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EXPANDING INTERNATIONAL AND NATIONAL PROTECTIONS AGAINST TRAFFICKING FOR FORCED LABOR USING A HUMAN RIGHTS FRAMEWORK

Shelley Case Inglis*

INTRODUCTION

The United States government estimates that each year between one to two million women and girls are trafficked around the world for the purposes of forced labor, domestic service, forced prostitution and involuntary marriage.1 Victims of trafficking— including men and boy children— are abducted, coerced or sold into labor situations from which they cannot escape or that they cannot control rendering them vulnerable to extreme exploitation and abuse. They are held in brothels, sexually exploited, imprisoned behind barbed wire in garment factories, and confined in abusive homes as servants or mail order brides. International criminal syndicates, government authorities, employment agencies, parents and neighbors have been implicated in this highly profitable process of trading in human beings for their labor. Trade in persons is not unique to any area of the world. It has been documented from Ukraine to Germany, Burma to Thailand, Mexico to the United States, Russia to Israel and China, Philippines to Kuwait, Nepal to India and within countries such as Brazil and Cambodia.2 The impact of trafficking on people in all countries makes it “a human rights abuse with global dimensions.”3

In recent years, international advocates have drawn attention to the growing phenomenon of trafficking in women and initiated a movement to

* Cornell B.A. (1993), Columbia Law School J.D. (1999), Skadden Fellow, Victim Services, NY (October 2000). The author is currently working in Kosovo. This article is dedicated to my mother, Judy Inglis, my sister, Sarah Inglis, and to my niece, Megan Inglis Winegar. Although perhaps impossible, I wish for my niece a future in which all women and girls, as herself, are free from. Many thanks to Cathy Powell, Ann Jorden, Martina Vandenberg and Alice Miller for their expertise and guidance on this topic and for their commitment to the human rights of all women and girls.

1 See Senior Coordinator for International Women’s Issues, Trafficking in Women and Girls— An International Human Rights Violation, Fact Sheet (hereinafter Trafficking Fact Sheet) (March 10, 1998).

2 See Comments of Martina Vandenberg, Briefing on Trafficking in Front of the Congressional Human Rights Caucus (Sept. 15, 1998).

3 See id.
deconstruct the complex set of issues and violations that constitute trafficking. In response to increased recognition of the issue, governments, such as the United States, and international organizations, like the United Nations, have begun to focus financially and strategically on combating this immense human rights problem. International labor policy, migration patterns and immigration law, transnational criminal networks and law enforcement, and the globalization of trade and the sex industry impact the trafficking phenomenon. As a result, current proposals and initiatives to combat trafficking implicate some of the most controversial issues in international policy, such as the legalization of prostitution and the treatment of illegal immigration and labor. In deconstructing and integrating these complex issues of law and policy concerning trafficking, using a human rights framework has proven an effective tool.

This article discusses how the current process of redefinition and debate concerning trafficking is working to simultaneously broaden the scope of traditional conceptions of trafficking and bring into focus this phenomenon. Section I of this article will assesses the contours of current international legal norms concerning trafficking and forced labor. Section II examines the limitations of these existing protections and contemporary suggestions from international actors for redefining trafficking. Section III reviews the current proposed solutions initiated by governmental, intergovernmental and non-governmental entities to address this considerable human rights problem. Turning to a discussion of the policy implications emerging from these proposed solutions, Section IV analyzes the most controversial aspects of the trafficking issue and highlights ways to expansively reconceptualize international protections against trafficking. Finally, Section V concludes with a set of recommendations to effectively combat trafficking within a human rights framework.

I. Existing International Legal Protections Against Trafficking

The international prohibition of trafficking is set out in the Convention for the Suppression of Traffic in Persons and of the Exploitation of Others (The 1949 Convention).\(^4\) This convention stems from the amalgamation of preceding treaties drafted to address the phenomenon of "white slavery."\(^5\) The 1949 Convention binds states to three general obligations: an anti-trafficking principle, specific enforcement measures and the use of so-


cial welfare to "rehabilitate" survivors.⁶ Both acts of procurement and exploitation of prostitution, such as pimping and brothel management, are prohibited and rendered punishable by the 1949 Convention. Additionally, states parties to the Convention agree to undertake defined measures of international coordination to combat trafficking as well as to take social and economic action for the prevention of prostitution and rehabilitation of victims.⁷

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) binds states to actively combating discrimination against women in all aspects of social and economic life. The trafficking provision, Article 6, mandates that "States parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."⁸ The Optional Protocol to CEDAW now provides a mechanism through which victims of trafficking and others can communicate a complaint against a State party and seek enforcement of States parties’ obligations under the convention.⁹

The CEDAW committee has addressed trafficking under the rubric of violence against women calling for the elimination of such violence through the Declaration on the Elimination of Violence Against Women and General Recommendations on Violence Against Women.¹⁰ Additionally, the Beijing Declaration and Platform for Action calls for the elimination of trafficking and assistance to the victims.¹¹

The League of Nations Slavery Convention of 1926 and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1957) indirectly address aspects of

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⁷ See id. for a more in-depth analysis of the 1949 Convention.
¹⁰ See id. The CEDAW Committee defines violence against woman as, in part, "[p]hysical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution."
¹¹ See id. Strategic Objective D.3. Eliminate trafficking in women and assist victims of violence due to prostitution and trafficking.
trafficking by prohibiting slavery, debt bondage and forced marriages. The International Labor Organizations Forced Labor Convention (No. 29) and the 1957 Abolition of Forced Labor Convention (No. 105) are integral for legally defining the broad phenomenon of trafficking because they provide the international legal definition of forced labor and mandate the end to forced labor practices.

In respect to the trafficking of girls and boys under 18, States parties to the Convention on the Rights of the Child (CRC) are bound to take “all appropriate national, bilateral and multilateral measures to prevent the abduction of, sale of or traffic in children for any purpose or in any form.” In addition, other substantive provisions of the CRC further address States parties' obligations regarding the sexual and economic exploitation of children.

Finally, there are international and regional human rights instruments, which both directly and indirectly address trafficking. The International Covenant on Civil and Political Rights (the ICCPR) and the International Covenant on Economic, Social and Cultural Rights (the ICESCR) are relevant to framing trafficking as a human rights issue, as they

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12 Slavery is defined in the 1926 Convention as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.” 60 L.N.T.S. 253, reprinted in 21 AM. INT'L. L. 171 (Supp. 1927). Traditional forms of slavery are practiced today in places such as the Sudan and Mauritania. See Charles Jacobs, Mohamed Athie, Bought and Sold, N.Y. TIMES, July 13, 1994, at A19.

13 Debt-Bondage is defined as “the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.” See 1926 Convention, supra note 12. In the trafficking context, debt-bondage is used to hold victims in slavery-like conditions. Victims are told that they must pay off the debt of their transportation by working. Usually, victims are not told how much they owe, how much their work is bringing into the exploitative establishment, nor how long they will need to work to pay off the debt.

14 See id.


17 For more discussion on the CRC and these provisions see Farrior, supra note 15, at 233.
detail and ensure the collection of core human rights. Victims of trafficking experience multiple violations of individual rights guaranteed them through these documents. For example, rights violated through the trafficking process include, among others, the right to life, and the right not to be tortured or subjected to cruel and degrading treatment (ICCPR Art. 9), the right to liberty and security of person and to be free from physical violence (ICCPR Arts. 6, 9), the right to freedom of choice of residence and movement (ICCPR Art. 12.1), the right to consensual marriage, equal rights in divorce and marriage (ICCPR Arts. 23.2-4; ICESR Art. 10.1), the right to work and just, fair and safe work conditions (ICESR Art. 6, 7), and the right to education, health and social services (ICESCR Art. 12). Regional treatises, specifically the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention) and the American Convention on Human Rights (the American Convention) prohibit trafficking either implicitly or explicitly. The American Convention explicitly prohibits “traffic in women” in Article 6(1) and the European Convention prohibits slavery, servitude and forced labor in Article 4. The practice of trafficking clearly fits within this prohibition.

Although international legal norms that prohibit different aspects of trafficking and bind states to the elimination of trafficking exist, there is a pervasive failure of international instruments to be precise about both the meaning of trafficking and specific actions that must be taken to combat it. For instance, until such time as a complaint regarding trafficking is made under the Optional Protocol to CEDAW, CEDAW’s provision on trafficking has vague language and undefined terms making the legal contours and implications of this provision unclear. As a result, the United Nations by way of its Special Rapporteur on Violence Against Women has recognized


20 See Toepfer & Wells supra note 3, at 113-128 for a broader discussion of these documents’ applicability to trafficking.

21 See id.

22 See Farrior, supra note 15, at 227: see also Toepfer & Wells supra note 6, at 100 for more in-depth analysis of CEDAW’s trafficking provision.
the lack of a coherent international definition on trafficking. Advocates for trafficked women agree; for example, the Global Alliance Against Trafficking in Women (GAATW) asserts that "a fundamental problem in responding to the issue of trafficking in women is the lack of a precise and coherent definition." 

II. LIMITATIONS OF EXISTING INTERNATIONAL LEGAL PROTECTIONS AGAINST TRAFFICKING

The 1949 Convention is currently the only international legal instrument that provides a definition of trafficking. The Convention sets out to punish a person who, in relevant part, "procures, entices or leads away, for purposes of prostitution, another person who, even with the consent of that person" and a person who "exploits the prostitution of another person, even with the consent of that person." The critical aspects of this definition are 1) its connection of physical recruitment with commercial exploitation as aspects of trafficking; 2) its limitation on trafficking as only for the purpose of prostitution; 3) its failure to define both "prostitution" and particularly "exploitation;" and 4) the element of "with or without consent." Some other important aspects of the 1949 Convention are its gender-neutral language, its abolitionist approach to brothels but not prostitution per se, and its lack of a cross-border requirement to trafficking. Although the Convention provides a definition of trafficking and an international prohibition of the practice, the Convention lacks an enforcement mechanism and since its creation there has been no enforcement of State parties' obligations.

In recent years the Convention and its definition of trafficking have been criticized for being inadequate in its conceptualization and ineffectual in combating trafficking which is now perceived as a much broader and more complex phenomenon. Contemporary feminists for trafficking vic-

25 See 1949 Convention, supra note 4.
26 See GAATW Summary Report supra note 18.
27 See Toepfer & Wells, supra note 3, at 99.
28 See Farrior, supra note 11, at 218-219.
29 See id.
tims have rejected many, but not all, aspects of the 1949 Convention definition. In an effort to formulate a comprehensive legal definition, attempts have been made to deconstruct our understanding of the complex nature of trafficking and consider the individual components that together comprise the phenomenon. This section examines the components of the problem that need to be highlighted and those that need to be reconsidered in developing more comprehensive protections against trafficking.

A. Defining the Scope of the Trafficking Definition

In creating a contemporary, broad and comprehensive trafficking definition, it is necessary to consider three issues concerning the scope of the definition that are, in part, adequately addressed by the 1949 Convention. A decision on who is protected by the international prohibition against trafficking, and to what extent, requires an analysis of the gendered nature of the trafficking phenomenon, the distinction between trafficking in adults and trafficking in children, and the existence of trafficking within national boundaries and across international borders.

The gender-neutral language of the 1949 Convention has been interpreted as meaning that anyone, regardless of sex, can be a victim of trafficking. This language has not been absolutely rejected and is appropriate to some trafficking situations where vulnerable men and boy children are trafficked for forced labor or sexual exploitation, for example in the insensitively named “Deaf Mexicans Case.” The fact remains, however, that the large majority of people trafficked throughout the world are women and girl children. The overwhelming prevalence of female victims of trafficking sheds light on the gendered nature of trafficking and its particular genesis in gender oppression, the result of which is the extreme vulnerability of women and girl children. Despite the gendered aspect of the trafficking phenomenon and the predominant use of the term “trafficking of women and girl children,” an official definition of “traffic in persons” which protects any person who is a victim of trafficking is more appropriately inclusive. Such an expansive view of the trafficking phenomenon, however, should still allow for a gender-specific focus in responses to trafficking.

Another aspect of the legal definition of trafficking concerns the relevancy of the age of the victim. The relevant international legal standard,

31 See TRAFFICKING FACT SHEET, supra note 1.
expressed in the CRC, defines under 18 as a child. Although a general definition of trafficking can cover both children and adults, there may be circumstances in which actions will constitute trafficking in children but not adults. For instance, in many definitions of trafficking, adults can consent to movement into an exploitative working environment or into prostitution if that consent is fully informed. Children, however, are considered unable to offer meaningful consent to exploitation or prostitution, so that in the instances of trafficking of children consent cannot be a defense. Because children are particularly vulnerable to coercion and exploitation through abuse of authority and dominant position by adults, trafficking in children is a substantial human rights issue that deserves a special focus.

As with trafficking in adults, trafficking in children is highly gendered. Girl children are differently and disproportionately affected by trafficking than boy children. Accordingly, any discussion of trafficking in children, separate from adults, should reflect its gendered character. It is difficult, however, to discuss trafficking in girl children as distinct from women because the artificial nature of an age cut-off, questions concerning age of consent to sexual relations and marriage and the gender oppression of both girl children and women throughout the world. As a result of the

33 See CRC, supra note 12.
34 See Roundtable Report, supra note 27.
35 See infra page 9.
36 See Roundtable Report, supra note 27. Girl children are often subject to particular forms of slavery, and arguably trafficking into those situations, because of culturally-based gender discrimination. For example, girls in southeastern Ghana are often offered by their families to priests as “slaves of gods” to appease the gods for family sins. This form of slavery includes labor and sexual slavery. See Howard W. French, The Ritual Slaves of Ghana: Young and Female, N.Y. TIMES, Jan. 20, 1997, at A1.
37 This issue of distinguishing between trafficking in women and children is much more complex than the cursory treatment I have given it here. At a Human Rights Watch meeting with women and children advocates working on trafficking in South Asia, some advocates felt that because the cultural and social line between childhood and adulthood for women is drawn much younger than international or western standards, such a distinction does not reflect cultural realities. In cultures where women marry young, for example from 14 onwards, the issue of consent to marriage and sexual relations is complicated. A perspective of fluidity in female maturation creates the question of whether a policy of a clear age cut-off and treating children and women separately in the context of trafficking makes sense. However, feminists may take a different view and consider that maintaining a connection between women and girl children is problematic because of the historical treatment of women as children. Treating women and children the same inevita-
tension between protecting girls but not perpetuating the oppression of women, strategies that are meant to combat trafficking in children can obscure generally law enforcement and non-governmental policy with respect to combating trafficking in prostitution and other sex work. Although they represent a deep commitment to combating the exploitation of children, if not carefully considered and implemented, these strategies may result in perpetuating trafficking and/or enhancing the negative affects of trafficking on both adult and child victims.

Finally, the 1949 Convention does not require international border crossing as an element of trafficking and therefore has an expansive approach to geographical limitations on trafficking. The common understanding of trafficking has come to include the movement of persons within and across national and international boundaries. How much movement leads to paternalism and female subordination. See Roundtable Report, supra note 27.

38 Sex work covers women who work as club dancers, beer-girls, club singers, masseurs who are also required to prostitute themselves. For a view on the different situations into which women are trafficked into sex work in Cambodia, see, National Assembly, Commission on Human Rights & Reception of Complaints, Report on the Problem of Sexual Trafficking in Cambodia (May 1997).

Younger and younger girls are being trafficked into forced prostitution, particularly in Southeast and South Asia. Analysts have looked to a variety of reasons for this youth phenomenon spanning a range from myths of sexuality to the increase in HIV/AIDS infection in sex work. Advocates disagree on the effectiveness of law enforcement techniques such as raids meant to ‘rescue’ children in brothels. Although all advocates agree that children under 18 cannot consent to prostitution and need to be assisted, some are not convinced of the soundness of this approach for both the children and adult women, who may be consensual sex workers. Such techniques work to push prostitution underground further endangering both children and adults by lowering working conditions and decreasing access to health care. In addition, this makes it more difficult for authorities to counteract trafficking and coercive sex work.

39 The debate over the most appropriate law enforcement techniques to use to combat trafficking for sex work is not unique. There are similar problems concerning the choice of appropriate strategies to end the trafficking and slavery of women and children in Sudan. Some non-governmental organizations working in the Sudan believe that buying the freedom of enslaved women and children is an appropriate tool for handling the human rights abuse. Other organizations, including the United Nations Children’s Fund (Unicef), argue that these practices perpetuate the slave trade and the long-standing brutal civil war. See Paul Lewis, U.N. Criticism Angers Charities Buying Sudan Slave Release, N.Y. TIMES, Mar. 12, 1999, at A7.

40 See discussion of 1949 Convention definition, infra page 7, 8.

41 See definitions of trafficking infra page 8-10.
within national borders is required to constitute trafficking is not defined by the international legal standard. However, non-governmental organizations concerned with women’s human rights and the issue of trafficking have set out some possible guidelines. The International Human Rights Law Group, Women’s Rights Advocacy Program Roundtable on Trafficking [The WRAP Roundtable] has suggested that dislocation from family and support networks could be a determinative factor.\textsuperscript{42} Similarly, a coalition of non-governmental organizations working on trafficking define the movement of persons in trafficking as movement to, or holding in, “a community other than the one in which [the trafficked person] lived at the [initial] time.”\textsuperscript{43} Thus, an expansive international prohibition against trafficking and the 1949 Convention definition could be interpreted to include any cognizable dislocation from one’s local residence as movement for trafficking.

B. Defining Intent in Trafficking for the Purpose of Forced Labor

The 1949 Convention places both the processes of procurement and transportation and the exploitative nature of the resulting labor under the rubric of trafficking, thereby including the end purpose of trafficking within the meaning of trafficking.\textsuperscript{44} The United Nations, which has provided a more contemporary legal interpretation of trafficking has condemned the phenomenon as the “illicit and clandestine movement of persons across national and international borders, . . . with the end goal of forcing women and girl children into sexually or economically oppressive and exploitative situations for the profit of recruiters, traffickers and crime syndicates, as well as other illegal activities related to trafficking, such as forced domestic labor, false marriages, clandestine employment and false adoptions.”\textsuperscript{45}

Some advocates have also defined trafficking this way.\textsuperscript{46} In the Human Rights Standards for the Treatment of Trafficked Persons (Human

\textsuperscript{42} See Roundtable Report, supra note 27.
\textsuperscript{44} See Roundtable Report, supra note 32, at 137.
\textsuperscript{46} See Roundtable Report supra note 27. The Roundtable of women’s activists decided on the following working definition: “Trafficking in persons consists of all acts involved in: the recruitment, transportation or movement of persons, within or across border, whether for financial or other gain or not, and in which material deception, coercion, force, direct or indirect threats, abuse of authority, fraud, or fraudulent non-disclosure is used, for the pur-
Rights Standards), GAATW, Foundation Against Trafficking in Women and the International Human Rights Law Group, define trafficking as "all acts and attempted acts involved in the recruitment, transportation within and across borders, purchase, sale, transfer, receipt, or harboring of a person (a) involving the use of deception, coercion (including the use or threat of force or the abuse of authority) or debt bondage (b) for the purpose of placing or holding such person, whether for pay or not, in involuntary servitude (domestic, sexual or reproductive), in forced bonded labor, or in slavery-like conditions." Thus, a core element in definitions of trafficking is the abusive or exploitative purpose for which persons are moved.

The 1949 Convention does not make clear what level of intent is required to constitute movement of a victim 'for the purposes of' prostitution for a person to be a trafficker. The legal implication of this core element depends on the level of intent required of persons in the chain of movement for that person to be criminally liable for trafficking. A decision of the level of intent required involves a judgment regarding which persons involved in trafficking should be the targets for criminality and which persons involved in trafficking are more appropriately handled through education and other social policy responses.

A low standard of intent could be that the person "reasonably should have known" that he is contributing to trafficking or the person exhibited "reckless disregard" for the possibility that the person being moved would end up in a coercive situation. Using a low standard would cast the net of the definition widely to include lower level persons in the chain of migration, such as smugglers or parents. A higher standard of requisite

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pose of placing a person forcibly, against their will or without their consent in exploitative, abusive, or servile situations; such as forced prostitution, sweatshop labor, domestic servitude or other abusive forms of labor or family relationships, whether for pay or not." (emphasis added)

47 See the Standards, supra note 37, at 3.
48 See Roundtable Report, supra note 27.
49 For instance, a parent who sells his daughter to, or sends his daughter away with, a trafficker usually does not know or intend that the child end up in a brothel, an abusive domestic service situation or a slavery-like factory. The parent might be told that she is going to be a domestic servant. However, the parent may have reason to suspect that is what happens to young women who are sold from their communities because of previous experience or knowledge of what has happened to other persons.

Alternatively, this situation can be considered an example of willful ignorance, if the parent does not inquire into what the ultimate working situation will be for the victim. Whether parents and family members are persons that should be targeted for prosecution of trafficking or more targeted for education and preven-
intent requiring knowledge would only capture those persons who ‘intend’ that the other person end up in or ‘know’ that the other person will end up in forced labor circumstances.\textsuperscript{50} This high threshold could allow marriage brokers and other facilitators to escape.\textsuperscript{51}

In the Human Rights Standards, GAATW defines the requisite mental state as “intends to” to constitute the “for the purpose of” element. In the commentary to this definition, however, they include persons or entities “that intentionally remain ignorant of the manner in which their acts contribute to the trafficking chain” as having the requisite mental state.\textsuperscript{52} Additionally, they indicate that the definition is intended to exclude those persons that “unwittingly (and without any reason to suspect the existence of trafficking) become a link in the trafficking chain, such as an innocent taxi driver or hotel owner.”\textsuperscript{53} These comments, although not clear, indicate that GAATW’s definition of “intends to” is calculated to require a somewhat lower standard of requisite intent, where a person or entity cannot escape prosecution for trafficking if they had reason to know that they were contributing to a chain of movement of persons that would place the person in exploitative or abusive circumstances. Because the legal consequences can be varied, the choice of the requisite intent required to constitute “for the purpose of” should depend on long-term policy and strategy considerations, including a clear picture of which persons are the targets for criminality under the particular rubric of trafficking for forced labor.

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\textsuperscript{50} The situation could be the following: a woman agrees to migrate with a trafficker to be a waitress, but ends up being forced into prostitution. Since the trafficker used deception to recruit the woman, misleading her into thinking that she was migrating to be a waitress when he knew that she would end up in coercive prostitution, the woman’s consent is not meaningful and trafficking has taken place. If the trafficker did not know that the woman who end up in forced prostitution, whether this scenario fits the offense of trafficking depends on the level of knowledge needed by the trafficker about the resulting situation. For instance, if the threshold is constructive knowledge or “reasonably should have known” standard the analysis would look to whether there were objective indications that the woman after migration will be forced into prostitution which would have but a reasonable person on notice that he was contributing to a trafficking chain, then there is trafficking. This analysis would be the same if the women agreed to migrate for prostitution, but was not informed that she would be held in debt-bondage or that her passport would be taken away from her.

\textsuperscript{51} See Roundtable Report, supra note 27.

\textsuperscript{52} See the Standards, supra note 37.

\textsuperscript{53} See id.
C. From “With or Without Consent” to “Coercion and Deception”

The 1949 Convention states that persons cannot consent to being trafficked. The European Parliament and advocates for trafficking victims have argued that instead of focusing on the issue of consent, the emphasis of any rights-based definition should be on whether a person was trafficked by deceptive or coercive means.\(^4\) Although both the 1949 Convention and the current United Nations contemporary definition do not include the element of coercion and/or deception, adding such an element to an international trafficking prohibition would clarify issues left ambiguous by the 1949 Convention and more clearly shape the legal analysis.

A shift from the issue of consent refocuses the legal inquiry away from the victim and onto the actions of the trafficker/exploiter reflecting a recognition that deception or coercion nullifies any meaningful, fully informed consent. This would make clear that a person, in the absence of coercion and/or deception, has a right to choose to migrate and to choose their form of labor. The increased attention on deception and/or coercion serves to clearly distinguish trafficking from other forms of cross-border movement of persons. Voluntary migration within and across borders with the assistance of profiting third parties, both legal and illegal, is standard practice in economically motivated migration flows of today. By virtue of the deception and/or coercion aspect of the definition, trafficking is rendered a separate offense from alien smuggling and other such practices.

To shed light on what constitutes coercion and deception, GAATW provides an illustrative list of forms that ‘coercion’ can take in their Draft Minimum Standards for the Treatment of Victims of Trafficking in Persons, Forced Labor and Slavery-like Practices. This list includes:\(^5\)

- violence or threat of violence, including deprivation of freedom of movement and of personal choice,
- abuse of authority or dominant position: which “can range from confiscation of personal documents to the placing of another in a dependent position, abusing one’s dominant social position, abusing one’s parental authority or abusing the vulnerable position of persons without legal status,”
- deception: with regard to the working conditions or the nature of work to be done.\(^6\)

\(^4\) See European Parliament Resolution 18 January 1996 calling for a new convention on trafficking which “should focus on coercion and deception.” See also GATW Summary Report, supra note 24.


\(^6\) See id.
Notably, GAATW does not include economic circumstances as a form of coercion in its guidelines or in the Human Rights Standards. Some activists have advocated that extremely harsh economic circumstances can constitute coercion.\textsuperscript{57} It highly controversial, however, to categorize dire economic circumstances that work to motivate women and girl children to migrate and seek clandestine labor, particularly in the case of prostitution, as coercion for the purposes of defining trafficking.

\textbf{D. Defining Forced Labor}

Forced labor is a component of the trafficking phenomenon and its legal definition in turn implicates configurations of trafficking definitions. The ILO Convention defines forced labor as “all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”\textsuperscript{58} The inquiry into whether a person is subject to forced labor hinges on voluntary-ness or consent of the victim to the coercive labor situation. Many advocates have argued that the meaning of voluntary in a definition of trafficking for forced labor would involve identifying that any consent to labor must be full and informed as to the coercive nature of the situation for it to be valid.\textsuperscript{59} Thus, in an expansive prohibition against trafficking, a person would be a victim of trafficking for forced labor if that person was not fully informed as to the coercive conditions and exploitative nature of their resulting work situation and therefore was not able to offer their labor voluntarily.

The definition of forced labor reflects that a person, if fully informed, may opt to work in exploitative circumstances because other options, such as returning to their country of origin in the case of migrants or being unemployed in a country which provides little or no governmental subsistence, are less socially and economically attractive. In the Human Rights Standards, GAATW agrees with this implication of the legal stan-

\textsuperscript{57} See Janie Chuang, \textit{Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts}, 11 Harv. Hum. R. J. 65, 93 (1998). The issue of economic deprivation amounting to coercion is particularly relevant for women who return to their country and region of origin after being trafficked and take part in recruiting new girls to take their place. This cyclical aspect of trafficking is rooted in the harsh social and economic realities that women face when they are released from their original coercive situation, particularly from sex work. Some advocates believe these and similar circumstances can amount to economic coercion into the trade in human beings.

\textsuperscript{58} See The 1930 Convention Concerning Forced or Compulsory Labor, modified 38 U.N.T.S. 3 (1949).

\textsuperscript{59} See Roundtable Report, \textit{supra} note 27.
standard on forced labor and explicitly recognizes the right of adults to "chose abusive or exploitative working conditions as preferable to other available options." In the area of trafficking for sexual exploitation, many advocates have argued that a person can consent to prostitution as a form of labor if the person is not 'forced' through coercive or deceptive means.

Meaningful consent to exploitative working conditions, however, does not relieve exploiters from prosecutions for trafficking when other forms of coercion and deception, such as restrictions on freedom of movement or appropriating the legal identity of the person, are used to maintain control over the person. Any use of coercion or deception in the migration, working or living conditions of a person should render facilitators and exploiters vulnerable to trafficking prosecutions.

Additionally, persons that maintain exploitative working facilities are usually in violation of labor law requirements or domestic criminal laws. Any expansive prohibition of trafficking should be clear to point out, as GAATW does, that abusers or exploiters remain "criminally liable" for other rights violations under domestic law, "such as assault, unlawful detention and labor abuses" even when the working conditions conform to the expectations of the person moved into them. Migrants in exploitative situations and trafficked persons are highly vulnerable to victimization from simple domestic crimes, such as rape or assault, and labor violations, such as substandard wages and lack of health care, because of language barriers, cultural issues, and temporary or illegal immigration status. Greater domestic prosecution of individual crimes against migrants in exploitative situations or trafficked persons and enhanced facilitation of civil suits against exploiters can assist in breaking down the control and domination that traffickers and exploiters maintain over groups of vulnerable workers.

E. Debt-Bondage

A large portion of women trafficked into sex work are held in debt-bondage. Debt-bondage violates international law through the Slavery Conventions as an institution and practice similar to slavery. It appears

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60 See the Standards, supra note 43, at 5.
61 See id.
62 See id.
63 See id.
64 See Human Rights Watch, Rape for Profit: Trafficking of Nepali Girls and Women to India's Brothels (June 1995) (hereinafter Rape for Profit). See also A Modern Form of Slavery: Trafficking of Burmese Women and Girls into Brothels in Thailand (December 1993) (hereinafter A Modern Form of Slavery).
65 See infra note 9.
clearly established that debt-bondage is prohibited in international law under any condition. Advocates for trafficked women in debt-bondage clearly agree to the prohibition of this practice. GAATW has defined debt-bondage as "pledging the personal services or labor of a person indefinitely as security for debt, when the length and nature of the service is not clearly defined" and it lists debt-bondage as a key element of its trafficking definition in the Human Rights Standards. The WRAP Roundtable agreed that a person is not able to consent to a debt-bondage arrangement.

F. For Prostitution Only

The United Nations in its more current definition of trafficking has clearly rejected the limitation on trafficking for the sole purpose of prostitution imposed by the 1949 Convention. Advocates agree that an expansion of the 1949 Convention definition is required to cover other forced labor situations into which people are trafficked. Although human rights reporting on trafficking has focused on the sex work or sexual exploitation dimension of the practice, attention to the international trade in human beings has uncovered ("the" cut) the multiple coercive situations into which people are trafficked, which include sweatshop labor, domestic service and exploitative marriages. Such abusive situations, as with coercive prostitution, may constitute forced labor and slavery-like practices.

Some advocates who believe that sex work is not inherently forced labor have argued for a clearer international legal standard regarding prostitution than that in the 1949 Convention, which does not define prostitution and as an abolitionist approach to brothels and pimping but not to prostitution per se. They argue that an international prohibition against trafficking should outlaw the trafficking of persons for 'forced prostitution,' which would recognize the possibility of consensual entry into prostitution. Women rights advocates also call for heightened attention to certain other gendered categories of forced labor, noting that international recognition of trafficking into abusive domestic and marital circumstances involves long

66 See GAATW SMR supra note 48.
67 See the Standards, supra note 37.
68 See Roundtable Report, supra note 27.
69 In the context of this paper, "forced labor" will be used to denote all types of coercive labor, including sex work. The distinctions between prostitution and labor in the context of trafficking policy and enforcement are discussed in detail below.
overdue attention to the most invisible of sectors- the private realm of home and marital relationships.\textsuperscript{71}

III. Proposals for New International Protections Against Trafficking

The recent attention on trafficking as an intranational and international issue has engendered various proposals for international protections and national actions against trafficking from different governmental and international entities. This section provides an overview of some of the most prominent proposals in the area of trafficking.

A. The United States Government\textsuperscript{72}

According to some statistics, between 50,000 to 100,000 women and children are trafficked into the United States each year.\textsuperscript{73} The executive and legislative branches of the United States government have recently increased their focus on trafficking as both an international and a national human rights issue. On March 11, 1998, President Clinton acknowledged the international problem of trafficking in women and girls\textsuperscript{74} and noted that there have been "cases of trafficking for forced prostitution, sweatshop la-

\textsuperscript{71} See GAATW Summary Report \textit{supra} note 18. GAATW calls for more needed research into trafficking and forced labor in the context of marriage and domestic service.

\textsuperscript{72} There have also been regional initiatives from other parts of the globe that will not be covered in this paper. On the regional level in Southeast and South Asia as well as Europe, non-governmental, intergovernmental and governmental institutions and organizations have considered the issue of trafficking at many conferences. The South Asian Association for Regional Cooperation (SAARC) has developed a convention on preventing and combating trafficking which is scheduled to be signed in 1999. \textit{See} ESCAP 55th Commission Session, \textit{Empowerment of Women in Asia and the Pacific}, E/ESCAP/113 (Feb. 18, 1999). The European Union held a Ministerial Conference to prepare a European Code to Prevent and Combat Trafficking in Women. As a result, NOTRAF, Basic Principles for a Code of Conduct within the Member States of the European Union to Prevent and Combat Traffic in Women was produced, although it is not legally binding on the member states, it is a clear commitment and statement of policy by the Union. \textit{See generally}, IOM, \textit{Trafficking in Migrants}, Quarterly Bulletin at www.iom.org.


bor, and exploitative domestic servitude” in the US. In expressing his administration’s commitment to focusing “on the areas of prevention, victim assistance and protection, and enforcement,” he emphasized the need for awareness raising to decrease the vulnerability of young women and girls to traffickers and worldwide law enforcement to prevent trafficking and punish traffickers. The President characterized trafficking of women and girls as a “fundamental human rights violation.”

Through the Memorandum on Steps to Combat Violence Against Women and Trafficking in Women and Girls the President ordered a review of national laws to determine their adequacy for combating trafficking and the current treatment of victims of trafficking in the United States including the provision of services and consideration of temporary and/or permanent legal status for victims and witnesses of trafficking. On the international level, the President directed the provision of assistance to the international community for enacting legislation, providing training as well as developing strategies to assist victims and combat trafficking. Many of the directives made explicit note of the importance of non-governmental organizations and the need for consultation with these organizations in making policy.

As a result of the Memorandum and the increased executive focus on the issue of trafficking, the U.S. has initiated projects targeted at improving international law enforcement strategies against trafficking. The U.S. has worked closely with the government of Ukraine investing millions of dollars on the development of a bilateral multi-disciplinary model for combating trafficking. The administration has also initiated bilateral coopera-

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76 See Memorandum, supra note 67, at 413.

77 See id.

78 See id.

79 See id.

80 See id.

81 See generally, TRAFFICKING FACT SHEET, supra note 25. The U.S. has funded an awareness raising campaign, the Prevention of Trafficking in Women from Ukraine, in coordination with the European Union that is funding a similar campaign in Poland. See BUREAU OF EUROPEAN AND CANADIAN AFFAIRS, U.S.-E.U.
tion of law enforcement agencies through the training by U.S. law enforcement of foreign police and immigration authorities on effective implementation of border security. In addition to law enforcement strategies, the U.S. Agency for International Development has allocated significant funds for the program development on trafficking in Southeast and South Asia, with an emphasis on the public health ramifications of trafficking for sex work.

The administration has also established national initiatives to tackle some aspects of the trafficking problem in the U.S. After the 1995 raid of a Los Angeles sweatshop in which Thai workers were being held in slavery-like conditions, the administration established a task force consisting of industry representatives, labor advocates and human rights groups which considered the development of an industry-run labor monitoring group to monitor sweatshop conditions. As a follow up to this case and after the discovery of a trafficking for forced labor ring of deaf Mexican workers, the Attorney General created a federal task force on modern-day forms of slavery in 1998.

There has also been a movement to formulate legislative policy on trafficking that reflects an increased sensitivity to victims' needs and a financial commitment to combating the trafficking problem globally. On March 11, 1999, Senator Wellstone introduced the International Traffick-
ing of Women and Children Victim Protection Act of 1999 to the senate with the goal of “combat[ing] the crime of international trafficking and protect[ing] the rights of victims.”87 In the Act, trafficking is defined as “the use of deception, coercion, debt bondage, the threat of force, or the abuse of authority to recruit, transport within or across borders, purchase, sell, transfer, receive, or harbor a person for the purpose of placing or holding such a person, whether for pay or not, involuntary servitude, or slavery or slavery-like conditions, or in forced, bonded, or coerced labor.”88 The objectives of the Act are to set up an Inter-Agency Task Force to monitor and combat trafficking, to provide legal protection for trafficking victims through adding a new nonimmigrant status to the Immigration and Naturalization Act89 and a waiver of ineligibility grounds,90 to create regulations which protect the rights of victims in the U.S., to facilitate assistance to trafficking victims and to prohibit the appropriation of police assistance to countries that fail to effectively combat official involvement in trafficking. To facilitate these objectives, the Act authorizes the appropriation of, in total, $42,000,000 to the executive branch for years 2000 and 2001.91

The purpose of placing persons in situations of abuse or exploitation such as forced prostitution, sexual slavery, battering and extreme cruelty, sweatshop labor or exploitative domestic servitude.” This definition was advocated by Gillian Caldwell; Director of the Lawyer’s Committee for Human Rights Witness Program and other NGOs. The resolution further noted that “trafficking also involves one of more forms of kidnapping, false imprisonment, rape, battering, forced labor or slavery-like practices which violate fundamental human rights.” See S. Con. Res. 82, O:\RYN\RYN98.600, 105th Congress, 2d Session, March 10, 1998.

88 See id.
89 The Act suggests adding a new subparagraph to §101(a)(15) of the Immigration and Nationality Act as follows:

“(T) an alien who the Attorney General determines—is physically present in the United States, and is or has been a trafficking victim for a stay of not to exceed 3 months in the United States, except that any such alien who has filed a petition seeking asylum or who is pursuing civil or criminal action against traffickers shall have the alien’s status extended until the petition or litigation reaches its conclusion.” See id.

90 Waiver of Grounds for Ineligibility for Admission- §212(d)

“(2) The Attorney General shall, in the Attorney General’s discretion, waive the application of subsection (a) [which lists the classes of aliens who are ineligible for visas or admission to the US including §212(a)(2)(D) for prostitution and criminal vice]. . . in the case of a nonimmigrant described in §101(a)(15)(T), if the Attorney General considers it to be in the national interest to do so.”

91 See id.
In the House, Representative Smith introduced the Freedom from Sexual Trafficking Act of 1999 on March 25, 1999, which targets more narrowly international sex trafficking defined as "the taking of a person across an international border for the purpose of a commercial sex act, if either such taking or such sexual act is effected by fraud, force, or coercion, or if the person has not attained the age of 18 years."\textsuperscript{92} The Act modifies present immigration law to allow for a new non-immigrant status, waiver of ineligibility grounds, and adjustment to permanent resident status.\textsuperscript{93} This Act has been combined with draft legislation submitted by Representative Gejdenson into the "Trafficking Victims Protection Act of 1999."\textsuperscript{94} This draft legislation prohibits 'sex trafficking' as defined by Smith as well as "severe forms if trafficking in persons" – which is defined into the following two categories: (a) ‘sex trafficking’ through the use of force, fraud, or deception and (b) the purchase, sale, recruitment, harboring or transportation of a person for the purposes of subjecting that person to involuntary servitude, slavery, or slavery-like practices effected by force, coercion, fraud or deception.\textsuperscript{95} The bill strengthens potential punishment of traffickers and authorizes a total of $94.5 million dollars over two years.\textsuperscript{96}

The efforts of the U.S. executive and legislative branches not only represent an increased awareness of and attention to the substantial problem of trafficking, they also suggest a significant improvement in domestic policy towards victims of the practice. The fast pace of the movement to combat this substantial and complex problem of trafficking, however, may be a cause concern. Effective policy, legislation and fiscal allocation concerning the issue of trafficking should be the result of a well-informed, thoughtful process that includes an analysis of the ramifications of such choices. All the recent drafts of proposed legislation on trafficking provide an example of the need for comprehensive analysis of the ramifications on victims of proposed national prohibitions against trafficking.

For example, the Wellstone Act provides a definition of trafficking that is contemporary and comprehensive in that it would cover all persons subject to the practice. However, the visa provisions are not broad enough to allow victims of trafficking to remain in the United States long-term through an adjustment of their immigration status to permanent residency. Representative Smith’s draft legislation addresses only the issue of sexual trafficking without the element of coercion and/or deception and fails to

\textsuperscript{92} See Smith H.R. 1356 (Mar. 25, 1999).
\textsuperscript{93} See note 96.
\textsuperscript{94} See.
\textsuperscript{95} See id.
\textsuperscript{96} See id.
afford protection to other types of trafficked workers. Although the Gejdensen definition of trafficking added to the Smith draft Act has coercion and deception as an element of trafficking, the combined Smith-Gejdenson compromise bill conflates the problem of trafficking with issues of migration for labor purposes, in particular migration into the sex industry. As a result, if this legislation becomes law it may not only be inadequate to cover the expansive phenomenon of trafficking, but it may also negatively affect the rights of persons to migrate and choose their labor situations, including sex work.

Domestic legislation should be critical to combating the problem of trafficking to the U.S. the U.S. government should continue to look to experienced advocates for trafficking victims for their insight into the human rights dynamics of the practice and recognize how vital such organizations are to the development and implementation of service for victims, training of law enforcement and the enforcement of victims’ rights.

B. International Treatises and Non-Governmental Initiatives

To address the deficiencies of the 1949 Convention, it has been proposed that a new convention on trafficking be developed. Alternatively, some advocates have suggested that the 1949 Convention be reopened and modified to more effectively handle the current issues in trafficking. Although international legal experts have yet to formulate an in-depth interna-

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97 There are other concerns regarding the potential negative impact of the Freedom from Sexual Trafficking draft legislation on trafficking victims if it were to become law even in the combined version with the Gejdenson legislation. For example, the requirement that victims of sexual trafficking do not “unreasonably refused to provide assistance in the investigation or prosecution” of traffickers could be interpreted narrowly by the government and used to intimidate frightened victims into cooperating despite their fear of retribution. Moreover, the act includes another difficult requirement that victims show “a significant possibility” of retribution or hardship if removed from the United States. Not only does this requirement appear to place a high standard of proof on the victim it also implicates concerns of government and judicial interpretation of retribution and hardship. Victims of sexual trafficking have already had their rights severely violated in their home countries and/or in the United States and their claim to remain in the United States should be interpreted in light of their past experiences as well as the economic, social and safety risks that they would face if they were forced to return.

98 For example, in the case of the El Monte site where around 80 Thai workers and 70 Latino workers were held in slave-like conditions, victims advocates brought a civil suit against five companies which settled for more than 2 million dollars. See George White, Patrick McDonnell, Sweatshop Workers To Get $2 Million, L.A. TIMES, Oct. 24, 1997, at D1.
tional treaty on trafficking, currently a process is underway to create a protocol on trafficking to a new Convention against Transnational Organized Crime.\textsuperscript{99} Contemporary proposals of international non-governmental organizations (NGOs) concerned with trafficking have been influential in the formulation of the protocol and their initiatives and the protocol may provide the basis for a new treaty or a review and modification of the 1949 Convention.

The Human Rights Standards for the Treatment of Trafficked Persons, formulated by a coalition of NGOs, defines trafficking, traffickers and trafficked persons and sets out the responsibilities of states to trafficking victims in conformity with international human rights standards.\textsuperscript{100} The areas of state responsibilities advocated in the Human Rights Standards cover: non-discrimination—particularly intersectional discrimination against women of a minority ethnicity or race—conditions for the safety and fair treatment of trafficked persons, access to justice; including the treatment of trafficked persons facing prosecution or administrative proceedings, access of trafficked persons to private actions and reparations against traffickers, the provision of resident status to trafficked persons in the destination country, the provision of health and other support services for trafficked victims, assistance in the repatriation and reintegration of trafficking victims into their society of origin, and cooperation of states to combat the international phenomenon of trafficking.\textsuperscript{101} The Human Rights Standards, which have their genesis in the significant experience of human rights groups with trafficking, provide precise and practical obligations that states need to undertake to protect the rights of trafficked persons.

Although not specifically a trafficking convention, an international NGO, the Coalition Against Trafficking in Women (CATW), created a draft Convention Against Sexual Exploitation in Women in 1995 which includes a prohibition on trafficking and situations into which women are trafficked, such as prostitution and mail order bride schemes.\textsuperscript{102} The primary concern of this draft convention, however, is binding states to eradicating all forms of “sexual exploitation” as defined by the draft convention itself.\textsuperscript{103} Reflecting the

\textsuperscript{99} See General assembly Resolution 51/120 of 12 Dec. 1996 proposing an international convention against organized transnational crime.

\textsuperscript{100} See the Standards, \textit{supra} note 43.

\textsuperscript{101} See id.


\textsuperscript{103} See id.

Art. 2 “Sexual exploitation is the sexual violation of a person’s human dignity, equality, and physical and mental integrity. It is a practice by which some
views of CATW, this draft convention characterizes prostitution as a form of sex discrimination and thus a human rights abuse. States would be prohibited from instituting any law or policy that legitimizes, legalizes or regulates prostitution in any form.\textsuperscript{104} The draft convention covers multiple areas of "sexual exploitation" such as pornography, sexual tourism, sexual exploitation in armed conflict and mail order bride schemes.\textsuperscript{105} In regards to trafficking expressly, the draft convention does not provide an exact definition of the phenomenon. Article 8 of the draft convention, however, does outline the responsibilities of states parties to combat trafficking and to provide victims with substantial assistance including immigration related remedies.\textsuperscript{106}

Reflecting the different viewpoints of advocates for prohibitions against trafficking, The Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Conventions against Transnational Organized Crime has two options for the definition of trafficking and the scope of application of the protocol.\textsuperscript{107} Option 1, submitted by the United States,

people (primarily men) achieve power and domination over others (primarily women and children) for the purposes of sexual gratification, financial gain, and/or advancement."

Art. 3 "[S]exual exploitation takes the forms of, but is not limited to sexual violence and murder; sexual abuse and torture including sadistic, mutilating practices; genital mutilation; prostitution, sex trafficking, sex tourism and mail order bride markets; rape, incest, sexual harassment and pornography; involuntary sterilization and childbearing; female seclusion, dowry and bride price; temporary marriage or marriage of convenience for the purpose of sexual exploitation."

\textsuperscript{104} See id.

\textsuperscript{105} See id. Art. 2 "Sexual exploitation is the sexual violation of a person's human dignity, equality, and physical and mental integrity. It is a practice by which some people (primarily men) achieve power and domination over others (primarily women and children) for the purposes of sexual gratification, financial gain, and/or advancement."

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\textsuperscript{106} See id.

defines “trafficking in persons” as the “recruitment, transportation, transfer, harboring or receipt of persons, either by the threat or use of abduction, force, fraud, deception, coercion or by giving or receiving of unlawful payments or benefits to achieve the consent of a person having control over another person [ , with the aim of submitting them to any form of exploitation, as specified in article. . .].” This proposed definition reflects the enhanced understanding of the contemporary aspects of trafficking. Option 2, submitted by Argentina, however, reflects the 1949 Convention definition in that it suggests trafficking can occur with or without the consent of a person.\(^{108}\)

The Draft Protocol has many other important suggested provisions. For example, Article 3 of the draft protocol obligates states to criminalize such conduct under domestic law, including the criminalizing of inchoate offenses (i.e., attempt, accomplice, and conspiracy liability).\(^{109}\) Section II of the draft protocol called “Protection of trafficked persons” encourages states to enact measures which ensure trafficking victims civil remedies, legal representation, social and support services, and immigration-related rights.\(^{110}\) Section III called “Prevention, cooperation and other measures” suggests law enforcement measures that should be taken, including specific provisions on border controls.\(^{111}\) In addition, the Protocol may require states to establish comprehensive policies, programs and other measures to prevent and combat trafficking generally.\(^{112}\)

International scholars are also considering developing a protocol to CEDAW on Violence Against Women. This protocol would most likely contemplate international norms on what constitutes trafficking from a gender perspective and on the appropriate treatment of female victims of trafficking, as well as steps states would need to take to combat trafficking and assist victims. Such deliberation of the trafficking issue may require CEDAW to commit to a position on the feminist debate over the nature of prostitution as a human rights issue. In addition, Cherif Bassiouni advocates for the drafting of a comprehensive treaty on slavery, forced labor and slav-
ery-like practices that would integrate the multiple existing treatise, including the 1949 Convention, into one international legal framework. This approach would place international protections against trafficking under the rubric of slavery and slavery-like practices detailing the steps that states need to take to arrest these practices. As a result, this convention would address and protect both trafficked workers and migrant workers subject to slavery-like practices.

The current process of addressing trafficking in new international prohibitions will set the standard for the future treatment of trafficking within other international legal frameworks, such as CEDAW, and implicate the decisions of governments when creating national prohibitions against trafficking. As a result, the ultimate decision on the definitions of trafficking in the draft protocol to the Convention against Transnational Organized is of great significance. This decision will impact whether international prohibitions reflect the contemporary understanding of the trafficking phenomenon, including the progress made in ensuring the protection of women’s rights and a recognition of the realities of migration and labor today or whether trafficking prohibitions will continue to reflect the older conceptualization of vulnerable persons as victims without the right to make choices about their migration and their labor as expressed in the 1949 Convention.

C. The United Nations and International Bodies

The United Nations (U.N.) has been involved in reporting on trafficking of women and children since 1994. Through multiple resolutions the General Assembly has requested that the Secretary General submit reports on the issue of trafficking. The Secretary General’s reports cover a collection of legislative and policy steps taken by Member States on the issue and the work of various U.N. bodies on the subject. In an eclectic fashion, the reports detail actions taken by Member States to address the prob-

113 See Bassiouni, supra note 2, at 459. Bassiouni concludes “[w]hat is needed, therefore, is a comprehensive convention covering all the traditional and contemporary slave-related practices, whether in time of war or peace. This comprehensive convention would obviate the problems of multiple international instruments with different parties, applicable to different contexts and having different contents.”


lem of trafficking in the areas of legal measures, interministerial and interdepartmental cooperation, research and statistics, and international and other measures. Although the basic sketch of governmental actions on trafficking provides some insight into the policy choices and focuses of Member States, the reports do not offer an analysis of the states’ actions nor a commentary on the effectiveness of the measures reportedly undertaken. As a result, the usefulness of these reports is limited in assessing the legitimacy and effectiveness of the proposed solutions to trafficking undertaken by Member States.

The U.N. bodies concerned with the problem of trafficking have assumed various tasks addressing different aspects of the issue. The Commission on Human Rights has recognized the vulnerability of women and girls from developing countries to trafficking and invited governments and U.N. bodies to formulate training manuals for law enforcement on gender-sensitivity and the special needs of victims. The Commission on the Status of Women has called for the acceleration of the implementation of the Beijing Platform of Action including specific recommendations for countries of transit, origin and destination to ratify relevant treaties, address root factors leading to the trafficking of women and children, for the provision of services to victims, criminalization of trafficking and relevant offenses and training and awareness raising. The Subcommission on Prevention of Discrimination and Protection of Minorities has called for reporting on the implementation of the Programme of Action for the Prevention of the Traffic in Persons and Exploitation of the Prostitution of Others and the establishment of specific projects to protect victims from HIV/AIDS. The Subcommission has recently released a report on Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict, which touches on the trafficking that takes place during war. The Working Group on Contemporary Forms of Slavery has considered issues relating to the right of victims to repatriate if they so chose and the extraterritoriality of laws penalizing traffickers.

The Special Rapporteur on Violence Against Women addressed the issue of trafficking in women and forced prostitution in her most recent

116 See id.
117 See id.
118 See id.
120 See generally Report of the Secretary General, supra note 115.
report on the causes and consequences of violence against women. The Special Rapporteur expressed concern about state participation and complicity in trafficking rings. In her report, the Special Rapporteur detailed some of the obstacles to reporting trafficking violations experienced by women trafficked for forced prostitution including fear of arrest, legal sanctions and reprisals by trafficking networks.

In regard to trafficking in children, the Commission on Human Rights is working on a draft optional protocol to the CRC on the prohibition of the sexual exploitation of children. The Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography has reported on the subject of trafficking in children based on a trip to Czech Republic. In addition, Unicef, the U.N. agency explicitly concerned with the state of the world's children, has become involved in developing program and policies to combat trafficking in children in the Mekong Subregion of Southeast Asia. In this region, the U.N. Economic and Social Commission for Asia and the Pacific (ESCAP) is developing a program to directly coordinate and fund the work of governmental, non-governmental and community-based organizations working on trafficking of children and women.

Finally, the Commission on Crime Prevention and Criminal Justice has concerned itself with trafficking under the rubric of international migration and illegal alien smuggling, advocating that immigration laws focus more on the network of criminal organizations who traffic migrants instead of the punishment of migrants with no legal status. In this regard, the United Nations Office for Drug Control and Crime Prevention is planning

121 See Report of the Special Rapporteur on Violence Against Women, supra note 23.
122 See id.
123 See generally Report of the Secretary General, supra note 115.
124 Unicef in Cambodia created a position, working specifically on trafficking and exploitation of Children. Unicef is working with other Children's NGOs in Cambodia to assist the government in implementing the CRC Country Plan developed at the Stockholm Conference on the Exploitation of Children 1995.
125 In November 1998, government, non-government representatives from the region of Asia and the Pacific together with the United Nations Bodies and Specialized Agencies adopted the Bangkok Accord and Plan of Action to Combat Trafficking in Women representing "regional consensus on joint actions needed at the national, sub-regional, and regional levels to tackle trafficking in women." The plan is divided into two parts covering actions at the national level and at the macro-subregional, regional and multi-lateral levels. See U.N. Focus, Vol. 3, No. 3 (Nov. 1998).
126 See Report of the Secretary General, supra note 115.
to institute a Global Programme Against Trafficking in Human Beings which focuses "on the extent to which transnational organized crime is involved in trafficking of human beings and how both prevention and criminal justice responses can be improved to combat this form of crime." ¹²⁷ There are two main components of the program: global research on trafficking as smuggling and related dependency and exploitation, forced labor and sexual exploitation; and technical cooperation activities to assist governments in (a) counteracting operations and structures by which persons are trafficked (b) strengthening crime prevention strategies and (c) improving witness protection and victim assistance.¹²⁸ This in-depth program may result in substantial reliable data on the processes underlying international trafficking and provide some successful experimental projects for combating trafficking on which greater initiatives could be modeled.

Although U.N. bodies and the Secretary General have reported consistently on the issue of trafficking and the work of U.N. entities, recent developments in U.N. initiatives, such as the Programme of Action and the U.N. coordination of an initiative to combat trafficking in the Mekong Sub-Region of Southeast Asia, indicate that there is movement to reach beyond reporting into serious data collection and project implementation. In addition to providing information on the various approaches to the trafficking problem undertaken by Member States through U.N. reporting mechanisms, the Secretary General and U.N. agencies may consider further analyzing the effectiveness of these programs and policies to guide Member States in more effectively and efficiently combating trafficking.

D. International Standards of Labor Protections for Sex Workers and the Decriminalization of Prostitution

The International Labor Organization (ILO) has recently produced a report relating to trafficking of women and children particularly surveying the prevalence of the sex work industry in Southeast Asia.¹²⁹ The report

¹²⁸ See id.
focuses on the issue of prostitution and asserts that the sex business now constitutes between two to 14 percent of the Gross National Product in regional economies.\textsuperscript{130} The report points out, however, that \textquoteleft\textquoteleft[the sex sector is not recognized as an economic sector in official statistics, development plans or government budgets.\textquoteright\textquoteright\textsuperscript{131} As a result of this finding, the ILO suggests that the major obstacle to formulating effective policies and program measures to combat trafficking has been \textquoteleft\textquoteleftthat policy makers have shied away from directly dealing with prostitution as an economic sector.\textquoteright\textquoteright\textsuperscript{132}

Although the ILO maintains that it cannot advocate any particular position on the legalization of prostitution, the report does offer recommendations that provide a basis for developing policies. One suggestion is targeting child prostitution for elimination with the understanding that children are invariably victims of exploitation whereas adults may choose sex work as an occupation.\textsuperscript{133} The report continues to propose that policy concerns for women who choose sex work \textquoteleft\textquoteleftshould focus on improving their working conditions and social protection so as to ensure that they are entitled to the same labor rights and benefits as other workers.\textquoteright\textquoteright\textsuperscript{134} To combat the exploitative aspects of women trafficked into prostitution, the report recommends focusing on the economic and social factors that structurally sustain prostitution.\textsuperscript{135} Connected to uncovering the structural maintenance of prostitution, the report suggests that a macroeconomic analysis of the problem involving the official recognition of the activity, including the gathering of records, can assist in assessing and evaluating the growing phenomenon of forced and voluntary prostitution.\textsuperscript{136}

The ILO report is limited to the region of Southeast Asia, where the sex industry is considered to be significantly prevalent, and thus it does not analyze the economic and labor consequences of sex work in other global areas. The report reflects an important recognition by the ILO, however, that the sex industry presents serious labor issues on the international level. Some women's rights advocates view the report as misguided because it legitimizes prostitution by characterizing the industry as an economic is-

\textsuperscript{130} See id.
\textsuperscript{131} See id.
\textsuperscript{132} See id.
\textsuperscript{133} See id.
\textsuperscript{134} See id.
\textsuperscript{135} See id.
\textsuperscript{136} See id.
Nevertheless, this report may prove to be a welcome addition to the international debate on trafficking policy and represent a movement toward the understanding of prostitution as an important instance of unprotected labor.

IV. Policy Implications of Proposed Solutions to Trafficking

The proposed solutions and actions of governmental, non-governmental and international bodies discussed above implicate policies on some of the most complex and often controversial aspects of trafficking. This section examines the ramifications of trafficking on prostitution, labor, immigration and law enforcement policies in order to highlight where expansive international protections are needed to combat trafficking and protect the rights of trafficked persons.

A. Decriminalization of Prostitution

Feminists on both sides of the current debate regarding the nature and legal status of prostitution have used rights-based language to support their opposing positions. Abolitionists argue that prostitution is inherently


\[\text{This section of the paper focuses briefly on the complex feminist debate concerning the legalization of prostitution. This paper presents a simplistic and polarized view of the arguments on each side. There are, however, commonalities and shared concerns that are often lost in the on-going divisive split within feminist circles. Although a complete discussion of the lessons that can be learned from the legalization debate requires an entire paper, I will mention some of the root issues that motivate the work of feminists on both sides of the debate.}\]

On both sides of the feminist debate, advocates share a dislike for the reality that sex work is a pervasive and significant aspect of the global culture of gender subordination. They can agree that the ultimate goal is minimizing the existence of prostitution and providing safer and more profitable opportunities for women’s employment. Both sides are deeply concerned with protecting women’s rights on all levels, particularly with protecting women from rape, torture, drug abuse and death. In addition to women’s bodily autonomy, both sides want to protect women’s labor rights. All women’s work has been traditionally and continues to be severely undervalued. In fact, work in the home and childcare remains completely devalued if a women does this work in the context of a marital relationship. Neither perspective on prostitution policy undercuts the feminist goals of equal rights for women in employment and the recognition of women’s substantial contribution to the world’s economies.
exploitative of women making its existence a form of sex discrimination.\textsuperscript{139} The foundation of this position is the view that prostitution reflects the commodification of women's bodies and renders women a societal class for sexual servitude.\textsuperscript{140} In viewing prostitution as sexual servitude, abolitionists reject the notion that prostitution is a form of "sex work," or labor, by utilizing a definition of work that encompasses an assessment of the moral legitimacy of the actions that constitute the work. Abolitionists applauded the recent decisions of countries, such as Sweden and Venezuela, to explicitly reject the legalization of prostitution, on the premise that prostitution is not a legitimate economic and labor sector.\textsuperscript{141} A focus on the harmful effects of prostitution on women, abolitionists contend, mandates a continued policy of punishing all those involved in prostitution accept prostitutes. Abolitionists argue that the goal of complete eradication of prostitution can be


\textsuperscript{140} See \textit{Legitimating Prostitution}, \textit{supra} note 137.

\textsuperscript{141} See id.
achieved through severe penalties for those who purchase or profit from sexual services and the reeducation of society.\textsuperscript{142}

Alternatively, pro-legalization activists, more concisely decriminalists, characterize the failure to legally protect prostitutes as discrimination against women and advocate the decriminalization of prostitution, placing it under the rubric of labor with corresponding legal protections.\textsuperscript{143} Decriminalists contend that the distinct and negative treatment of women involved in prostitution is a form of sex discrimination, as well as individual violations of women’s rights to education, work, equal pay, decent working conditions, information and equal treatment. Like abolitionists, decriminalists are deeply concerned with the exploitation and harm involved in contemporary prostitution and advocate that decriminalization will create a safer and more autonomous environment for prostitutes, eroding the brutality currently involved in prostitution.\textsuperscript{144} In fact, decriminalists claim that to continue to ignore the realities of prostitution and maintain the criminalization of most, if not all, aspects of the prostitution industry reinforces the harmful and exploitative effects of prostitution on women.\textsuperscript{145} Moreover, decriminalists argue, conceptualizing all women who are involved in prostitution as simply victims fails to recognize women’s autonomy and perpetuates traditional male views of women’s sexuality.\textsuperscript{146}

Decriminalization is used to connote total decriminalization of all aspects of prostitution or the removal of all laws restricting consensual commercial sexual activity.\textsuperscript{147} This includes eradicating laws against pimping (i.e., living off the earnings from prostitution) which restrict the ability of prostitutes to self-manage or organize for self-protection.\textsuperscript{148} This approach is distinct from most contemporary forms of legalized prostitution where some aspects of prostitution are criminal and the state controls the industry. Contemporary states regulate prostitution in many ways, such as taxes for prostitutes, restricting where prostitutes can work, licensing prosti-


\textsuperscript{144} See id. at 32.

\textsuperscript{145} See id. at 29.

\textsuperscript{146} See id. See also, Sylvia Law, A Practical Program for Regulating Sex, (unpublished paper) 1998.

\textsuperscript{147} See Defining Terms, supra note 142.

\textsuperscript{148} See id.
tutes or brothels, registration of prostitutes and mandatory health checks, which can have punitive results.\(^{149}\) Although legalized, these types of regulations for the most part treat prostitution differently than other industries and other forms of employment.

Decriminalization would entail rejecting these forms of legalized prostitution and facilitating the privatization of prostitution subject to labor laws in place of state control. The objective of privatizing prostitution is to provide greater autonomy to prostitutes, enhanced control of the industry by women in prostitution, safer working conditions and increased prosecution of crimes associated with prostitution, such as assault and rape.\(^{150}\) As opposed to state regulation or criminal regulation, prostitutes would be allowed to self-regulate, forming unions for protection and lobbying for civil codes for businesses to ensure safe working conditions and the rights of workers.\(^{151}\) Although abolitionists argue that countries where prostitution is legal have not achieved the goals of safeguarding women’s rights, it appears that a comprehensive restructuring of the sex industry as mandated by decriminalization has never truly been attempted.

By definition, however, trafficking for forced labor can be both a violation of human rights and a crime irrespective of the criminality of prostitution. But even though a definition of trafficking can be consistent with both philosophies, the prostitution debate is not completely transcended or irrelevant to trafficking policy. Decisions on the most effective approaches to the treatment and eradication of trafficking for sex work hinge on a given perspective of the debate.\(^{152}\) The importance of the choice between decriminalizing prostitution and keeping prostitution isolated from other forms of labor is easily seen in the context of choosing law enforcement strategies. Abolitionist philosophy calls for the raids of brothels, rescuing women from prostitution, whereas a decriminalist stance maintains that raids push prostitution farther underground, further endangering women. With prostitution primarily an underground industry under the current regimes of criminalization and state control, it is difficult to identify women and girls being held in coercive situations.\(^{153}\) Greater transparency in prostitution and greater protection of women’s labor rights will increase the abil-

\(^{149}\) See id.

\(^{150}\) See Hauge, supra note 143, at 32.

\(^{151}\) See id.

\(^{152}\) See generally Jennifer Soriano, supra note 73; See also generally, Eric Goldsheider, supra note 108. The debate between advocates has influenced the formulation of the definition of trafficking in the Protocol to the Transnational Crime Convention.

\(^{153}\) See id.
ity of governments and advocates to combat trafficking for forced prostitution and make trafficking for this purpose less lucrative for traffickers.

B. Labor Protections for Sex and Other Forms of Trafficked Workers

Regardless of one’s normative stance on prostitution, it is by definition a form of work or labor, albeit clandestine or illegal, where sexual activity is exchanged for money. There are, however, contemporary social, legal and health-related distinctions between sex work and other forms of trafficked labor, as a result of the historically separate legal and normative treatment of prostitution. These legal and social barriers to the full recognition of prostitution as labor and deserving of labor protections must be overcome for the application of a consistent human rights approach to trafficking.

The social distinction between sex work and labor based on the stigma attached to prostitution in most, if not all cultures is perhaps the largest obstacle to the standardized treatment of sex work as labor. Although every culture has different social and cultural norms related to sex in exchange for money, there are some global trends in the negative stereotypes and prejudices against women who have been involved in prostitution. The severe social prejudice against sex workers results concretely in discrimination against prostitutes which other workers are not subjected to, particularly in the sphere of economic opportunities. Legal restrictions on sex work, as well as the separate legal treatment of sex work from other forms of labor, implicitly reinforce the social stigma attached to women who work in the sex industry. Decriminalizing prostitution, therefore, can serve to undercut the stigmatization of women in prostitution.

The current legal distinction between sex work and other labor is one that needs to be reexamined in the context of a broader reevaluation of the international standards regarding trafficking for forced prostitution. As sex work is in some respect illegal in almost all countries, there are differences in the application of laws and standards to prostitution than to other labor. Even in those countries that do not criminalize prostitution, sex work remains distinct from other labor protections and regulations. The different legal treatment both in domestic and international law and the inadequacy of labor protections for sex workers may reflect a global policy of ignoring the rights of persons in prostitution. Although the ILO in its report has recognized tacitly that trafficking for forced prostitution is a labor issue,

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154 See id.
155 See infra discussion on decriminalization.
this recognition is recent and has yet to lead to the concrete application of international labor standards and regulations to sex work.\footnote{See The Sex Sector, supra note 129.} Such an application of international labor standards to prostitution would represent a novel and long awaited commitment to the dignity and rights of women who undertake the dangerous labor of sex work.

Like the sex work dimension of trafficking, trafficking for domestic service and coercive marriage deserve special attention in the context of a broader reexamination of international labor standards and policies. Although the same civil and political and social and economic rights are implicated for domestic service as for other work, there are greater obstacles to the realization of those rights because the work occurs in the private sphere. Even though domestic service is a form of traditional labor, it has remained historically unregulated and excluded from the scope of most domestic and international legal protections.\footnote{See Report of the Secretary General, Violence Against Women Migrant Workers, A/51/325 at E. Abuses Faced By Migrant Workers (Sept. 16, 1996) (hereinafter Violence Against Women Migrant Workers). See also, Human Rights Watch, Punishing the Victim: Rape and Mistreatment of Asian Maids in Kuwait, Vol. 4, Issue 8 (Aug. 1992) (hereinafter Punishing the Victim) (discussing how the exclusion of domestic servants under Kuwait’s labor law has left Asian domestic servants in Kuwait vulnerable to widespread and horrific abuse by their employers).} The public/private dichotomy has functioned to promote the under-protection by international human rights law within the domestic realm, particularly those issues that concern gender-based culture and practice in the home.\footnote{For a discussion of how the public/private dichotomy functions in international law, see generally, Hilary Charlesworth, World Apart: Public/Private Distinctions in International Law, in Public and Private: Feminist Legal Debates 248 (Margaret Thorton ed., 1995).} This under-protection of rights, including labor rights, in the private sphere has perpetuated women’s vulnerability to exploitation and abuse by employers and family members.\footnote{In 1996, a serious case of abuse and forced labor in domestic service was uncovered in the U.S. A family hired a woman from India as a maid and brought her to the U.S. on a tourist visa. They forced her to work long hours with no vacation and little pay by subjecting her to severe abuse and threatening to kill her. See Mireya Navarro, In the Land of Free, A Modern Slave, N.Y. Times, at A22 (Dec. 12, 1996).} As a result, international efforts to combat trafficking for exploitative domestic service will need to reflect an expansive policy of greater international labor protection within the private sphere.

Similarly, the obstacles facing the realization of the rights of women trafficked into abusive marriages reflect the public/private dichotomy.
and gender-bias in international law. Although mail order bride marriages are in effect an exchange of sexual and domestic services for material and financial support, these relationships have not been defined as or treated as work.\textsuperscript{160} In the context of trafficking, however, the understanding of consent to marriage needs to be reevaluated. The contractual basis for these marital relationships must entail the fully informed consent of the women regarding the conditions and nature of the marital arrangement just as with other forced labor circumstances. Moreover, the protection of the woman’s rights once she has entered into the contract and regardless of her marital status is an essential element to maintaining the validity of the contractual basis of the marriage. As a result, expansive international protections for trafficking victims may necessitate enhanced international protections of women’s rights within marital relationships. The global implications of trafficking into abusive marriages require that states commit to implementing and/or enforcing domestic legal protections, such as freedom from domestic violence and rape and freedom of movement, for women suffering abuse in their homes.

There are serious public health ramifications to trafficking for all types of labor, including for sex work. Trafficking for sweatshop labor can result in grossly dangerous and unhealthy working conditions.\textsuperscript{161} Domestic workers and women in coercive marriages as well as sweatshop workers can be subject to physical abuse, rape, forced contraception and abortion that result in vulnerability to sexually transmitted diseases and other serious health matters.\textsuperscript{162} All trafficked workers are usually subject to severe violations of their rights to safe and secure working conditions, equal pay, health

\textsuperscript{160} See Law, supra note 146 (discussing how mail order bride marriages have never been considered prostitution).

\textsuperscript{161} The discovery of 80 Thai workers being held in slavery-like conditions in a factory in El Monte, California represents one of the most devastating recent cases of trafficking for forced labor in the U.S. Victims were held in a compound behind barbed wire in debt-bondage, some for many years. The workers were abused, threatened with harm to their families and children, and ones that tried to escape, beaten. See Kenneth B. Noble, Thai Workers Are Set Free in California, N.Y. Times, Aug. 4, 1995, at A1.

\textsuperscript{162} See Report of the Special Rapporteur, at Section Violence Against Women, supra note 23. See also, Violence Against Women Migrant Workers, supra note 157. Women in sweatshops are also subject to discriminatory practices in violation of domestic and international labor rights. For example, female workers in the Mexican Maquiladora factories were subjected to pregnancy discrimination in hiring and firing. Women were forced to take tests to prove they were not pregnant or were fired if they became pregnant. See Sam Dillon, Sex Bias Is Reported by U.S. At Border Plants in Mexico, N.Y. Times, Jan. 13, 1998, at A8.
care and bodily integrity. Sex workers, however, are particularly vulnerable to life threatening infection.\textsuperscript{163} For women trafficked into forced prostitution, the availability of contraception may depend on pimps and brothel owners and the women do not have ultimate control over the decision to use protection. Women who do become infected rarely have care or treatment available to them and they are often discarded with no where to turn for assistance.\textsuperscript{164} Due to the specific health consequences of trafficking for sex work, special initiatives and safeguards are needed for trafficked women in prostitution including protection from, treatment of and counseling for infection with HIV/AIDS.

Although the same human rights protections are implicated in and should extend to trafficking for all forms of forced labor,\textsuperscript{165} the social policy response to these forced labor circumstances must be tailored to overcome the social, legal and health distinctions between sex work, abuse in the private sphere, and other labor. The social and economic obstacles for women in sex work—resulting from the gendered stigma attached to prostitution, the lack of legal protections for sex workers, and the vulnerability of sex workers to HIV/AIDS infection—need to be addressed for the realization of the standardized treatment of sex work as labor. Similarly, the social policy response to coercive marriage and domestic service needs to take into account the gendered nature of the obstacles posed by the public/private dichotomy and promote greater international attention to rights violations against women in the home. Attacking the practical distinctions will allow a broader human rights approach to contextualize sex work, forced marriage and domestic service as forms of labor, so that sex workers and women workers in the private sphere will be less marginalized. Such a

\textsuperscript{163} See the Sex Sector, supra note 129, (estimating that 50% of the 20,000 to 30,000 Burmese sex workers in Thailand are HIV positive). See also, Rape for Profit, supra note 64 (describing estimates that 50% of sex workers in Bombay are HIV positive).

\textsuperscript{164} As a result of being discarded by their exploiters, women have returned to their homes from forced prostitution to become low level traffickers themselves, finding young women and girls to feed the needs of traffickers/exploiters and sometimes to continue to pay off their “debts.” See Chuang, supra note 57, at 90 (discussing the re-entry scenario).

\textsuperscript{165} The same civil and political rights protections of freedom of movement and association, freedom from torture, cruel and inhuman treatment, and rights to liberty, autonomy and bodily integrity as well as the same social and economic rights such as right to work, equal pay, health care, safe working conditions, education and information should be afforded trafficking victims regardless of the situation into which they are trafficked.
broad approach would be more effective in addressing the complex aspects of the trafficking issue.

C. The Distinction Between Migration and Trafficking

Although connections exist between trafficking and migration, there are conceptual and practical distinctions between the two phenomena, highlighted by the current definitions of trafficking for forced labor. The United Nations definition purports to distinguish trafficking from illegal migration by stressing the purpose of the traffickers to place victims in exploitative working conditions as the determinative element.\textsuperscript{166} The definition does not require that traffickers use coercion and/or deception to accomplish their goals. This approach supports the appeal for the protection of trafficked persons, primarily women and children, because they are clearly victims of traffickers, not accomplices in illegal migration and work.\textsuperscript{167} In its simplicity, however, this conception of the trafficking problem fails to recognize the complexity of the current trafficking phenomenon by ignoring that potentially trafficked workers, primarily women, may make autonomous choices about their migration and about their working conditions in the absence of coercion or deception.

The difference between trafficking and illegal migration in terms of human rights is the presence of deception or coercion before the transport of the victim concerning the movement, the living conditions, and/or employment obtained at the end of the transport. Current trafficking definitions by NGOs that require an element of deception and coercion capture this distinction. Although there are trafficking cases where extreme violence, coercion or threat of violence is used to force victims to migrate and be placed in exploitative circumstances,\textsuperscript{168} in many situations the initial intention of the victim is to migrate and seek work with the assistance of a would-be trafficker.\textsuperscript{169} But regardless of the intention to migrate and seek work, it is the use of deception as to the real working conditions that the person will be subject to or the abuse of authority in controlling a person’s freedom of movement once the person has migrated which renders the person a victim of trafficking.\textsuperscript{170} This approach recognizes the complexity of

\textsuperscript{166} See Chaung, \textit{supra} note 57, at 98.
\textsuperscript{167} See \textit{id.}
\textsuperscript{168} See generally, \textit{A Modern Day Form of Slavery, supra} note 64.
\textsuperscript{170} See \textit{id.} at Story of Lyuba.
the current phenomenon of trafficking and attempts to realistically assess what happens to many trafficking victims.

The approach to trafficking which highlights how coercion and deception are used by traffickers does not address the immediate forced labor circumstances for the element of coercion and therefore would not include persons who had migrated separately and ended up in forced labor/slavery-like conditions. From a rights-based perspective, however, there are significant connections between the phenomena of contemporary migration and migrant labor and trafficking for forced labor. Many people today voluntarily migrate for economic reasons and find themselves subject to coercive and abusive labor conditions. These labor conditions can be the same as for someone who was trafficked into them. As a result, migrant workers may experience the identical human rights abuses as trafficked workers regardless of whether the individual person can be said to have voluntarily migrated or not. Violence against migrants and trafficking victims in forced labor stem from the same vulnerability of foreign workers to exploitation, the economic incentive for countries to allow illegal labor and the failure of governments to commit to the protection of foreign workers' human rights.

The underlying causes of increasing migration and trafficking for forced labor are also considered highly interconnected. Trafficking and increased migration, particularly of women, stem from the presence of similar factors in the source and destination countries. The social and economic effects of globalization on developing countries, tied to the global trend in the feminization of poverty, have interacted with increased need/desire for workers in richer destination countries, particularly in the service/entertainment sector. This interaction has resulted in rising migration and increased profitability in trafficking of workers. Both migrant workers and trafficking victims tend to originate from poorer sectors of developing

171 See Crosette, supra note 70.

172 Violations of migrant workers' labor rights are widespread in the U.S. The El Monte Thai workers case illustrated the shortcomings in the government's efforts to protect migrant workers. The Immigration and Naturalization Service was suspicious of the activities at the El Monte site as early as 1988, seven years before the factory was raided. In addition, it was the local and state authorities that eventually raided the site, after the INS had turned the case over to them. See James Sterngold, Agency Missteps Put Illegal Aliens At Mercy of Sweatshops, N.Y. TIMES, Sept. 21, 1995, at A16.

173 See Violence Against Women Migrant Workers, supra note 162, at Key Issues, Migration patterns and trends.

174 See id.
countries where a substantial lack of social and economic opportunities exists. As a result of sex discrimination or gender oppression, women are particularly affected by the absence of social and economic opportunities in their regions of origin.\textsuperscript{175}

In recognition of the global trends in migration and the vulnerability of migrant workers to exploitation and violence, the U.N. created international protections for migrant workers, most specifically the International Convention on the Protections of the Rights of Migrant Workers and Members of Their Families (Migrant Workers Convention).\textsuperscript{176} Although the Migrant Workers Convention pledges the protection of the human rights of undocumented migrant workers, it is also maintains a commitment to national control over immigration.\textsuperscript{177} As a result, the tension between the goals of the convention hinders its ability to be an effective tool to protect migrant workers as well as trafficking victims.\textsuperscript{178} Because migration and trafficking intersect, international initiatives against trafficking should target the strengthening of human rights protections for all migrant workers in transit and destination countries, such as the Migrant Workers Convention, as well as supporting preventative social and economic development in poor sending countries.

The ILO Conventions relating to forced labor and slavery-like conditions, as well as the Migrant Workers Convention, are human rights instruments that can be looked to for the protection of migrants who end up in coercive labor circumstances but who were not specifically trafficked for that purpose. The perspective on trafficking which highlights the coercion and deception element may bother constituencies concerned with illegal migration because it highlights that victims of trafficking may have been initially willing to migrate illegally or, in the case of sex work, even partake in criminal work in the destination country.\textsuperscript{179} Clearly articulating that women, who are the majority of trafficked victims, can be victims of trafficking and at the same time autonomous actors is one of the greatest challenges for redefining trafficking within the context of global gender subordination.

\textsuperscript{175} See id.
\textsuperscript{177} See id.
\textsuperscript{178} See Chuang, supra note 57, at 98. The Migrant Workers Convention has not yet entered into force and therefore has no legal effect at this stage.
\textsuperscript{179} See Chuang, supra note 57, at 89.
D. The Problems of Immigration Status and Law Enforcement

Although there are connections between illegal migration, violence against migrant workers and trafficking for forced labor as discussed above, there are substantial differences and a compelling need to clearly distinguish between the two. Most importantly, a significant amount of trafficking takes place within national borders and therefore does not implicate international migration. It is when trafficking happens across international borders, however, that complications arise for both victims in respect to their immigration status and for law enforcement agencies. Law enforcement agencies in many countries have failed to adequately differentiate between illegal migration through networks, often referred to as alien smuggling, and trafficking. The approaches to combating trafficking that have resulted from this misconception have been criticized for their detrimental affect on victims and their ineffectiveness in stopping traffickers.

The conflation of trafficking with alien smuggling serves to diminish the human rights abuses of trafficking and reconceptualize victims as potential law violators even when they retain legal status in a destination country. People who are trafficked are often legal migrants. Women trafficked through mail order bride services may arrive in the destination country on fiancé visas or other legitimate authorizations to stay. Similarly,

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180 Cambodia is a good example of where the majority of trafficking takes place internally within the country. Women and girls are trafficked from the rural areas to Phnom Penh and to Koh Kong Province, a region bordering Thailand known for smuggling of goods, people and a booming sex industry. See Sin Kim, Ashley Barr, Trafficking in Women and Girls for Sexual Exploitation in Cambodia, at 5 (unpublished paper for the Mekong Subregion Conference) (Aug. 1998). There is also international trafficking into and out of Cambodia. For an overview of the situation in trafficking of Vietnamese women into Cambodia and within Cambodia, see Annuska Derks, Trafficking of Vietnamese Women and Children to Cambodia, IOM (March 1998). For a similar report on the trafficking of Cambodian women and girls to Thailand, see Annuska Derks, Trafficking of Women and Children to Thailand, IOM (Oct. 1997).

181 Although not alone, the U.S. has conflated trafficking with illegal migration, obscuring the distinctions and separate problems of these two phenomena. See e.g., Patrick J. McDonnell, Dina Bass, INS Expands Its War on Smuggling of "Human Cargo," L.A. TIMES, June 20, 1997, at A14.


183 See Christine Chun, The Mail-Order Bride Industry: The Perpetuation of Transnational Economic Inequalities and Stereotypes, 17 U. PA. J. INT'L ECON. L. 1155 (1996). Although mail-order bride services traditionally focused on arranging marriages between Western men and Southeast Asian women, since the end of the cold war there has been a developing mail-order bride market from the former
women trafficked for domestic service may be provided legitimate visas to work in the destination country.\textsuperscript{184} For these women, their immigrant status in a foreign country may specifically depend on their employer or spouse.\textsuperscript{185} Control over a woman's immigration status, including the ability to confiscate her immigration documents, and threats to modify that status can serve as a license for the dominant party to further exploit and abuse.\textsuperscript{186} Thus, trafficked women with legal status are still highly vulnerable to abuse, exploitation and fear of seeking assistance because of the temporary or dependent nature of their immigration status.

Recognizing that trafficking happens intranationally as well as the diverse ways in which people are trafficked internationally sheds light on the inappropriateness of an illegal migration rubric for conceptualizing trafficking. The trafficking of women into illegal immigration status can happen in many ways. Women can travel and enter a country legally but have their passports and other documents taken from them upon arrival.\textsuperscript{187} Women may be given false visas and documents under which they unknowingly enter a destination country illegally.\textsuperscript{188} Women may be kidnapped and illegally shuttled across international borders without their knowledge or under extreme coercion.\textsuperscript{189} Sometimes women may be aware of their illegal entry. As a result of the coercion and/or deception from traffickers, they travel disguised or knowingly carry fake documents.\textsuperscript{190}

Understanding trafficking as an aspect of illegal migration works to punish victims of trafficking instead of traffickers and exploiters. As a re-

\textsuperscript{184} See generally, Punishing the Victim, supra note 157.
\textsuperscript{185} See Chun, supra note 183, at 1191.
\textsuperscript{186} See Michelle J. Anderson, A License to Abuse: The Impact of Conditional Status On Female Immigrants, 102 Yale L.J. 1401 (1993) detailing the effects of US immigration laws on battered immigrant women, such as mail order or military brides. See also, Punishing the Victim, supra note 157, describing the abuse domestic servants in Kuwait suffer at the hand of their employers who confiscate their passports or otherwise threaten the security of their immigration status.
\textsuperscript{187} See Martina Vandenberg, Trafficking of Women to Israel and Forced Prostitution, Israel Women's Network (Nov. 1997).
\textsuperscript{188} See Gillian Caldwell, Bought & Sold (1997).
\textsuperscript{189} See generally, Rape for Profit, supra note 64. See also generally, A Modern Form of Slavery, supra note 64.
\textsuperscript{190} See generally Vandenberg, supra note 187.
suit of misconceived law enforcement solutions to the problems of transna-
tional trafficking, the victims of trafficking and consequently women traveling generally have been targeted. Some countries have instituted policies of restricting the grant of visas to groups of women that are thought to be trafficked, resulting in the rejection of visa applications of women applying as incoming maids or nurses. These types of policies lead to unjustified suspicion and treatment of women traveling from source countries and have worked to curtail women's freedom of movement generally in some countries. Moreover, trafficked women who are present illegally in destination countries are treated as illegal migrants, as opposed to victims of crime, and therefore face detention and immediate deportation. The targeting of resources on immigration law enforcement to combat trafficking may be the reason why governments and law enforcement have failed to provide the services needed for victims, such as shelter, means of survival and special immigration status.

Not only does the confusion of trafficking with illegal migration hurt victims it also aids traffickers in their work. This inadvertent and explicit assistance functions on many levels. In some countries, law enforcement officials and government have been directly implicated in trafficking, through assistance in cross-border movements and profitable protection of exploitative establishments. The pervasive policy of detaining and deporting victims of trafficking allows traffickers to rely on governments to get rid of trafficked workers who are no longer needed and allows traffickers to keep the profits from the victims. In some regions, traffickers maintain positive relationships with authorities, informing them of brothels or other places to 'bust' when it serves the traffickers needs. Also, the threat of prosecution, detention and deportation is used as a weapon against trafficking victims, keeping them dependent on traffickers and afraid to report abuses. Further, the use of such crude law enforcement techniques

191 Comments of Martina Vandenbarg, Researcher, Human Rights Watch (Fall, 1998).
192 See generally Vandenbarg, supra note 187.
193 Comments of Nepalese NGO Representative at Human Rights Watch meeting (on file with author).
194 See generally Vandenbarg, supra note 187. See also generally, Rape for Profit, supra note 64. See also, A Modern Form of Slavery, supra note 64.
195 See generally, Rape for Profit, supra note 64.
196 See generally Vandenbarg, supra note 187.
197 See id.
198 See id. See also generally, Rape for Profit, supra note 64. See also, A Modern Form of Slavery, supra note 64.
serves to alienate victims when they do come in contact with law enforcement agencies. Because victims do not trust law enforcement both in the destination country and in their countries of origin, they are reluctant to testify and assist in prosecuting traffickers.\footnote{199 See generally Vandenberg, supra note 187.}

As the focus on international immigration law enforcement has proven ineffective in combating trafficking, law enforcement strategies should shift to the protection of victims from rights violations. The policy implications of many proposed solutions suggest that the tenure of law enforcement contact with trafficking victims should be overhauled, taking into account the dangerous situation that victims face, in both the destination country and in the country of origin, if they cooperate with the police. The new policy of law enforcement agencies should be to provide assistance to victims, such as shelter, means of survival and special immigration status, as an incentive for victims to trust law enforcement and cooperate in combating trafficking. As a result, countries committed to combating trafficking need to modify their immigration and refugee laws to allow for the protection of trafficked persons. An international law enforcement strategy that works to decriminalize and destigmatize trafficked workers in vulnerable immigration situations will stop assisting traffickers and, ultimately, be more effective in combating trafficking.\footnote{200 Women victims of trafficking may argue that they meet the requirements for asylum on the basis of either past persecution or fear of future persecution because of their membership in a particular social group (e.g., women in poor regions of developing countries vulnerable to coercion etc.) This standard is difficult to meet and requires a showing that the government of the victim’s respective country is unwilling or unable to protect them. It may entail proving that the criminal trafficking network in the region of the given country has so much control over the authorities that they cannot or could not protect the victim. For a discussion of how asylum claims in the US could be applied in the trafficking context see, Maya Rahgu, Sex Trafficking of Thai Women and the United States Asylum Law Response, 12 GEO. IMMIGR. L.J. 145 (1997). For a reevaluation of gender-based persecution claims, See Binaifer A. Davar, Rethinking Gender-Related Persecution, Sexual Violence and Women’s Rights: A New Conceptual Framework for Political Asylum and International Human Rights Law, 6 TEX. J. WOMEN & L. 241 (1997). For an INS perspective on gender-based claims for asylum, See Nancy Kelly, Guidelines for Women’s Asylum Claims, Interpreter Releases, Vol. 71, No. 24 (June 27, 1994).}
V. Recommendations

Based on the proposed solution and policy implications discussed above, this section distills a set of rights-based recommendations to combat trafficking and protect victims.

A. Strengthening the international and national legal framework prohibiting trafficking

The Protocol to the Transnational Organized Crime Convention is a welcome initiative and should provide ultimately for a more contemporary international legal standard on trafficking than the 1949 Convention. Moreover, the protocol should provide for real enforcement of international obligations to prohibit and combat trafficking, as the 1949 Convention has not. Such a proposed legal instrument addressing trafficking as an aspect of other international legal issues, however, may complement, but may not be able to replace, comprehensive and broader international protections on trafficking specifically. Current efforts to define trafficking and bind states to explicit requirements to protect trafficking victims and prosecute traffickers may provide the foundation and experience, if necessary, on which to build a comprehensive and enforceable international instrument to handle the vast global problem of trafficking. Such an instrument should be premised on a right-based analysis of the trafficking problem and entail practical enforcement measures that assure that a new convention on trafficking is thorough and effective where the 1949 Convention has failed. National legislative initiatives to prohibit and prosecute trafficking should reflect a broad analysis of the problem, including governments' responsibilities to protect victims, and any contemporary international standards.

B. Refocusing the Role of Law Enforcement

Although proposals of the U.S. government and other intergovernmental bodies have emphasized the need to extend support rather than punishment to victims of trafficking, the current actions of many countries represent a continuing commitment to law enforcement strategies that focus on cross-border movements of migrants and migrating women generally. This policy should be reevaluated based on the evidence that suggests it results in violations of the rights of both victims and migrants and does little to prevent trafficking. Rethinking the role of law enforcement should include refocusing law enforcement strategies on trafficking away from border control and on to investigating, apprehending and prosecuting traffickers, as well as exploiters who violate the rights of migrant and trafficked workers. An enhanced focus on investigating and prosecuting domestic crimes and labor violations against all foreign workers, including
solidifying and strengthening domestic and international protections for all forms of migrant labor, will undercut both the trafficking industry and the illegal migration networks. As the trafficking protocol to the new Transnational Organized Crime Convention and the U.N.’s Global Programme suggest, law enforcement’s expertise and skills are most appropriately targeted on combating the transnational criminal networks behind the trafficking phenomenon.

A refocused law enforcement role should be one that compliments, not undermines, the work of non-governmental organizations and other activists serving trafficking victims. Due to their experience with victims of trafficking and their practical knowledge about the dynamics of the phenomenon, NGOs from around the world should play a significant part in formulating laws, policies and programs to address trafficking. In particular, NGOs should be funded to train law enforcement officials about trafficking in their countries and to provide services and assistance to victims of trafficking. Additionally, legal services organizations should be provided funds to protect trafficking victims and ensure that their rights are enforced and vindicated. As the Human Rights Standards imply, trafficking victims need personal representation to ensure that they receive the services available to them, that their rights are respected by law enforcement and that they are able to pursue remedies against the traffickers who have harmed them.

C. Increasing the Protection of the Rights of Trafficking Victims

One of the primary ways to uncover the economic forces that drive trafficking into the lucrative sex work area, suggested by the ILO report, is to decriminalize prostitution and thereby bring it out into the open. Decriminalization of prostitution mandates the end to practices that leave women in prostitution legally unprotected or governmentally regulated by requiring the provision of labor rights and protections for sex workers. International governmental organizations and individuals, such as the ILO and the Special Rapporteur, can play a significant part in encouraging the decriminalization of prostitution through advocating the development of international labor standards applicable to sex work. The provision of rights to sex workers would serve to eliminate the legal distinction and undercut the social prejudice and health issues that presently stigmatize sex work and distinguish it from other forms of labor. Shining the light on the sex industry through legality and labor regulation would make it easier to identify women that are subject to forced prostitution and slavery-like practices and children in prostitution.

The existence of trafficking for coercive domestic service and abusive marriages mandates greater international involvement in protecting women’s rights, including labor rights, in the home. The policy choice to
decriminalize prostitution and protect women in prostitution, domestic service and mail order marriages with international and domestic labor rights is based on the premise that human rights protection of trafficked workers is the most vital step to combating trafficking. At the core of this approach is the understanding that protecting the rights of trafficked women and girls will relieve the vulnerability of victims to trafficking and exploitation. In addition, decriminalization and rights protection will mitigate the obstacles women experience to reporting rights violations and thereby promote increased prosecution of traffickers. Promoting the reporting of violations of individual rights by trafficked women would apply direct pressure on the traffickers, as opposed to current policies that target actual or potential victims through punitive immigration and law enforcement strategies.

D. Highlighting the Protection and Support of Victims of Trafficking

Current law enforcement strategies that target deterring victims instead of traffickers stem from the conflation of trafficking with illegal migration. Such a conflation by governments prevents meaningful efforts to provide protection and support services for women who are trafficked across international borders.\textsuperscript{201} One of the most important and basic implications of a rights protective approach to trafficking is that procedures and policies that result in the incarceration and deportation of trafficked victims must be ended. As indicated in proposed U.S. legislation, international protections against trafficking should include the provision of an immigration status specific to trafficking victims, as well as legal opportunities for victims to regularize their status in the destination country. Additionally, in recognizing that trafficked victims may face persecution if they return home or that they have suffered persecution in the past, countries should be required to repatriate only those victims who voluntarily choose to return in spite of the assurance that they may remain in the country of destination on the basis of asylum with a full panoply of rights.

In addition to legal immigration status, as many of the proposals suggest, trafficking victims recently liberated from slavery-like conditions require supportive services specific to their needs. Trafficking involves multiple violations of human rights, which can leave victims physically and

\textsuperscript{201} Although not covered in depth in this paper, there are law enforcement agencies in certain countries actively involved in trafficking and therefore clearly not committed to its eradication. \textit{See} Report of the Special Rapporteur, \textit{supra} note 23. It goes without saying that any recommendations to combat trafficking must include substantial international pressure to stop this corruption and state complicity in criminal activities. The proposed U.S. laws on trafficking include measures to punish countries that do not actively combat government complicity in trafficking.
emotionally scarred. Gender-appropriate health services and psychological assistance are vital for victims' well-being, ensuring that they are treated for medical conditions and trauma resulting from the severe abuse they have suffered. In order to guarantee the survival of victims and their transition from captivity into a new society, the provision of financial assistance and shelter is fundamental. Because trafficking victims are trafficked into foreign countries and alienating situations, all these services should be provided in a linguistically and culturally competent manner. The provision of these significant supportive services is essential for protecting victims of trafficking and facilitating victims' assistance in apprehending and prosecuting traffickers.

E. Combating the Root Causes of Trafficking

Several of the current proposals to combat trafficking recognize that the root causes of trafficking, as with illegal migration, are based in severely limited social and economic opportunities in the country of origin or in an area of the country of origin. These limited opportunities combine with gender inequalities or sex discrimination to result in the extreme vulnerability of women and girl children to exploitation and abuse. Any policy aimed at effectively combating the problem of trafficking needs to include targeting the social circumstances and lack of economic opportunities that lead women and young girls to be vulnerable to the coercion and deception involved in trafficking. These efforts should be complimented by more direct forms of preventive measures, such as awareness raising and training for persons and communities vulnerable to traffickers.

In addition to recognizing the complex social and economic forces that propel persons into exploitative circumstances, proposed actions, particularly highlighted by the ILO and the Special Rapporteur’s report, call for attention to the compelling profitability of trafficking. In the context of trafficking for sex work, there remains a failure globally to recognize the sex industry as a significant and growing economic sector, which fundamentally drives the trade and exploitation of persons, exemplified in the ILO report on Southeast Asia. Likewise, there has been failure to analyze the economic incentives and social realities that underlie the trafficking of women into the private sphere. Recognizing and addressing the economic motivations maintaining the underground trade in women for sex, mail-order bride, and domestic service industries is fundamental to combating trafficking. Without a true commitment to undermining the substantial economic benefits of trafficking while bolstering economic opportunities for vulnerable persons, trafficking may prove to be extremely difficult to stop.
F. Protecting Children and Providing HIV/AIDS Health Services

The existence of trafficking in children for forced labor including prostitution, as well as the enhanced vulnerability of trafficked women and girls to deadly diseases are aspects of trafficking that deserve heightened attention. As recommended by the ILO report and the Special Rapporteur for Children, the trafficking of children for forced labor and sexual exploitation should be targeted for complete eradication. Although the complexities of this significant human rights problem extend beyond the scope of this paper, the increased transparency in underground labor, such as prostitution, and a meaningful economic commitment to the protection of children worldwide are vital to achieve this goal. Additionally, programs that aim to protect sex workers from HIV/AIDS within a rights-based framework should be pursued because the HIV/AIDS epidemic threatens the lives of many of the world’s women and girls who end up working in the dangerous sex industry.