Migration and Violence Against Women*, U.N. Doc. E/CN 4/2000/68 (2000).

⁵⁷ See U.N. REPORT ON THE FOURTH WORLD CONFERENCE ON WOMEN, BEIJING DECLARATION AND PLATFORM FOR ACTION, U.N. Doc. A/CONF 177/Rev.1, U.N. Sales No. 96.IV.13 (1995); *Traffic in Women and Girls*, G.A. Res. 50/167, 50th Sess., 99th plen. mtg., paras. 113, 122, U.N. Doc.

Governments and NGOs alike have renewed international interest in human trafficking, particularly trafficking in women and children.

The highly emotional public outcry regarding trafficking in women, both nationally and internationally, has echoed the outrage of the earlier response to white slavery. The narrative of a typical story is remarkably similar:

Lenny (18), Wida (16) and Dewi (20) were three young girls who were prostituted after being recruited in a shopping mall in Medan, North Sumatra, where they met three good-looking, charming and generous young men who offered them job opportunities elsewhere. The three young women did not suspect anything wrong when they were invited to have dinner in a café and were offered promising jobs as bar tenders in a discotheque in Dumai, which is close to Singapore. When they arrived in Dumai, they were repeatedly beaten by the bodyguards. They were made to sign contracts indicating that they had consented. Along with 600 young women, they were locked in "barracks." "I cried one night when I had to give my virginity to a fat Chinese man for the price of Rp 50.000. And I had to give that money to Mami" (the brothel owner).⁵⁸

The focus is again on using the stories of "innocent" young victims of sexual violence—although this time the victims are from across the ocean rather than across town—to mobilize political decisionmakers nationally and internationally.

Nonetheless, there was no further activity at the treaty level on the issue of human trafficking until 2000.⁵⁹ In part, this was because there was an existing treaty regime on trafficking, albeit one that was outdated and flawed in many respects. Efforts to develop another treaty were also hindered by the debate, particularly within the women's human rights movement, over the scope of such a treaty and the nature of the obligations involved.⁶⁰ The debate has

A/RES/50/167 (1995) (addressing "trafficking and forced prostitution" under the heading "violence against women," and identifying as a strategic objective the goal to "eliminate trafficking in women and assist victims of violence due to prostitution and trafficking"). See also *U.N. Report of the Ad Hoc Committee of the Whole of the Twenty-Third Special Session of the General Assembly*, U.N. GAOR, 23d Special Sess., Supp. No. 3, ch. III, Draft Resolution II, U.N. Doc. A/S-23/10/Rev.1 (2000). The latter document addresses trafficking in the context of girl children and violence against women, as well as making recommendations for action at national and international levels. *Id.* paras. 32, 59, 70, 96–97.

⁵⁸ JANICE G. RAYMOND ET AL., *A COMPARATIVE STUDY OF WOMEN TRAFFICKED IN THE MIGRATION PROCESS: PATTERNS, PROFILES AND HEALTH CONSEQUENCES OF SEXUAL EXPLOITATION IN FIVE COUNTRIES: INDONESIA, THE PHILIPPINES, THAILAND, VENEZUELA AND THE UNITED STATES* 20 (2002). This study uses numerous other stories to illustrate trafficking scenarios.

⁵⁹ See generally Farrior, *supra* note 34 (providing overview of human rights treaties and mechanisms that could potentially address trafficking). See also Reanda, *supra* note 6, at 211 (describing a 1987 proposal for an implementation mechanism similar to that created for the Convention Against Torture). There were, however, some earlier efforts to address trafficking in children through the mechanisms established by the Convention on the Rights of the Child. See Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 982 n.46 (2001); Farrior, *supra* note 34, at 233–36 (providing an overview of obligations and enforcement mechanisms under the Children's Rights Convention). In addition, the ILO adopted the Convention on the Worst Forms of Child Labour in 1999. Convention on Child Labour, *supra* note 16, art. 3(a). It has been easier for the international community to reach consensus on addressing trafficking in children because there is widespread agreement that consent is not at issue.

⁶⁰ See Coalition Against Trafficking in Women, *Proposed United Nations Convention Against Sexual Exploitation*, available at <http://www.catwinternational.org/about/UNconv.html> (last visited Feb. 12, 2004) (addressing trafficking and the scope of implementation of the convention in terms of sexual

focused on an appropriate definition of “trafficking.” In particular, activists have disagreed vehemently about its relationship to prostitution.⁶¹

Finally, in 2000, the U.N. adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (the “Protocol” or “2000 Protocol”).⁶² The Protocol provides the first international definition of trafficking and comes as part of an explicit law enforcement regime⁶³ rather than a human rights or labor rights regime, even though human rights activists were involved in the negotiation process.⁶⁴ The Protocol grew out of efforts to develop a new international legal response to transnational organized crime.⁶⁵ The U.N. Centre for International Crime Prevention (CICP)—the office responsible for crime prevention, criminal justice, and criminal law reform—is charged with assisting states in the

exploitation); Global Alliance Against Trafficking, *Commentary on Definition of Trafficking in UN Protocol*, available at <http://www.thai.net/gaatw/> (last visited Feb. 12, 2004) (noting that government delegates to the negotiations on the Protocol could not agree on the meaning of “exploitation of prostitution of others or other forms of sexual exploitation”).

⁶¹ See Gallagher, *supra* note 59, at 984–990 (relating the debates on the definition of trafficking and the link between trafficking and prostitution and noting that “it would be incorrect to view the final result as indicative of a majority sentiment on the issue of prostitution”).

⁶² See Protocol, *supra* note 2. Two other protocols have also been prepared—a protocol on smuggling of migrants, which has been adopted, and a protocol on trafficking in firearms, which has not yet been adopted. See Protocol Against Smuggling of Migrants by Land, Sea, and Air, G.A. Res. A/RES/55/25, U.N. GAOR, 55th Sess., U.N. Doc. A/55/383 (2000) [hereinafter Protocol Against Smuggling]; Revised Draft Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, U.N. GAOR Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, U.N. Doc. A/AC.254/4/Add.2/Rev.1 (1999). See also Gallagher, *supra* note 59, at 982 (stating that “[t]he origins of the Trafficking Protocol can be traced back to Argentina’s interest in the issue of trafficking in minors and its dissatisfaction with the slow progress of negotiating an additional protocol to the Convention on the Rights of the Child (CRC) to address child prostitution and child pornography. Argentina was also concerned that a purely human rights perspective to this issue would be insufficient” (footnote omitted)).

⁶³ See U.N. Office on Drugs and Crime (“UNODC”) website, at http://undcp.org/odccp/crime_cicp.html (last visited Feb. 10, 2004) (stating that the UNODC Crime Programme “is the United Nations office responsible for crime prevention, criminal justice and criminal law reform. It pays special attention to combating transnational organized crime, corruption and illicit trafficking in human beings”). See also G.A. Res. 53/111, U.N. GAOR, 53d Sess., 85th plen. mtg., para. 10, U.N. Doc. A/RES/53/111 (1998) (establishing an ad hoc committee open to all states for the purpose of elaborating a new comprehensive international convention against transnational organized crime and, as necessary, additional international legal instruments on illegal transport and trafficking in migrants and trafficking in women and children); Kelly E. Hyland, *The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, 8 HUM. RTS. BRIEF 30 (2001) (providing a history on the Protocol).

⁶⁴ See Gallagher, *supra* note 59, at 984–85 n.67–68 (noting the role of NGOs in the negotiation of the definition of trafficking). The Coalition Against Trafficking in Women advocated a reference to the “exploitation of prostitution of others,” while Human Rights Caucus was part of the anti-prostitution lobby. The InterAgency Group included the U.N. High Commissioner for Human Rights, the United Nations Children’s Fund, the International Organization for Migration, the U.N. High Commissioner for Refugees, and the U.N. Special Rapporteur on Violence Against Women. *Id.* at 977–981 (providing an overview of the Convention against Transnational Organized Crime). See also *Guide to the New U.N. Trafficking Protocol*, available at www.action.web.ca/home/catw/attach/un_protocol.pdf (last visited Sept. 30 2002) (stating that the Coalition Against Trafficking in Women International, the Movement for the Abolition of Pornography and Prostitution, the European Women’s Lobby, and the Association des Femmes de Europe Meridionale played an important role in the evolution of the trafficking protocol).

⁶⁵ Gallagher, *supra* note 59, at 975.

implementation of the various international criminal law conventions and protocols.⁶⁶

To date, the second wave of international attention to human trafficking has followed the problematic path of the first by focusing on trafficking in women for purposes of prostitution or sexual exploitation. The relationship between human trafficking and (sexual) violence against women has dominated the discussion, and the relationship between trafficking and forced or exploitative labor has been largely unexamined. Although human rights and labor rights bodies and activists have been more involved in the international response to trafficking, the Protocol still embodies the law enforcement framework. Though the Protocol's effectiveness remains unproven, it will frame the contours of the international response for the foreseeable future.⁶⁷

II. THREE VIEWS ON THE NATURE OF HUMAN TRAFFICKING AND APPROPRIATE INTERNATIONAL RESPONSE

Efforts by the international community to respond to the problem of human trafficking fall under three basic rubrics—law enforcement, labor rights, and human rights.⁶⁸ Each approach has strengths and limitations. Whether we consider trafficking as a problem of law enforcement, labor, or human rights, a range of different consequences emerges—from who is involved at the international level, to what role there is for the “victim,” to who can be held accountable.

Though the law enforcement approach has been the dominant framework at the international level, both the labor and human rights approaches have become increasingly influential in past decades.⁶⁹ Because each framework has limitations in scope and effectiveness, a coordinated, multifaceted approach would offer the opportunity to draw upon the strengths of each. The fragmented approaches have generally heightened the limitations of the individual frameworks by confining their work to narrow mandates, defining human trafficking in a discriminatory manner, adopting a piecemeal approach to solving the problem, and marginalizing the interests of those most affected—the trafficked persons. This fragmentation ultimately has made the international response to human trafficking ineffective.

⁶⁶ See United Nations Office on Drugs and Crime website, at http://www.unodc.org/unodc/en/crime_prevention.html (last visited Nov. 13, 2003) (describing the purpose and activities of the office).

⁶⁷ The Protocol has also generated pressure on national governments to address trafficking. See *TRAFFICKING IN PERSONS REPORT*, *supra* note 27, at 13 (representing an annual report to the United States Congress, required by law, on the “status of severe forms of trafficking in persons”).

⁶⁸ These are, of course, neither mutually exclusive nor exhaustive accounts of possible frameworks. See discussion *supra* note 14.

⁶⁹ See *supra* Part I (discussing the various frameworks).

*A. A Law Enforcement Framework: Traffickers, Prostitutes,
and Illegal Migrants*

All of the international documents addressing human trafficking in detail have essentially embodied a law enforcement perspective.⁷⁰ The early international agreements focused on cooperation among national and international authorities, criminalizing offenses, and preventing trafficking by warning potential victims and discouraging migration.⁷¹ The most comprehensive of the early treaties, the 1949 Convention, focused on punishing traffickers and criminalizing related conduct. While some attention was given to preventing trafficking and the repatriation of victims, law enforcement was the primary focus of the 1949 Convention.⁷²

This approach is similarly apparent in the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. The Protocol evinces a law enforcement orientation in multiple ways. Most obviously, it is a protocol to a convention regarding transnational organized crime.⁷³ In order to become a party to the Protocol, a state must first become party to the convention itself.⁷⁴ The focus of the institutions responsible for its development and implementation is on drugs and organized crime.⁷⁵ Human trafficking is treated as simply one more component of the fight against organized crime.⁷⁶ The Protocol requires state parties to criminalize trafficking

⁷⁰ See *supra* notes 4, 7 (listing international agreements addressing trafficking from the law enforcement framework). The Protocol is mostly identified as a law enforcement mechanism. For example, it is a protocol to a Convention on organized crime, and the U.N. agency charged with implementation is a law enforcement body. See *Special Rapporteur's Report*, *supra* note 12, paras. 7, 22 (noting law enforcement focus of 1949 Convention and new Protocol).

⁷¹ See, e.g., *supra* text accompanying note 19 (noting the focus of the International Agreement for the Suppression of the White Slave Traffic on establishing coordination between members to address trafficking).

⁷² See CSTPE and Prostitution of Others, *supra* note 7 (providing a majority of provisions to address law enforcement issues). See also Farrior, *supra* note 34, at 220–21 (discussing problems with enforcement mechanisms).

⁷³ See United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/45/49 (2001). Article 37 states that Parties to the Convention are not bound by the Protocols unless they also become Party to them. It also provides that the Protocols shall be interpreted together with the Convention. *Id.* art. 37.

⁷⁴ *Id.* (stating in Article 37 that “[i]n order to become a Party to a protocol, a State or a regional economic integration organization must also be a Party to this Convention”).

⁷⁵ The Centre for International Crime Prevention, which is part of the U.N. Office for Drug Control and Crime Prevention, is the United Nations office responsible for crime prevention, criminal justice, and criminal law reform. The Global Programme Against Trafficking in Human Beings is part of its mandate. Centre for International Crime Prevention website, at http://undcp.org/odccp/crime_cicp.html (last visited Oct. 1, 2002). See also G.A. Res. 53/111, U.N. GAOR, 53d Sess, 85th plen. mtg., para. 10, U.N. Doc. A/RES/53/111 (1998) (establishing an Ad Hoc Committee open to all states, for the purpose of elaborating a new comprehensive international convention against transnational organized crime and, as necessary, additional international legal instruments on: (i) illegal transport and trafficking in migrants; (ii) illicit manufacturing of and trafficking in firearms, their parts and components, and ammunitions; and (iii) trafficking in women and children). See Reanda, *supra* note 6, at 221–22, 226–27 (noting parallels between fight against human trafficking and fight against drug trafficking).

⁷⁶ While much trafficking does occur in the context of organized crime, it is not the only locus of trafficking. Trafficking also occurs on a smaller scale, with the involvement of families and corrupt officials. See, e.g., ASIA WATCH & THE WOMEN'S RIGHTS PROJECT, A MODERN FORM OF SLAVERY: TRAFFICKING OF BURMESE WOMEN AND GIRLS INTO BROTHELS IN THAILAND 45–46 (1993) (describing the complicity of a woman's family in the recruitment process of trafficking). Some poor family members in Bangladesh, Nepal, and Burma sell their daughters to traffickers in hopes that these women

and to adopt policies and programs to prevent and combat it.⁷⁷ Although it also includes some victim protection measures—such as provisions for physical and psychological care and limited options for temporary residence—these are not mandatory.⁷⁸

The reasons why international anti-trafficking efforts have continually emphasized law enforcement are readily apparent. The acts of traffickers, particularly any coercion, kidnapping or ill treatment of victims, likely violate domestic criminal law in the various countries where they occur. In addition, because most states criminalize or otherwise regulate prostitution, the link between prostitution and trafficking suggests a criminal justice response on an international level. Finally, trafficking, at least in its current manifestations, often does occur in connection with other criminal activities. Thus, there is a need for a coordinated law enforcement response at the international level.

The greatest advantage of a law enforcement approach is that it offers the potential for prosecuting traffickers directly.⁷⁹ Accountability by individuals and states for violations of international law is always a difficult issue, and a coordinated law enforcement approach offers at least the potential for concrete results in specific cases—the traffickers will be caught and punished, and ideally, prevented from trafficking again. There is also a symbolic value to criminalizing trafficking and prosecuting traffickers. It draws increased public attention to the problem and sends a message about the value of the victims and the fact that consequences will follow for those who engage in trafficking. Moreover, a law enforcement approach provides benefits by allocating resources to combat trafficking. Generally, crime prevention resources at the national and international levels—not just in financial terms, but also in terms of personnel and enforcement mechanisms—are greater than those for labor or human rights concerns.

There are limitations, however, to a law enforcement approach. One major issue has been the struggle to define “trafficking,” an essential exercise if the

will earn money for the family by working as maids or cooks. *Id.* See also Human Rights Watch, Memorandum of Concern, Trafficking of Migrant Women for Forced Prostitution into Greece, available at http://www.hrw.org/background/eca/greece/greece_memo_greece.htm#_Toc520092593 (last visited Nov. 1, 2003) (stating that successful trafficking of women for forced prostitution depends on the complicity of the police and corrupt government officials).

⁷⁷ See Protocol, *supra* note 2, arts. 6, 9 (addressing assistance to and protection of victims of trafficking in persons and measures to prevent trafficking). Within the international law enforcement framework and the implementation of the Protocol, there is an emphasis on developing the uniformity of national laws and setting standards for domestic law. This is an important and understandable goal for international crime prevention efforts, and adopting guidelines or model legislation can be an effective tool for coordinating efforts. See, e.g., Trafficking in Persons Report, *supra* note 27 (summarizing State Department findings on the effectiveness of national efforts to combat trafficking around the world). However, an international threshold that prioritizes prosecution of offenders and minimizes victims' rights can undermine national efforts to include greater victim protections. See also *Special Rapporteur's Report*, *supra* note 12, paras. 89–97 (discussing various national attempts to respond to trafficking).

⁷⁸ See Protocol, *supra* note 2, art. 6(3) (stating that “[e]ach State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons”).

⁷⁹ See, e.g., *id.* art. 5 (criminalizing trafficking according to the definition of the Protocol). Although it is not possible to assert claims directly under the Protocol, national laws must criminalize trafficking and offer some possibility for victim compensation. Even these benefits are somewhat diffuse. *Id.* art. 6.

goal is uniform enforcement.⁸⁰ Trafficking was characterized as “white slave traffic” and “traffic in women and children” in the early international documents, but neither term was explicitly defined.⁸¹ Although the terminology became less explicitly racist⁸² (though not necessarily less sexist) over the years, there was no definition of “trafficking” in an international document until the 2000 Protocol. In the second wave of international attention, the lack of a definition was a consequence of states’ and advocates’ inability to agree about core elements of the definition.⁸³ The current disagreement has revolved primarily around the relationship to prostitution, the question of consent, and the purpose of the trafficking conduct covered.⁸⁴

There is disagreement within the international community (and among feminist and other advocates) about how to conceptualize and respond to prostitution.⁸⁵ Many governments take an approach of criminalizing all aspects of prostitution.⁸⁶ Others criminalize only certain aspects or legalize and regulate other aspects.⁸⁷ Because of the differing approaches, there has been debate over how, and whether, prostitution should be included within a definition of trafficking. Because it is both criminalized and stigmatized in many societies, this treatment reflects a judgment about prostitutes and

⁸⁰ See Chang, *supra* note 2, at 356–363 (discussing the importance of defining “trafficking” in the human rights context).

⁸¹ See ICST in Women of Full Age, *supra* note 7, art. 1 (describing the offense as “in order to gratify the passions of another person, procur[ing], entic[ing] or [leading] away even with her consent, a woman or girl of full age for import purposes to be carried out in another country”). See Demleitner, *supra* note 4, at 165–67 (describing the history of the “white slavery” terminology).

⁸² Demleitner, *supra* note 4, at 188–89 (discussing racial aspect of trafficking). See also *Special Rapporteur’s Report*, *supra* note 12, para. 44 (noting role of racism and xenophobia in responses to trafficking); Kempadoo, *supra* note 26, at 9–14 (discussing racism and cultural imperialism in international discourse on prostitution). See generally Doezeema, *supra* note 11, at 34–51 (discussing racism in “poverty as force” approach to distinguishing between forced and voluntary prostitution).

⁸³ See Gallagher, *supra* note 59, at 984 (noting that discussion about the definition of trafficking in the protocol were the most controversial discussions during negotiations).

⁸⁴ See *id.* at 984–88 (discussing the debates which centered around prostitution and consent).

⁸⁵ See Reanda, *supra* note 6, at 203 (briefly defining the three approaches for responding to prostitution, which include prohibition, regulation, and abolition). See also *Special Rapporteur’s Report*, *supra* note 12, para. 21 (characterizing four primary legal paradigms for responding to prostitution—criminalization, decriminalization, legalization/regulation, and decriminalization combined with a human rights approach).

⁸⁶ For example, prostitution is illegal in almost every state in the United States, except Nevada. See, e.g., CAL. PENAL CODE §§ 266–67, 309, 318, 647.1, 11225; D.C. CODE ANN. §§ 22, 2701–2713; FLA. STAT. ANN. §§ 796.03 to 796.07; N.J. STAT. ANN. §§ 2C:34-1, 2C:34-1.1, 46:8-8; N.Y. PENAL LAW §§ 230.00–230.40, 240.37. See also Margarete von Galen, *Prostitution and the Law in Germany*, 3 CARDOZO WOMEN’S L.J. 349 (1996) (examining the history of German criminal and regulatory law against prostitution); Patricia D. Levin, *Curtailing Thailand’s Child Prostitution Through an International Conscience*, 9 AM J. INT’L L. 869, 871 (1994) (noting that the Prohibition of Prostitution Act prohibits all forms of prostitution in Thailand and that “[t]he Act holds all parties involved in the trade criminally liable, but contains an exemption of customers”).

⁸⁷ See NEV. REV. STAT. ANN. § 244.345 (Michie 1995) (permitting a person to obtain a license to engage in the business of a house of prostitution in a county whose population is less than 400,000); NEV. REV. STAT. ANN. § 201.320 (Michie 1995) (stating that prostitutes are not forbidden from living off their own earnings from prostitution). See also, Claire Sterk-Elifson & Carole A. Campbell, *The Netherlands*, in PROSTITUTION 191 (Nanette J. Davis ed., 1993) (explaining that the Netherlands has accepted prostitution as a legitimate profession); Micloe Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 YALE J.L. & FEMINISM 69 (1998) (providing an overview of the laws in Nevada which regulate prostitution and distinguishing between the decriminalization and the regulation of prostitution); Jessica N. Drexler, *Governments’ Role in Turning Tricks: The World’s Oldest Profession in the Netherlands and the United States*, 15 DICK. J. INT’L L. 201, 202 (1996) (stating that most European nations do not criminalize all aspects of prostitution).

prostitution, particularly when the prostitution is voluntary. The treatment of prostitution also reflects the social interest in women's sexuality—ranging from the desire to rescue the “innocent” victim of forced prostitution, who suffers a “fate worse than death,” to the marginalization that all prostitutes, voluntary or coerced, suffer. The law enforcement approach struggles to reconcile two apparently conflicting views of prostitutes and prostitution—one that seeks to protect individuals from being trafficked into prostitution and another that seeks to exclude from protection those who willingly engage in the criminal conduct of prostitution, even if they have been trafficked to another country.

Therefore, the debate about the relationship between prostitution and trafficking is connected (somewhat paradoxically) to the question of the role of consent and whether to distinguish between voluntary and forced prostitution.⁸⁸ The first anti-trafficking treaty to address the question of consent was the 1910 Convention, which specifically states that an offense may constitute trafficking even if done with the woman's consent.⁸⁹ The 1933 and 1949 Conventions also made consent irrelevant to the issue of trafficking,⁹⁰ an approach followed by the 2000 Protocol.⁹¹ The decision to remove consent as an element of the offense comports with the emphasis of those agreements on punishing traffickers.⁹² But it also reflects a discriminatory, paternalistic view of women—one that creates its own “innocent” victims.⁹³ This view assumes not only that no one would choose to be trafficked, but also that no one would voluntarily choose prostitution.

The focus of the anti-trafficking treaties on prostitution has deflected concern away from the other purposes for which people are trafficked. All of

⁸⁸ See Demleitner, *supra* note 4, at 164 (arguing for naming only “forced prostitution” as an international offense); Doezeema, *supra* note 11, at 42 (discussing the voluntary versus forced prostitution dichotomy and noting that the forced/voluntary distinction was first developed by the prostitutes' rights movement in response to those who characterize all prostitution as abusive; however, she criticizes the way the distinction has been used to reinforce sexual stereotypes and justify ignoring the rights of voluntary sex workers); *Special Rapporteur's Report*, *supra* note 12, paras. 12, 36 (noting that “trafficking is never consensual” and describing four typologies for involvement in the sex trade, three of which involve varying degrees of coercion and constitute trafficking).

⁸⁹ ICSWST at Final Protocol, *supra* note 4, art. 1.

⁹⁰ See ICST in Women of Full Age, *supra* note 7, art. 1; CSTPE and Prostitution of Others, *supra* note 7, art. 1(1) (stating that parties must punish any person who “procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person”).

⁹¹ Protocol, *supra* note 2, art. 3(b).

⁹² The goal was to eliminate a potential defense that the victim had “consented” to being trafficked or to the purported exploitation. See Janie Chuang, *Redirecting the Debate Over Trafficking In Women: Definitions, Paradigms, and Contexts*, 11 HARV. HUM. RTS. J. 65, 75 (1998) (noting that the 1933 Convention declared that a woman's consent to being trafficked would not constitute a defense to the crime of international trafficking and that the 1949 Convention also conceived the crime of trafficking, irrespective of consent). See also Gallagher, *supra* note 59, at 984 (highlighting debates on whether to include consent in the definition of trafficking). Those arguing for the inclusion of the phrase “irrespective of the consent of the person” point out that the inclusion “would ensure traffickers could not escape conviction by using the victim's so called consent as a defense.” *Id.*

⁹³ Although there would likely be consensus that no one consents to the violent, abusive, or coercive methods or outcomes of trafficking, the issue of the role of consent is more complex. See *Special Rapporteur's Report*, *supra* note 12, para. 36 (describing four types of situations that result in women's and children's involvement in the sex trade and the varying levels of consent and coercion involved). But see Heather Montgomery, *Children, Prostitution, and Identity: A Case Study from a Tourist Resort in Thailand*, in GLOBAL SEX WORKERS, *supra* note 11, at 139, 139 (problematizing perceptions of child prostitution).

the trafficking documents until the 2000 Protocol have been limited to trafficking for “immoral purposes,” prostitution or other sexual purposes.⁹⁴ The public outcry has revolved around this issue—it seems most shocking and does not implicate as clearly the broader and more troublesome issues involving exploitative labor and migration. Many advocates, especially in more recent years, have argued for a broader definition of trafficking to include trafficking for purposes of forced labor or other slavery-like practices.⁹⁵ This would encompass people who have been trafficked for domestic work, sweatshop labor, migrant labor, or other work in the informal economy.⁹⁶ However, advocates have faced resistance on this point because of concerns about the increase in economic migration coupled with the potential for a broader pool of “victims” making claims upon states and the international community.

The 2000 Protocol resolves many of these controversial issues by following the traditional law enforcement approach. It defines “trafficking in persons” as:

The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.⁹⁷

It eliminates the issue of consent,⁹⁸ includes all forms of prostitution, and focuses primarily on sexual exploitation.⁹⁹ However, it does expand the list of end purposes that are covered to include forced labor, servitude, and slavery-like practices.

In addition to the definitional questions, there are other limitations inherent in a law enforcement approach. A major drawback to the law enforcement perspective—particularly when the focus is on organized crime—is that it only

⁹⁴ See discussion *supra* note 4 (documenting the early agreements addressing trafficking).

⁹⁵ See *Special Rapporteur's Report*, *supra* note 12, para. 13 (noting the variety of exploitative purposes of trafficking, including forced and/or bonded labor).

⁹⁶ See, e.g., Human Rights Watch, *Hidden in the Home: Abuse of Domestic Workers with Special Visas in the United States* (June 2001), available at <http://www.hrw.org/reports/2001/usadom> (last visited Nov. 13, 2003).

⁹⁷ Protocol, *supra* note 2, art. 3.

⁹⁸ *Id.* (providing that “[t]he consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used”).

⁹⁹ See Global Alliance Against Trafficking, *supra* note 60 (noting that government delegates to the negotiations could not agree on the meaning of the phrase “exploitation of prostitution of others or other forms of sexual exploitation”). Prostitution and sexual exploitation are listed first in the list of prohibited forms of exploitation. Moreover, the focus of discussion and enforcement efforts has been on sexual exploitation. See, e.g., U.N. Office on Drugs and Crime, *Trafficking in Human Beings*, at http://www.undcp.org/odccp/trafficking_human_beings.html?id=11705 (last visited Nov. 13, 2003) (focusing on trafficking of women and girls and stating that “[w]omen and girls forced to work as prostitutes are blackmailed by the threat that traffickers will tell their families”).

penalizes individual offenders. It does not address the role of the state or government officials in committing or tolerating trafficking. Advocates have noted that much trafficking could not occur without the involvement of government officials, such as police and border control officers.¹⁰⁰ Presumably, the Protocol would allow prosecution of the individual officials involved. However, official complicity in trafficking is often so widespread and systemic that it reflects governmental policy or acquiescence.¹⁰¹ The law enforcement approach does not contemplate holding the state responsible, either domestically or internationally. Such accountability should be an important component of effectively combating trafficking, but simply cannot be accomplished in a law enforcement context.

Moreover, the law enforcement framework has typically ignored or marginalized human rights and labor concerns.¹⁰² Although mentioned in the 2000 Protocol, human rights issues are given minimal consideration. Yet the law enforcement approach has human rights implications, such as its potential for restricting freedom of movement and its lack of privacy protection. In their zeal to combat trafficking, many states adopted laws restricting the freedom of movement of migrants, particularly female migrants.¹⁰³ While paying lip service to this concern, the Protocol in fact reaffirms states' abilities to restrict these rights.¹⁰⁴ Even the provision affording temporary residence status to victims of trafficking is left to the discretion of the states. The Protocol provides little other protection for victims.¹⁰⁵ Advocates have emphasized that the provisions of the Protocol relating to punishing traffickers are mandatory, while the provisions relating to victim protection and services are left to the discretion of the states.¹⁰⁶ Not only is there little protection for victims, but there is also very little role for them to play—other than as subjects of stories that evoke shock and pity—in asserting or protecting their rights and interests.

Finally, even within the law enforcement framework, there is a problem appropriately identifying trafficked persons. While the Protocol distinguishes

¹⁰⁰ See *Special Rapporteur's Report*, *supra* note 12, para. 51 (noting Global Survival Network study finding that police were actively involved or "knowingly turn[ed] a blind eye" to trafficking).

¹⁰¹ See U.N. INTERNATIONAL LABOUR OFFICE, *THE SEX SECTOR: THE ECONOMIC AND SOCIAL BASES OF PROSTITUTION IN SOUTHEAST ASIA* 8, 12 (Lin Lim ed., 1998) [hereinafter *THE SEX SECTOR*] (stating that in Indonesia, the financial turnover of the sex sector was estimated at between 0.8 and 2.4% of the country's GDP). In Thailand, turnover was estimated at about 10–14% of GDP. *Id.* at 10.

¹⁰² Although human rights organizations and activists were involved in some aspects of the negotiations around the Protocol, it was drafted in a law enforcement context and will be implemented by law enforcement mechanisms. See *Special Rapporteur's Report*, *supra* note 12, para. 7 (expressing concern that "the first modern international instrument on trafficking is being elaborated in the context of crime control, rather than with a focus on human rights").

¹⁰³ See *id.* paras. 42, 47, 89–97 (concerning trafficking in women and migration laws). The Special Rapporteur expresses her concern that governments restrict freedom of movement in an effort to combat trafficking. For example, she notes that the Canadian government's selective use of visitor visas to prevent illegal entry suggests "an anti-immigration approach to trafficking." *Id.* para. 92.

¹⁰⁴ See Protocol, *supra* note 2, art. 11 (stating that "[w]ithout prejudice to international commitments in relation to the free movement of people, State Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons").

¹⁰⁵ See *id.* art. 10 (providing requirements for sharing information about victims of trafficking).

¹⁰⁶ See *id.* art. 6 (providing assistance to and protection of victims "in appropriate cases" and stating that states "shall consider" implementing measures to provide for the physical, psychological, and social recovery of victims).

human trafficking from the smuggling of migrants,¹⁰⁷ many states and the institutions charged with supporting implementation of the Protocol conflate trafficked persons and illegal migrants.¹⁰⁸ The most obvious consequence of this is that trafficked persons face the risk of being identified primarily as “voluntary” illegal migrants; in effect, this often excludes them from protection as victims of human rights violations.¹⁰⁹ As illegal migrants, they are not entitled even to the minimal protections offered to trafficking victims.¹¹⁰

Because the narrative stories of trafficked persons have been so powerful in anti-trafficking advocacy, I will illustrate the different consequences of each framework as they affect an imaginary trafficked person named “Doti.”¹¹¹ The same basic scenario yields divergent visions of the trafficking “victim,” the traffickers, and the role of the international community, depending on the analytical perspective. Under a law enforcement approach to human trafficking, Doti is primarily, if not exclusively, identified as a victim. To benefit under the existing law enforcement regime, Doti is in a better position if she is a woman or a child (the primary intended beneficiaries of the anti-trafficking mechanisms).¹¹² She should not be a willing victim in any sense—ideally, she will be neither a prostitute or sex worker nor a voluntary migrant.¹¹³ She should not be interested in staying in the country to which she was trafficked on a permanent basis.¹¹⁴ If she did have an intent to migrate, it should not have been to work illegally, especially as a prostitute. However, if

¹⁰⁷ There is a second protocol that separately addresses the issue of smuggling of immigrants. See Protocol Against Smuggling, *supra* note 62 (focusing exclusively on the smuggling of migrant workers).

¹⁰⁸ See *Special Rapporteur's Report*, *supra* note 12, para. 46 (noting Special Rapporteur's concern that governments equate illegal migration with trafficking in women); Marjan Wijers, *Women, Labor, and Migration: The Position of Trafficked Women and Strategies for Support*, in GLOBAL SEX WORKERS, *supra* note 11, at 69, 72 (“[T]rafficked women are considered, above all, as undesirable aliens.”).

¹⁰⁹ Because most states strictly limit migration for employment and do not recognize sex work as a legal form of employment, trafficked persons are also not entitled to protection as legal migrants for employment. See ILO Convention No. 97 on Migration for Employment (Revised), *adopted* July 1, 1949, art. 2, 120 U.N.T.S. 71 (entered into force Jan. 22, 1952), *available at* http://portal.unesco.org/shs/en/ev.php@URL_ID=1416&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Feb. 10, 2004) [hereinafter ILO Convention No. 97] (stating that member states “undertake[] to maintain, or satisfy itself that there is maintained, an adequate and free service to assist migrants for employment, and in particular to provide them with accurate information”). See also General Conference of the International Labour Organization, Recommendation Concerning Migration for Employment, July 1, 1949, *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?R086> (last visited Sept. 30, 2002) (stating additional provisions member states must take to assist migrants and their families and to provide them with accurate information).

¹¹⁰ Compare Protocol Against Smuggling, *supra* note 62, art. 18 (stating that “[e]ach State Party agrees 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”), with Protocol, *supra* note 2, art. 7 (stating that “each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases”).

¹¹¹ See Muneer Ahmad, Remarks at “Transgressing Borders: Women’s Bodies, Identities and Families,” a Conference in Memory of Mary Joe Frug, New England School of Law (Mar. 31, 2001) (unpublished manuscript, on file with author) (using narrative to put forth different visions of the same person as trafficking victim and labor rights activist).

¹¹² See Protocol, *supra* note 2, art. 6(4) (stating that “[e]ach State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care”).

¹¹³ See *id.* art. 3(b) (stating that the consent of the victim shall be irrelevant).

¹¹⁴ See *id.* arts. 7, 8 (providing limited protection regarding the status of victims of trafficking in receiving states and regarding the repatriation of victims of trafficking).

she was previously “innocent” and then sexually exploited by her traffickers, she will have a stronger moral claim to protection.¹¹⁵ She should not be interested in bringing her own claim against the traffickers or complicit individuals, including government officials. Typically, such mechanisms are not available to trafficked persons.¹¹⁶ However, she should be willing to assist with their prosecution, including acting as a witness.¹¹⁷ If she does, then she may be eligible for additional benefits. Thus, the law enforcement framework may offer Doti little else than a chance to assist in punishing her traffickers.

B. A Labor Framework: Child Trafficking, Forced Labor, and “Sex Work”

Although labor issues are often intertwined with human trafficking, the International Labour Organization (“ILO”) and other components of the international labor rights framework have been underutilized for addressing human trafficking. In the first wave of international consideration of human trafficking, attention focused on prostitution and sexual exploitation rather than forced labor or slavery-like conditions.¹¹⁸ As a result, the ILO was not directly involved in the anti-trafficking movement. Rather, early ILO activities focused on legal migration for employment,¹¹⁹ preventing employment discrimination,¹²⁰ and eliminating forced labor.¹²¹

The ILO work on legal migration for employment and elimination of discrimination would arguably apply to some forms of trafficking where trafficking victims have migrated legally. However, it would not cover migration for “sex work” unless that activity was permitted in the destination

¹¹⁵ See *Special Rapporteur’s Report*, *supra* note 12, para. 85 (stating that “[o]verwhelmingly, the law continues to be fuelled by moral considerations. As such, it may be that the only trafficked women who will be provided protection are those who fit into the stereotype of the young virgin ‘who was snatched off the streets by unscrupulous criminals, drugged, taken across an international border, raped and then chained to a bed or at least severely beaten to engage in sex for money, paid to her captors’” (quoting Nora Demleitner, *The Law at Crossroads: The Construction of Migrant Women Trafficked into Prostitution*, in *COMPARATIVE PERSPECTIVE 12* (Rey Koslowski & David Kyle eds., 2001))).

¹¹⁶ But see Protocol, *supra* note 2, art. 6(2) (requiring each state party to provide to trafficking victims information on relevant judicial and administrative proceedings and procedures to integrate their concerns into criminal proceedings against suspected traffickers).

¹¹⁷ See Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 107(c)(3) (stating that “[f]ederal law enforcement officials may permit an alien individual’s continued presence in the United States if after an assessment, it is determined that such individual is a victim of a severe form of trafficking and a potential witness to such trafficking, in order to effectuate prosecution of those responsible”). See generally *Special Rapporteur’s Report*, *supra* note 12 (discussing legal status of trafficked migrants).

¹¹⁸ The early anti-trafficking treaties focused exclusively on trafficking for sexual purposes. See *supra* notes 4, 7 (providing a list of early agreements on trafficking).

¹¹⁹ See, e.g., ILO Convention No. 97, *supra* note 109, arts. 2, 3 (stating that member states undertake to provide free services and accurate information to migrants for employment and to take all appropriate steps against misleading propaganda); General Conference of the International Labour Organization, *supra* note 109 (stating additional provisions member states must take to assist migrants and their families and to provide them with accurate information).

¹²⁰ See, e.g., Convention (No. 111) Concerning Discrimination (Employment and Occupation), 362 U.N.T.S. 31 (1958).

¹²¹ See, e.g., ILO Forced Labour Convention (No. 29), *supra* note 4 (stating that each ratifying member must undertake “to suppress the use of forced or compulsory labour in all its forms within the shortest possible period”); Convention on Abolition of Forced Labour, *supra* note 46 (stating that each ratifying member must undertake “to suppress and not to make use of any form of forced or compulsory labour”). Even the treaties on forced labor are directed more at forced labor compelled by states rather than private persons.

country.¹²² The ILO forced labor conventions do not specifically mention trafficking, but they would arguably cover some aspects of trafficking. For example, the state parties to the 1930 Forced Labour Convention agreed to “suppress the use of forced or compulsory labour in all its forms within the shortest possible period.”¹²³ Forced or compulsory labor is defined as “all work or service that is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”¹²⁴ The convention requires state parties to penalize illegal use of forced or compulsory labor.¹²⁵

In 1975, the ILO adopted the Migrant Workers (Supplementary Provisions) Convention (“Migrant Workers Convention”) in response to evidence of increased trafficking for labor purposes.¹²⁶ Interestingly, this convention alludes to both human rights¹²⁷ and law enforcement claims.¹²⁸ However, the main purposes of the Migrant Workers Convention are to suppress the clandestine movement of migrants and their illegal employment and to stop the organizers of this movement and those who employ illegal migrants.¹²⁹ Despite the rhetorical flourish calling for the elimination of the abuses of trafficking and respect for human rights, it was not intended to protect those who have been trafficked.

Potentially, these conventions and the related ILO mechanisms could have been used to address human trafficking for forced labor and trafficked workers who were kept in slavery-like conditions.¹³⁰ Although the ILO mechanisms do not allow for individual complaints, they do allow for complaints by governments, employers’ associations, and workers’ associations.¹³¹ This

¹²² See Kamala Kempadoo, *The Migrant Tighrope: Experiences from the Caribbean*, in GLOBAL SEX WORKERS, *supra* note 11, at 124, 124 (discussing sex work as “an integral part of many working Third World women’s lives and strategies”); *Special Rapporteur’s Report*, *supra* note 12, para. 64 (stating that “[o]verwhelmingly, migrant women are not allowed to work legally in the sex sector”).

¹²³ ILO Forced Labour Convention (No. 29), *supra* note 4, art. 1.

¹²⁴ *Id.* art. 2(1).

¹²⁵ *Id.* art. 25 (stating that the “illegal exaction of forced or compulsory labour shall be punishable as a penal offence”).

¹²⁶ See Migrant Workers (Supplementary Provisions) Convention, *supra* note 46, pmb. (stating that “evidence of the existence of illicit and clandestine trafficking in labour calls for further standards specifically aimed at eliminating these abuses . . .”).

¹²⁷ See *id.* art. 1 (providing that each member must undertake “to respect the basic human rights of all migrant workers”).

¹²⁸ See *id.* art. 5 (providing that one purpose of the measures undertaken by the members in accordance with the Convention is that “the authors of manpower trafficking can be prosecuted whatever the country from which they exercise their activities”).

¹²⁹ See *id.* art. 3 (stating that each member “shall adopt necessary and appropriate measures . . . to suppress clandestine movements of migrants for employment and illegal employment of migrants, and against the organizers of illicit or clandestine movements”).

¹³⁰ Instead, the forced labor conventions have been used to address prison labor, private employment of prisoners, child labor, bonded labor, compulsory military service, minor communal services, and forced labor for political purposes, for economic development, and as punishment for participating in a strike. HECTOR BARTOLOMEI DE LA CRUZ ET AL., *THE INTERNATIONAL LABOR ORGANIZATION: THE INTERNATIONAL STANDARDS SYSTEM AND BASIC HUMAN RIGHTS*, 143–48, 159–164 (1996). The ILO Committee has considered forced child labor, child prostitution, and child pornography.

¹³¹ See Lee Swepston, *Human Rights Complaint Procedures of the International Labor Organization*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 85, 85–101 (Hurst Hannum ed., 3d ed. 1999) (describing the human rights complaint procedures of the ILO); Farrior, *supra* note 34, at 223–24 (describing ILO enforcement mechanisms).

reflects the tripartite structure of the ILO and its bodies, which includes representatives of governments, employers, and workers. The ILO can investigate complaints and issue decisions, including recommendations that may address both the violation at issue and broader concerns.¹³² Despite their potential for broad application, however, the ILO did not use these mechanisms, even tangentially, to address human trafficking until the 1970s.¹³³

To the extent the ILO has been explicitly involved in trafficking issues, it has generally limited its efforts to the issue of trafficking in children.¹³⁴ In 1999, the ILO adopted the Worst Forms of Child Labour Convention. In this context, it addresses child trafficking for a range of purposes, including forced labor, prostitution, and other forms of exploitation.¹³⁵ However, the ILO has begun expanding its conception of forced labor and examining the relationship between forced labor and human trafficking for both children and adults.¹³⁶ It has increased its work on trafficking for labor purposes.¹³⁷ The ILO has also taken a significant step toward acknowledging sex work as an international

¹³² See Swepston, *supra* note 131, at 91 (describing the formal and substantive requirements for representations under article 24 of the ILO Constitution); INTERNATIONAL LABOUR ORGANIZATION CONST., available at <http://www.ilo.org/public/english/about/iloconst.htm#pre> (last visited Nov. 13, 2003) (stating in the preamble that “[t]he High Contracting Parties, moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world, and with a view to attaining the objectives set forth in this Preamble, agree to the following Constitution of the International Labour Organization”).

¹³³ See *Stopping Forced Labour*, International Labour Conference, 89th Sess., Report I (B) (2001), available at <http://www.ilo.org/public/english/standards/decl/publ/reports/report2.pdf> (last visited January 29, 2004) (stating that, while the legal notion of forced labor is consistent, the context of forced and compulsory labor changes over time). For instance, during the 1980s and 1990s, there was an increasing awareness of gender issues and forced labor. The gender analysis revealed situations in which women were obliged to work, ranging from work as domestic servants to work in the sex trade after being trafficked.

¹³⁴ See Convention on Child Labour, *supra* note 16, art. 3(a) (including the sale and trafficking of children as one of the worst forms of child labor); *ILO Waves “Red Card” at Child Labour*, WORLD OF WORK (THE MAGAZINE OF THE ILO), Mar. 2002, at 18, available at <http://www.ilo.org/public/english/bureau/inf/magazine/42/redcard.htm> (reporting that some children are trafficked into slave-like conditions or prostitution); *Sexual Exploitation of Children*, WORLD OF WORK (THE MAGAZINE OF THE ILO), Mar. 2002, at 14, available at <http://www.ilo.org/public/english/bureau/inf/magazine/42/yokohama.htm> (discussing sexual exploitation of children in Yokohama, Japan, and reporting that the number of children who fall victim to commercial sexual exploitation is rising); *IPEC Action Against Child Trafficking*, WORLD OF WORK (THE MAGAZINE OF THE ILO), Dec. 2001, at 8, available at <http://www.ilo.org/public/english/bureau/inf/magazine/41/traffic.htm> (reporting on an IPEC project to combat child trafficking that aims to protect victims’ rights through “strengthening the judiciary and police . . . and by dismantling trafficking networks”).

¹³⁵ See Convention on Child Labour, *supra* note 16, arts. 3(a), 3(b) (providing a list of the worst forms of child labour). Article 3 states that the worst forms of child labour include:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

¹³⁶ See generally *Stopping Forced Labour*, *supra* note 133 (discussing international action on trafficking in persons).

¹³⁷ *Id.* at 100 (stating that “[t]he ILO is now developing its own strategy and has embarked on a limited number of projects focusing on prevention of labour trafficking for those at risk”).

labor issue.¹³⁸ Although it does not take a position on the legal status of prostitution,¹³⁹ it has acknowledged that, at least in Southeast Asia, “the sex business has assumed the dimensions of a commercial sector, one that contributes substantially to employment and national income in the region.”¹⁴⁰ This report is groundbreaking for moving the discussion of prostitution and other sex work into the labor framework. Although it is in line with the past practice of the ILO by targeting child prostitution for elimination, the report moves away from stigmatizing prostitution by recognizing the variety of abusive circumstances prostitutes face and the importance of eliminating such abuses. The report further focuses on structures that sustain prostitution and not just prostitutes themselves. Finally, it recommends adopting a macroeconomic analysis that allows for official recognition of sex work activity.¹⁴¹

Thus, while little use was initially made of the labor rights framework to address human trafficking, the ILO and advocates have recently given the subject increasing attention. By initially focusing only on children, the ILO significantly avoided the more difficult definitional issues surrounding trafficking, such as the role of “consent” by trafficked persons. The ILO makes clear, however, that it does not distinguish between voluntary and forced prostitution because it considers all child prostitution to be coerced.¹⁴² The ILO’s focus on children has also largely eliminated the need to construct “innocent” victims because of the presumption that children cannot consent to prostitution or sexual exploitation.¹⁴³

Nonetheless, an expanded use of the labor framework for trafficked children and adults would be useful in several respects. Such an approach would allow anti-trafficking efforts to address a broader range of trafficking activity. The broader framework would expand the focus beyond trafficking for sexual purposes to include the various forms of forced labor that are often its end purpose, such as domestic work, sweatshop labor, migrant labor, or other work in the informal economy. This focus would extend international protection to more people who have been coerced and exploited in their work.

¹³⁸ See generally THE SEX SECTOR, *supra* note 101 (presenting case studies revealing the circumstances of those in prostitution and exploring the possibility of making a distinction between voluntary and forced prostitution).

¹³⁹ *Id.* at v (stating that it would be outside the purview of the ILO to take a position on whether prostitution should be legalized).

¹⁴⁰ Press Release, International Labour Organization, Sex Industry Assuming Massive Proportions in Southeast Asia (Aug. 19, 1988), available at <http://www.ilo.org/public/english/bureau/inf/pr/1998/31.htm>.

¹⁴¹ See *id.* (discussing prostitution and the feminization of migration, noting that a “major hurdle to the formulation of effective policy and programme measures to deal with prostitution has been ‘that policy-makers have shied away from directly dealing with prostitution as an economic sector,’” and outlining recommendations in response to the growing sex industry in Southeast Asia).

¹⁴² See THE SEX SECTOR, *supra* note 101, at 170 (noting the crucial differences between child prostitution and adult prostitution). But see Kempadoo, *supra* note 26, at 7 (discussing reconceptualization of child prostitution as part of the broader context of global exploitation of child labor).

¹⁴³ Although our notions of children’s sexuality and their developing capacities for judgment are continually evolving, it may be appropriate to maintain this presumption based on their vulnerable status. See, e.g., *Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, 45th Sess., Supp. No. 49, U.N. Doc. A/RES/44/25 (1989). See also Montgomery, *supra* note 93, at 139–150 (suggesting contextualizing even child prostitution).

It would further broaden the conception of trafficking “victims” to include women, men, and children, and it might help avoid distinctions between “innocent” and knowing victims. Perhaps the biggest contribution a labor framework can offer is a shift in focus away from the problematic assessment of the complicity or worthiness of trafficked persons and towards improving the working conditions for those who have been trafficked.¹⁴⁴ This proposed expansion would allow governments and advocates to address the present conditions of those trafficked and require more accountability from those “customers” and “employers” who benefit from trafficked labor.¹⁴⁵

The biggest obstacle to the effective use of the labor framework to address human trafficking, however, is the continuing disagreement among states and activists as to the nature and legality of prostitution and other sex work.¹⁴⁶ Until states are willing to consider some notion of legal “sex work,” they will continue distinguishing between trafficking for prostitution and trafficking for labor purposes.¹⁴⁷ Similarly, until activists move beyond the debate over whether prostitution is inherently exploitative and harmful in ways that other work is not, they will continue to reinforce differential treatment that further stigmatizes those who have been involved in prostitution or sex work.

However, even if labor standards could be used to improve the working conditions of trafficked persons, the current framework may be inadequate for dealing with the particular conditions of prostitutes or victims of sexual exploitation.¹⁴⁸ The labor framework is intended to govern the conduct of employers, organized labor, and government, and it would likely be inadequate to address issues involving organized crime or more extreme abuses that fall outside traditional notions of labor and employment. Moreover, given its substantive focus, the labor framework does not reach the full range of human rights issues that are implicated in human trafficking. For example, it is less suited to address issues of freedom of movement, security of the person, and cruel, inhuman, and degrading treatment. Finally, the framework is limited in the means by which it can hold governments accountable.¹⁴⁹

¹⁴⁴ See Bindman, *supra* note 47, at 65–66 (arguing that singling out prostitution hides the commonality of prostitution and other dangerous, low-status labor).

¹⁴⁵ *Id.* at 66 (noting that most workers in the sex industry “lack formal contracts with the owners or managers but are subject to their control,” and that they are denied whatever international, national, or other protection that is available to other workers).

¹⁴⁶ See Gallagher, *supra* note 59, at 984–88; THE SEX SECTOR, *supra* note 101, at 1–2. Regardless of the likely success of using the international labor framework to address human trafficking, there would be value in simply reconceptualizing prostitution as a form of labor. Kempadoo and others argue that situating prostitution as work allows for solidarity among working women across national and other boundaries. Kempadoo, *supra* note 26, at 8 (citing Chandra Talpade Mohanty, *Women Workers and Capitalist Scripts: Ideologies of Domination, Common Interest and the Politics of Solidarity*, in FEMINIST GENELOGIES, COLONIAL LEGACIES, DEMOCRATIC FUTURES 1, 7 (M. Jacqui Alexander & Chandra Mohanty eds., 1997)).

¹⁴⁷ See THE SEX SECTOR, *supra* note 101, at 211–14 (urging “legislators and policy makers [to] adopt a clear position on prostitution, as the basis for the review and formulation of effective legal, policy and programme measures”).

¹⁴⁸ See *id.* at 170–200 (discussing the definition and magnitude of child prostitution and how child prostitution differs from adult prostitution).

¹⁴⁹ See Swepston, *supra* note 131, at 93–99 (describing the complaint procedures of the ILO). The ILO mechanisms offer a narrower set of remedies than the major human rights treaties such as the ICCPR, which expressly hold governments accountable for violations and allow for individual petitions through the Optional Protocol.

If we consider the story of “Doti” under the labor framework, rather than through a law enforcement lens, a different story emerges. First, Doti appears as a worker, rather than just as a victim—although this is less true if Doti is a child or a sex worker. Doti’s age is more significant to whether she can benefit from child protection mechanisms than her gender is to whether she qualifies as a trafficked person.¹⁵⁰ Doti’s motivations can be explicitly economic under the labor framework, but she will have limited protection unless she is a legal migrant for purposes of employment.¹⁵¹ Although she has no individual right to bring a claim under the labor mechanisms, those mechanisms are available to her if she organizes with others to improve her working conditions.¹⁵² She does not necessarily have to choose between working and seeking to vindicate her rights—she seeks protection of her rights as a worker. The labor framework may not allow her to hold her traffickers directly accountable, but she can focus international attention on her employers and government officials. The labor framework therefore provides more recognition of her agency and may allow her to affect her current working conditions.¹⁵³

C. *A Human Rights Framework: Victims and Advocates*

Although human trafficking was not originally understood as a “human rights” problem, it has been widely recognized as a phenomenon that violates human rights.¹⁵⁴ In fact, the human rights violations inherent in trafficking have been a point of emphasis in the “second wave” of attention and advocacy—more particularly, it has been considered an issue of women’s human rights.¹⁵⁵ However, the current human rights framework fails to comprehensively address the problem of human trafficking by analyzing it from a purely women’s human rights perspective rather than a “mainstream” human rights perspective. As in the law enforcement and labor rights contexts, trafficking is often linked to or conflated with prostitution in human rights discourse, and it is almost always considered under the rubric of “violence against women.”¹⁵⁶

¹⁵⁰ See *supra* notes 134–136 and accompanying text (providing references to conventions providing specific protections for children).

¹⁵¹ See generally ILO Convention No. 97, *supra* note 109 (providing protections for economic migrants).

¹⁵² See Swepston, *supra* note 131, at 88–95 (identifying complaint procedures at the ILO that may be initiated by workers’ organizations).

¹⁵³ I use the term “agency” here and throughout the Article to reflect the reinterpreted notion of “autonomy” advanced by Kathryn Abrams. Abrams advances an understanding of agency that emerges from group-based oppressions and focuses on resistance to subordination or oppression. Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 806–07 (1999) (discussing the relation between the autonomous self and autonomous decisionmaking).

¹⁵⁴ See U.N. REPORT ON THE FOURTH WORLD CONFERENCE ON WOMEN, *supra* note 57, para. 130 (incorporating forced marriages and forced labor into the definition of trafficking). See also Chang, *supra* note 2, at 325–26.

¹⁵⁵ See *supra* Part I.B. (discussing the reemergence of trafficking in persons as part of the growing global movement for women’s human rights). Trafficking has also increasingly become an issue of children’s rights. See *Convention on the Rights of the Child*, *supra* note 143, art. 11 (providing that “State Parties shall take measures to combat the illicit transfer and non-return of children abroad”).

¹⁵⁶ In fact, the U.N. Human Rights Commission’s Special Rapporteur on Violence Against Women has been one of the most significant institutional actors on this issue. See *infra* Part II.C.1.

1. *Human Rights or Women's Rights*

The concept of human trafficking as a human rights violation is not fully articulated under the existing human rights system. This is due to inadequacies in both human rights law and the current structure of the system, which tends to revolve around the relationship between human rights and women's rights. Within the U.N. system, there are instruments and mechanisms directed at promoting and protecting human rights, and there are separate instruments and mechanisms intended to address women's issues. In theory, the human rights instruments and mechanisms should encompass human rights issues for both men and women; however, some argue that considering human rights without regard to gender ignores the unique issues that arise for women in the exercise of human rights.¹⁵⁷ Similarly, in theory, the instruments and mechanisms created to consider women's issues should address any potential imbalance by providing additional attention to those issues; however, there are concerns that instead these issues are devalued and marginalized.¹⁵⁸ Human trafficking has been caught in this conundrum, and as a result, has not received comprehensive, balanced attention in the human rights context either as a "mainstream" or as a "women's" human rights issue.

The only major human rights treaty to address trafficking specifically is also the only gender-specific human rights treaty, the Convention on the Elimination of Discrimination Against Women ("CEDAW"). CEDAW imposes the imprecise requirement on parties to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."¹⁵⁹ It also links trafficking with prostitution—perhaps to some extent equating them.¹⁶⁰ The "international bill of rights"—the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights ("ICCPR"), and the International Covenant on Economic, Social and Cultural Rights ("ICESCR")—does not specifically address human trafficking. However, the Universal Declaration and the Covenants each contain prohibitions and obligations that arguably cover some human trafficking conduct, such as the prohibitions against slavery and the slave trade or involuntary servitude and forced labor.¹⁶¹ They also recognize

¹⁵⁷ See Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUM. RTS. Q. 486–498 (1990) (discussing why women's rights and human rights are perceived distinctly and exploring the policy implication of the division).

¹⁵⁸ See *id.* at 492 (arguing that the distinction between human rights and women's rights "perpetuates the idea that the rights of women are of a lesser order than 'the rights of man'").

¹⁵⁹ See CEDAW, *supra* note 16, art. 6.

¹⁶⁰ See Doezeema, *supra* note 11, at 39 (discussing drafting history of Article 6).

¹⁶¹ ICCPR, *supra* note 45, arts. 8(1)–8(3). Both covenants also contain general prohibitions against discrimination in the exercise of the enumerated rights based on sex or other status. *Id.* art. 2 (providing that each state party "to the Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200(XXI), U.N. GAOR, art. 7, 993 U.N.T.S. 3 (1966) [hereinafter ICESCR] (stating that "[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status").

both the right to work that is freely chosen and the right to “just and favourable” conditions of work.¹⁶²

This bifurcation between human rights issues and women’s issues is equally evident in the mechanisms created to address those issues.¹⁶³ The current international system for promoting and protecting human rights is organized into two main types of mechanisms—treaty-based bodies and U.N. Charter-based bodies or institutions.¹⁶⁴ Treaty-based bodies, as their name suggests, are created by particular treaties to monitor compliance by state parties with those instruments. The most powerful and well-known entity of this type is the Human Rights Committee, created to monitor compliance with the ICCPR.¹⁶⁵ Most human rights treaties require parties to report periodically to the relevant treaty body on their efforts to implement the treaty and fulfill their obligations. Some treaties also allow for individual complaints against governments who violate their obligations. None of the anti-trafficking treaties have created a treaty-based body to monitor compliance or hear complaints.¹⁶⁶

In addition, there are non-treaty bodies within the U.N. system that address human rights and women’s human rights.¹⁶⁷ Most of the human rights work on

¹⁶² ICESCR, *supra* note 161, art. 6 (providing that “[t]he State Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right”). Article 7 enumerates those just and favorable conditions of work, including remuneration that provides fair wages and equal remuneration for work of equal value and a decent living, safe and healthy working conditions, equal opportunity for promotion, and rest, leisure, and reasonable limitation of working hours. *Id.* art. 7.

¹⁶³ This bifurcated approach to the human rights of women has been criticized. *See, e.g.,* HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* (2000). The criticism is directed not just at the purported substantive split, but also at the practical realities involved. Both the Committee on Human Rights and the Human Rights Commission have greater prestige, larger membership (which is predominantly male), a higher budget, and longer working sessions than the CEDAW Committee and the Commission on the Status of Women.

¹⁶⁴ *See, e.g.,* Sian Lewis-Anthony, *Treaty Based Procedures for Making Human Rights Complaints within the UN System*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE*, *supra* note 131, at 41, 41–60 (exploring treaty-based procedures for making human rights complaints within the U.N. system); Nigel Rodley, *United Nations Non-Treaty Procedures for Dealing with Human Rights Violations*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE*, *supra* note 131, at 60, 60–86 (exploring U.N. non-treaty procedures for dealing with human rights violations).

¹⁶⁵ *See* ICCPR, *supra* note 45, art. 28 (creating the Human Rights Committee). In addition, there are the Economic, Social and Cultural Rights Committee, which oversees compliance with the ICESCR, and the Committee on the Elimination of All Forms of Discrimination Against Women, which monitors compliance with CEDAW. *See* ICESCR, *supra* note 161, art. 21 (stating that “[t]he Economic and Social Council may submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialized agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the present Covenant”). There are also specialized treaty bodies that consider aspects of human rights. *See, e.g.,* *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (creating the Committee on Torture in Article 17 to monitor state compliance with the statute); CEDAW, *supra* note 16, art. 17 (creating the Committee on the Elimination of All Forms of Discrimination Against Women to monitor compliance with the Convention). *See* Farrior, *supra* note 34, at 227–230 (providing an overview of the obligations and enforcement mechanisms under CEDAW).

¹⁶⁶ *See supra* Part I.A. (describing the first wave of international responses to trafficking). *See also* Farrior, *supra* note 34, at 237–38 (describing the benefits and drawbacks of treaty procedures); Reanda, *supra* note 6, at 211 (noting that the 1987 proposal for an implementation mechanism for the 1949 Convention was similar to the monitoring body created for the Convention Against Torture).

¹⁶⁷ These non-treaty bodies typically investigate patterns of rights violations rather than specific complaints. *See* Farrior, *supra* note 34, at 238–249 (discussing benefits and drawbacks of U.N. Charter-based mechanisms). The Human Rights Commission and its Sub-Commission on the Promotion and

human trafficking has occurred in one of these gender- or issue-specific mechanisms, rather than in the general human rights bodies.¹⁶⁸ The CEDAW Committee has addressed human trafficking in the context of its General Comment on Violence Against Women and in individual country reports.¹⁶⁹ The Special Rapporteur on Violence Against Women, whose mandate comes from the Commission on Human Rights, has perhaps been the most active on this issue. She has investigated trafficking in various regions and issued reports on her findings and recommendations.¹⁷⁰ The work of the human rights mechanisms regarding human trafficking has generated significant attention to the issue at the international level; however, the human rights framework has ultimately embraced only a limited vision of trafficking, considering it primarily as an issue of violence against women.

Protection of Human Rights are the most prominent human rights mechanisms. Within the Commission and Sub-Commission, there are numerous country-specific and issue-specific mechanisms, such as working groups, task forces, and special rapporteurs, including a Working Group on Contemporary Forms of Slavery and a Special Rapporteur on Violence Against Women. Similarly, there is a Commission on the Status of Women established to address issues relating to women. In addition, the U.N. has convened a significant series of conferences addressing issues of women's human rights, culminating in the most recent Fourth World Conference on Women in Beijing, China. *See supra* notes 51–57 and accompanying text (discussing the women's world conferences).

¹⁶⁸ The Human Rights Committee and the Committee on Economic, Social and Cultural Rights have also addressed human trafficking in the context of state parties' general reports to the Committees. *See, e.g., Concluding Observations of the Human Rights Committee (Macau)*, U.N. GAOR, Hum. Rts. Comm., 68th Sess., 1806th mtg., para. 11, U.N. Doc. CCPR/C/79/Add.115 (1999) (noting that trafficking in women and prostitution persist in Macao and urging the government to take preventive action); *Concluding Observations of the Human Rights Committee on Economic, Social and Cultural Rights (Croatia)*, U.N. GAOR, Hum. Rts. Comm., 27th Sess., 83d, 84th mtgs., paras. 14, 27, U.N. Doc. E/C.12/1/Add.73 (2001) (expressing concern that Croatia is reported to be a major transit point for human trafficking and regret that the Government has not provided information on this issue, and recommending that detailed information be included in the next report). *See also General Comment No. 28 on Equality of Rights Between Men and Women (Article 3)*, U.N. GAOR, Hum. Rts. Comm., 68th Sess., 1834th mtg., para. 12, CCPR/C/21/Rev.1/Add.10 (2000) (providing that state parties should inform the Committee of measures taken to eliminate trafficking of women and children pursuant to their obligations under Article 8).

¹⁶⁹ *See CEDAW General Recommendation No. 19*, U.N. HCHR, 11th Sess., paras. 13–16, U.N. Doc. A/47/38 (addressing Article 6 of CEDAW, which requires state parties to "take measures to suppress all forms of traffic in women and exploitation of the prostitution of women"); U.N. OFFICE OF THE HIGH COMM'R FOR HUM. RTS, *MANUAL ON HUMAN RIGHTS REPORTING* 324–26, U.N. Doc. HR/PUB/91/1 (Rev. 1), U.N. Sales No. GV.E.97.0.16 (1997) (discussing the CEDAW Committee's focus on state measures to combat prostitution). The CEDAW Committee has raised concerns about prostitution and trafficking with state parties. *See, e.g., Concluding Observations of CEDAW: Sweden*, U.N. Hum. Rts. Comm., 25th Sess., 510th, 511th mtgs., para. 355, U.N. Doc. A/56/38 (2001) ("encourag[ing] the Government [of Sweden] to evaluate the effect of the current policy of criminalizing the purchase of sexual services, especially in view of the complete lack of data on clandestine prostitution which may have incidental effects on the trafficking of women and girls"); *Concluding Observations of CEDAW: Thailand*, U.N. Hum. Rts. Comm., 20th Sess., 417th, 418th mtgs., paras. 236–38, U.N. Doc. A/54/38 (1999) (expressing concern about cross-border trafficking, forced prostitution, and the commercial sex industry, and "strongly recommend[ing] that the Government consider the issue of migration and commercial sex work as a critical human rights issue"). *See also Doezeema, supra* note 11, at 40 (discussing the CEDAW Committee's work as an example of focusing on prostitutes as "subject[s] whose rights can be violated").

¹⁷⁰ *See, e.g., Report on Violence in the Community*, U.N. E.S.C., 53d Sess., U.N. Doc. E/CN.4/1997/47 (1997); *Report on Visit to Poland*, U.N. E.S.C., 53d Sess., U.N. Doc. E/CN.4/1996/47/Add.1 (1996); *Report on Trafficking in Women, Women's Migration and Violence Against Women*, U.N. E.S.C., 56th Sess., U.N. Doc. E/CN.4/2000/68 (2000). The Working Group on Contemporary Forms of Slavery has done some limited reporting on this issue. *See generally Chang, supra* note 2, at 321–363 (providing a general overview of trafficking in women); Farrior, *supra* note 34 (providing an overview of the international law relating to trafficking). The Commission on the Status of Women has not been significantly involved. *See Reanda, supra* note 6, at 216–220.

2. *Evaluating the Human Rights Framework*

Although the law enforcement framework has dominated the international response to human trafficking, the human rights community has become increasingly influential in shaping the response to trafficking both within and outside the human rights framework. Perhaps the most significant advantage that a human rights approach offers is the ability to hold states accountable for how they treat both their nationals and other individuals under their control.¹⁷¹ While accountability for individual traffickers is important, the widespread nature of human trafficking and the compelling evidence of government complicity suggest the need to ensure state responsibility.

The rights-based nature of a human rights response is also a significant advantage of the human rights framework.¹⁷² A human rights approach centers on the individual affected and offers the possibility of reconceptualizing that person as a rightsholder rather than as a mere "victim." In the context of human trafficking, this is particularly important given the historical and continuing focus on the need to identify or construct "innocent" victims before the international community becomes engaged. Human rights discourse, however, has emphasized the universal and inalienable nature of human rights. One is entitled to protection of those rights simply by virtue of being human, regardless of the complex standards of worthiness for protection that come into play in other contexts. For example, an individual does not forfeit the right to be free from torture just because he or she has been accused of a crime. Similarly, a prostitute (whether convicted of a crime or not) is no less entitled than other persons to human rights guarantees, such as equal protection of the law and security of his or her person.¹⁷³

However, there are limitations to a human rights framework. The current human rights approach is a "snapshot" approach limited to the acts of traffickers and focusing on violence against trafficked women. This approach ignores the complex set of factors, conditions, and rights violations that lead to human trafficking in the first place.¹⁷⁴ It also ignores the realities of the lives of direct victims of trafficking, who have generally had other rights violated before, during, and after the trafficking process. These rights include, but are not limited to, the right to education, the right to work (under just conditions),

¹⁷¹ See Rebecca J. Cook, *Women's International Human Rights Law: The Way Forward*, in HUMAN RIGHTS OF WOMEN, NATIONAL AND INTERNATIONAL PERSPECTIVES 3, 21–22 (Rebecca J. Cook ed., 1994) [hereinafter HUMAN RIGHTS OF WOMEN] (discussing how traditional notions of state responsibility for breaches of international obligations apply to violations of women's human rights). See also *Special Rapporteur's Report*, *supra* note 12, paras. 49–53 (addressing questions of state responsibility for trafficking).

¹⁷² See generally Farrior, *supra* note 34 (criticizing early trafficking documents for not being rights-based).

¹⁷³ Some human rights protections are "derogable" under certain circumstances. See, e.g., ICCPR, *supra* note 45, art. 4 (allowing derogation from some obligations under the Convention and prohibiting derogation of others). However, even then, the limitations on the rights are tied to the circumstances rather than to the status of the individual. Derogation is permitted only "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed," provided that it does not conflict with other international obligations and is not discriminatory. *Id.*

¹⁷⁴ See *Special Rapporteur's Report*, *supra* note 12, paras. 54–60 (addressing root causes of trafficking).

the right to freedom of movement, the right to be free from discrimination,¹⁷⁵ the right to be free from cruel, inhuman and degrading treatment, the right to security of the person, the right to health,¹⁷⁶ and the right to equal protection of the laws.¹⁷⁷

A comprehensive and effective approach to eliminating trafficking would have to encompass and respond to many of these realities. Currently, however, all of these rights violations are collapsed into a concept of trafficking where the focus is limited to violence, particularly sexual violence against women. This may be a useful strategy to identify human trafficking as a unique and recurring practice or phenomenon. However, it runs the risk of obscuring other very real violations occurring and may “excuse” governments and advocates from addressing those rights violations. The human rights framework offers the potential for a broader view of trafficking, but due to lack of consensus and political will, governments and activists have not effectively pursued it thus far.

Despite the growth and popularity of the human rights movement, those who have been traditionally left out of decisionmaking roles in the creation of international law and policy have increasingly critiqued its validity and legitimacy.¹⁷⁸ Because the human rights framework identifies trafficking as a women’s issue, the feminist critique is particularly relevant. The feminist critique argues that the international legal order, including the human rights structure, reflects a male perspective and is set up to ensure its continued dominance.¹⁷⁹ Even the normative structure of international law ignores or undermines issues of particular concern to women.¹⁸⁰ Moreover, feminist

¹⁷⁵ See ICESCR, *supra* note 161, art. 6 (asserting “the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts”). Article 7 provides the “right of everyone to the enjoyment of just and favorable conditions of work.” *Id.* art. 7. Article 11 provides the “right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.” *Id.* art. 11. Article 13 provides the “right of everyone to education.” *Id.* art. 13. Article 12 of the ICCPR provides that “[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence Everyone shall be free to leave any country, including his own.” See ICCPR, *supra* note 45, art. 12.

¹⁷⁶ See ICCPR, *supra* note 45, art. 7 (providing that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”). Article 8 provides that “[n]o one shall be held in slavery . . . [or] servitude . . . [and] no one shall be required to perform forced or compulsory labor” *Id.* art. 8. Article 9 provides that “[e]veryone has the right to liberty and security of person.” *Id.* art. 9.

¹⁷⁷ See *id.* art. 16 (providing that “[e]veryone shall have the right to recognition everywhere as a person before the law”). Article 26 states that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.” *Id.* art. 26.

¹⁷⁸ Two diverse communities have been particularly critical—feminists and culturalists or cultural relativists. Although there are common themes in both strands of critique, there are important differences as well. See Eva Brems, *Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse*, 19 HUM. RTS. Q. 136, 140 (1997).

¹⁷⁹ Feminists have argued this persuasively in the context of the public/private distinction in international law. See, e.g., CHARLESWORTH & CHINKIN *supra* note 163, at 56; Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, in HUMAN RIGHTS OF WOMEN, *supra* note 171, at 85. Some have also critiqued the distinction between civil and political rights and economic, social, and cultural rights as reflecting this same gendered hierarchy. *Id.* at 107–09.

¹⁸⁰ See Hilary Charlesworth et. al, *Feminist Approaches to International Law*, 85 AM. J. INT’L L. 613 (1991) (articulating the main points of criticism). This critique would apply to each of the frameworks—law enforcement, labor rights, and human rights—within the international legal system. However, it is specifically addressed here because the human rights system has the most clearly bifurcated system and there has been significant debate and involvement by feminists in this context.

critics assert that not all rights are equal in practice or theory—there are competing rights and an existing hierarchy among rights—and some rights can operate to the detriment of women.¹⁸¹ Therefore, approaching women's experiences solely through the existing international legal order is inadequate.

The human rights response to human trafficking illustrates the points identified by the feminist critique. Human trafficking, which is generally perceived as an issue of women's human rights, is not the subject of any major human rights treaty. Trafficking is addressed in one article of CEDAW, but it appears neither in the Convention on the Elimination of All Forms of Racial Discrimination nor in any of the other mainstream human rights treaties.¹⁸² The major human rights bodies that have addressed the issue have typically relegated it to gender-specific mechanisms, where it is discussed primarily in the context of sexual exploitation and violence against women. This, in turn, perpetuates a sexualized view of women that emphasizes their victimization as opposed to their agency as human beings.¹⁸³ By confining the discussion of trafficking this narrowly—viewing it essentially as a subset of “violence against women,” which is itself a subset of “women's human rights”—it becomes easier to marginalize or ignore the broader issues of women's status, such as agency and resistance.

However, this feminist critique of human rights moves us only to a certain point in the analysis. This discourse has come under scrutiny by other feminists in the global context.¹⁸⁴ Some scholars have criticized “western” or “first world” feminists for veering into gender essentialism, racism and neocolonialism, as well as failing to incorporate the views of other feminists, particularly “third world” feminists, in a meaningful way.¹⁸⁵ One way in which this view is manifested is in the controversy within the anti-trafficking movement over the definition of trafficking, and in particular, how to conceptualize prostitution.¹⁸⁶ There is a spectrum of views on the issue, and

¹⁸¹ *Id.* at 635–36 (giving the examples of the right to freedom of religion and rights protecting the family, both of which have been used to justify discriminatory treatment of women).

¹⁸² *See supra* Part I.B. (discussing the reemergence of trafficking as part of the growing global movement for women's human rights).

¹⁸³ *See supra* Part I.B. (discussing how CEDAW and the women's world conferences linked trafficking to prostitution under the rubrics of “exploitation of the prostitution of others and traffic in persons”). Moreover, this view of women is further confined to a particular type of victim—innocent and powerless—who does not challenge existing structures and validates intentions to “protect.” The human rights framework has given little room to the more challenging narratives of agency and resistance.

¹⁸⁴ *See* Mohanty, *supra* note 146, at 52–75 (providing a critique of Western feminism). *See also* Johanna E. Bond, *International Intersectionability: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 52 EMORY L.J. 71 (2003) (arguing for the integration of intersectionality theory—the notion that multiple systems of subordination are interlocking or “intersectional” and mutually reinforcing—into the international human rights arena); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (stating the criticism of feminism in the United States by women of color as focused too much on concerns of white, middle-class women).

¹⁸⁵ *See* Mohanty, *supra* note 146, at 11–14 (describing the “neo-colonialism” evident in feminist writings from the United States and Western Europe). I use them here in quotations to signify the differing groups and perspectives while acknowledging the problematic nature of the terminology.

¹⁸⁶ *See* Demleitner, *supra* note 4, at 186–89 (arguing that trafficking and prostitution are never voluntary because of the gender power construct); Reanda, *supra* note 6, at 202–07 (raising the question whether prostitution is a per se human rights violation and suggesting that the distinction between voluntary and forced prostitution has become blurred). *See also* Farrior, *supra* note 34, at 227–230 (calling for a more active role on the part of NGOs).

the debate is most contentious at either end of this spectrum.¹⁸⁷ Some advocates contend that all prostitution exploits women and violates human rights.¹⁸⁸ Others frame trafficking as an issue of migrant and worker rights. These latter advocates distinguish between forced prostitution and voluntary sex work and seek to promote human rights for all prostitutes and sex workers.¹⁸⁹ Advocates on both sides of the debate, which has absorbed a significant amount of time, energy and advocacy effort, consider themselves women's and anti-trafficking advocates.¹⁹⁰

This tension in the relationship between prostitution and trafficking is an interesting example to consider in evaluating the global feminist critique of the women's human rights movement. Human trafficking is an issue that is not just gendered, but also raises issues of racism and neocolonialism.¹⁹¹ This is true historically—with the early characterizations of “white slavery”—but also in the present context where trafficking is linked to increased globalization and discriminatory migration policies. There is a persuasive argument that the focus on prostitution as a component of trafficking is more meaningful to white, Western feminists than to other feminists and that it reflects and reinforces dichotomies of the civilized and the uncivilized, actors and objects, and rescuers and victims.¹⁹²

¹⁸⁷ See Shelley Case Inglis, *Expanding International and National Protections Against Trafficking for Forced Labor Using a Human Rights Framework*, 7 BUFF. HUM. RTS. L. REV. 55, 85–89 (2001) (describing the debate among feminists about the nature and legal status of prostitution).

¹⁸⁸ This view is typified by the work of Kathleen Barry and the Coalition Against Trafficking in Women. See Coalition Against Trafficking in Women, *Statement on Trafficking and Prostitution*, at <http://www.catwinternational.org/> (last visited Nov. 13, 2003) (urging governments to decriminalize “the act or condition of being sexually exploited, and to criminalize the act of pimping, procuring, sex trafficking, and the purchase of sex, regardless of the consent given by those sexually exploited”); Coalition Against Trafficking in Women, Written Statement to the United Nations Commission on Human Rights 57th Session, available at http://action.web.ca/home/catw/readingroom.shtml?sh_itm=5bf430c8473ad9836c9695d106d71808 (last visited Nov. 3, 2002) (stating that the report on trafficking in women presented by the Special Rapporteur on Violence against Women at the 56th Session of the Commission on Human Rights “affirm[s] an outmoded and repressive standard of distinguishing between forced and so called voluntary trafficking, thereby laying the groundwork for voluntary prostitution as sex work”); About the Coalition Against Trafficking in Women, at <http://www.catwinternational.org/about/> (last visited Nov. 13, 2003) (stating that “[a]ll prostitution exploits women, regardless of women's consent”). See generally KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* (1979). But see Kempadoo, *supra* note 26, at 11–12 (criticizing Barry's work on trafficking in women as neo-colonialist).

¹⁸⁹ See Global Alliance Against Trafficking, *supra* note 60 (supporting the Protocol's definition of trafficking, which distinguishes between forced prostitution and voluntary, noncoercive participation by adults in prostitution).

¹⁹⁰ See Chang, *supra* note 2, at 321–361 (noting the debates around trafficking and prostitution); Gallagher, *supra* note 59, at 984–87 (documenting the divide among NGOs on whether the definition of trafficking should distinguish between forced and voluntary prostitution); Inglis, *supra* note 187, at 85 n.138 (stating that the “current divisive advocacy from feminist circles may be ultimately more damaging than helpful to women in prostitution throughout the globe”). Although the debate about the relationship between trafficking and prostitution runs through each framework, it seems to have been most fiercely fought under the human rights rubric.

¹⁹¹ See Kempadoo, *supra* note 26, at 9–14 (discussing two dimensions of the racism in the international response to trafficking and sex work: “racisms embedded in structures and desires within specific local industries, and cultural imperialism refracted through international discourses on prostitution”).

¹⁹² See Kapur, *Economies of Desire*, *supra* note 12 (discussing the East/West binary in perceiving trafficking victims); Kempadoo, *supra* note 26, at 2. See also Karen Engle, *Female Subjects of Public International Law: Human Rights and the Exotic Other Female*, 26 NEW ENG. L. REV. 1509 (1992) (noting, in the context of clitoridectomy, that Western feminists struggle to conceptualize and engage the

Because the role of prostitution has dominated the international response to human trafficking, the international community has given only limited consideration to other aspects of trafficking.¹⁹³ As a result, governments and advocates have neither grappled with nor meaningfully addressed other complexities such as the scope of protections for trafficked persons, the relationship to migrant smuggling and other migration issues, and the prevalence of trafficking for purposes other than prostitution or sexual exploitation.¹⁹⁴ If the human rights framework were a more inclusive system, it is likely that other issues would become more visible and more prominent in the discussion of human trafficking.

If we return to the story of "Doti" and consider her experience under the human rights framework, we see some of the advantages and disadvantages of the system. Once again, Doti's gender matters. If she is a woman, she would likely be encouraged to proceed under the mechanisms set up to address women's issues, though the mainstream mechanisms, such as the Human Rights Committee, may be available to her as well.¹⁹⁵ Here, Doti is again viewed as a victim, but also as a rightsholder. However, her victimization may be magnified and the protection of her rights minimized if she is a prostitute or an illegal migrant, particularly if she is from the developing world. Nonetheless, Doti may be able to bring an individual complaint to a human rights body or otherwise seek to hold her government and the government of the country where she was trafficked accountable.¹⁹⁶ If Doti connects with an NGO, she may have additional access to human rights mechanisms and may have some input on policy towards trafficking.¹⁹⁷ She may also be able to

"Exotic Other Female" and either "maternalistically try to change her mind or they seem to ignore or not believe her desires, often dissipating her by attributing to her false consciousness").

¹⁹³ Other topics include the protection of trafficked persons, status and repatriation, prevention, root causes, and migrant smuggling. See discussion *supra* Part II; Gallagher, *supra* note 59, at 976.

¹⁹⁴ See Gallagher, *supra* note 59, at 984–85 (noting how another debated aspect of the definition of trafficking concerned the end-purpose of trafficking: "The Ad-Hoc Committee reached an early consensus on the need to move beyond the traditional focus on prostitution and the sex industry in order to ensure the relevance of the protocol to contemporary trafficking situations including forced labor, debt bondage, and forced marriage").

¹⁹⁵ If Doti is a man, he would not have access to the gender-specific mechanisms as they focus on the status of women and discrimination against women, rather than sex-based discrimination generally. He would only be able to proceed through the mainstream human rights mechanisms.

¹⁹⁶ Both CEDAW and the ICCPR have optional protocols that permit individual petitions against state parties. See *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 54/4, U.N. GAOR, 54th Sess., Supp. No. 49, at 5, U.N. Doc. A/RES/54/4 (1999) (Forty-seven states are parties to the Optional Protocol to CEDAW); *Optional Protocol to International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) (104 states are parties to the Optional Protocol to ICCPR). Some regional human rights mechanisms also allow for individual petition. See, e.g., Organization of American States, *Inter-American Democratic Charter*, art. 8, OAS Doc. OEA/SerP/AG/Res.1 (2001), available at http://www.oas.org/charter/docs/resolution1_en_p4.htm (last visited Nov. 15, 2003) (stating that "any person or group who consider that their [sic] human rights have been violated may present claims or petitions to the Inter-American system for the promotion and protection of human rights in accordance with its established procedures"); European Convention on Human Rights, arts. 19, 25, available at http://www.hrcr.org/docs/Eur_Convention/euroconv5.html (last visited Nov. 13, 2003) (creating the European Commission on Human Rights and authorizing it to receive individual petitions); African Charter on Human and People's Rights, art. 46, OAU Doc. CAB/LEG/68/3/Rev. 5 (1981), available at <http://www1.umn.edu/humanrts/instree/z1afchar.htm> (last visited Feb. 7, 2002) (allowing the Commission to use any appropriate method of investigation and to hear from any person capable of enlightening it).

¹⁹⁷ For example, Doti could participate in providing comments or information to the Human Rights Commission or Special Rapporteur on Violence Against Women. See generally Farrior, *supra*

raise a broader set of claims for human rights violations than just the incidents surrounding her trafficking. Thus, a human rights framework offers her some opportunities for seeking redress, but may continue to lock her in a victim role and ignore her attempts to challenge that view.

III. TOWARDS AN EFFECTIVE AND INCLUSIVE RESPONSE TO HUMAN TRAFFICKING

For more than a century, the international community has struggled with how to respond to the problem of human trafficking. The inadequacies of the past and present frameworks for addressing trafficking are evident. Each has struggled with how to define “trafficking,” marginalized victims or privileged “innocent” victims, and simply ignored significant aspects of the problem.¹⁹⁸ However, each approach also brings strengths to the effort to eliminate human trafficking and addresses components missing from the others. Human trafficking does implicate law enforcement, labor, and human rights concerns. Together, these frameworks represent some level of international commitment to work cooperatively to eliminate human trafficking.¹⁹⁹ This commitment could be strengthened and made more effective by improving the work within the existing frameworks and increasing cooperation among them.

A. Principles for Reform

The international community should reexamine the assumptions underlying the three frameworks by using fundamental concepts of international law as guidance for a more balanced and principled response to human trafficking. It should develop a more nuanced understanding of the complexities of human trafficking and draw upon expanded notions of individual agency and nondiscrimination to counter the current fixation on victimization and sexual exploitation.

A recurring theme in each framework has been the difficulty of defining “trafficking”—a problem that was frequently avoided in the early international agreements. The first definition of trafficking in an international agreement appears in the 2000 Protocol; however, this definition itself was the subject of significant debate.²⁰⁰ One reason the definition of trafficking has been the

note 34 (addressing the role of NGOs in pushing for enforcement of international obligations regarding human trafficking).

¹⁹⁸ See Marjan Wijers, *Women, Labor, and Migration: The Position of Trafficked Women and Strategies for Support*, in GLOBAL SEX WORKERS, *supra* note 11, at 69, 69. Wijers characterizes most current responses as “repressive strategies” and calls for broader consideration and adoption of strategies that strengthen victims’ rights.

¹⁹⁹ See Gallagher, *supra* note 59, at 982 (stating that “a general awareness was also developing, amongst an influential group of states, of the need for a holistic approach where the crime control aspects of trafficking were addressed along with traditional human rights concerns”).

²⁰⁰ *Id.* at 984–88 (discussing how the definition of trafficking was the most controversial part of the negotiations). Advocates and international experts have also developed and proposed other definitions in recent years. See Ali Miller & Alison N. Stewart, *Report from the Roundtable on the Meaning of “Trafficking in Persons”: A Human Rights Perspective*, 20 WOMEN’S RTS. L. REP. 11, 15–19 (1998) (arguing to include the key principle that a definition of trafficking involves “a stream of activities in which a person is treated as an object for trade by others”); Global Alliance Against Traffic in Women et al., *Human Rights Standards for the Treatment of Trafficked Persons*, January 1999, available at

subject of such controversy is the important consequences that flow from any definition. A definition directs the priorities of response in terms of which conduct is proscribed, what rights are protected, and which victims are identified for assistance. However, it is not a foregone conclusion that there can be only one definition of human trafficking at the international level—it may be appropriate to consider different definitions for different contexts.²⁰¹

Regardless of what definition is adopted, the law enforcement, labor, and human rights communities should recognize that each framework addresses only portions of a complex phenomenon and should endeavor to integrate more explicitly the work of the others through increased cooperation and deference where appropriate.²⁰² Within this context, each framework should reexamine or confront the more important and difficult definitional questions—how to address prostitution, how to incorporate victim concerns and priorities, what the scope of trafficking is, and what the scope of their work is—in light of the experiences and priorities of the other perspectives. Decisionmakers within each framework will not necessarily reach the same conclusions on these issues, but they should be able to work towards a shared vision and more effective response by increasing their awareness of other perspectives.

Recognition of trafficked persons' agency should also inform the reevaluation of the international response to human trafficking. International law now recognizes a certain level of individual autonomy that is universal and inalienable.²⁰³ Nonetheless, a common flaw among the dominant frameworks for responding to human trafficking is the marginalization of those who have been trafficked.²⁰⁴ From its inception and through the most recent protocol,

<http://www.hrlawgroup.org/resources/content/IHRLGTraffickingStandards.pdf> (defining trafficking as “[a]ll acts and attempted acts involved in the recruitment, transportation within or across borders, purchase, sale, transfer, receipt or harbouring of a person involving the use of deception, coercion (including the use or threat of force or the abuse of authority) or debt bondage for the purpose of placing or holding such person, whether for pay or not, in involuntary servitude (domestic, sexual or reproductive), in forced or bonded labour, or in slavery-like conditions, in a community other than the one in which such person lived at the time of the original deception, coercion or debt bondage”); *Special Rapporteur's Report*, *supra* note 12, para. 13 (using a similar definition but also including the use of fraud). See also Coalition Against Trafficking in Women, *Proposed United Nations Convention Against Sexual Exploitation*, art. 3, available at <http://www.catwinternational.org/about/UNconv3.html> (last visited Feb. 11, 2003) (framing the definition of trafficking in the broader context of sexual exploitation).

²⁰¹ Generally, uniformity in definition is desired for clarity; however, in the context of human trafficking at this stage, other goals, such as effectiveness in addressing different aspects of the problem, may be more significant. For example, law enforcement may be more limited in how it would address the relationship between prostitution and trafficking because of the different legal regimes for responding to prostitution. Yet the labor framework could allow for a broader definition of “sex work” to improve the working conditions of sex workers and recognize the role of the informal economy.

²⁰² See Farrior, *supra* note 34, at 233–36 (giving example of the Convention on the Rights of the Child and the need for a coordinated approach); Reanda, *supra* note 6, at 221–26 (describing the potential for technical cooperation within the UN system).

²⁰³ International law has historically been concerned primarily with states and their relationships with one another. See CHARLESWORTH & CHINKIN, *supra* note 163, at 23–37 (discussing origins of theories of international law). However, particularly with the advent of international human rights law, individuals have become increasingly important subjects of international law. This autonomy is most evident in the context of international human rights law, but it is not limited to that legal regime. In fact, inherent in the nature of human rights is the notion that these individual rights cut across various legal regimes.

²⁰⁴ As the examples of Doti's experience under the various frameworks show, there are very few opportunities for her to participate in the process of addressing trafficking at the international level. Doti's agency is further disregarded by the focus on her victimization and the refusal to acknowledge her decisionmaking on a range of issues. See Kapur, *Victimization Rhetoric*, *supra* note 12, at 6–7, 20 (discussing the focus on violence and victimization of the anti-trafficking campaign). See also Abrams,

the international approach has embodied the intent to “rescue” and “rehabilitate” those who have been trafficked.²⁰⁵ It is interested in them as victims rather than as autonomous actors—migrants, workers, and rightsholders.²⁰⁶ Despite this primacy of victimization, the existing frameworks provide inadequate protections for victims or mechanisms for redress—“victims,” who are the justification and the purported beneficiaries of international action, ultimately benefit very little. Governments and advocates must account for the agency of trafficked persons and should ensure that they have a role in influencing the policy directions of the anti-trafficking movements within each framework.

Finally, the international community should respond to concerns about the discriminatory underpinnings of the anti-trafficking response. The prohibition against discrimination on the basis of race, sex, and other grounds has become recognized as a virtually universal international norm, both within the human rights framework and more generally in international law.²⁰⁷ Nonetheless, the anti-trafficking movement has been characterized by both racism and sexism in its approaches to preventing and punishing human trafficking.²⁰⁸ The early anti-trafficking treaties were explicitly racist, with their focus on “white slavery,” and both sexist and paternalistic in their limited focus on the sexual

supra note 153, at 842–43 (noting that observers, including legal actors, often misunderstand resistance to oppression when it does not meet their confrontational expectations and “assume that women are either weak, wholly compromised figures who can be treated paternalistically, or inadequately assertive individuals who should be compelled by the use of legal incentives to defend their own rights”). Abrams notes that the law regarding many gender-specific injuries requires complainants to show that they resisted sexualized treatment. *Id.* at 843–44 (using sexual harassment as an example).

²⁰⁵ See *Special Rapporteur’s Report*, *supra* note 12, paras. 85, 88, 101 (discussing the focus on rescue and rehabilitation of trafficked women by both governmental and non-governmental actors). See also *supra* notes 29–34 and accompanying text (providing an overview of the international agreements in response to white slavery). See generally PETRIE, *supra* note 5 (discussing the efforts of Josephine Butler to rescue the victims of white slavery and prostitution).

²⁰⁶ See Jo Doezema, *Who Gets to Choose? Coercion, Consent and the UN Trafficking Protocol*, 10 GENDER AND DEV. 20, 21 (2002) [hereinafter Doezema, *Who Gets to Choose?*]; Jo Doezema, *Ouch! Western Feminists’ Wounded Attachment to the ‘Third World Prostitute’*, 67 FEMINIST REV. 16, 28–29 (2001). See also Abrams, *supra* note 153, at 845–46 (discussing expectations in the legal system that women should be either “unambivalently assertive or thoroughgoingly submissive, wholly compromised or fully resilient” and arguing for more recognition of the variability in individuals). The international approach to trafficking has particularly privileged “innocent” victims, creating them when necessary and ignoring those who fall outside that scope. See Doezema, *Who Gets to Choose?*, *supra* at 20–21. See also Kapur, *Victimization Rhetoric*, *supra* note 12, at 18–20; Kapur, *Economies of Desire*, *supra* note 12, at 855; Abrams, *supra* note 153, at 842–44 (arguing that the law should give more recognition to the constrained forms of resistance women already undertake).

²⁰⁷ See, e.g., U.N. CHARTER pmbl. (reaffirming faith “in the equal rights of men and women”); Universal Declaration of Human Rights, *supra* note 45, pmbl. (noting that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”); ICCPR, *supra* note 45, pmbl. (recognizing the “inherent dignity and . . . the equal and inalienable rights of all members of the human family”); ICESCR, *supra* note 161, arts. 5, 6 (recognizing equal and inalienable rights); CEDAW *supra* note 16, pmbl. (noting the equal rights principles of the U.N. Charter). Article 14 of the 2000 Protocol explicitly recognizes the principle of nondiscrimination. See Protocol, *supra* note 2, art. 14, para. 2. Many scholars and commentators agree that the prohibition of discrimination has achieved the status of *jus cogens*. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 512–17 (4th ed. 1990) (stating that the least controversial examples of *jus cogens* includes the principle of racial nondiscrimination). Some commentators contend that only the prohibition against racial discrimination has achieved this status and that the prohibition against discrimination on the basis of sex is not yet universally agreed. Anne F. Bayefsky, *The Principle of Equality or Non-Discrimination in International Law*, 11 HUM. RTS. L. J. 1, 15–17, 22–23 (1990).

²⁰⁸ See *supra* Part I.

exploitation of women and children, as well as their conclusion that consent was not a relevant issue.²⁰⁹ Although the international instruments and approaches have become less overtly discriminatory, some of that legacy remains in the current anti-trafficking movement.²¹⁰ A renewed commitment to equal treatment of trafficked persons and a nondiscriminatory approach could be effected within the current frameworks. An approach of committed nondiscrimination would also further the goals of both recognizing the complexity of human trafficking and supporting the agency of trafficked persons.

B. Steps Toward a More Effective and Inclusive Response

This reevaluation of the approach to human trafficking would unfold differently within each of the frameworks. In the law enforcement context, governments and international bodies should expand their focus beyond organized crime to also include other traffickers, including government officials.²¹¹ They should commit to prosecuting all forms of trafficking, not just trafficking of women and children for the purpose of sexual exploitation.²¹² As part of the process of modifying national criminal laws to implement states' obligations to prevent and punish trafficking, international experts should encourage governments to reevaluate the legal treatment of prostitution and the practical distinctions in the treatment of prostitutes and other victims of trafficking with a goal of moving away from criminalization and stigmatization of prostitution and sex work.

In addition, law enforcement mechanisms—both nationally and internationally—should commit to meaningful inclusion of the other rights-based perspectives.²¹³ The Preamble and Article 2 of the 2000 Protocol

²⁰⁹ See *supra* note 3 and accompanying text.

²¹⁰ See generally Kapur, *Economies of Desire*, *supra* note 12 (discussing the limitations of an analysis that focuses on the victim and how such a perspective “recreates the ‘native’ subject of colonialism and invites imperialist interventions in the form of anti-trafficking legislation and intensified moral surveillance”).

²¹¹ The definition of “organized criminal group” in the Convention is arguably broad enough to include government officials; however, it is not clear whether enforcement efforts will be limited to traditional organized crime organizations. See United Nations Convention Against Transnational Organized Crime, *supra* note 73, art. 2(a) (“‘Organized criminal group’ shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or material benefit . . .”). See also *id.* art. 8 (addressing criminalization of corruption of public officials).

²¹² The current definition of trafficking in the 2000 Protocol would allow this, but there must also be sufficient political will to address those forms of trafficking. The Protocol also incorporates the principle of nondiscrimination. See Protocol, *supra* note 2, art. 14, para. 2, which provides:

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

States and international authorities should interpret this broadly to include a commitment by states not to discriminate with regard to the identification or subsequent treatment of either traffickers or victims on the basis of race, sex, or other status.

²¹³ Although human rights experts and advocates participated at an advisory level in the negotiations, this could be augmented in future negotiations by inclusion of formerly trafficked persons and more formal cooperation both in developing mandatory victim protection mechanisms and in implementation efforts.

currently allude to human rights protection for trafficked persons.²¹⁴ However, in the substantive provisions of the Protocol, these concerns are largely absent or optional.²¹⁵ The Protocol should either be amended to make human rights protections mandatory, or there should be a concerted effort in implementation at the national level to ensure that states give robust consideration to the human rights of both the victims and the perpetrators.²¹⁶ Thus, for example, governments should not restrict freedom of movement or the ability to work based solely on sex, race, or other status, including status as a victim of trafficking. This would also include reexamination of the Protocol provision—and any corresponding national law—disregarding the consent of a trafficked person to avoid the paternalism inherent in that conclusion.²¹⁷ Moreover, governments should not distinguish among prostitutes, illegal migrants, and “innocent” victims in providing protections or access to enforcement mechanisms for trafficking victims.

In the labor framework, recognition of the complexity of human trafficking would suggest expanding the existing definitions of forced labor and slavery to include explicitly the current forms of human trafficking.²¹⁸ It would also suggest that the ILO give consideration to migrants who move for

²¹⁴ See Protocol, *supra* note 2, pmb., art 2 (“[d]eclaring that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights”). Article 2 states that one of the purposes of the Protocol is “[t]o protect and assist the victims of such trafficking, with full respect for their human rights.” *Id.* art. 2. See also *id.* art. 14(1) (stating that “[n]othing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein”). However, there is little substantive recognition of human rights within the Protocol.

²¹⁵ In fact, the section on protection of victims contains essentially no obligations for states, using nonmandatory language such as “in appropriate cases and to the extent possible under its domestic law,” *id.* art 6(1), regarding protecting the privacy and identity of victims, “shall consider implementing measures to provide for the physical, psychological and social recovery of victims,” *id.* art. 6(3), and “shall endeavor to provide for the physical safety of victims of trafficking in persons while they are within its territory,” *id.* art. 6(5). The Protocol also provides that the training of officials “should also take into account the need to consider” human rights issues. See *id.* art. 10(2). However, there is mandatory language in Article 8 requiring states to take back nationals or permanent residents who were trafficked. *Id.* art. 8.

²¹⁶ The U.S. Trafficking Victims Protection Act, for example, notes that “trafficking in persons involves grave violations of human rights and is a matter of pressing international concern.” Trafficking Victims Protection Act of 2000, 22 U.S.C.A. §§ 7101–7110. However, it makes most human rights protections optional. See, e.g., *id.* § 7105 (providing assistance to victims in other countries “as appropriate” and limiting protection to victims in the U.S. to victims of “severe forms of trafficking”). See also Model Law to Combat Trafficking in Persons, available at <http://www.state.gov/g/tip/rls/other/19087pf.htm> (last visited Nov. 7, 2003) (making the same distinctions between mandatory law enforcement provisions and optional or qualified victim protection provisions). Both the U.N. CICP and NGOs active on trafficking issues could play a role in ensuring that governments fully address human rights concerns in implementing the Protocol.

²¹⁷ Protocol, *supra* note 2, art. 3(b) (stating that “the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used”). See also Gallagher, *supra* note 59, at 984–88 (discussing the debates on the definition of trafficking and the link between trafficking and prostitution). The point is not that it is not a difficult question, but rather that it essentially robs adult victims of status as someone who can consent. See, e.g., Doezeema, *Who Gets to Choose?*, *supra* note 206 (discussing the consequences of denying consent); *Special Rapporteur’s Report*, *supra* note 12, paras. 12, 36 (stating that trafficking is never consensual and describing differing levels of consent to component acts of trafficking).

²¹⁸ See *supra* Part I.B. (providing an overview of the labor framework for addressing trafficking).

employment, including sex work, in order to increase awareness of the problems faced by illegal migrants. Labor rights mechanisms should work cooperatively with other international mechanisms and integrate increased human rights protections.²¹⁹ Most controversially, the ILO and labor advocates should maintain and develop their nascent challenge to the current exclusion of “sex work” from the existing labor framework.²²⁰ The ILO should take the next logical steps of advocating for labor rights for prostitutes and other sex workers, even in contexts where that work is not legal, and for state recognition of prostitution as a form of voluntary labor in many circumstances. By overtly including prostitutes and sex workers within the labor framework, they could greatly expand protection of the labor rights of sex workers and begin to eliminate the stigma currently attached to that work.²²¹ The labor framework is uniquely situated to identify the common thread of exploitative labor conditions that runs through various forms of trafficking. By reframing the experiences of trafficked persons as experiences of exploited workers, it will underscore agency rather than victimization.

Similarly, the human rights community and its institutions should adopt a more thoughtful and comprehensive approach to human trafficking. Trafficking could be explicitly defined as a human rights violation, rather than one manifestation of other broader violations.²²² One option would be a specialized treaty that addresses trafficking as a human rights concern.²²³

²¹⁹ See Migrant Workers Convention, *supra* note 46, art. 1 (members endeavor “to respect the basic human rights of all migrant workers”). Article 7 requires consultation with representative organizations of employers and workers in preventing abuses. *Id.* art. 7. Both the labor and human rights frameworks also include explicit prohibitions against discrimination. See International Labour Organization, Convention concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, arts. 1, 2, 362 U.N.T.S. 31. Article 1 defines “discrimination” to include “[a]ny distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.” *Id.* art. 1. Article 2 requires members to eliminate discrimination in employment and occupation. *Id.* art. 2. This arguably encompasses the wide range of labor situations that result from trafficking and could include sex work.

²²⁰ In their programmatic and research work, they should continue giving recognition to “sex work” as labor, assessing its prevalence and its significance in national economies even when it is not formally acknowledged. Additional research, such as the ILO reports on *Stopping Forced Labour* and *The Sex Sector*, would be helpful in articulating and reconceptualizing the forced labor component of trafficking, whether it is for prostitution, domestic work, or other work. See *Stopping Forced Labour*, *supra* note 133; THE SEX SECTOR, *supra* note 101. See also Kempadoo, *supra* note 26, at 8–9 (arguing for recognition of “sex workers as actors in the global arena, as persons capable of making choices and decisions that lead to transformations of consciousness and changes in everyday life”); Montgomery, *supra* note 93, at 46–47 (discussing agency of children in prostitution).

²²¹ The Sex Sector report is a first step in this direction. See generally THE SEX SECTOR, *supra* note 101.

²²² See *supra* notes 51–57 and accompanying text (showing the reemergence of trafficking as part of the growing global movement for women’s rights). CEDAW starts this process, but it is vague and limited to women; the same is true for the other documents, such as the World Conference reports. See *id.*

²²³ However, proposals for reform at the U.N. level are generally moving in a different direction—towards coordinating, and perhaps ultimately consolidating, the work of existing treaty bodies, rather than adding new ones. See ANNE F. BAYESKY, THE U.N. HUMAN RIGHTS TREATY SYSTEM, UNIVERSALITY AT THE CROSSROADS 8–9 (2001). One proposal has been to consolidate all the treaty-monitoring bodies into one monitoring body. See *id.* 134–39. This would have the advantage of eliminating the distinction between human rights and women’s rights. It would alter the historical practice of giving less consideration to women’s human rights within the general mechanisms and allow for greater collaboration and sharing of expertise among the member bodies. However, the potential drawbacks are that women’s human rights issues would get marginalized within the bigger system without an organization specifically charged with considering those issues.

However, a preferable strategy would be to “mainstream” trafficking as a full-status human rights violation, rather than just an issue affecting women and children. This approach would include considering both civil and political rights violations, as well as the economic, social, and cultural rights violations that contribute to trafficking. Regardless of whether this broader reform occurs, both human rights and women’s rights bodies should collaborate in responding to human trafficking. Human rights advocates and experts should also continue to participate in other international arenas, such as in law enforcement bodies, either formally or informally as they did during the negotiations surrounding the 2000 Protocol.²²⁴ An important part of this effort would include constructing a more inclusive process that would give voice to those often excluded under the current process—advocates from the “third world,” prostitutes and other sex workers, and trafficked persons, including women, men, and children.²²⁵

In addition, international experts and advocates should also give increased attention to the human rights of prostitutes and other sex workers, regardless of differing views on the legality and legitimacy of prostitution and sex work.²²⁶ This would help avoid problems distinguishing between forced and voluntary prostitution and instead focus on the shared concern of human rights violations regardless of context.²²⁷ By focusing on the agency of those trafficked and on human rights violations regardless of the status of the victim, advocacy and implementation efforts would shift away from prostitution issues and towards broader concerns surrounding various forms of trafficking.

Finally, the human rights community should work to make the guarantee of nondiscrimination meaningful in its work on human trafficking by addressing trafficking as a mainstream human rights issue, while still recognizing the issues of gender, race, and other status that are implicated. International institutions and advocates should consider the extent to which the focus on the relationship between trafficking and prostitution reflects and reinforces discriminatory assumptions.²²⁸ Both the historically racist and

²²⁴ See Gallagher, *supra* note 59, at 983–85 (discussing the role of the ad hoc committee in drafting the protocol).

²²⁵ Inclusion of a wide range of voices should yield broader concern with all forms of human trafficking, not just trafficking for sexual purposes, but also trafficking for exploitative labor. It would likely also result in greater emphasis on addressing the rights of migrant women and men more generally and a greater focus on protecting the rights of trafficked persons at all stages of the process. Ultimately, it could lead to advocacy to take a closer look at systemic, governmental, and international economic, cultural, and social policies that promote or encourage trafficking. See generally Chandra Mohanty, *Under Western Eyes*, in *THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM* 51, 52–75 (Chandra Mohanty et al. eds., 1991); Kapur, *Economies of Desire*, *supra* note 12 (discussing the emergent voices of the sex worker in post-colonial India and how these voices pose significant challenges and claims).

²²⁶ See JO BINDMAN, *REDEFINING PROSTITUTION AS SEX WORK ON THE INTERNATIONAL AGENDA* (1997), available at <http://www.walnet.org/csis/papers/redefining.html> (discussing violations of international norms concerning sex workers).

²²⁷ See Doezeema, *Who Gets to Choose?*, *supra* note 206, at 42–43 (noting problems with distinguishing between voluntary and forced prostitution include the limiting advocacy efforts to stopping forced prostitution and reinforcing notions of voluntary sex workers as “guilty” and forced prostitutes as “innocent”).

²²⁸ The international community and its mechanisms are generally criticized for being dominated by Western, developed nations, and the membership of international bodies is overwhelmingly male, even where there is a broader geographical and racial distribution. See, e.g., CHARLESWORTH & CHINKIN, *supra* note 163, at 36–37, 174–79 (identifying a “Southern” critique of the “Western origins, orientation and cultural bias” of the international legal order and noting that both the U.N. membership

sexist approach to trafficking and the current contentions that the focus on prostitution reflects imperialist attitudes should be a caution about the need to include other voices and about the difficulty of doing so. At a minimum, feminists and activists should change the way they view this division in the anti-trafficking context, recognizing the power differentials within the international community and the different perspectives among women from receiving countries and those from sending countries, sometimes within the same region.²²⁹ Advocates and decisionmakers need to question the anti-trafficking movement's preoccupation with the protection and rescue of trafficking victims to ensure that this is not grounded in discriminatory attitudes. Only by confronting the many complexities of human trafficking, and adjusting its work accordingly, will the international community be able to develop and implement an effective response.

CONCLUSION

Human trafficking—"the trade in human misery"—should outrage us and inspire us to eradicate it. Although the early panic about "white slavery" may have been disproportionate to the actual scope of the problem, today there are more reliable indicators that human trafficking is a widespread, and perhaps growing, phenomenon. The current international response to human trafficking, however, adopts many of the problematic aspects of the earlier approaches to white slavery. It overemphasizes the aspects of trafficking that relate to the sexual exploitation of women and children; it conflates trafficking and prostitution; it ignores or marginalizes both trafficking of less innocent victims and trafficking for other purposes; and it predominantly adopts a law enforcement approach, ignoring issues of human rights and rights violations.

The current approaches cluster in three different areas—law enforcement, labor, and human rights—that often overlap. Each framework presents its own strengths and weaknesses. The shared strengths include bringing increased international attention to the problem of human trafficking and attempting to update the response to incorporate current manifestations of the problem. However, no framework goes far enough in this regard. Each has significant limitations in approach, often resulting from a narrow mandate that excludes the perspectives of the other frameworks. None is truly comprehensive.

The international community must remedy these overarching concerns. Any approach to human trafficking must be more nuanced, thus avoiding the trap of concentrating on the most lurid aspects and limiting the concern to innocent victims. In addition, at the structural level, governments and international officials should work towards a more comprehensive approach that draws on the strengths of each framework. There should be more coordination among the different frameworks to explicitly recognize the broad and complex nature of trafficking and the overlapping aspects of the

and its bureaucracy are dominated by men). *See also* UNITED NATIONS, THE WORLD'S WOMEN 2000: TRENDS AND STATISTICS 167–68 (2000) (discussing women's representation in U.N. professional staff).

²²⁹ In addition to longer-term structural and institutional changes at the international level, another way to include the voices of those currently marginalized would be to increase access for NGOs that represent other perspectives and include trafficked persons in their membership.

international response. Another goal should be to resolve some of the more problematic and inflammatory issues, such as the relationship between trafficking and prostitution and the role of consent.

Equally important to increased coordination among the mechanisms is broadening the role of those who have been trafficked. The current frameworks largely act upon those who have been trafficked, allowing very little input by them into how the systems work in practice. By acknowledging victim agency, the approach to human trafficking should be more reflective of the views of those most affected, and will thus be more effective in ultimately ending human trafficking.

Finally, each framework should commit to incorporating nondiscrimination principles in all aspects of the approach to human trafficking. The past international responses have been characterized by both racism and sexism. While the terminology has become more progressive, there should be an effort to ensure that international mechanisms and laws do not continue to reflect these biases. Nondiscrimination is related to the recognition both of complexity and of victim agency; by incorporating each of these norms, the international community may be able to finally respond appropriately to the human trafficking dilemma.