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A Proposal Leading to an International Court to Combat Trafficking in Human Beings

John Cooper Green

"The cigarette smuggling channels in Bulgaria start to develop into human trafficking channels and the Bulgarian government is responsible for that." Rumen Petkov, Socialist MP and ex-Interior Minister 2005-2009, Bulgaria.¹

"[F]or those of us who are in position to do something to combat human slavery, however small our contribution, neutrality is a sin." Inspector General Joseph E. Schmitz, Department of Defense.²

"They would not call it slavery, but some other name. Slavery has been fruitful in giving herself names ... and it will call itself by yet another name; and you and I and all of us had better wait and see what new form this old monster will assume, in what new skin this old snake will come forth." Frederick Douglas - (1818 - 1895) Former Slave, Abolitionist Leader.³

I. Introduction

States and international organizations recognize human trafficking as a crime under international law.⁴ Human trafficking, however, obliges more than recognition and a consensus on definition. As an international aim, it requires international cooperation via prosecution and prevention.⁵ Human trafficking is largely run by organized crime

¹ Ex Minister Blasts Bulgarian Govt for Cigarette Contraband, Human Trafficking, novinite.com: Sofia News Agency (Jan. 4, 2011), *available at* http://www.novinite.com/view_news.php?id=123802.

² Initiative Against Sexual Trafficking (IAST), *available at* <http://www.iast.net/NotableQuotes.htm> (last visited May 9, 2011).

³ John Burger, Top 10 Inspiring Abolitionist Quotes, Examiner.com, *available at* <http://www.examiner.com/human-trafficking-in-dallas/top-10-inspiring-abolitionist-quotes> (last visited May 9, 2011).

⁴ Human Trafficking, Amnesty International, <http://www.amnestyusa.org/violence-against-women/end-human-trafficking/page.do?id=1108428> (last visited April 6, 2011).

⁵ *Id.*

syndicates, earning an estimated \$36 billion annually.⁶ Human trafficking is now the third largest profit center for transnational criminal groups, after trade in drugs and arms.⁷ Estimates total 600,000 to four million human trafficking victims a year; the majority trafficked for the sex trade.⁸ The sex trade is not always plied in the underground's dark side streets, massage parlors and brothels. Italy's Prime Minister Silvio Berlusconi, for example, currently "faces accusations of paying an underage girl for sex and other improprieties."⁹ Also, for this author, the reality of human trafficking hit home after learning of a Ukrainian colleague's experience of being recruited to work in the United Arab Emirates. At first, the recruitment was for the service industry; a purposely disjointed description of possible work opportunities was given: waitress, nanny, musician employed directly by a hotel. With few prospects of work at home, many young college-aged girls in what were once major industrial cities in Ukraine began the process of applying for visas, with financial assistance from their job recruiters. Girls often

⁶ Kimberly A. McCabe and Sabita Manian, Eds., *Sex Trafficking: A Global Perspective* 1 (2010).

⁷ Kevin Bales, *International Labor Standards: Quality of Information and Measures of Progress in Combating Forced Labor*, 24 *Comp. Lab. L. & Pol'y J* 321, 324 (2003) (unfortunately, "[t]he number of *organizations* in Russia alone is estimated to be between 5,000 and 8,000, involving up to three million people").

⁸ *Id.*

⁹ Rachel Donadio, Berlusconi Prostitution Trial Starts But is Adjourned, *International Herald Tribune* (Published: April 6, 2011), *available at* http://www.nytimes.com/2011/04/07/world/europe/07italy.html?_r=1&ref=global-home ("Mr. Berlusconi denies having sex with the young woman or abusing his influence to have her released from police custody when she was detained for theft last year, when she was 17. The age of consent in Italy is 14, but it is illegal to pay someone under 18 for sex").

arrived in the Middle East to empty promises and a life of slavery. Luckily, my colleague found work as a computer engineer near home.¹⁰

The need to create an international court to combat human trafficking is compelling. Domestic jurisdictions vary in their power to prevent human trafficking. This variance allows human traffickers to take advantage of weak states lacking in enforcement and conviction capabilities. These frail domestic jurisdictions often have porous borders. Efforts and proposals to strengthen domestic systems with a special regard for human trafficking (notably in Central and Eastern Europe) have failed.¹¹

Section II will set forth the consensus as to the definition of human trafficking and a general background of the regional developments and laws of human trafficking. For purposes of this paper, a special focus will be on the sex trade and sexual exploitation of trafficked women and children. Current legal and treaty regimes that concentrate on human trafficking and why such regimes should first develop regionally, by including only a number of neighboring states, will be the focus of Sections III and IV. By breaking a global problem down and putting pressure on a few arenas at a time, a regional court could set the stage for a well-organized international court, if necessary. Cross-

¹⁰ See e.g. (regarding sex trade recruitment in Eastern Europe) Jasna Vujin, *Human Trafficking in the Balkans: An Inside Report*, 4 Intercultural Hum. Rts. L. Rev. 267 (2009) (“What is interesting is that, no matter which Balkan country one takes to analyze, the recruitment strategies of those women tend to be very similar or completely identical . . . One of the methods [traffickers] use is publishing advertisements for various jobs located in Western European countries in the local newspapers. Usually, they offer well paid jobs in a country of destination, covered travel expenses, visas, and accommodation: everything that seems attractive for young girls who are dreaming of having a better life . . . [G]irls and their families do not do a proper background check . . . In many cases, the victims of trafficking testified that they have been offered a job from some relative or close friend, and they did not check whether that job really exists . . . Those are the examples where uneducated and uninformed women become deceived by the traffickers and enter a vicious circle from which there is no going back.”).

¹¹ See e.g. Vujin note 10.

jurisdictional record sharing is more likely to occur with border sharing nations that have similar regional interests. This will be the focal point of section V: proposing a novel method to reach global prevention. Before an International Court to Combat Human Trafficking¹² is developed, two regional courts, an Eastern European Tribunal and a Southeast Asian Tribunal might be established.¹³ Attempts at global prevention must first concentrate on the source countries. Any new treaty, tribunal, or court should attempt to harmonize current legal anti-trafficking laws, but also further provide for more plenary enforcement, conviction, and sentencing power using an ad hoc international tribunal. If necessary, these tribunals could lead to an International Court to Combat Human Trafficking.

II. Background

a. Human Trafficking Defined

Conceptually, while each country will attempt to draft their own definition of human trafficking with certain objectives in mind, for the purposes of this paper, a focus on the role of prostitution and the sex trade will help define trafficking under current international law.¹⁴ A uniform structure and standard is necessary to combat international

¹² This article will also tentatively propose more influence and power over human trafficking cases by the International Criminal Court. However, because the United States is not a member to the ICC as of yet, a post-Trafficking Victims Protection Act United States may be more amenable to the proposed International Court to Combat Human Trafficking.

¹³ For a comparison to proposed East African Anti-piracy courts *see* “United Nations Considers Anti-piracy court,” VOANews.com (Aug. 25, 2010); *see also* Yvonne M. Dutton, *Bringing Parties to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court*, 11 Chi. J. Int'l L. 197 (2010).

¹⁴ Alison Cole, *Reconceptualizing Female Trafficking: The Inhuman Trade in Women*, 26 Women's Rts. L. Rep 97, 98 (2005).

human trafficking (IHT).¹⁵ Otherwise, regional and international coordination will continuously be marred by national policy disputes.¹⁶

Prostitution is often the end result of an illegal migration. Including the term and act of prostitution in a definition of human trafficking will focus such definition on both *movement* and *exploitation*.¹⁷ The United Nations Convention of Transnational Organized Crime¹⁸ was supplemented by a Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.¹⁹ The protocol has 124 parties and 117 signatories. Accordingly, the following definition of human trafficking from the Protocol is both appropriately general and widely accepted:

“*Trafficking in persons* shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”²⁰

Core confusion in the definition is that the word ‘trafficking’ “connotes only the movement portion of the trafficking chain.”²¹ Many laws and organizations, incorrectly, focus on the *movement* (transfer, recruitment, transportation) aspect over or more than exploitation.²² The international community should step back and understand sex

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Slavery* 4 (2009).

¹⁸ UNGA Res. 55/25 (Nov. 15, 2000).

¹⁹ Doc. A/55/383.

²⁰ *Id.* at Art. (3)(a).

²¹ Kara, note 17 at 4.

²² *Id.*

trafficking as a form of slavery,²³ “focus[ing] . . . on thwarting movement across borders . . . [and] . . . shutting down the modern plantations to which those individuals are being moved.”²⁴

b. A Brief Note on Slavery

Sadly, slavery has been a constant throughout the history of human beings (roughly the last 5,000 years).²⁵ Slavery has nearly found its way into all societies, but “in the 20th century, slavery was generally criminalized and forced underground.”²⁶ This had unintended repercussions because governments were then unable to measure the illegal slaves and their treatment; slavery became a hidden phenomenon.²⁷

Globalization has made organized criminal groups stronger and more structured. These illicit syndicates act as the new slaveholders, controlling the individual slaves (their movement and exploitation) *and* the slave-based activities (mining, sweatshops, agricultures, sex trade).²⁸ Two themes allow slavery to further perpetuate itself:

²³ *See id.* (“The transatlantic slave trade from the sixteenth to the eighteenth centuries involved the trafficking of eleven million Africans across thousands of miles to work as slaves on plantations”).

²⁴ *Id.* at 5; *see also* Abigail Schwartz, *Sex Trafficking in Cambodia*, 17 Colum. J. Asian L. 371, 376-79, for a discussion on definitional issues regarding the elements of *border crossing* (“The United Nations has adopted the second definition in its Protocol Against Trafficking—that is, trafficking may exist within national borders. This approach seems reasonable when one considers the practical application of trafficking laws and the overall objective of safeguarding victims’ rights.”).

²⁵ *See* Bales, note 7 at 321.

²⁶ *Id.* at 322: In some countries, slavery still persists as “chattel slavery”; *see also* Vujin, note 10 at 267 (“[T]he traditional type of slavery, so called ‘chattel slavery,’ has mostly died away and only persists in a few countries such as Sudan and Mauritania . . .”).

²⁷ *Id.* at 322 (“When [slavery] was commonly accepted as a ‘natural’ social and economic relationship, even governments took part in detailed record-keeping of slaves and their treatment, an activity only diminished by the relative lack of social importance of the individual slaves.”).

²⁸ *See* Bales, note 7 at 323-24 (“In Brazil, slaves are ‘recruited’ in densely populated, economically depressed regions and then shipped over 1,000 miles to the fields where

“dispersed economic activity and the loss of governmental control.”²⁹ Dispersal hinders the researcher’s ability to trace the links between slavery in one place and the economic impetus for that slavery in another. The loss of governmental control also means the loss of a government’s means to record and investigate the crime of slavery.³⁰ Understanding these two themes is critical to be able to legislate against current forms of slavery—human trafficking.

c. Regional Numbers, Developments and Issues in Human Trafficking

Regional perspectives are important because “trafficking for the purposes of sexual exploitation is a transnational crime that starts in a source country, is facilitated in a transition country, and terminates in a destination country.”³¹ Studies have found incidences of human trafficking in almost every country, whether on the delivery or receiving end.³² Typically, however, women and children are more vulnerable in countries with low education rates, higher poverty, and social conflict or war.³³ Women in these countries seek a better life. They end up, nonetheless, worse off in wealthy nations such as the United States.³⁴

they will make charcoal. The charcoal, in turn, will be shipped another 1,000 miles to steel mills for use. In Southeast Asia, women are enslaved in Burma or Laos for use in Thailand or trans-shipment to brothels in Japan or Europe. Capital from Hong Kong funds the brothels of Thailand, investment from Europe indirectly funds the charcoal operations in Brazil. Slaves from Mali are found in Paris, slaves from the Philippines are found in London and Saudi Arabia, *and Eastern Europeans, especially women, are being dispersed as slaves around the globe.*”).

²⁹ *Id.* at 323.

³⁰ *Id.* at 324.

³¹ Susan W. Tiefenbrun, *Sex Slavery in the United States and the Law Enacted to Stop it Here and Abroad*, 11 *Wm. & Mary J. Women & L.* 317, 319-20 (2005).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

By the numbers, regional estimates “suggest about 30 million people are engaged in prostitution around the world.”³⁵ This number attempts to include cross-border and within border trafficking. The number of trafficking cases annually is 1.7 million *at a generous minimum* (concerning people trafficked out of or within each region).³⁶ “The estimated numbers of victims are 300,000 for Europe and Russia, 50,000 for North America, 500,000 for East Asia, 250,000 for South Asia, 200,000 for Southeast Asia, 300,000 for Latin America, and 120,000 for Africa. . . .”³⁷ The following will attempt to summarize human trafficking issues regionally. Some regions will only be briefly described. Section V, however, will scrutinize Bulgaria and emphasize a regional Balkan solution.

i. Asia

The sheer size of the world’s largest continent makes Asia a source, transit and destination mecca. Total volume of trafficking for sexual exploitation may be near 5 million cases.³⁸ 30 million women and children have been sexually exploited over the past 30 years in Asia, with total profits hovering between 6 and 7 billion dollars annually.³⁹

A. Middle East

The Middle East serves as both a destination and a transit center between Europe and Asia.⁴⁰ Israel and the United Arab Emirates have the highest numbers of prostitutes,

³⁵ Martti Lehti and Kauko Aromaa, *Trafficking For Sexual Exploitation*, 34 *Crime & Just.* 133, 187 (2006).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 203.

³⁹ *Id.* (“[W]hich would mean more than 1 million per year.”).

⁴⁰ *Id.* at 208.

many coming from Eastern Europe, Russia and the Balkans.⁴¹ International anti-trafficking organizations, however, find it difficult to gather information because “prostitution is largely taboo in the region.”⁴²

B. China and India

Trafficking issues in India and China could take up an entire article. Both countries have the most serious numbers of human trafficking cases in the world, paralleling their sheer population growth over the last few decades. “It is estimated that annually about 250,000 women are trafficked within [China] for prostitution and about the same number out of the country.”⁴³ In India, the number of people engaged in prostitution could be up to *9 million*, “some 15-30 percent of whom are children.”⁴⁴

C. Southeast Asia

Thailand and Cambodia are the important source, transit and destination countries of human trafficking in Southeast Asia.⁴⁵ Over a million are trafficked annually in both countries combined and a large percentage is minors trafficked specifically to supply foreign sex tourists.⁴⁶ Cambodia’s sex trafficking problem is pandemic; the country is known as “a virtual ‘rape camp.’”⁴⁷ Corresponding to the country’s growing sex industry

⁴¹ Lehti, note 35 at 208.

⁴² *Id.*; also the Gulf States are addicted to cheap labor to support, for example, many of their oil fields, *see* McCabe, note 6 at 91.

⁴³ *Id.* at 203.

⁴⁴ *Id.* at 209.

⁴⁵ Lehti, note 35 at 206.

⁴⁶ *Id.*; for an excellent article documenting the powerful Asian gangs that run the sex trade in Southeast Asia, *see* McCabe, note 6 at 37.

⁴⁷ Abigail Schwartz, *Sex Trafficking in Cambodia*, 17 Colum. J. Asian L. 371, 372 (2004) (“In 1999, a Dan Sandler, an American living in Cambodia, added a live bondage sex show to his pornographic web site. The site, named ‘Rape Camp,’ featured ‘Asian sex slaves’ who were used for ‘bondage, discipline and humiliation.’ The Cambodian women on the site were blindfolded, bound, gagged, and some had clothespins attached to their

is a government either ambivalent, or worse tolerant of “its burgeoning sex trade.”⁴⁸ In 2003, the FBI launched Operation Innocence Lost to capture and prosecute U.S. citizens who engaged in sex acts with children abroad.⁴⁹ The operation has been somewhat successful in making over five hundred arrests, mostly in Cambodia, Thailand and the Philippines.⁵⁰ The United Nations, Cambodia, and neighboring countries have developed a project pursuing traffickers and providing services for victims.⁵¹

ii. Latin America

Central America, although not untouched by human trafficking, has much lower numbers than South America and the Caribbean.⁵² The South American drug trade logically parallels the sex trade. Brazil and Columbia are the major source countries of prostitution to old European colonial ties and to East Asia (Japan, Singapore, and Hong Kong).⁵³ The Dominican Republic dominates the sex trade in the Caribbean.⁵⁴ There is an

nipples. The site also advertised Cambodia’s flourishing sex trade, for those who are ‘sick of demanding American bitches who don’t know their place.’ It volunteered to help tourists find cheap flights, hotels, and brothels. It also offered advice for naïve first timers. ‘Don’t pay in advance,’ it counseled, ‘and don’t be bashful about sending her back if she doesn’t do as advertised or if there is some major attitude shift.’ When the site came to the attention of Mu Soucha, the Cambodian Minister of Women’s Affairs, she demanded Sandler’s arrest and prosecution under Cambodia’s new anti-trafficking laws. Facing a five year sentence, Sandler appealed to the United States government, which eventually intervened, arranging for him to be deported rather than prosecuted under Cambodian law”).

⁴⁸ *Id.*

⁴⁹ Kara, note 17 at 194.

⁵⁰ *Id.* at 195 (“The first two men convicted under the new laws” were over seventy years old and caught with “suitcases packed with condoms, pornographic materials, and several pounds of candy.”).

⁵¹ See United Nations Inter-Agency Project on Human Trafficking in the Greater Mekong Sub-Region (UNIAP), available at <http://www.humantrafficking.org/organizations/78> (last visited May 11, 2011).

⁵² Lehti, note 35 at 199.

⁵³ *Id.* at 202 (In fact, “Brazil is the largest exporter of women in South American and one of the most important globally”).

estimated 50,000 Dominican women engaged in the sex trade overseas in western and southern Europe, the U.S., Israel, Argentina, and Caribbean tourist areas.⁵⁵

iii. Africa

Africa, generally, is an important source country for prostitutes trafficked to Europe and the Middle East.⁵⁶ However, “economic exploitation makes up a much larger percentage of trafficking than sexual exploitation.”⁵⁷ Culture and the dual legal system in Africa play a major role in human trafficking.⁵⁸ Customary, or tribal, laws derived from pre-colonial legal traditions still govern the majority of the population.⁵⁹ Under these laws, both legally and culturally, women and children are mere objects owned by their family.⁶⁰ Moreover, women have few rights other than those granted by the heads of their families.⁶¹ This has caused a silent voice for trafficking abuses in Africa.⁶²

iv. Russia, Central Europe and The Balkans

Human trafficking in the Balkans received national media attention during and after the brutal wars that split up Yugoslavia. Many Bosnian villages were razed and stories surfaced of “Serb soldiers who raped and trafficked young Bosnian Muslim Women by the truckloads to brothels across Europe.”⁶³ The media attention was further

⁵⁴ *Id.* at 201.

⁵⁵ *Id.*

⁵⁶ Lehti, note 35 at 210.

⁵⁷ *Id.*

⁵⁸ *Id.* at 211.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Lehti, note 35 at 211.

⁶³ *See* Kara, note 17 at xi.

compounded when word spread that United Nations and NATO peacekeepers participated in and facilitated much of the human trafficking in the Balkans.⁶⁴

Prostitution demand is on the rise in Western Europe and the fall of the Iron Curtain in the early 1990s “offer[s] a source area from which trafficking to western Europe can be organized far more easily and more economically than from the old source areas (Southeast Asia, West Africa, and Latin America).”⁶⁵ Contributing to this may be the lack of formal and informal equality between men and women in Central and Eastern Europe, and a lack of or lower bar of human rights for women in former socialist countries.⁶⁶ There are upwards of 200,000 women and children trafficked through the Balkans each year, with most victims coming from Albania, Lithuania, Moldova, Romania, Russia, and Ukraine.⁶⁷ Over the past twenty years, the Balkans have become

⁶⁴ See Sarah E. Mendelson, *Barracks and Brothels: Peacekeepers and Human Trafficking in the Balkans*, CSIS Report (Feb. 2005); also see Vujin, note 10 at 287-90 (“In Valesta, [Macedonia women] are locked into dark and cold rooms of some bar or restaurant, are provided with very little or no food, and they are forced to work as domestic slaves during the day. At night, they are forced to prostitute themselves finding clients mostly in NATO peacekeeping soldiers in Macedonia and Kosovo. Thus, even though they are surrounded by police and military personnel, there are just a few cases of saving girls from the traffickers . . . In 1999, a contingent of the international military forces of 40,000 was stationed in the territory of Kosovo. Presence of the international peace forces in Kosovo exacerbated the sexual exploitation of women and intensified human trafficking. Furthermore, it was reported that members of U.N. and NATO troops used women and young girls for sex and they are often involved in trafficking themselves. Many of these women are often tortured, raped and intimidated.”).

⁶⁵ Lehti, note 35 at 190.

⁶⁶ See e.g., Julie Mertus, *Human Rights of Women in Central and Eastern Europe*, 6 Am. U. J. Gender & L. 369 (1998).

⁶⁷ *Id.* (For purposes of this paper, the Balkans include: Albania, Bosnia, Bulgaria, Croatia, Cyprus, Greece, Kosovo, Macedonia, Romania, Serbia and Montenegro, Turkey).

the “main source and transit area for trafficking in women for sexual exploitation in Europe.”⁶⁸ Balkan prostitutes working abroad may be around 800,000.⁶⁹

Due to the relatively new democracies in the Balkans, the number of identified victims and money to provide assistance and support groups to those victims is falling and failing.⁷⁰ Most Balkan countries are parties and signatories of human rights international treaties, protocols and covenants.⁷¹ Little is done by these countries, however, to implement these documents. This is almost entirely because of the Balkans “appalling economic conditions, unstable political climate, corruption present in all spheres of society, improper education, the failure of the state to implement ratified international codes and already existing domestic legislature, and the lack of opportunities for young people.”⁷²

Regrettably, little reliable data comes out of Russia and CIS states. In fact, “Russian authorities believe that the majority of prostitutes who emigrate or work abroad does so voluntarily.”⁷³

v. Western Europe

Concerning trafficking for purposes of prostitution, ironically, “Europe is divided into two parts: the old member countries of the European Union serve as a destination area, and central Europe, the Balkans, and the [CIS] countries serve as source and transit

⁶⁸ Lehti, note 35 at 195.

⁶⁹ *Id.* at 196.

⁷⁰ Vujin, note 10 at 270.

⁷¹ *Id.* at 271.

⁷² *Id.*

⁷³ Lehti, note 35 at 198.

areas.”⁷⁴ The Baltic countries acceptance into the European Union (EU) and the loosening of the borders between the Baltics and Scandinavian EU countries has led to an increase in pandering there.⁷⁵ Western Europe is one of the main receiving hubs for prostitution-related trafficking. It is estimated that close to 150,000 women and children are trafficked into Western Europe *annually*.⁷⁶ Interestingly, Italy and the Iberian Peninsula traffickers are also under the same organized crime umbrella that smuggles a majority of Europe’s drugs.⁷⁷

The European Union has done well to organize workshops and training programs specifically for police officers and border and custom control; but the EU still struggles to *identify* human trafficking victims.⁷⁸ Academics find it troubling that each EU member state often has their own way of drafting, enforcing, and prosecuting anti-trafficking and illegal migrant laws.⁷⁹ The EU has spent considerable energy in developing Europol, creating Eurojust, and proposing a European Public Prosecutor.⁸⁰ It is hoped such programs and organizations will strengthen efforts to combat human trafficking by

⁷⁴ *Id.* at 191 (More specifically, “[i]rregular immigration as a whole has six main routes to and inside Europe: from Moscow through Lithuania, Poland, or the Czech Republic to Germany and Austria; from Ukraine through Slovakia, Hungary, the Czech Republic, or Poland to Austria and Germany; from the Middle East and Turkey to Greece and Italy; from North Africa to Spain and Italy; from Turkey through the Balkans to Italy and Austria; and from South and Central American to Portland and Spain. These routes also serve as the main routes of trafficking in persons.”).

⁷⁵ *Id.* at 192.

⁷⁶ *Id.* at 194 (Furthermore, “[t]he number of people engaged in prostitution in the region is estimated to be 270,000-500,000, of whom over 20,000 are minors.”).

⁷⁷ Lehti, note 35 at 197.

⁷⁸ McCabe, note 6 at 78.

⁷⁹ Elspeth Guild and Paul Minderhoud, Eds., *Immigration and Criminal Law in the European Union: The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling in Human Beings* 3-4 (2006) (“The difference between smuggling and trafficking is unclear in many countries and indeed such a difference may not exist in some.”).

⁸⁰ *Id.*

preventing victims from being fearful of being deported for breaking a country's immigration laws and prosecute cases of human trafficking through one European Union arm.⁸¹

vi. The United States

The United States receives up to 50,000 victims of human trafficking annually, mostly women and children.⁸² The U.S. is also an example of internal trafficking.⁸³ The media began to give special attention to IHT via the internet and international matchmaking organizations (IMOs) that appeared in the late 1990s. IMOs arrange international marriages, typically between wealthy men of affluent countries with desperate women from poor countries (e.g. Russia).⁸⁴ Such marriages, however, are often “used as a ruse to ensnare a woman in prostitution.”⁸⁵

⁸¹ *Id.* at 3 (For example, “in Greece, [regarding a 2003 immigration law] if criminal law requires the immediate expulsion of person irregularly on the territory then there is unlikely to be any chance of a successful prosecution of the perpetrators of trafficking as to those able to give evidence against them will already be outside the jurisdiction of the tribunal. One of the many difficulties in the field is the degree of complicity between the trafficker and the victim. Culpability of one or other depends on the distinction which is made between their respective responsibilities. The willingness of the authorities to grant protection to victims depends to a substantial degree on the extent to which those authorities accept that the victims are indeed such and not accomplices of the traffickers. Little is known about the comparative situation as regards this critical aspect of law in different Member States”).

⁸² Lehti, note 35 at 199.

⁸³ *Id.*

⁸⁴ Suzanne H. Jackson, *To Honor and Obey: Trafficking in “Mail-Order Brides”*, 70 *Geo. Wash. L. Rev.* 475, 476 (2002).

⁸⁵ *Id.*; see also *id.* at 480 (“Various U.S. embassies around the world report that matchmaking agencies conceal organized prostitution rings victimizing newly arrived ‘brides.’”).

Congress decided to combat human trafficking in the United States by passing the Trafficking Victims Protection Act (TVPA) in 2000.⁸⁶ The TVPA purposes, reach, and effectiveness will be discussed and analyzed in the following section.

III. The United States Attempts to Set an International Example: Trafficking Victims Protections Act of 2000 (TVPA)⁸⁷

a. Background

While the United Nations and international treaties had largely eradicated *conventional* forms of slavery by the 1990s, it was the United States that first leapt to curb human trafficking through legislation.⁸⁸ The U.S. passed the Trafficking Victims Protection Act (TVPA), focusing on the sexual exploitation and trafficking of women and children.⁸⁹ First, the United States wanted to improve and clean up domestic human trafficking issues. Second, the U.S. would use its domestic success to combat human trafficking globally.⁹⁰ The TVPA was passed two months before the General Assembly adopted its Trafficking Protocol, supplementing the United Nations Convention Against

⁸⁶ Victims of Trafficking Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

⁸⁷ The TVPA set the Stage for the United Nations Convention Against Transnational Organized Crime, or “Palermo Convention,” to be discussed at Part IV.

⁸⁸ Anne T. Gallagher, *The International Law of Human Trafficking* 22 (2010). *See also* Jackson, note 104 at 519 (It is important to note that “[e]ven before enactment of TVPA, federal criminal statutes contained many provisions applicable to trafficking-related practices. Such provisions include laws related to immigration fraud; enforcing the Thirteenth Amendment’s mandate against slavery and involuntary servitude; regulating interstate and foreign commerce; and penalizing substandard employment and working conditions.”). *See also* Lan Cao, *Illegal Traffic in Women: A Civil RICO Proposal*, 96 Yale L.J. 1297 (1987) (Before the TVPA, the Racketeer Influenced and Corrupt Organizations Act (RICO) was one of the few was “enable[ing] women in prostitution to fight the problems that the government” chose not to or couldn’t fight).

⁸⁹ *Id.*; *see* TVPA note 106.

⁹⁰ Elizabeth Pugliese, *Organ Trafficking and the TVPA: Why One Word Makes a Difference in International Enforcement Efforts*, 24 J. Contemp. Health L. & Pol’y 181, 193 (2007).

Transnational Organized Crime. The U.S. strove to minimize the differences in definition between the TVPA and the one being negotiated in the United Nations.⁹¹ The U.S. was serious about combating the newest form of slavery and made it a priority to work closely with and constructively assist international bodies in the drafting process.⁹²

The TVPA specifies penalties for traffickers, benefits for victims, and cross-border programs that both aim for domestic and international results.⁹³ Through U.S. programs, like United States Agency for International Development (USAID), financial assistance may be offered to combat human trafficking and levied when countries don't comply with the minimum standards set by the TVPA.⁹⁴ The TVPA stipulates long prison terms and heavy fines, depending on the violation and degree of trafficking.⁹⁵

The two main criticisms of the TVPA are: (1) the bureaucracy behind the special visas provided to victims of severe forms of human trafficking; and (2) the budget allotted by Congress to combat human trafficking under the TVPA.⁹⁶ The special T-visas

⁹¹ *Id.*

⁹² *Id.* 22 U.S.C.A. 7101 extended and defined the most severe forms of trafficking as: “(a) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (b) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”

⁹³ *Id.*; *see also* Kara, note 17 at 194.

⁹⁴ *Id.*; *see also* Tiefenbrun, note 31 at 325 (The TVPA “also includes a three-tiered ranking of nations based on their level of compliance with minimum standards that apply to all nations. Tier 1 includes those nations whose governments fully comply with such standards. Tier 2 is made up of those nations whose governments do not yet fully comply with the standards but are making significant efforts to bring themselves into compliance. Finally, those nations whose governments do not fully comply and are not making significant efforts to bring themselves into compliance comprise tier 3. Beginning in 2003, Tier 3 countries were subject to withholding of non-humanitarian and non-trade related assistance.”).

⁹⁵ *Id.*

⁹⁶ Kara, note 17 at 195-6.

attach special cooperation conditions with criminal investigators and often testifying during legal proceedings against a trafficker.⁹⁷ As of 2009, the budget for the TVPA was less than \$100 million annually, while the budget to fight the war on drugs was well over \$20 billion annually.⁹⁸

i. Prosecutions and Convictions

The TVPA attempts to eradicate human trafficking through the three P's approach: prevention of human trafficking, prosecution of traffickers, protection of victims.⁹⁹ The three P's approach is a "victim centered approach that has been able to strengthen and target the federal government's responses to the crime of human trafficking."¹⁰⁰ First, the TVPA was drafted to prevent and protect vulnerable persons from becoming victims of human trafficking.¹⁰¹ The raw economics of a crime can be a strong deterrent factor. Second, if prevention fails and a trafficker is later prosecuted for human trafficking, the victim has access to a support network after being freed from the bondage of slavery. The TVPA endeavors to fund education, training, shelters, reintegration programs, and most importantly U.S. visas.¹⁰²

It is difficult to measure the effectiveness of the TVPA, but because the Department of Justice documents and records its criminal case load, prosecution results

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Michelle Crawford Rickert, *Through the Looking Glass: Finding and Freeing Modern-Day Slaves at the State Level*, 4 Liberty U. L. Rev. 211, 221 (2010). Using the Anti-Trafficking war could be an effective way to further track and combat International Organized Crime Groups also involved in the global drug and arms distribution.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (Prevention comes via increased imprisonment penalties and forfeiture of a defendant's trafficking assets in some cases).

¹⁰² *Id.*

are the easiest of the three P's to quantify.¹⁰³ The U.S. government has documented a steady rise in investigations and indictments since the TVPA's passage.¹⁰⁴ More importantly, the total number of convictions has also increased.¹⁰⁵ The Department of State's 2010 Trafficking in Persons (TIP) report listed 4,166 successful trafficking prosecutions globally in 2009.¹⁰⁶

Under the TVPA, the Bureau of Justice Statistics of the Department of Justice quoted that the federally funded task forces opened 2,515 suspected incidents of human trafficking for investigation between January 2008 and June 2010.¹⁰⁷ Only 389 of those incidents were confirmed to be human trafficking by high data quality task forces.¹⁰⁸ The most recent data for arrests and adjudications in alleged human trafficking incidents (at both the federal and state level) is from 2007-2008 and provided by the U.S. Department of Justice.¹⁰⁹ At the federal level, 56 human trafficking suspects were arrested, 47 of whom were charged by the Department of Justice.¹¹⁰ At both the state and federal level there were only 61 convictions and *only* five of the convictions resulted in a jail sentence of more than 10 years.¹¹¹ For an internationally heinous crime, these numbers, representing a country like the United States, are alarmingly low. More prosecutions and

¹⁰³ Anthony M. Destefano, *The War on Human Trafficking: U.S. Policy Assessed* 128 (2007).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ The 2010 Trafficking in Persons Report, Department of State, <http://www.state.gov/documents/organization/142980.pdf>.

¹⁰⁷ Bureau of Justice Statistics, <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=40>.

¹⁰⁸ *Id.*

¹⁰⁹ U.S. Department of Justice, Bureau of Justice Statistics: Special Report on Characteristics of Suspected Human Trafficking Incidents, 2007-2008, http://files.meetup.com/1160329/Post_on_Site.pdf.

¹¹⁰ *Id.* at 10.

¹¹¹ *Id.*

funds, at the state and federal level, will likely decrease the problem.¹¹² However, the United States struggles to prosecute and combat human trafficking help support the strengthening of an international regime, convention, and possible court.

The TVPA increased trafficking penalties for involuntary servitude from ten to twenty years imprisonment.¹¹³ If the crime includes kidnapping or aggravated assault or sexual abuse, the penalty can be up to life imprisonment.¹¹⁴

Through increased arrests and convictions for trafficking in the U.S. and combining international humanitarian assistance with minimum standards and regulations, the “TVPA has not only made progress in the domestic fight against trafficking, but it has impacted attempts made by other nations to eradicate this transnational crime.”¹¹⁵ However, the fight against human trafficking requires nothing less than a fully international effort to eliminate the world’s newest form of slavery.¹¹⁶

IV. Existing International Treaty Regimes on IHT: The Palermo Protocol¹¹⁷

Slavery, prostitution, and human trafficking have existed for thousands of years, but it wasn’t until late 20th century intergovernmental talks that led to the establishment of a Convention on Transnational Organized Crime.¹¹⁸ The Convention directly confronted the trafficking phenomenon, “making it more central to international crime-

¹¹² Rickert, note 101 at 236.

¹¹³ 18 U.S.C 1581, 1583.

¹¹⁴ *Id.*

¹¹⁵ Tiefenbrun, note 31 at 326-7.

¹¹⁶ *Id.*

¹¹⁷ For clarification, when I use “Palermo Convention” that is a synonym for the “Convention Against Transnational Organized Crime.” When I use “Palermo Protocol” it is the same as the Supplement to the Convention, or the “Trafficking Protocol.”

¹¹⁸ Chantal Thomas, et al, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 Harv. J. L. & Gender 335, 356 (2006). See U.N. G.A. Res. 53/111 (Dec. 9, 1998).

fighting efforts of official actors.”¹¹⁹ International law, after all, is made, recognized and accepted only through the will of States.¹²⁰

The Protocol interestingly does not give prostitution any special status. It defines human trafficking in article 3 as: “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.”¹²¹ It is important to note that consent of the victim is irrelevant; it is never mentioned in the protocol.¹²²

a. The War on Human Trafficking and Sexual Exploitation

The early 20th century saw international treaties largely focused on finally eradicating the slave trade, the white slave trade, and some forms of prostitution.¹²³ In 2000, with the emergence of the Palermo Protocol,¹²⁴ the war on human trafficking began on an international scale never seen before. The context changed with the turn of the century “from combating slavery or prostitution to the international fight against organized crime.”¹²⁵ The change was necessary in large part because of the increase in global migration.¹²⁶ Organized crime syndicates were finally the primary objective of

¹¹⁹ *Id.*

¹²⁰ Gallagher, note 88 at 54.

¹²¹ UNGA Res. 55/25 (Nov. 15, 2000).

¹²² Lehti, note 35 at 173.

¹²³ *Id.* at 163.

¹²⁴ United Nations 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (A/RES/55/25).

¹²⁵ Lehti, note 35 at 163.

¹²⁶ Forced Labor and Human Trafficking Casebook of Court Decisions, International Labor Office 15 (2009).

international treaty and cooperation.¹²⁷ The Protocol also focused on enlarging the number of signatory states, squeezing the organized crime syndicates by forging and strengthening cross-border links.¹²⁸ The more signatory states, the fewer “safe havens” available for the mafia to freely run human trafficking rings.¹²⁹

i. The Failure of Domestic Jurisdictions Collectively and the Cross-border Phenomenon

The human trafficking dilemma is best addressed at the international level for a number of reasons. First, the discussion and raw numbers above regarding the United States difficulties in prosecuting and convicting traffickers show the challenges domestic jurisdictions generally face. Until the Palermo Convention, women involved in trafficking were rarely granted any protection largely due to the prostitution stigma.¹³⁰ When traffickers are caught and prosecuted they often go unpunished. Their cases fall apart due to lack of witnesses, poor witness protection, or victims fearing deportation.¹³¹ Globalization has led to an increase in contemporary trafficking and that increase involves the movement of women from poorer countries to wealthier ones.¹³² International jurisdiction and treaty regimen is meritorious and warranted for

¹²⁷ Lehti, note 35 at 172.

¹²⁸ Gallagher, note 88 at 74. For research of the financial opportunity and global market supply and demand for human trafficking *see* Meredith Flowe, *The International Market for Trafficking in Persons for the Purpose of Sexual Exploitation: Analyzing Current Treatment of Supply and Demand*, 35 N.C. J. Int'l L. & Com. Reg. 669 (2010).

¹²⁹ *Id.* Much inspiration for the Protocol also stemmed from ending the sexual exploitation and forced labor of children in sweat shops around the world; *see* Karene Jullien, *The Recent International Efforts to End Commercial Sexual Exploitation of Children*, 31 Denv. J. Int'l L. & Pol'y 579 (2003).

¹³⁰ Sasha L. Nel, *Victims of Human Trafficking: Are They Adequately Protected in the United States?* 5 Chi.-Kent J. Int'l & Comp. L. 3, 4 (2005).

¹³¹ *Id.*

¹³² Stephanie A. Limoncelli, *The Politics of Trafficking: The First International Movement to Combat the Sexual Exploitation of Women* 150 (2010).

international human trafficking because serious cross border crimes are occurring in every region across the globe.

Second, unlike the past where slave traders were largely individual companies or enterprises, “contemporary traffickers are thought to be organized into large underground crime syndicates.”¹³³ Such syndicates are often also involved in the arms and drug trafficking trade.¹³⁴ After much effort in the 1980s and 1990s, U.S. prosecutors leveled a severe blow to the traditional forms of organized crime (e.g. the infamous La Cosa Nostra); globally the situation is much different.¹³⁵ Other countries are unable to prosecute, let alone arrest, crime syndicate members. This is due to lack in laws, law enforcement capability, judicial experience and government corruption that often benefits from strong organized crime.¹³⁶ Accordingly, passage of the trafficking protocol (supplement to the Palermo Convention) provided the law and “committed the global community to address human trafficking in concrete, affirmative ways.”¹³⁷ Signatory nations were required to criminalize all human trafficking and harmonize their laws with the given protocol to formulate something of a uniform standard.¹³⁸ But how could states enforce a law without enforcement capabilities domestically? The U.N. carried out periodic assessments, but regional tribunals set up to support enforcement of the laws and conviction of human traffickers is required to combat the problem.

¹³³ *Id.* at 151.

¹³⁴ *Id.*

¹³⁵ Destefano, note 103 at 16.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

ii. Human Trafficking as a Crime Against Humanity (CAH)

The question of when and whether “trafficking *qua* trafficking” can be characterized as a CAH is quite complex.¹³⁹ If trafficking were labeled a CAH, then individual states would have the responsibility and obligation to prosecute, prevent, and suppress acts of trafficking.¹⁴⁰ This is because crimes against humanity are considered the “most serious crime of concern to the international community as a whole.”¹⁴¹

1. Arguments Supporting CAH

Thanks to the widespread international acceptance of the statutes for the International Criminal Tribunal for the Former Yugoslavia¹⁴² and Rome Statute of the International Criminal Court,¹⁴³ it may be pragmatic to reconceptualize human trafficking as a CAH.¹⁴⁴ Both statutes lend support to “create a uniform basis for the individual liability of traffickers reflecting the severity of the crime, applicable to all legal systems, at all times.”¹⁴⁵ Today, the practices associated with human trafficking are indisputably recognized under both international humanitarian and criminal law.¹⁴⁶

a. ICTY and ICC Statutes

The Rome Statute created an International Criminal Court and a defined number of crimes within its jurisdiction. Article 7 deals with crimes against humanity to which enslavement is included and defined as:

¹³⁹ Gallagher, note 88 at 214.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*; ICC Elements of Crimes, at Art. 5.

¹⁴² S/Res/827 (1993).

¹⁴³ A/CONF.183/9 (17 July 1998).

¹⁴⁴ *See* Cole, note 14 at 113.

¹⁴⁵ *Id.*

¹⁴⁶ Gallagher, note 88 at 216.

“Enslavement means the exercise of any or all of the powers attaching to the right of ownership over a person, and includes the exercise of such power *in the course of trafficking in persons, in particular women and children.*”¹⁴⁷

For the first time, an international statute was drafted to be much broader than only including slavery.¹⁴⁸ It clearly prohibits human trafficking. The first element of the crime of enslavement supports this:

“The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more person, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.”¹⁴⁹

A footnote¹⁵⁰ was added during the drafting process from NGO pressure to include trafficking within the new offense of enslavement. For example, Human Rights Watch argued: “By restricting the examples of enslavement to traditional forms of slavery involving commercial transaction, and other similar forms of deprivation of liberty, the text *fails to embrace slavery-like practices in the modern world.* If the Court’s jurisdiction over this crime is to be meaningful, it must encompass practices such as debt bondage and forced labor.”¹⁵¹

The characterization of the ICC Statute above lends me to believe that trafficking could fall under the jurisdiction of the ICC provided all of the acts were “part of a widespread and systematic attack directed against any civilian population, with

¹⁴⁷ A/CONF.183/9 (1998) (emphasis added).

¹⁴⁸ Force Labor Handbook, note 126 at 17-8.

¹⁴⁹ *Id.*; A/CONF.193/9.

¹⁵⁰ See ICC-ASP/1/3 at 117 (“It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labor or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.”).

¹⁵¹ Human Rights Watch Commentary to the 5th Preparatory Commission at hrw.org/campaigns/icc/docs/prepcom-006.htm.

knowledge of the attack.”¹⁵² A more flexible interpretation of CAH and including human trafficking has gained currency.¹⁵³ Certainly the legal framework surrounding trafficking would strengthen and more states would feel obliged to criminalize and prosecute human trafficking.¹⁵⁴ However, a discussion *infra* explains why the ICC would be an improper forum for human trafficking cases. The work of past ad hoc tribunals will prove more useful and influential. For example, past ICTY cases¹⁵⁵ could inspire a future ad hoc tribunal focused on human trafficking (*see* Part V, *infra*).

The ICTY lists ‘enslavement’ as one of the crimes against humanity that the tribunal has jurisdiction over.¹⁵⁶ Unfortunately, the statute does not define it. Instead, the tribunal relied on the Draft Code of Crimes against the Peace and Security of Mankind which had been adopted by the International Law Commission in 1996.¹⁵⁷ The Comment provides:

“Enslavement means establishing or maintaining over persons a status of slavery, servitude or forced labor contrary to well-established and widely recognized standards of international law, such as: the Slavery Convention (slavery); the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (slavery and servitude); the International Covenant on Civil and Political Rights (slavery and servitude); and ILO Convention No. 29, concerning Forced of Compulsory Labor (forced labor).”¹⁵⁸

¹⁵² ICC Statute at Art. 7(1); Gallagher, note 88 at 214-5.

¹⁵³ Gallagher, note 88 at 115.

¹⁵⁴ *Id.*

¹⁵⁵ The main ICTY case on enslavement was *Prosecutor v. Kunarac*, to be discussed below.

¹⁵⁶ Forced Labor Handbook, note 126 at 17.

¹⁵⁷ *Id.*

¹⁵⁸ 1996 Draft Code of Crimes Against the Peace and Security of Mankind with commentaries, U.N. Doc. A/51/10 at 48.

b. ICTY: *Prosecutor v. Kunarac*

For the first time, the ICTY closely analyzed the requirements of an enslavement charge in *Prosecutor v. Kunarac*; a case largely based on acts of sexual abuse.¹⁵⁹ In *Kunarac*, defendants “were charged with enslavement for acts that included keeping two girls in a house for several months and treating them as personal property. The girls were required to do all household chores and comply with all sexual demands.”¹⁶⁰ The women were threatened with murder if they tried to leave and were eventually sold to other soldiers.¹⁶¹

The ICTY held the above facts constituted enslavement and thus a crime against humanity.¹⁶² The Appeals Chamber affirmed.¹⁶³ Both chambers, albeit cautiously, noted that enslavement could have a broader meaning than slavery within customary international law.¹⁶⁴ Although a true legal test was never strictly applied, the Trial Chamber based its decision on indicia of enslavement:

¹⁵⁹ Case No. IT-96-23 (Feb. 22, 2001).

¹⁶⁰ *Id.*; Forced Labor Handbook, note 126 at 19.

¹⁶¹ *Id.*; see also Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* 229 (2009).

¹⁶² *Id.* (To compare to the sentences discussed regarding the TVPA, the lead defendant, Kunarac, was sentenced to 28 years imprisonment, and two lesser defendants to 20 and 12 years. The sentences were upheld.)

¹⁶³ Case No. IT-96-23-A (June 12, 2002) (Appeals Chamber) (The appeals chamber added its own emphasis stating that the traditional form of slavery has evolved to include various contemporary forms of slavery. “In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with ‘chattel slavery,’ but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in case of ‘chattel slavery’ but the difference is one of degree. The Appeals Chamber considers that, at the time relevant to the alleged crimes, these contemporary forms of slavery formed part of enslavement as a crime against humanity under customary international law.”).

¹⁶⁴ *Kunarac* para. 541; see *id.*; see Guilfoyle note 161 at 229.

“Elements of control and ownership: the restriction or control of an individual’s autonomy, freedom of choice or freedom of movement; the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example: the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim’s position of vulnerability; detention or captivity; psychological oppression or socio-economic conditions. Further indications of enslavement include: exploitation; the exaction of forced or compulsory labor or service, often within remuneration and often, though not necessarily, involving physical hardship, sex, prostitution and human trafficking.”¹⁶⁵

It seems that ownership (chattel principles) is only one of the indicia and today a broader range of crimes may be punished as enslavement when compared to older definitions and applications of anti-slavery treaties.¹⁶⁶ This is why the work of the ICTY will be so influential to a future ad hoc regional tribunal or international court that combats human trafficking.¹⁶⁷ *Kunarac* is significant because it proves “acceptance of an evolution of the concept of enslavement, away from highly prescribed notions of property and ownership and toward a more nuanced understanding, reflected in the definition of trafficking, of the many and varied ways in *which individuals can and do exercise complete and effective control over others.*”¹⁶⁸

2. Arguments Against CAH

a. Enslavement = Trafficking?

Some commentators resist any expansive reading of the ICC Statute.¹⁶⁹ Opponents argue that human trafficking was not added as an *additional* form of slavery within the context of the statute and that the statute actually “acknowledges that slavery is

¹⁶⁵ *Id.* at para. 542.

¹⁶⁶ Guilfoyle, note 161 at 230

¹⁶⁷ Gallagher, note 88 at 217

¹⁶⁸ *Id.* (emphasis added).

¹⁶⁹ Gallagher, note 88 at 216.

but one possible component part of the definition of trafficking.”¹⁷⁰ Yet, the statute never gives a detailed definition of trafficking. Instead, “it foresees that the (undefined) act of trafficking in persons can be a *vehicle* for the exercise of power attaching to the right of ownership of the kind required to constitute enslavement.”¹⁷¹

V. Proposal: A Regional Tribunal to Set the Stage for a Possible International Court to Combat Human Trafficking.

a. Regionally and Internationally

i. A National or Global Rapporteur Is Not Enough: Victims Cannot Be Protected Unless Traffickers Are Convicted and Sentenced

With the development of a comprehensive approach to battling human trafficking in mind, in depth knowledge of the scope of the problem and evaluation of government action to fill gaps in legislation and law enforcement is imperative.¹⁷² However, knowledge of empirical data, and government oversight and evaluation, is not enough. Anti-trafficking measures need to have a strong deterrent factor. Possible imprisonment for trafficking human beings against their will should serve as an adequate economic and physical deterrence.

This author agrees that establishing an independent national and global rapporteur within the framework of Article 32 of the United Nations Convention Against Transnational Organized Crime and the United Nations Protocol to Prevent, Suppress,

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Mohamed Y. Mattar, *Comparative Models of Reporting Mechanisms on the Status of Trafficking in Human Beings*, 41 Vand. J. Transnat'l L. 1355 (2008).

and Punish Trafficking in Persons, Especially Women and Children, *is necessary*.¹⁷³

However, if the critical question is what an adequate and effective mechanism might be, then a rapporteur only takes us half-way. The ICTY and ICC were developed for a reason: to act as forums to support rapporteurs and law enforcement when government promises did not materialize into action and few or no legal and administrative provisions were implemented. If the ultimate goal of monitoring and reporting on government policies is to end human trafficking, it is unlikely that complete eradication would ever come to fruition without the threat of being prosecuted and jailed. The millions of individuals trafficked annually have not decreased since the inception of the Palermo Protocol to suppress trafficking.¹⁷⁴

1. Palermo issues: In what court can victims of IHT seek relief? Who is effectively enforcing it? How well are they enforcing it?

The Protocol addresses both the punishment of traffickers and protection of victims, but its success will depend entirely on the ability of domestic jurisdictions to provide the protections called for in the Protocol's principles.¹⁷⁵ The definition and criminalization of human trafficking in the Palermo Protocol include both intraborder and cross-border acts (thus, a regional court would be perfect to prosecute those cases where

¹⁷³ *Id.*

¹⁷⁴ *See id.* at 1391 (“It has been argued that the State Department’s Trafficking in Persons Report, which monitors the severe status of trafficking in foreign countries, is having a significant impact on behavior of foreign governments.” However, this seems too unilateral. Some governments have also been responding to the international prohibitions on trafficking).

¹⁷⁵ Nel, note 130 at 6.

traffickers are caught while crossing borders).¹⁷⁶ However, the Protocol addresses many issues inadequately, most relevant here: how to *combat* the demand of cross border trafficking.¹⁷⁷

Once a rapporteur makes his report, what happens if a government does not successfully punish or stop human traffickers within its jurisdiction? The rapporteur's job is done-she reported and can only hope her efforts were not wasted time.¹⁷⁸ Governments should be induced into taking necessary measures to protect victims of trafficking. If a government is not induced, it is our international duty as citizens of a 21st century world to hail traffickers into court and prosecute them.

Although the Department of State has worked hard to make human trafficking a global problem (and focused on a global solution), the sheer numbers of human trafficking victims prove that attempts to label and strengthening weak domestic jurisdictions is not enough, or simply failing. Fluidity of cross border jurisdiction over human trafficking crimes is the best solution. The glaring issues described above must be used as a platform for reform and a new judicial institution focused on eradicating the human trafficking trade should be formed.

¹⁷⁶ Lehti, note 35 at 173.

¹⁷⁷ Mattar, note 172 at 1396-7.

¹⁷⁸ *Id.* (“The purpose of reporting on and monitoring trafficking in human beings is to promote the observance of internationally recognized standards of human rights, including the rights of victims of trafficking.”).

**ii. “Trial” run: Eastern European Court of Human Trafficking in
Sofia, Bulgaria¹⁷⁹**

The time is ripe to support a regional court in Bulgaria to prosecute and convict human traffickers. Human trafficking is a global humanitarian crisis as evidenced by the surge in national (TVPA), regional (European Union Conventions¹⁸⁰) and multilateral (Palermo Protocol) legal instruments and treaties.¹⁸¹ These instruments, however, are not enough and “offer limited protection for victims.”¹⁸² A regional or international court is needed because the human trafficking networks are international in nature and victims are routinely taken across borders.¹⁸³

Academics have proposed an alternative to sole reliance on treaty law—customary international law.¹⁸⁴ Norms, or universal practices, in state approaches may be found analyzing “diplomatic relations, legal agreements, domestic laws, and *opinio*

¹⁷⁹ A topic for another paper is the proposal of a Southeast Asian Court of Human Trafficking in Phnom Penh, Cambodia. Like Bulgaria, Cambodia is a region with numerous cases of cross-border human trafficking. *See e.g.* Schwartz, note 47 at 420-1 (“The recognition that trafficking is a problem affecting connecting countries in Southeast Asia has led to a consistent call for regional and sub-regional cooperative initiatives to combat the problem.”).

¹⁸⁰ *See* Heli Askola, *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (2007).

¹⁸¹ Schwartz, note 47 at 424.

¹⁸² *Id.* (“Treaty obligations are only applicable to state actors. Thus, although most trafficking is conducted by individuals or groups of individuals, a victim may not bring suit against her abductor or brothel manager in an international tribunal. Instead she (or her state) must bring a case against the state in which such activity occurred for breaching its treaty obligations.”). *See also* The Economic Community of West African States (ECOWAS) Community Court of Justice: Recognizing Positive Obligations of States to Protect Individuals from Slavery, the case of *Hadijatou Mani v. Republic of Niger* (Oct. 27, 2008) Force Labor Handbook (It is one of the only examples of a country held accountable to protect its citizens from slavery where the Plaintiff won a judgment of 10 million francs (CFA)).

¹⁸³ *Id.* at 425.

¹⁸⁴ *Id.*

juris.”¹⁸⁵ However, international courts often struggle defining what is customary international law, and while slavery is certainly a universally recognized crime, if we look at global state practices, “it is just as clear that trafficking is an accepted, or prevalent activity in most regions of the world.”¹⁸⁶

I propose to focus on what has already been drafted and ratified by 124 states: the Trafficking Protocol. One of the three main purposes of the Protocol was *to promote and facilitate cooperation among state parties.*¹⁸⁷ Some of the relevant obligations state parties have are to: criminalize the laundering of the proceeds of trafficking; provide other state parties with mutual legal assistance in investigation, prosecution, and judicial proceedings for trafficking offense; criminalize obstruction of justice; protect victims and witnesses; provide for channels of communication and police-to-police cooperation in relation to the investigation of trafficking offenses.¹⁸⁸ Most of these obligations require at the very least bilateral commitments, communication, and cooperation.

State parties are also obligated to cooperate with each other through information exchange aimed at identifying criminal traffickers, victims, and the funds used in the perpetration thereof.¹⁸⁹ Furthermore, “border controls, sanctions on commercial carriers, and measures relating to travel or identify documents are all seen as an important means of making it more difficult for traffickers to operate.”¹⁹⁰ Finally, the end of the Protocol

¹⁸⁵ *Id.* at 426.

¹⁸⁶ Schwartz, note 47 at 426.

¹⁸⁷ Doc. A/55/383 at Art. 2. (The other two were (1) to prevent and combat trafficking in persons and (2) to protect and assist victims of trafficking).

¹⁸⁸ A/RES/55/25 at Art. 27; *see also* Gallagher, note 88 at 80-1.

¹⁸⁹ A/55/383 at Art. 10(1).

¹⁹⁰ *Id.* at (10)(2); *see also* Gallagher, note 88 at 88.

requires parties to strengthen border controls to satisfactorily detect and prevent trafficking.¹⁹¹

The entire purpose of the Trafficking Protocol was to provide a dialogue for improved regional collaboration and cross-border cooperation.¹⁹² In fact, ratification of the Protocol *obliges* cooperation and the sharing of information.¹⁹³ Human trafficking is a transnational crime that deserves focused international attention. Yet, because of the cross-border nature of trafficking, multi-lateral enforcement at the regional level will produce the best results.

**a. Developing a Regional Center to Arraign and
Try Human Traffickers**

Human trafficking is a transnational crime and it is imperative to have both international and regional law enforcement cooperation to deter, combat and prosecute it.¹⁹⁴ Promotion of bi and multi-lateral regional treaties between police and intelligence agencies of different countries only takes reform halfway.¹⁹⁵ A regional court would sufficiently support law enforcement and should be adopted.

¹⁹¹ *Id.* at Art. 11(1).

¹⁹² *See* Trafficking Protocol Preamble and Art. 11. For an article that surveys many of the regional initiatives and conventions around the world *see* Ratna Kapur, *Post-Colonial Economies of Desire: Legal Representations of the Sexual Subaltern*, 78 *Denv. U. L. Rev.* 855, 870-79 (2001).

¹⁹³ Gallagher, note 88 at 89.

¹⁹⁴ Lehti, note 35 at 217.

¹⁹⁵ *Id.*; *See also* Kara, note 17 at 212 (“In most countries, conviction rates are insufficient due to a lack of law-enforcement resources for gathering evidence, poor multi-lateral cooperation between origin and destination countries, judicial corruption, and poor, unrealistic, and unfunded witness-protection programs”).

For an anti-trafficking strategy to work, bilateral and regional multi-lateral agreements between states are essential.¹⁹⁶ Moreover, treaties between regional neighbors should “create compelling political incentives for governments to fulfill their obligations where they might not otherwise under general international law.”¹⁹⁷ Accordingly, the Eastern European tribunal would adhere to the global treaty, the Palermo Protocol.

Typically, human trafficking originates in countries with weak economies and corrupt or unstable governments.¹⁹⁸ Targeting these locales should be the first step in developing regional initiatives.¹⁹⁹ Most of the global traffic of trafficking victims moves a short distance.²⁰⁰ In Europe, most of the trafficking takes place in the Balkan region and moves from its rural areas to industrialized cities in Western Europe (France, United Kingdom, Italy, The Netherlands), or alternatively from economically depressed regions to affluent ones.²⁰¹ Keeping cross-border traffic in mind, the Balkans, specifically those countries that border Bulgaria (Serbia, Macedonia, Greece, Romania, and Turkey), and poorer countries in Europe geographically close to Bulgaria, are where the bulk of prostitution related trafficking takes place.

1. Why Sofia, Bulgaria, is both an ideal and receptive location for a Regional Tribunal

There are four reasons that Bulgaria is an ideal location to institute a regional tribunal to combat human trafficking. First, geographically, Bulgaria is in the center of a

¹⁹⁶ Schwartz, note 47 at 427.

¹⁹⁷ *Id.*

¹⁹⁸ Enrique A. Maciel-Matos, *Beyond the Shackles and Chains of the Middle Passage: Human Trafficking Unveiled*, 12 SCHOLAR 327, 340 (2010).

¹⁹⁹ *Id.*

²⁰⁰ Lehti, note 35 at 214.

²⁰¹ *Id.*

critical region where cross-border trafficking occurs *and* Bulgaria is near other countries with internal and cross-border trafficking issues. Second, Bulgaria is a very peaceful country in the middle of the volatile Balkan region. Third, although Bulgaria has its share of corrupt politicians and ignorant or aloof legislators, it has made recent political and economic improvements after joining the European Union and NATO. Finally, Bulgaria has a highly educated and literate population. Over the last five years, it has made significant efforts to pass anti-trafficking legislation.

Due to Bulgaria's geographic location, it is classified as both a county of origin and a transit area for a great number of women trafficked in and out of the Balkans.²⁰² Reports of women from Moldova, Russia, Ukraine, Romania and Armenia are trafficked *through* Bulgaria *into* Macedonia, Greece, Turkey, Kosovo, Bosnia, and onto wealthy Western European countries.²⁰³ In the region surrounding Bulgaria, the following countries have *ratified* the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime: Bulgaria, Turkey, Serbia, Macedonia, Romania, Croatia, Bosnia and Herzegovina, Albania, Moldova, Ukraine, Belarus, the European Union.²⁰⁴ Accordingly, the legal instrument has been already drafted and should already be in use.

²⁰² Vujin, note 10 at 282.

²⁰³ *Id.*

²⁰⁴ The list of signatories and parties is *available at* <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html>. Greece was only a signatory; it has yet to ratify the treaty.

Bulgaria is also home to a large Roma population. The Roma are the most frequently reported criminal group in human trafficking.²⁰⁵ Given the size of the Roma communities in Bulgaria, the proposed accession of Bulgaria into the Schengen (visa free) Zone could increase the Roma and Bulgarian crime syndicate's mobility.²⁰⁶

Bulgaria is a very peaceful country in a volatile region. Unlike Bulgaria's neighbors to the southeast (Turkey and Greece) and the Western Balkans (Serbia, Kosovo, Croatia, and Bosnia), Bulgaria has not been engaged in war or ethnic strife since World War II. Until recently, trafficking in the Balkans was exceptionally violent.²⁰⁷ Now most traffickers trick women into thinking they are moving to Western Europe to become a waitress, nanny, or resort maid; in other words the women *leave* the country voluntarily.²⁰⁸

The 1990s rise in trafficking in the Western Balkans was the result of two factors: the collapse of the Soviet Union and subsequent economic and social turmoil in the region; the presence of thousands of international peacekeepers and other international and non-governmental organizations in and around conflict regions.²⁰⁹ War torn areas are the destination and transit zone of choice for traffickers due to lack of a legal and political system, porous borders with relaxed or non-existent visa requirements, and a high amount

²⁰⁵ Европол: Български групировки участват в трафика на хора в Европа (Europol: Bulgarian criminal groups involved in human trafficking in Europe) (May 4, 2011), available at <http://focus-news.net/?id=n1520527>.

²⁰⁶ *Id.*

²⁰⁷ Lehti, note 35 at 158.

²⁰⁸ *Id.*

²⁰⁹ H. Richard Friman & Simon Reich, eds., *Human Trafficking, Human Security, and the Balkans* 41 (2007). On the connection of brothels, human trafficking and peacekeepers see Sarah E. Mendelson, *Barracks and Brothels: Peacekeepers and Human Trafficking in the Balkans* (Feb. 2005).

of political and border guard corruption.²¹⁰ Other than economic turmoil and social stagnation, Bulgaria was relatively free of such conflicts.

United States actions are proof that Bulgaria is a peaceful country in an important region that needs more international oversight. The U.S. recently built and invested in a massive embassy in Sofia that spreads over an area of 10 acres; the size of the building is a total of 50,000 square meters.²¹¹ The building cost the U.S. \$70,000,000.²¹²

Although Bulgaria still needs to clean up corruption according to Transparency International, the country has made enough improvements to join the European Union and NATO.²¹³ Bulgaria is acutely aware of its trafficking problem on its borders and the recruitment for girls that takes place in country.²¹⁴ The EU closely monitored and helped Bulgaria clean up its borders before accession in 2007.²¹⁵ Accordingly, “an approach to prosecuting suspects of trafficking in persons on the EU level based on the concept of regional jurisdiction” seems to be the most appropriate, and Bulgaria would be a relatively easy going and amenable country to open a trafficking tribunal.²¹⁶

²¹⁰ *Id.*

²¹¹ *New US Embassy in Sofia Open for Business on Dec 20*, Novinite.com (Dec. 15, 2004), available at http://www.novinite.com/view_news.php?id=42633. (The building required “20,000 cubic meters of concrete and 2,267 metric tons of steel. . .”).

²¹² *Id.*

²¹³ See Transparency International: Corruptions Index for 2010, available at http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results (last visited May 10, 2011) (Bulgaria ranks 73rd in the world, tied with Panama and El Salvador. It is five spots ahead of Greece and Serbia, 14 spots ahead of Albania, and six spots behind Italy); Bulgaria joined NATO in 2004 and the EU in 2007.

²¹⁴ Vujin, note 10 at 282.

²¹⁵ *Id.* (Before joining the EU it was “very common that state officials [would] close their eyes and ignore . . . the issue of trafficking as a whole. That goes by the principle, if one does not see a problem, the problem does not exist.”).

²¹⁶ Conny Rijken, *Trafficking in Persons: Prosecuting from a European Perspective* 249 (2003).

Finally, Bulgaria's population, including women, is highly educated and has literacy rates at the same level or higher than first world countries as a result of socialism up to 1989.²¹⁷ However, there is a wage and profession gap between men and women which likely stifles dialogue on the topic of solving the trafficking problem.²¹⁸ The Bulgarian penal code²¹⁹ has improved over the years.²²⁰ The government recently formed the Bulgarian National Anti-Trafficking Commission.²²¹ Furthermore, in May 2003, the Bulgarian National Assembly passed the "Combating Trafficking in Human Beings Act," and began to curb this kind of crime.²²² However, implementation is the key to the legislation's success, which is why Bulgaria would be sympathetic to a tribunal using its laws and the laws of the Palermo Protocol to bring the traffickers along its borders to justice.

iii. Avoidance of ICC jurisdiction

Briefly, although trafficking in human beings should be considered a crime against humanity, the International Criminal Court is not the proper place to prosecute human traffickers. Undoubtedly, there is often overlap between the functions of courts,

²¹⁷ Julie Mertus, *Human Rights of Women in Central and Eastern Europe*, 6 Am. U. J. Gender & L. 369 (1998).

²¹⁸ Vujin, note 10 at 283.

²¹⁹ For an example of the older penal code with regard to women's rights *see* Mertus, note 220 at 423 ("The Criminal Code in Bulgaria requires a witness in order to prosecute a rape case. Prosecutions for spousal abuse are permitted only if 'the wife has been killed or permanently injured.'").

²²⁰ Vujin, note 10 at 283.

²²¹ Bulgarian National Anti-Trafficking Commission, *available at* <http://antitraffic.government.bg/m/1/cat/12/id/30/lang/en/> (last visited May 11, 2011).

²²² "Combating Trafficking in Human Beings Act," Promulgated, State Gazette, No. 46/20.05.2003.

and courts may wear different hats at different times.²²³ However, each court has a *dominant function* and must be able to do it well.²²⁴ The ICC dominant function is not to prosecute human traffickers, even if a trafficker's crime may qualify as a crime against humanity.²²⁵ Moreover, as drug trafficking crimes were rejected during drafting of the Rome Statute, human trafficking would also not fit within the Rome Statute.²²⁶ The ICC simply doesn't have the funds or resources to prosecute human trafficking cases.²²⁷ A regional tribunal that has the potential to lead to other regional tribunals or an International Court focused on trafficking is in the world's best interest.

VI. Conclusion

The need to create an international court to combat human trafficking is compelling. Domestic jurisdictions vary in their power to prevent human trafficking. This variance allows human traffickers to take advantage of the weak states lacking in enforcement and conviction capabilities. These weak domestic jurisdictions often have porous borders. Efforts and proposals to strengthen domestic systems with a special regard for human trafficking (notably in Central and Eastern Europe) have failed. This article has explained why there is a need to focus more regionally, including only a number of neighboring states that engage in cross-jurisdictional record sharing, in the battle against human trafficking. Before an International Court to Combat Human Trafficking is developed, a trial regional court, like an Eastern European Tribunal, should

²²³ Dinah Shelton, *Form, Function, and the Powers of International Courts*, 9 Chi. J. Int'l L. 537, 538 (2009).

²²⁴ *Id.*

²²⁵ *Id.* at 566-8.

²²⁶ Heather L. Kiefer, *Just Say No: The Case Against Expanding the International Criminal Court's Jurisdiction to Include Drug Trafficking*, 31 Loy. L.A. Int'l & Comp. L. Rev. 157 (2009).

²²⁷ *Id.*

be established. Attempts at global prevention must first concentrate at the source countries. Any new treaty, tribunal, or court should attempt to harmonize current legal anti-trafficking regimes, but also further provide for more plenary enforcement and conviction power using ad hoc international tribunal. These tribunals could then lead to an International Court to Combat Human Trafficking.