

A HOUSE DIVIDED: DIVERGENT APPROACHES TO SEX TRAFFICKING IN INTERNATIONAL LAW*

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I. INTRODUCTION

Few issues in the twenty-first century have captivated as much international attention as the horrific crime of sex trafficking. From documentaries, novels, news specials, and even Hollywood blockbusters, sex trafficking is front-page news.¹ Even with this increased visibility however, trafficking remains a serious problem for the international legal community. Sex trafficking in persons is the third highest grossing crime in the world.² Perpetrators continue their activities with impunity, while victims remain trapped in a system of slavery and sexual exploitation.³ Human rights organizations and journalists have worked over the past decade to push trafficking into the public eye,⁴ but now that the spotlight has been turned to the international legal community, it is left frozen.

One of the primary obstacles facing legal intervention is a fundamental divide between different conceptualizations of sex trafficking. In an attempt to confront sex trafficking, organizations try to classify the issue neatly within the international justice spectrum. This comment will determine that sex trafficking has been roughly divided between two separate international legal frameworks: transnational crime and human rights abuse. This problem is particularly relevant to lawyers attempting to assist in the fight against sex trafficking.⁵ Lawyers often

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1. For examples of sex trafficking in documentaries, see *WHORES' GLORY* (Lotus-Film GmbH, Quintefilm 2011) (featuring the daily lives of sex workers in Thailand, Bangladesh, and Mexico). For examples in novels, see Patricia McCormick, *SOLD*, (Hyperion, 2006) (portraying a fictional young girl from Nepal traded into sexual slavery). For examples in news specials, see *Freedom Project* (CNN 2014) (documenting modern day slavery) and *Sex Slaves* (MSNBC 2014) (chronicling the effects of human trafficking). For examples in Hollywood movies, see *TAKEN* (20th Century Fox 2008) (showing human trafficking in Paris and the international sex slave trade).

2. Pino Arlacchi (Under-Secretary-General, U.N.), Opening Statement International Seminar on Trafficking in Human Beings (Nov. 28, 2000) http://www.unodc.org/unodc/en/about-unodc/speeches/speech_2000-11-28_1.html.

3. *Id.*

4. *Id.*

5. See generally Marieke van Doorninck, *Human Trafficking: A High Profit, Low-Risk*

straddle the line between victim-advocacy and criminal prosecution, balancing interests and concerns on both sides of this delicate issue. The way legal professionals confront sex trafficking and attempt to aid victims will largely depend on how they frame trafficking between these two frameworks.⁶

Treating sex trafficking as only one type of issue without addressing its many facets leads to a limited form of justice. Such interventions neither adequately punish perpetrators nor fully address the needs of victims, and often fail on both fronts. This comment will argue against the stratification of sex trafficking between international justice frameworks. Furthermore, it will contend from a pragmatic view that issue stratification of sex trafficking is not an effective use of international legal resources, and in fact causes unnecessary divides between international, state, and nongovernmental actors.

This comment will first define international sex trafficking, specifically by discussing the complicated spectrum between sex trafficking and prostitution. Next, it will break down the current frameworks under which sex trafficking has been grouped, discussing the advantages and drawbacks of each framework. By breaking down these frameworks into their primary mechanisms and examining advantages and drawbacks, this comment will clarify the often-muddled line between transnational crime and human rights based mechanisms. Subsequently, it will outline the pragmatic problems that arise from the bifurcation of this issue. Finally, it will propose a new, hybridized model for conceptualizing international sex trafficking that promotes cross-disciplinary cooperation. This new model will have a more holistic view on the culpability of traffickers, as well as advocate for a broader focus on victim advocacy and community outreach.

II. WHAT IS INTERNATIONAL SEX TRAFFICKING?

Even as sex trafficking becomes a more prominent issue on the international stage,⁷ it is still largely unclear what international sex trafficking actually encompasses. The international legal community has attempted to define trafficking in many ways.⁸ Sex trafficking falls under the umbrella of human trafficking, which is, in essence, modern day slavery.⁹ Contrary to popular belief, modern interpretations of human trafficking do not require that persons be moved across national borders.¹⁰ Accordingly, human trafficking can occur even without any physical transportation of the victim, as long as the individual is forced to act

Crime, DIGITAL DEVELOP. DEBATES (Sept. 2011), <http://www.digital-development-debates.org/issue-05-securing-peace—crime—human-trafficking-a-high-profit-low-risk-crime.html>.

6. *Id.*

7. *See* U.S. DEP'T OF STATE, INTERNATIONAL PROGRAMS TO COMBAT HUMAN TRAFFICKING (Jun. 2014) (noting the preeminence of anti-trafficking measures in the international community).

8. *See generally* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT, 29 (2014) [hereinafter TIP REPORT].

9. *See generally* *What is Human Trafficking?*, UNODC, <https://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html> (last visited Nov. 22, 2014).

10. TIP REPORT, *supra* note 8, at 29.

against their will.¹¹ Estimates of how many people are subject to this form of slavery vary.¹² According to the International Labour Organization, around 20.9 million men, women, and children are currently victims of forced labor, encompassing various forms of human trafficking.¹³

One of the most neutral definitions of human trafficking (i.e. not strictly defined in terms of transnational crime or human rights abuse) comes from the U.S. State Department's annual Trafficking in Persons Report (TIP Report).¹⁴ The TIPs Report is arguably the most definitive document on human trafficking globally.¹⁵ It defines human trafficking broadly as "the act of recruiting, harboring, transporting, providing, or obtaining a person for compelled labor or commercial sex acts through the use of force, fraud, or coercion."¹⁶

The TIP Report contains language that implies a criminal law slant towards human trafficking.¹⁷ The words "recruitment," "harboring," "fraud," and "coercion" indicate a criminal justice perspective.¹⁸ However, as the language is not explicitly geared towards a transnational criminal or human rights based conceptualization of sex trafficking, this definition provides a base point for evaluating the issue.

The TIP Report defines sex trafficking as when a "commercial sex act is induced by force, fraud, or coercion, or [when] the person induced to perform such an act has not attained 18 years of age."¹⁹ While of course men can be victims of international sex trafficking, the overwhelming majority are women and young girls.²⁰ Like human trafficking in general, estimates on the number of victims of sex trafficking vary greatly.²¹ Some calculate the number of victims at 4.5 million,²²

11. *Id.*

12. See *Global Sex Trafficking Fact Sheet*, EQUALITY NOW, <http://www.equalitynow.org/node/1010> (last visited Nov. 22, 2014) (listing 20.9 million adults and children being held in sexual servitude, forced labor and bonded labor).

13. INT'L LABOUR ORG. [ILO], *New ILO Global Estimate of Forced Labor: 20.9 Million Victims* (June 1, 2012), http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_182109/lang-en/index.htm.

14. TIP REPORT, *supra* note 8, at 29.

15. See Annie Kelly, *US Human Trafficking Report Under Fire as Cuba and Malaysia are Upgraded*, THE GUARDIAN (July 27, 2015), <http://www.theguardian.com/global-development/2015/jul/27/us-human-trafficking-in-persons-report-under-fire-cuba-malaysia-upgraded> ("The report . . . is the principal diplomatic tool with which the US engages foreign governments on human trafficking."). Note, however, that the 2015 Report has been criticized for leniency in several regions rife with human trafficking. See, e.g., *id.*

16. TIP REPORT, *supra* note 8, at 29.

17. *Id.*

18. *Id.*

19. *Id.* at 9.

20. An estimated 98% of sex trafficking victims are women or young girls. Patrick Belser, Michaëlle de Cock, & Farhad Mehran, *Minimum Estimate of Forced Labour in the World*, INT'L LABOUR ORG., 6 (Apr. 2005), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_081913.pdf.

21. *Id.* at 34–37.

while others place the figure far higher, such as the United Nations (U.N.) Women Director and former president of Chile, Michelle Bachelet, who publically stated that “80% of all trafficking victims are used and abused as sexual slaves.”²³

Victims of sex trafficking face not only horrific abuse by both their traffickers and “clients,”²⁴ but are often removed from their home countries, relocated to nations where they likely do not speak the language, and have no contacts.²⁵ Victims are isolated, either psychologically or physically from the outside world, making it impractical for them to reach out for aid.²⁶ Even given the uneven estimates regarding the scope of this problem, it is clear that sex trafficking is a serious form of abuse that poses a significant challenge to the international legal community.²⁷

One of the primary reasons that sex trafficking, as opposed to other forms of human trafficking, is such a complex issue under the current international legal system is the controversial nature of the issue itself: the sale of sex for money.²⁸ To this point, it is important to differentiate sex trafficking from prostitution generally. Prostitution, defined broadly as engaging in sexual acts for some form of payment, is an unsettled legal issue across the global community.²⁹ Sex work occupies a gray area in international jurisprudence, given the highly differential treatment of this issue across and even within nations.³⁰ Some countries have legalized prostitution wholesale,³¹ while others allow prostitution in a limited scope,³² and many outlaw the practice completely.³³ There is no clear determining factor as to why countries allow prostitution, as laws differ even across countries with similar religious or cultural backgrounds.³⁴ A few countries have had success in limiting sex trafficking using the “Nordic Model.”³⁵ This model decriminalizes the act of selling sex, while

22. INT'L LABOUR ORG., *supra* note 13.

23. EQUALITY NOW, *Global Sex Trafficking Fact Sheet*, *supra* note 12.

24. *Id.*

25. *Id.*

26. *Id.*

27. *See id.* (describing sex trafficking as the fastest growing criminal enterprise in the world).

28. *See generally Prostitution: Is There Anything Wrong with Selling Sex?*, BBC, <http://www.bbc.co.uk/guides/ztkpcdm> (last visited Nov. 22, 2014).

29. *See id.* (addressing the unsettled nature of prostitution globally, as well as the many arguments for and against legalization and/or limited decriminalization).

30. *See 100 Countries and Their Prostitution Policies*, PROCON.ORG (Jul. 23, 2013), <http://prostitution.procon.org/view.resource.php?resourceID=000772> (providing a broad overview of the legal status of prostitution globally).

31. These countries include Portugal, Argentina, Belgium, etc. *Id.*

32. Take for example, the United States, which has very strict anti-prostitution laws throughout the majority of states, and yet allows prostitution in only certain counties of Nevada. *Id.*

33. These countries include Afghanistan, Cambodia, South Korea, the Philippines, etc. *Id.*

34. *See generally id.*

35. *See What is the 'Nordic Model?'*, EQUALITY NOW, http://www.equalitynow.org/sites/default/files/Nordic_Model_EN.pdf (last visited Nov. 22, 2014) (outlining the Nordic Model and

criminalizing more strictly the purchasing of sexual acts.³⁶ While the popularity of this method has grown, it has yet to be adopted globally.³⁷ The difficulty in addressing prostitution as a legal matter goes to whether those engaging in sex work actually act voluntarily, or whether, even in situations of “consent,” these individuals are in fact victims of a larger exploitative system.³⁸ This system of abuse preys on the normalization of sexual violence, largely by men towards women.³⁹ This issue is much debated,⁴⁰ and this comment will not attempt to provide an answer to the true voluntary nature of prostitution generally.

For purposes of this evaluation, however, it is important to make clear that victims of sex trafficking are unwilling, non-consenting participants in sex work.⁴¹ Even if they do not physically or verbally fight against their captors or clients, and even if they never attempt to escape, these individuals should not be conceptualized as “sex workers” to indicate that they somehow consented to their slavery.⁴² Whether through physical, verbal, or emotional abuse,⁴³ victims of sex trafficking have been unwillingly forced into a system of oppression, different from any consensual sexual activity.⁴⁴

II. SITUATING SEX TRAFFICKING WITHIN THE INTERNATIONAL LEGAL FRAMEWORK

International efforts to confront sex trafficking do not always explicitly state the framework under which they orient their intervention methods.⁴⁵ In fact, based on the existing literature, few organizations formally recognize a divide in how

highlighting the success and future hopes for this system of dealing with sex trafficking and prostitution).

36. *Id.*

37. *Id.*

38. *See, e.g.*, BBC, *surpa* note 28; Megan Murphey, *Prostitution is More than A Labor Rights Issue*, AL JAZEERA (Aug. 7, 2014), <http://www.aljazeera.com/indepth/opinion/2014/08/prostitution-labour-rights-201485121735809892.html>.

39. *E.g., id.*

40. *See generally* BBC, *surpa* note 28; Murphey, *surpa* note 38; Melissa Farley, *Prostitution is Sexual Violence*, PSYCHIATRIC TIMES (Oct. 1, 2004), <http://www.psychiatrictimes.com/sexual-offenses/prostitution-sexual-violence/>; Dorchen A. Leidholdt, *Demand and the Debate*, Speech at The Forces of Demand in Global Sex Trafficking Conference, Chicago (2003) (*full transcript available at* <http://www.prostitutionresearch.com/Leidholdt%20Demand%20and%20the%20Debate.pdf>).

41. *See generally* Melissa Ditmore, *Sex Work, Trafficking: Understanding the Difference*, RH REALITY CHECK (May 6, 2008), <http://rhrealitycheck.org/article/2008/05/06/sex-work-trafficking-understanding-difference/>; Ruth Jacobs, *Knowing the Difference Between Sex-Trafficking and Sex-Work – a Survivor Speaks*, WOMEN NEWS NETWORK (Jan. 16, 2014), <http://womennewsnetwork.net/?p=29005>.

42. *See, e.g.*, Ditmore, *surpa* note 41; Jacobs, *surpa* note 41.

43. This abuse can lead to a phenomenon known as “trauma bonding” between a victim and his/her abuser. TIP REPORT, *surpa* note 8, at 16.

44. *See generally* Ditmore, *surpa* note 41; Jacobs, *surpa* note 41.

45. *See, e.g.*, Trafficking Victims Protection Act 22 U.S.C. §§ 7101-13 (2000), which includes language on both criminal prosecutions and victim-advocacy. [hereinafter TVPA].

human trafficking is currently framed in the international community.⁴⁶ Certainly, many conventions and declarations include language dealing with both criminal justice and victim advocacy.⁴⁷ However, upon closer inspection of the existing international materials, two major models become evident: transnational crime and human rights.⁴⁸ Each of these models has distinct advantages and drawbacks,⁴⁹ which will be further examined in greater detail. While there is a large body of relevant conventions, laws, and declarations surrounding the issue of human trafficking, this comment has attempted to identify the most relevant of these mechanisms to the issue of sex trafficking, as well as address those that hold the greatest importance in international law.

A. *Transnational Crime*

1. Mechanisms

One way the international legal community conceptualizes sex trafficking is as a transnational crime.⁵⁰ Transnational crime intervention methods fall under the larger umbrella of international criminal justice.⁵¹ Transnational criminal justice deals with issues of migration, smuggling, and a myriad of other crimes that affect multiple nations or disrupt international norms.⁵² This comment identifies the hallmarks of a transnational criminal approach to sex trafficking as including: a focus on identification and punishment of perpetrators, an outline for criminal punishment for these perpetrators, engagement with regional or international law enforcement agencies, and/or a definition of trafficking in traditional criminal justice language.

Many international institutions have placed trafficking within the transnational criminal sphere.⁵³ The document most specifically dealing with human trafficking from the U.N. is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking in Persons Protocol).⁵⁴ This document defines “trafficking in persons” as:

46. One notable exception is Marieke van Doorninck’s piece, *Human Trafficking: A High Profit, Low-Risk Crime*, where she highlights the contrast between criminal law and human rights based approaches to sex trafficking interventions. See van Doorninck, *supra* note 5.

47. For example, the TVPA includes broad language on both criminal prosecutions and victim-advocacy. TVPA, *supra* note 45.

48. See van Doorninck, *supra* note 5 (discussing the development of two competing approaches: trafficking as a transnational crime and trafficking as a human rights issue).

49. See *infra* Sections A and B for a discussion of these advantages and drawbacks.

50. See, e.g., EQUALITY NOW, *Global Sex Trafficking Fact Sheet*, *supra* note 12.

51. See, e.g., Neil Boister, ‘*Transnational Criminal Law*’, 14 EUR. J. INT’L L. 953, 953–56 (2003) (broadly defining transnational crime and transnational criminal law).

52. *Id.* at 961–63.

53. See, e.g., Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Annex 2, Nov. 15, 2000, 2237 U.N.T.S. 343 [hereinafter Trafficking Protocol].

54. *Id.*

[T]he recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power 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.⁵⁵

The Trafficking in Persons Protocol supplements the United Nations Convention against Transnational Organized Crime (UNTOC), indicating a clear transnational criminal approach.⁵⁶ Furthermore, the Trafficking in Persons Protocol proscribes directives for the international criminalization of trafficking,⁵⁷ border control measures,⁵⁸ and document controls,⁵⁹ all indicating a criminal justice model. This definition provides a broad perspective on trafficking generally, but outlines it as a criminal activity without specific focus on victims.⁶⁰

The Trafficking in Persons Protocol contains several articles focusing on victims, specifically Article 6 (promoting assistance and protection of trafficking in persons),⁶¹ Article 8 (allowing repatriation of trafficking victims),⁶² and Article 9 (advocating for the prevention of trafficking in persons).⁶³ However, nowhere in these Articles is there a definition of who constitutes an actual victim of trafficking.⁶⁴ Nor do these Articles provide specific suggestions on how countries should implement victim-centric programs, aside from recommending general goals such as “medical, psychological and material assistance”⁶⁵ or “employment, education and training opportunities.”⁶⁶ The overall impression of the Trafficking in Persons Protocol is one of a transnational criminal approach to confronting human trafficking.⁶⁷

Within the transnational criminal framework, sex trafficking is often mixed with the issue of migrant smuggling.⁶⁸ Like the Trafficking in Persons Protocol, the

55. *Id.* at art. 3(a).

56. *Id.*

57. *Id.* at art. 5.

58. *Id.* at art. 11.

59. Trafficking Protocol, *supra* note 53, at art. 12–13.

60. *Id.* at art. 3(a), 5, 11–13.

61. *Id.* at art. 6.

62. *Id.* at art. 8.

63. *Id.* at art. 9.

64. *See id.* at art. 3(a) (defining trafficking in persons generally).

65. Trafficking Protocol, *supra* note 53, at art. 6(3)(c).

66. *Id.* at art. 6(3)(d).

67. *See id.* at art. 1(1) (stating that the Trafficking in Persons Protocol supplements the UNTOC and the two should be interpreted together); *id.* at art. 2 (stating the purpose of the protocol was to prevent and combat trafficking in persons); *id.* at art. 4 (stating that the protocol shall first apply to the prevention, investigation, and prosecution of offences).

68. *See generally* THE HUMAN SMUGGLING AND TRAFFICKING CENTER, FACT SHEET:

U.N. Protocol against the Smuggling of Migrants of Land, Sea and Air (Migrant Smuggling Protocol) is also an addition to the larger UNTOC.⁶⁹ Migrant smuggling is defined under the Migrant Smuggling Protocol as “. . . the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a state party of which the person is not a national.”⁷⁰ Viewed from a purely transnational criminal perspective, migrant smuggling shares many similarities with human trafficking.⁷¹ In both instances, people are illegally transported across national borders by means of secretive, often exploitative, channels.⁷² However, smuggling is generally considered a crime against the government, as it is a violation of immigration laws, which normally ends when the person arrives at the final destination.⁷³ In contrast, human trafficking is a crime against the individual, which involves exploitation that can continue after arrival at the final destination.⁷⁴

Despite their different legal definitions, it is often difficult to distinguish between migrant smuggling and trafficking in persons.⁷⁵ For example, a person can start as a smuggled migrant—with the intent to move illegally—but end up a victim of exploitation commonly associated with trafficking after she arrives at her destination.⁷⁶ Furthermore, the legal definition of trafficking itself is complex as it involves the intention to exploit, which is difficult to verify in relation to merely smuggled migrants.⁷⁷

Regional actors have also frequently placed human trafficking in a

DISTINCTIONS BETWEEN HUMAN SMUGGLING AND HUMAN TRAFFICKING (hereinafter FACT SHEET) (Apr. 2006), <http://www.state.gov/documents/organization/90541.pdf> (providing basic principles of both human smuggling and human trafficking in order to explain the differences and overlap between the two); *see also* *People Smuggling*, INTERPOL <http://www.interpol.int/Crime-areas/Trafficking-in-human-beings/People-smuggling> (last visited Feb. 22, 2015) (“[i]n general, the individuals who pay a smuggler in order to gain illegal entry to a country do so voluntarily whereas the victims of human trafficking are often duped or forced into entering another county.”).

69. Protocol against the Smuggling of Migrants of Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime, Annex 3, Nov. 15, 2000, 2237 U.N.T.S. 319.

70. *Id.* at art. 3(a).

71. *See generally* UNODC *on Human Trafficking and Migrant Smuggling*, UNODC <https://www.unodc.org/unodc/human-trafficking/> (last visited Jan 3, 2015); *see also* FACT SHEET, *supra* note 68, at 1 (stating that the underlying issues that give rise to human trafficking and migrant smuggling are similar).

72. *See id.* (defining human trafficking and migrant smuggling).

73. *See* FACT SHEET, *supra* note 68, at 2 (outlining the Immigration and Nationalization Act, which provides for criminal penalties).

74. *See id.* at 3 (“[h]uman trafficking does not require the crossing of an international border—it does not even require the transportation of victims from one locale to another.”).

75. *See id.* at 1 (discussing the complicated relationship between migrant smuggling and human trafficking).

76. *Id.* at 3.

77. *See id.* at 4 (providing a useful chart on the difference between smuggling and trafficking, specifically dealing with the elements of coercion and force).

transnational criminal framework in their legislative declarations and actions. Throughout Asia, for example, the transnational criminal model is a primary approach in confronting human trafficking.⁷⁸ In 2002, members of the South Asian Association for Regional Cooperation signed the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, which outlined a criminal justice model for identifying and prosecuting sex traffickers.⁷⁹ Additionally, the Association of Southeast Asian Nations (ASEAN) has passed a series of recommendations aimed at confronting sex trafficking from a criminal justice framework: the ASEAN Practitioner Guidelines on Effective Criminal Justice Responses to Trafficking in Persons.⁸⁰ The Guidelines outline, in detail, trial and prosecution standards that lawyers should implement in trafficking cases.⁸¹ The only reference to victims in this document is as witnesses for prosecutions.⁸²

Domestic legislation in the United States has likewise emphasized a transnational crime framework.⁸³ The Trafficking Victim Protection Act of 2000 (TVPA) is the most comprehensive legislation on trafficking in the United States.⁸⁴ While the TVPA puts a greater emphasis on victim-advocacy than many other transnational crime doctrines,⁸⁵ the act adopts a similar definition of trafficking as proscribed in the U.N. Protocol:

[A] commercial sex act [that] 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 the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through . . . the subjection to involuntary servitude, peonage, debt bondage, or slavery.⁸⁶

The TVPA takes a particularly hardline stance against sex trafficking, specifically stating that “[i]f death results from a violation of this section or if the violation includes . . . aggravated sexual abuse or the attempt to commit aggravated sexual abuse, . . . the defendant shall be fined under this title or imprisoned for any

78. See South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, Jan. 5, 2002, <http://www.saarc-sec.org/userfiles/conv-trafficking.pdf> (outlining the offenses, aggravating circumstances, penalties, and preventative measures for the crime of human trafficking).

79. *Id.*

80. Association of Southeast Asian Nations, *Criminal Justice Responses to Trafficking in Persons: ASEAN Practitioner Guidelines* (June 25–27, 2007), http://jica-cb-workshop.weebly.com/uploads/8/0/7/2/8072630/criminal_justice_responses_to_trafficking_in_persons.pdf [hereinafter *ASEAN Practitioner Guidelines*].

81. *Id.* at Part 1(F).

82. *Id.* at Part 1(C), (D), (E).

83. See TVPA, *supra* note 45, at § 102(b)(24) (emphasizing that trafficking is deterred by prescribing appropriate punishment and giving priority to the prosecution of trafficking offenses).

84. See *id.* at § 102(b)(14) (finding that up until this legislation, no comprehensive legislation existed to adequately deter human trafficking).

85. See *id.* at §§ 1201–09 (emphasizing a stronger commitment to victim services such as legal assistance, shelter services, and transitional housing assistance).

86. *Id.* at § 103 8(a), (b).

term of years or life, or both.”⁸⁷

The TVPA has become a primary mechanism for police interventions and federal prosecutions of sex trafficking.⁸⁸ In 2007, under TVPA proscription, “the U.S. Department of Justice (DOJ) created a specialized unit within the Criminal Section of the Justice Department’s Civil Rights Division dedicated to the prosecution of human trafficking offenses.”⁸⁹ Furthermore, “the DOJ received a 50% increase in the funding dedicated to prosecution of federal human trafficking cases,⁹⁰ bringing the Human Trafficking Prosecutions Unit budget to \$5.3 million.”⁹¹ The TVPA has also spurred a movement of state legislation to confront human trafficking.⁹² Since the passing of the TVPA, forty-nine states have passed state legislation criminalizing human trafficking, and many of these states have created more comprehensive mechanisms such as police training and data collection to improve local response to these crimes.⁹³

The TVPA also contains provisions that encourage other nations to put greater focus on confronting trafficking through a transnational criminal approach.⁹⁴ Section 110 indicates, “[i]t is the policy of the United States not to provide non-humanitarian, nontrade-related foreign assistance to any government that . . . does not comply with minimum standards for the elimination of trafficking.”⁹⁵ The TVPA provides a strong example of how domestic legislatures and regional actors have categorized human trafficking under a transnational criminal model.

Outside international and regional conventions and legislation, the transnational criminal model is also the primary mechanism in international courts and tribunals.⁹⁶ International courts deal primarily with crimes that affect the

87. *Id.* at § 112(a)(1)(B).

88. See William Adams, Colleen Owens, & Kevonne Small, *Effects of Federal Legislation on the Commercial Sexual Exploitation of Children*, U.S. DEP’T OF JUST. OFF. OF JUST. PROGRAMS 1 (July 2010), <https://www.ncjrs.gov/pdffiles1/ojdp/228631.pdf> (“TVPA . . . is considered to be the seminal piece of U.S. legislation in the fight against CSEC [commercial sexual exploitation of children].”); see also U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., REPORT ON THE TENTH ANNIVERSARY OF THE TRAFFICKING VICTIMS PROTECTION ACT 3 (Oct. 29, 2010), http://www.justice.gov/crt/about/crm/trafficking_newsletter/tvpaanniversaryreport.pdf (noting that the most notable success of the TVPA is the evolution of strong partnerships between law enforcement and government agencies in prosecuting offenders).

89. Amy Farrell et al., *Identifying Challenges to Improve the Investigation and Prosecution of State and Local Human Trafficking Cases 2* (Apr. 2012), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412593-Identifying-Challenges-to-Improve-the-Investigation-and-Prosecution-of-State-and-Local-Human-Trafficking-Cases.PDF>.

90. *Id.*

91. *Id.*

92. *Id.* at 4.

93. *Id.*

94. See TVPA, *supra* note 45, at §102(b)(24) (encouraging other nations to recognize that trafficking is a serious offense).

95. *Id.* at § 110(a)(1).

96. See generally Neil Boister, *International Tribunals for Transnational Crimes: Towards*

international community, either by their effect on peace and security or by their gravity.⁹⁷ The preeminent international court, the International Criminal Court (ICC), created by the Rome Statute, refers to sex trafficking both as a war crime and as a crime against humanity.⁹⁸

Other international courts, such as the Inter-American Court of Human Rights,⁹⁹ European Court of Human Rights,¹⁰⁰ the International Criminal Tribunal for the Former Yugoslavia,¹⁰¹ and the African Commission on Human and Peoples' Rights,¹⁰² have heard cases related to trafficking. These courts take a criminal justice approach to the issue of sex trafficking by prosecuting perpetrators, engaging victims as witnesses, and proscribing criminal penalties.¹⁰³

Currently, crimes brought before most international criminal tribunals must

a Transnational Criminal Court?, 23 CRIM. L. F. 295 (2012) (arguing that the international community should extend its transnational criminal model and establish a court for transnational crimes).

97. See generally *UN Documentation: International Law*, U.N. DAG HAMMARSKJÖLD LIBR. RES. GUIDES, <http://research.un.org/en/docs/law/courts> (last visited Jan. 5, 2015) (detailing different international tribunals and crimes within their jurisdiction).

98. Article 8(2) of the Rome Statute criminalizes sex trafficking as a war crime under (b)(xxii), which includes “[c]ommitting rape, sexual slavery, enforced prostitution, forced pregnancy . . . enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions,” and (e)(vi), which reiterates these crimes in non-international conflicts. Rome Statute of the International Criminal Court art. 8(2), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. The statute also outlines sex trafficking as a crime against humanity, outlawing “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.” *Id.* at art. 7(1)(g). Note that while the language “trafficking in persons” is not used in the Rome Statute, the enumerated crimes have substantial similarities to other definitions of sex trafficking. Compare *id.* at arts. 7(1)(g), 8(2), with FACT SHEET, *supra* note 68, at 3 (defining trafficking in persons).

99. See, e.g., Velásquez-Rodríguez v. Honduras, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988); Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 17, 2003).

100. See, e.g., Rantsev v. Cyprus, 2010-I Eur. Ct. H.R.; Siliadin v. France, 2005-II Eur. Ct. H.R. 545 (alleging that France’s criminal law provisions did not provide plaintiff with adequate protection against forced labor); MC v. Bulgaria, 2003-I Eur. Ct. H.R. 646 (alleging that the state did not provide effective legal protection against rape and sexual abuse); Osman v. the United Kingdom, 1998 Eur. Ct. H.R. 101 (alleging the state failed in protection against sexual assault); Akkoc v. Turkey, 2000-I Eur. Ct. H.R. (alleging deprivation of access to the courts after plaintiff’s husband was killed and plaintiff was tortured in police custody).

101. See Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001) [hereinafter Kunarac I] (finding violations of international humanitarian law when Serbian forces in Bosnia raped and detained, among other allegations, Muslim women, children, and elderly people); Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23-1-A, Judgment (Int’l Crim. Trib. for the former Yugoslavia June 12, 2002) [hereinafter Kunarac II] (affirming the trial chamber’s findings of rape and wrongful detention).

102. See Democratic Republic of the Congo v. Burundi, Communication 227/99, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.] (May 2003) (trying Rwandan and Ugandan forces for the spread of sexually transmitted diseases through rape).

103. See, e.g., Kunarac II, Case No. IT-96-23 & IT-96-23/1-A (affirming the conviction of and imprisonment penalties given to Kunarac and others).

relate to specific conflict scenarios.¹⁰⁴ In the existing model, sex crimes are tangential pieces of larger war crimes and crimes against humanity.¹⁰⁵ However, there is growing support for the application of universal and/or international court jurisdiction for cases involving human trafficking and more specifically, sex trafficking.¹⁰⁶ Some argue that the gravity and severity of sexual enslavement specifically raises these crimes to a level concerning the international community at large, regardless of relation to armed conflict.¹⁰⁷ If implemented, a universal jurisdiction model would not only allow domestic courts to more actively prosecute sex trafficking, but would also allow international courts, such as the ICC, to prosecute sex trafficking as a free-standing crime, without a background conflict.¹⁰⁸ This would be a huge development in international criminal jurisprudence and would provide a new field of prosecution under the transnational criminal model.¹⁰⁹

2. Advantages

The transnational crime model has many advantages. As is evidenced by the mechanisms of this framework, these efforts are supported by the funding and legitimacy through domestic and international government support.¹¹⁰ Many nations are more willing to confront an issue of crime that could negatively impact the nation, rather than commit resources to a “soft” human rights issue.¹¹¹ Indeed,

104. See U.N. Dag Hammarskjöld Library, *UN Documentation: International Law*, *supra* note 97 (describing the various international courts and tribunals and the crimes under their jurisdiction).

105. For example, though the Rome Statute gives the ICC the power to prosecute sex crimes, these crimes must be committed in the course of a larger conflict. Rome Statute, *supra* note 98.

106. See Joshua N. Aston & Vinay N. Paranjape, *Human Trafficking and its Prosecution: Challenges of the ICC* (Dec. 20, 2012) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2203711 (explaining the application of the ICC in prosecuting crimes against humanity, including sexual slavery and enforced prostitution); Jane Kim, *Prosecuting Human Trafficking as a Crime Against Humanity under the Rome Statute*, COLUM. L. SCH. GENDER AND SEXUALITY ONLINE (GSL ONLINE) (March 7, 2011), http://blogs.law.columbia.edu/gslonline/files/2011/02/Jane-Kim_GSL_Prosecuting-Human-Trafficking-as-a-Crime-Against-Humanity-Under-the-Rome-Statute-2011.pdf (examining the potential of the ICC in prosecuting human trafficking as a crime against humanity).

107. See Kim, *supra* note 106, at 4–5 (arguing that unless human trafficking is recognized as a separate crime, it will be overshadowed by crimes committed in armed conflict).

108. See Aston & Paranjape, *supra* note 106 (arguing that by overcoming the current limitations of the ICC in prosecuting trafficking, the ICC and other nations could be more effective in prosecuting cases of trafficking).

109. See Kim, *supra* note 106, at 25 (arguing that a stand-alone sex trafficking crime would allow the ICC to prosecute small-scale trafficking operations that have been able to evade prosecution).

110. See Ann D. Jordan, *Human Rights or Wrongs? The Struggle for a Rights-Based Response to Trafficking in Human Beings*, 10 GENDER AND DEV. 28, 31–33 (2002) (describing the decision by the international community to create a protocol that would make states criminalize trafficking).

111. See *id.* at 29–31 (detailing the failures of domestic governments in prosecuting

this can be directly seen within the Southeast Asian community, a region that continually garners international attention for sex trafficking, and which generates one-third of the global human trafficking trade.¹¹² ASEAN has framed sex trafficking under a transnational criminal framework rather than as a human rights abuse, which does not receive the same fervent political support.¹¹³

Another significant advantage of the transnational criminal model is the criminal justice system underlying this framework.¹¹⁴ Prosecutions against traffickers can be a key component in trafficking confrontation methods.¹¹⁵ Criminal prosecutions of sex traffickers have retributive, deterrent, and norm promotion advantages.¹¹⁶ Prosecutions of sex traffickers send a clear message, to both would-be perpetrators and national governments, that these actions are unacceptable throughout the international community.¹¹⁷ Furthermore, prosecutions allow victims to feel that their abuse is being addressed and that their abusers have received proper punishment.¹¹⁸ The trial process itself, with the full extent of a sex trafficker's crimes laid out in the open, may have a cathartic effect for victims, exposing deceptions and validating victim grievances.¹¹⁹

Another significant advantage of the transnational criminal framework is its ability to confront the organized crime component often associated with trafficking rings.¹²⁰ While some sex traffickers are individual or small-group actors, many prevalent perpetrators of sex trafficking are organized crime groups.¹²¹ Criminal

trafficking crimes); van Doorninck, *supra* note 5 (“States’ accountability does not so much concern the trafficked person, but rather the national system of laws.”).

112. Annuska Derks, *Combating Trafficking in Southeast Asia*, IOM MIGRATION RES. SERIES (International Organization of Migration, Geneva, Switzerland) 16 (Feb. 2000), <http://www.unesco.org/most/migration/ctsea.pdf>.

113. *Id.* at 13, 20.

114. *See id.* at 13 (cautioning that if the criminal system is corrupt, then there is no longer an advantage to having an underlying criminal system).

115. *See generally* Heather J. Clawson et al., *Prosecuting Human Trafficking Cases: Lessons Learned and Promising Practices*, ICF INT’L (Jun. 30, 2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/223972.pdf>; *Human Trafficking Case Law Database*, UNDOC, <http://www.unodc.org/cld/index.jsp> (last visited Feb. 23, 2015).

116. *See generally* Clawson et al., *supra* note 115.

117. *See id.* at 1–2 (explaining that the International Protocol and the TVPA assisted in deterring trafficking).

118. *See* TIP REPORT, *supra* note 8, at 13.

For those who have endured the brutality of modern slavery, seeing their abusers brought to justice can have an enormous positive impact on their recovery process. In addition to broader benefits of removing a criminal from the streets, victims’ knowledge that those who enslaved them can no longer do them or others harm can play a major role in helping overcome their trauma.

119. *See id.* at 16–17 (explaining that victim participation in trafficking prosecutions can be helpful to victims).

120. *See* Jordan, *supra* note 110, at 31 (discussing the Trafficking in Persons Protocol passed to punish trafficking, including a convention against transnational organized crime).

121. *See generally* Sally Stoecker, *The Rise of Human Trafficking and the Role of Organized Crime*, 8 DEMOKRATIZATSIYA 129 (2000), <https://www.gwu.edu/~ieresgwu/assets/>

groups in this domain, such as the Russian mafia or Chinese gangs, control a large portion of the world's sex trafficking business.¹²² These groups often have power throughout many countries, and control significant portions of criminal activity.¹²³ In order to confront these large-scale criminal organizations, well-trained and well-funded police forces are necessary.¹²⁴ The transnational criminal model actively engages organizations with experience in dealing with organized criminal activity, including the International Criminal Police Organization (INTERPOL)¹²⁵ and the U.S. Federal Bureau of Investigation (FBI).¹²⁶ These organizations cannot only identify and intervene in organized crime activity, but can also serve a crucial role in apprehending perpetrators for criminal prosecutions.¹²⁷

3. Drawbacks

Even with these significant advantages, conceptualizing sex trafficking through a transnational criminal lens alone has serious drawbacks, specifically for victims. Despite the capacity of the transnational criminal model to engage in the criminal justice system, its primary advantage, it has largely failed to effectively do so.¹²⁸ There have been relatively few successful prosecutions of traffickers in comparison to the enormity of sex trafficking worldwide.¹²⁹

Even when successful trafficking busts occur and prosecutions take place,

docs/demokratizatsiya%20archive/08-1_Stoecker.PDF.

122. See generally Danielle Mossbarger, *Corruption and Crime in the East: Organized Crime and Human Trafficking in Russia and Ukraine*, HUM. RTS. AND HUM. WELFARE (2009), <https://www.du.edu/korbel/hrhw/researchdigest/trafficking/Ukraine.pdf>; Dena Weiss, *Organized Crime's Involvement in Sex Crimes and Human Trafficking*, AM. MILITARY U.: IN PUB. SAFETY (July 24, 2014), <http://inpublicsafety.com/2014/07/organized-crimes-involvement-in-sex-crimes-and-human-trafficking/>.

123. See Weiss, *supra* note 122 (describing the transnational and financial nature of human trafficking as organized crime).

124. See James O. Finckenauer, *Effectively Combating Transnational Organized Crime*, NAT'L INST. OF JUST. (Nov. 15, 2007), <http://www.nij.gov/topics/crime/organized-crime/pages/effective-practices.aspx> (describing the benefits of having effective law enforcement for transnational organized crime).

125. See generally *Trafficking in Human Beings*, INTERPOL, <http://www.interpol.int/Crime-areas/Trafficking-in-human-beings/Trafficking-in-human-beings> (last visited Nov. 22, 2014).

126. See generally *Human Trafficking*, THE FBI FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/investigate/civilrights/human_trafficking (last visited Nov. 22, 2014).

127. See generally *Human Trafficking—FBI Initiatives*, THE FBI FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/about-us/investigate/civilrights/human_trafficking/initiatives (last visited Oct. 13, 2015).

128. See Geneva Brown, *Women and Children Last: The Prosecution of Sex Traffickers as Sex Offenders and the Need for a Sex Trafficker Registry*, 31 B.C. THIRD WORLD L.J. 1, 1–3 (2011), <http://lawdigitalcommons.bc.edu/twlj/vol31/iss1/2> (discussing the failure of trafficking prosecutions).

129. See *id.* (arguing the lack of successful prosecutions is because of the growth of sex trafficking and dearth of cooperation among international, federal, and state enforcement agencies).

victim interests can often be tangential to the prosecution itself.¹³⁰ To understand the failures of the transnational criminal approach for victims, it is helpful to contrast international sex trafficking with two other prominent forms of transnational crime: drug and weapons trafficking.¹³¹ Unlike drugs or weapons, where each individual unit can only be sold once to one buyer, a single human body is a commodity that can be sold repeatedly, sometimes hundreds or thousands of times to many different clients.¹³² The profit potential in human trafficking is immense, with an estimated \$99 billion generated by commercial sexual exploitation globally,¹³³ and the risk of prosecution is relatively low for both traffickers and buyers.¹³⁴ Perpetrators make roughly \$21,800 per year per victim of sex trafficking.¹³⁵ The input costs for human trafficking are also low, as victims are not paid, kept in squalid conditions, and require little upfront expenditures.¹³⁶ This creates a “perfect storm” of conditions for traffickers, and makes it even more challenging for legal interventions to dismantle sex trafficking organizations.¹³⁷ Traditional conceptualizations of transnational crime are unlikely to rise to the challenges of international sex trafficking.

Perhaps the most important distinction between drug or weapons trafficking and sex trafficking, however, is the *human* aspect of sex trafficking. When a drug cartel is brought down or a weapons ring exposed, the traffickers face criminal prosecution, and the contraband materials themselves (i.e. drugs and/or weapons)

130. See generally *id.*

131. See *The Globalization of Crime: A Transnational Organized Crime Threat Assessment*, UNDOC ii (2010), https://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf (discussing trafficking in drugs and arms as transnational organized crimes).

132. See EQUALITY NOW, *Global Sex Trafficking Fact Sheet*, *supra* note 12 (discussing how sex trafficking degrades the minds and bodies of the victims).

133. *The Economics of Forced Labor*, U.S. DEP'T OF ST. (June 2014), <http://www.state.gov/documents/organization/228263.pdf>.

134. See U.N. Office on Drugs and Crime, *Human Trafficking: An Overview*, UN.GIFT 3–4 (Jan. 2008), http://www.ungift.org/doc/knowledgehub/resource-centre/GIFT_Human_Trafficking_An_Overview_2008.pdf (stating that there are few convictions and little punishment for human traffickers); *Human Trafficking*, NAT'L HUM. TRAFFICKING RESOURCE CTR., <http://www.traffickingresourcecenter.org/type-trafficking/human-trafficking> (last visited Nov. 24, 2014) (recognizing human trafficking as a high-profit, low risk crime, and finding there has been little effective prosecution of traffickers).

135. U.S. DEP'T OF ST., *The Economics of Forced Labor*, *supra* note 133.

136. See Quentin Hardy, *Global Slavery, by the Numbers*, N.Y. TIMES: BITS (Mar. 16, 2013, 8:32 PM), http://bits.blogs.nytimes.com/2013/03/06/global-slavery-by-the-numbers/?_r=1 (stating that most trafficked persons are in bonded servitude to pay back debts). Indeed, estimates indicate that there are more slaves today than at any other point in human history, even when slavery was legal in some countries. *Id.* The average cost for a trafficked person today is \$140. *Id.*

137. See, e.g., U.N. Office on Drugs and Crime, *What is Human Trafficking?*, *supra* note 9 (explaining that national legislation needs to address the complexity of transnational human trafficking); U.N. Office on Drugs and Crime, *Human Trafficking*, *supra* note 134 (explaining that human trafficking is fueled by the demand for cheap labor and the financial gain it provides).

are confiscated.¹³⁸ These remaining inanimate objects are of secondary importance.¹³⁹ However, when a sex trafficking operation is exposed and the traffickers apprehended, it is not inanimate objects left behind, but human beings.¹⁴⁰ Legal interventions must address the grievances of these victims in a way that not only prosecutes traffickers, but also helps rehabilitate victims into society.¹⁴¹ The existing transnational criminal system may not be capable of balancing victim interests with effective prosecutions on a wide scale.¹⁴² Although it may seem self-evident that the by-product of sex trafficking is human victims, the transnational criminal framework fails to address the critical human-aspect of this issue.¹⁴³

Even when the transnational criminal model does focus on the health and safety of victims, it is often not primarily focused on assistance and rehabilitation, but rather on publicizing the crime of trafficking.¹⁴⁴ Victims are used as witnesses in prosecutions, or as poster-children for tougher legislation.¹⁴⁵ The identity of victims becomes limited to just that: the victim.¹⁴⁶ They testify against their abusers and are made to seem either endearing or helpless.¹⁴⁷ This identity framing makes victims both sympathetic to juries in making criminal convictions and legislatures in creating more stringent anti-trafficking laws.¹⁴⁸ While of course victims have experienced extreme physical and emotional trauma, limiting their identity to their victim role demeans their other personal identities and limits their ability to resume normal lives.¹⁴⁹ The psychological damage of limiting a person's identity to a

138. See *Fact Sheet: Department of Justice Efforts to Combat Mexican Drug Cartels*, THE FBI FED. BUREAU OF INVESTIGATION (Apr. 2, 2009), <https://www.fbi.gov/news/pressrel/press-releases/fact-sheet-department-of-justice-efforts-to-combat-mexican-drug-cartels> (explaining the federal government's efforts to prevent firearms and drugs from crossing the border).

139. See *id.* (discussing the importance of the Criminal Division in prosecuting individuals involved in drug and arms trafficking).

140. See Michelle Brock, *Life After Being a Victim of Human Trafficking*, HOPE FOR THE SOLD (June 24, 2010), <http://hopeforthesold.com/life-after-human-trafficking/> (explaining the plights of victims after being rescued).

141. See Hussein Sadruddin et al., *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL'Y REV. 379, 406–07 (2005) (arguing that the TVPA should be revised to ease the process and rules by which victims who cooperate with prosecuting traffickers receive benefits).

142. See Jordan, *supra* note 110, at 29–30 (arguing against a traditional transnational criminal model, specifically in relation to victim advocacy).

143. *Id.*

144. See *id.* (noting that governments often fail to sympathize with the victims of trafficking, treating trafficking as organized crime rather than as human rights abuses).

145. Sadruddin et al., *supra* note 141, at 395–96.

146. See Jordan, *supra* note 110, at 30 (discussing how victims are often treated by governments and NGOs as objects rather than as human beings).

147. See, e.g., Sarah Pierce, *The "Perfect Victim" Problem*, HUM TRAFFICKING SEARCH (May 26, 2015), <http://humantraffickingsearch.net/wp/the-perfect-victim-problem/>.

148. See *id.* (discussing the sympathetic victim).

149. See Diane Enns, *Identity and Victimhood: Questions for Conflict Management Practice*, BERGHOF OCCASIONAL PAPER NO. 28, 22 (May 2007) (explaining victim

victim role after trauma is well documented, particularly in the area of post-conflict studies.¹⁵⁰ The transnational criminal model does not have the capacity on its own to empower victims beyond their exploited role.¹⁵¹

Moreover, the categorization of sex trafficking as primarily a transnational crime too often criminalizes victims by wrapping them into a criminal framework.¹⁵² In this way, sex trafficking is distinct not only from drug and weapons trafficking, but from other forms of human trafficking as well.¹⁵³ Victims of labor trafficking may confront significant problems upon obtaining freedom.¹⁵⁴ However, these victims are not often forced to commit acts that were, in themselves, illegal during their captivity.¹⁵⁵ In contrast, as prostitution is illegal or partially criminalized in many parts of the world,¹⁵⁶ sex trafficking victims are forced to commit criminal acts (i.e. performing sex acts for payment) repeatedly over a period of weeks, months, or even years.¹⁵⁷ It may seem unthinkable, but trafficking victims may actually be prosecuted for the crimes they were forced to engage in while in captivity.¹⁵⁸

Furthermore, transnational crime models can too narrowly define the roles of “victim” and “perpetrator.”¹⁵⁹ Sex trafficking involves a systematic dehumanization of victims, using abuse and isolation.¹⁶⁰ This can lead to serious, sometimes

empowerment is crucial to the reconciliation process).

150. *See generally id.*

151. *See* Sadruddin et al., *supra* note 141, at 406 (noting the current system should broaden access to victim benefits).

152. *See* van Doorninck, *supra* note 5, at 2–3 (explaining how trafficked persons are sometimes treated as criminals themselves).

153. *See id.* (noting that in the current system raids on brothels usually result in all working women being arrested and jailed or deported); *but see About Slavery*, FREE THE SLAVES, <https://www.freetheslaves.net/faq> (last visited Oct. 15, 2015) (noting other forms of human trafficking do not involve illegal acts by the victims).

154. *See generally* TIP REPORT, *supra* note 8.

155. *See id.* at 33 (discussing forced and bonded labor). Forced or bonded labor is any work or service that a victim is forced to do against their will. *Forced Labor*, ANTI-SLAVERY, http://www.antislavery.org/english/slavery_today/forced_labour/ (last accessed Dec. 4, 2015).

156. *See* PROCON.ORG, *supra* note 30 (stating 51 of the 100 countries surveyed have illegal prostitution or limited legality of prostitution).

157. Neha A. Deshpande & Nawal M. Nour, *Sex Trafficking of Women and Girls*, NAT'L CTR. FOR BIOTECHNOLOGY INFO., <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3651545/> (last visited Oct. 27, 2015).

158. *See* van Doorninck, *supra* note 5, at 2–3 (explaining how trafficked persons are sometimes treated as criminals themselves); *Human Trafficking Victims as Criminal Defendants*, HUM. TRAFFICKING & THE ST. CTS. COLLABORATIVE (Nov. 2013), http://www.htcourts.org/wp-content/uploads/HT_Victims_asCriminalDefendants_v01.pdf?InformationCard=HT-Victims-as-Criminal-Defendants (explaining how coercion is used as a mitigating factor in sentencing of victims).

159. Sadruddin et al., *supra* note 141, at 396.

160. *See* Amanda Walker-Rodriguez & Rodney Hill, *Human Sex Trafficking*, THE FBI FEDERAL BUREAU OF INVESTIGATION (Mar. 2011), <https://leb.fbi.gov/2011/march/human-sex-trafficking> (discussing the severe emotional and physical abuse that can lead sex trafficking victims into a cycle of trafficking perpetration).

debilitating, psychological effects.¹⁶¹ People who were once victims of their traffickers can assume abuser roles, either by coercion, or by slow manipulation.¹⁶² Indeed, in many trafficking organizations, women who were once trafficked eventually turn to controlling and recruiting other victims.¹⁶³ The transnational criminal model is ill-equipped to deal with the sometimes-unclear definition of “victim.”¹⁶⁴ Police interventions rely on an identification of perpetrators to arrest and charge.¹⁶⁵ Likewise, in criminal trials, prosecutors need to be able to identify a “bad guy” for the jury or tribunal to convict.¹⁶⁶ However, when this villain was once a victim herself, lines that were once clear become hazier.¹⁶⁷

B. Human Rights Abuse

1. Mechanisms

The alternative framework through which international sex trafficking has been viewed is as a human rights abuse.¹⁶⁸ International human rights law and international humanitarian law focus on the violation of pre-established human rights norms, whether by individual, group, or state actors.¹⁶⁹ Sex trafficking has a clear connection to this conceptualization, as victims experience direct physical, mental, and emotional violence, as well as severe restrictions on their individual liberties.¹⁷⁰ The rights abuses associated with sex trafficking are extensive, and largely horrifying.¹⁷¹ This comment identifies indicators of a human rights based approach to sex trafficking as: a focus on victims, an outline of a model for

161. *Id.*

162. HUMAN TRAFFICKING & THE ST. CTS. COLLABORATIVE, *supra* note 158; Walker-Rodriguez & Hill, *supra* note 160.

163. *See* HUMAN TRAFFICKING & THE ST. CTS. COLLABORATIVE, *supra* note 158 (discussing former victims as criminal defendants).

164. Sadruddin et al., *supra* note 141, at 396.

165. Walker-Rodriguez & Hill, *supra* note 160.

166. *See generally* Sarah Pierce, *Prosecuting Human Trafficking in the United States: State and Federal Jurisdictions*, HUM. TRAFFICKING SEARCH (Mar. 3, 2015), <http://humantraffickingsearch.net/wp/prosecuting-human-trafficking-in-the-united-states-state-and-federal-jurisdictions/>.

167. *See Vacating Convictions*, POLARIS, <https://www.polarisproject.org/what-we-do/policy-advocacy/assisting-victims/vacating-convictions> (last visited Oct. 15, 2015) (discussing the difficulties and remedies available when a victim of human trafficking becomes a criminal herself).

168. *See* van Doorninck, *supra* note 5, at 3–4 (recognizing a split between the human rights and criminal justice frameworks for confronting human trafficking).

169. *See generally International Human Rights Law*, UNITED NATIONS HUM. RIGHTS: OFF. OF THE HIGH COMM’R FOR HUM. RTS., <http://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx> (last visited Nov. 24, 2014).

170. *See Fact Sheet: Sex Trafficking*, OFF. OF REFUGEE RESETTLEMENT (Aug. 2, 2012), <http://www.acf.hhs.gov/programs/orr/resource/fact-sheet-sex-trafficking-english> (briefly outlining the conditions under which sex trafficking victims are recruited and the severe human rights abuses they face while in captivity).

171. *See id.* (recounting some other abuses faced by victims, such as drug and alcohol addiction, physical injuries, and traumatic brain injury).

recovery and reintegration for these victims, engagement with human-service based government agencies or non-governmental organizations (NGOs), and/or a definition of sex trafficking in language of international human rights.

While the primary mechanism for confronting human trafficking in the U.N. is situated within the sphere of transnational crime,¹⁷² several U.N. human rights declarations touch upon the issue of sex trafficking.¹⁷³ The Convention on the Elimination of All Forms of Discrimination against Women contains provisions aimed at eliminating sex trafficking.¹⁷⁴ Similarly, the Convention on the Rights of the Child also makes specific reference to preventing sexual exploitation and commercial sex trafficking of children in Article 34.¹⁷⁵ Furthermore, the UNICEF Guidelines on the Protection of the Rights of Child Victims of Trafficking provide a rights-based perspective on dealing with child victims of sex trafficking.¹⁷⁶

While not specifically geared towards sex trafficking, other international human rights declarations focus on tackling gender inequality, a significant factor in sexual exploitation.¹⁷⁷ For example, the International Covenant on Civil and Political Rights¹⁷⁸ provides that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law . . . [and] the law shall prohibit any discrimination and shall guarantee to all persons equal and effective protection against discrimination on any ground such as . . . sex.”¹⁷⁹

Some regional organizations have also recognized a human rights component

172. Trafficking Protocol, *supra* note 53.

173. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (“[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).

174. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (Dec. 18, 1979), 1249 U.N.T.S. 13, at art. 6 (“[s]tates Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”).

175. Convention on the Rights of the Child, G.A. res. 44/25, Annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49, at art. 34 (Nov. 20, 1989) (“[s]tates Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices.”).

176. *Guidelines on the Protection of Child Victims of Trafficking*, UNICEF (Sept. 2006), http://www.unicef.org/ceecis/0610-Unicef_Victims_Guidelines_en.pdf (showing that children possess inherent rights against involvement in trafficking..

177. *See, e.g.*, EQUALITY NOW, *Global Sex Trafficking Fact Sheet*, *supra* note 12; JEAN D’CUNHA, TRAFFICKING IN PERSONS: A GENDER AND RIGHTS PERSPECTIVE, U.N. Doc. EGM/TRAF/2002/EP.8 (Nov. 8, 2002), <http://www.un.org/womenwatch/daw/egm/trafficking2002/reports/EP-DCunha.PDF> (discussing the relationship between gender discrimination and sex trafficking).

178. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/6316 (Dec. 16, 1966).

179. *Id.* at art. 26.

in their responses to sex trafficking.¹⁸⁰ The Council of Europe Convention on Action against Trafficking in Human Beings,¹⁸¹ while also outlining a criminal prosecution mechanism, has a notably strong focus on human rights and victim protection and reintegration.¹⁸²

The Inter-American Convention on Violence against Women, the only international legal agreement specifically addressing the issue of violence against women,¹⁸³ is not solely geared towards ending sex trafficking, but encompasses issues of forced prostitution.¹⁸⁴ Article 2 of the Convention provides a broad definition, encompassing acts of sex trafficking as violence against women:

Violence against women shall be understood to include physical, sexual and psychological violence . . . (b) that occurs in the community and is perpetrated by any person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place¹⁸⁵

The most common promoters of the human rights based approach to combatting sex trafficking are NGOs.¹⁸⁶ Dozens of these organizations, such as Human Rights Watch,¹⁸⁷ Equality Now,¹⁸⁸ and Polaris Project¹⁸⁹ (to name very few of an ever-expanding list) focus their efforts on identifying and helping victims of sex trafficking.¹⁹⁰ These organizations actively advocate under a victim-centric, rights-based approach to sex trafficking.¹⁹¹ NGOs play an important role in fact collection,¹⁹² on-the-ground education and interventions,¹⁹³ and providing direct services and victim support, including prevention activities based in governmental lobbying and raising awareness of root gender issues in origin countries.¹⁹⁴

180. *See, e.g.*, Council of Europe Convention on Action Against Trafficking in Human Beings, *opened for signature* May 16, 2005, C.E.T.S. No. 197 [hereinafter Council of Europe Convention]; Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *adopted* June 9, 1994, 33 I.L.M. 1534 [hereinafter Convention of Belém do Pará].

181. Council of Europe Convention, *supra* note 180.

182. *Id.* at ch. V.

183. Convention of Belém do Pará, *supra* note 180.

184. *Id.* at art. 2.

185. *Id.*

186. *See* Marina Tzvetkova, *NGO Responses to Trafficking in Women*, 10 GENDER & DEV. 60 (2002) (analyzing the human rights-based anti-trafficking activities of over four hundred NGOs worldwide).

187. HUMAN RIGHTS WATCH, <http://www.hrw.org> (last visited Oct. 11, 2015).

188. EQUALITY NOW, <http://www.equalitynow.org> (last visited Oct. 11, 2015).

189. POLARIS, <http://www.polarisproject.org> (last visited Oct. 11, 2015).

190. *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 187; EQUALITY NOW, *supra* note 188; POLARIS, *supra* note 189.

191. *See* Tzvetkova, *supra* note 186, at 61.

192. *See id.* at 64–65 (discussing NGO research and lobbying role).

193. *See id.* (noting NGO intervention methods in origin countries).

194. *See id.* at 61–62 (examining NGO victim resources).

Additionally, NGOs actively assist in the reintegration of repatriated victims through the provision of temporary shelter, psychological counseling services, and legal assistance in bringing criminal charges against traffickers.¹⁹⁵

2. Advantages

Viewing sex trafficking as a human rights abuse more adequately deals with the needs of victims than the transnational criminal model.¹⁹⁶ In the human rights framework, addressing the immediate psychological, physical, social, and economic needs of victims is the top priority.¹⁹⁷ This is a distinct, more holistic model than the transnational crime framework, as it shifts the focus from perpetrators to victims.¹⁹⁸ This method potentially helps victims not only overcome the trauma they have experienced, but also reenter society more quickly and effectively.¹⁹⁹ A rights-based model does not attempt to strip victims of their identity as a victim, but rather takes a broader view than the transnational criminal model on moving these people from their abusive situations back into society.²⁰⁰

Moreover, viewing sex trafficking through a human rights framework may allow interventions to be preemptive, rather than merely responsive. Criminal prosecutions, the main mechanisms in the transnational crime model, are by their very nature, primarily responsive.²⁰¹ Prosecutorial interventions can only occur after the crime has occurred and by this time, victims have already been irreparably harmed.²⁰² In contrast, a human rights view targets not only criminal organizations after the crime has occurred, but takes aim at the roots of trafficking, including poverty, gender inequality, and many other significant factors.²⁰³ Confronting the roots of sex trafficking can not only prevent the formation of trafficking rings, but can also prevent potential victims from falling prey to these groups in the first place.²⁰⁴

195. *Id.*

196. *See* Jordan, *supra* note 110, at 33–35 (suggesting a comprehensive human rights-based framework to supplement the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children as adopted in 2000).

197. *See, e.g.,* van Doorninck, *supra* note 5, at 4.

198. *Id.* at 6.

199. *Id.* at 4.

200. *See* Jordan, *supra* note 110, at 35 (noting the implied governmental obligation under existing human rights principles, to make available to victims basic services like adequate food, clothing, and housing).

201. *See* Farrell et al., *supra* note 89, at 11–13 (discussing institutional challenges like lack of prosecutorial specialization and lack of institutional awareness as contributing to the difficulty of prosecuting trafficking-related crimes).

202. *See* van Doorninck, *supra* note 5 (noting that the criminal justice approach may even cause additional harms after trafficking crimes have been identified, including deportations, limitations on migration, and confining trafficking victims to shelters).

203. *Id.*

204. *See* Sarah Lachman, *A Dollar of Prevention is Worth \$34 in Prosecution*, RENEWAL FORUM (Aug. 22, 2014), <http://renewalforum.org/a-dollar-of-prevention-is-worth-34-in-prosecution/> (discussing the long-term, systemic financial and social benefits of an increased

Furthermore, human rights models can utilize education and vocational training as preventative measures for both would-be victims and their communities.²⁰⁵ In many areas stricken by poverty, families may sell or trade children and women into sex bondage.²⁰⁶ In other instances, a family may think they are sending a girl to work in a legitimate industry, only to discover later that she has been trafficked.²⁰⁷ Sex traffickers thrive on a mixture of poverty and misinformation that leaves communities desperate and vulnerable.²⁰⁸ Human rights actors can engage these communities, educating them about the dangers of trafficking organizations.²⁰⁹

Arguably, the transnational crime model also plays a deterrence role, which would be a preemptive response to sex trafficking.²¹⁰ However, it is unclear how effective the specific and general deterrence is at preventing sex trafficking given the large profit potential.²¹¹ Moreover, while criminal prosecutions may deter actual traffickers, they do not reach the communities that participate, either actively or passively, in sex trafficking.²¹² Criminal prosecutions, while perhaps a deterrence mechanism for large-scale perpetrators of sex trafficking, are unlikely to deter impoverished communities from participating in the cycle of exploitation.²¹³ A human rights model that seeks to educate and empower potential victims, as well as communities that are highly affected by sex trafficking, can likely have a more direct effect on preventing this exploitation.

3. Drawbacks

Categorizing sex trafficking only through the international human rights framework also has significant disadvantages. Governments may be unwilling to allocate funding to those projects couched in only human rights language, without other direct tangible benefits.²¹⁴ Furthermore, without pressure from international institutions or criminal justice organizations, governments have shown significant reluctance to acknowledge sex trafficking or differentiate the issue from domestic

focus on prevention, including the decreased burden of prosecuting trafficking-related crimes).

205. Tzvetkova, *supra* note 186, at 64–65; Lachman, *supra* note 203.

206. See TIP REPORT, *supra* note 8, at 8 (relating the story of a 12 year old Cambodian girl sold to sex traffickers to satisfy her family's exorbitant debts to a local loan shark).

207. *The Sex Trafficking Issue*, DAUGHTERS RISING, <http://daughtersrising.org/the-sex-trafficking-issue> (last visited Oct. 11, 2015) (noting that families may be tricked or coerced into sending their daughters into the commercial sex industry).

208. *Id.*

209. *Id.*

210. See *supra* notes 118–20 and accompanying text for a discussion of the benefits of criminal prosecutions of sex trafficking.

211. See *supra* notes 135–37 and accompanying text for a discussion of the profit potential for traffickers.

212. See DAUGHTERS RISING, *supra* note 206 (providing a discussion on community and family involvement in the sale of girls or women into sex trafficking).

213. See Lachman, *supra* note 203 (arguing for a prevention focused, rather than prosecutorial, intervention to sex trafficking).

214. Jordan, *supra* note 110, at 29–30.

prostitution and undocumented migration.²¹⁵

Even government-led initiatives to combat trafficking are often under-funded and given lower priority than other issues.²¹⁶ As with many human rights issues, sex trafficking takes a backseat to other more “pressing” international policy decisions.²¹⁷ International institutions and NGOs have thus taken the lead in confronting sex trafficking through the human rights system.²¹⁸ While essential in their research and fact-finding capacity,²¹⁹ these organizations often lack the funding and enforcement mechanisms necessary to confront trafficking organizations and provide tangible aid to victims.²²⁰

Furthermore, the immediate benefits of human rights-based interventions are not as apparent as with transnational criminal justice methods.²²¹ The criminal conviction of a trafficker or the police raid of a trafficking ring are immediate and tangible events for both victims and the international community to identify as “successes.”²²² However, human rights models do not have the same high profile.²²³ These models work more subtly and measuring effectiveness can be difficult.²²⁴ Governments and funders worry that progress is not being made, and victims may feel that the crimes they have experienced are not being adequately addressed.²²⁵ Human rights interventions alone may leave many feeling uncertain of their

215. *Id.* at 30.

216. *See* SENIOR POLICY OPERATING GRP. GRANTMAKING COMM., PROMISING PRACTICES: A REVIEW OF U.S. GOVERNMENT-FUNDED ANTI-TRAFFICKING IN PERSONS PROGRAMS 3 (2012) (noting that anti-trafficking programs funded by the United States government lack the resources to implement evidence-based best practices because to do so would require the programs to divert scarce resources from other important areas, namely direct services for victims).

217. *See* Jordan, *supra* note 110, at 31–33 (providing background on the compromises necessary for multilateral implementation of the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children, and lamenting the missed opportunity to incorporate human rights into the protocol).

218. Tzvetkova, *supra* note 186, at 60.

219. *See* TIP REPORT, *supra* note 8, at 7 (noting the importance of NGOs in their expertise on victim and community needs).

220. Tzvetkova, *supra* note 186, at 60; *see also* TIP REPORT, *supra* note 8, at 7 (noting that NGOs, in partnership with governments can provide expertise on identifying trafficking victims and attending to their needs).

221. *See* Jordan, *supra* note 110, at 31 (noting that the failings of criminal justice focused approaches reveal themselves over time).

222. *See* Sally Quillian Yates, *Building Bridges to Combat Human Trafficking in the Northern District of Georgia*, U.S. DEP’T OF JUST. OFFICES OF THE U.S. ATTORNEYS (last updated July 9, 2015), <http://www.justice.gov/usao/priority-areas/civil-rights/human-trafficking> (observing that the Northern District of Georgia initially responded to the issue of human trafficking in Atlanta by simply prosecuting more cases).

223. *See id.* (indicating that only through experience gained in prosecuting trafficking crimes did the need for NGO involvement and a focus on victims’ rights become apparent).

224. *Id.*

225. *See* van Doorninck, *supra* note 5 (discussing how due to the lack of investment, the criminal justice model and human rights model fail to address all the criminal activity in human trafficking).

effectiveness.

IV. THE GREAT DIVIDE: PRAGMATIC PROBLEMS

As evidenced above, both the transnational criminal model and the human rights model of confronting international sex trafficking have significant advantages and disadvantages. One might assume that the international legal community can simply implement both models and gain the benefit from each. Indeed, that is much the way the international system operates now; transnational criminal models deal with police interventions and prosecutions, while human rights models deal with prevention and victim advocacy.²²⁶ However, simply implementing both models simultaneously is not efficient, and in many ways limits the effectiveness of both models.

One of the primary reasons that using divergent models of sex trafficking intervention is ineffective is the tension this method creates throughout the international legal community. International governmental actors, such as the U.N.,²²⁷ regional actors such as the European Union²²⁸ and ASEAN,²²⁹ and domestic actors such as the United States,²³⁰ all use different conceptualizations of sex trafficking in determining their intervention methods. Some models seem to integrate rights-based approaches,²³¹ while others focus primarily on criminal justice.²³²

As evidenced in the above sections, even the definitions of sex trafficking vary throughout international jurisprudence. Take for instance the contrast between the language in the U.N. Trafficking in Persons Protocol²³³ and the definition in the Inter-American Convention on Violence against Women.²³⁴ The Trafficking in Persons Protocol defines sex trafficking as first and foremost a crime, for which governments are responsible for its prosecution.²³⁵ In contrast, the Inter-American

226. *See id.* (contrasting the two approaches and weighing the relative merits of each).

227. *See* Trafficking Protocol, *supra* note 53 (seeking to criminalize human trafficking on an international level).

228. *See* Council of Europe Convention, *supra* note 180 (seeking to protect human rights of victims of human trafficking).

229. *See* ASEAN Practitioner Guidelines, *supra* note 80 (attempting to solve judicial issues through a criminal justice focus for human trafficking crimes).

230. *See* TVPA, *supra* note 45 (seeking to combat human trafficking and protect victims).

231. Though primarily focused on law enforcement and criminal justice, the European Union and United States regulatory schemes integrate initiatives focused on victims rather than perpetrators. *See generally* Council of Europe Convention, *supra* note 180; *see* TVPA, *supra* note 45 (combating human trafficking by creating legislation to protect victims).

232. Both regional authorities and international criminal agencies apply a criminal justice focus. *See* ASEAN Practitioner Guidelines, *supra* note 80; INTERPOL, *supra* note 126.

233. Trafficking Protocol, *supra* note 53.

234. Convention of Belém do Pará, *supra* note 180.

235. *See* Trafficking Protocol, *supra* note 53, at art. 3(a) (indicating that the smuggling of migrants by land, sea, and air is a crime and that the purpose of the Trafficking in Persons Protocol is to adopt legislation that will lead to prevention, investigation and prosecution of these offenses).

Convention defines sex trafficking as form of violence against women.²³⁶ This is a small, yet important, distinction. The U.N.'s definition internationally codifies the act of trafficking and presents recommendations to combat this problem.²³⁷ The Inter-American Convention does not see sex trafficking as a discrete crime, but rather as a part of a larger discriminatory global system, primarily violence against women.²³⁸ The distinction between these two definitions may be slight,²³⁹ but confrontations of sex trafficking under each are likely to be significantly divergent.²⁴⁰ As international sex trafficking is a global issue, the international community limits its ability to combat the problem because it lacks a unified view on this issue.²⁴¹

Furthermore, the stratification of sex trafficking across transnational criminal methods and a human rights model alienates “hard-law” actors, such as police and prosecutors,²⁴² from “soft-law” organizations, like NGOs.²⁴³ There is little common ground between a prosecutor who believes that a victim’s primary role, post-abuse, is as a potential witness, and an NGO worker who is trying to deal with the psychological trauma and eventual reintegration of such a victim.²⁴⁴ Indeed, one of the major limitations to human trafficking prosecutions is the inability or unwillingness of victims to testify against their abusers.²⁴⁵ Human rights advocates could be a significant resource to criminal justice workers, as they can provide

236. Convention of Belém do Pará, *supra* note 180, at art. 2.

237. See Trafficking Protocol, *supra* note 53 (presenting recommendations to combat the crime of smuggling migrants).

238. See Convention of Belém do Pará, *supra* note 180 (“[v]iolence against women constitutes a violation of their human rights and fundamental freedoms.”).

239. See Trafficking Protocol, *supra* note 53 (seeking to combat the crime of human trafficking); Convention of Belém do Pará, *supra* note 180 (attempting to protect the human rights and fundamental freedoms of female victims).

240. See Trafficking Protocol, *supra* note 53 (finding that human trafficking will end through criminal convictions); Convention of Belém do Pará, *supra* note 180 (finding that human trafficking can be prevented by protecting the victims).

241. See generally ASEAN Practitioner Guidelines, *supra* note 80; Convention of Belém do Pará, *supra* note 180; Council of Europe Convention, *supra* note 180; Trafficking Protocol, *supra* note 53.

242. For example, INTERPOL or criminal justice personnel operating under the TVPA. See TVPA, *supra* note 45, at §§ 7101–13 (providing a means for prosecution against human traffickers); see generally Overview, INTERPOL, <http://www.interpol.int/About-INTERPOL/Overview> (last visited Oct. 13, 2015).

243. For example, Polaris Project and Equality Now. See generally *What We Do*, POLARIS, <http://www.polarisproject.org/what-we-do> (last visited Oct. 13, 2015); *About Us*, EQUALITY NOW, <http://www.equalitynow.org/about-us> (last visited Oct. 13, 2015).

244. See Jordan, *supra* note 110, at 29–30 (addressing the divide between the traditional prosecutorial view of victim participation and human rights responses).

245. See Cherish Adams, Note, *Re-Trafficked Victims: How Human Rights Approach Can Stop the Cycle of Re-Victimization of Sex Trafficking Victims*, 43 GEO. WASH. L. REV. 201, 217 (2011) (indicating that victims may be unable or unwilling to testify out of fear for their safety or the safety of their family).

valuable insight into a victim's psychology.²⁴⁶ However, if these types of organizations cannot find common ground for confronting trafficking, their effects will continue to be limited.

Finally, the division of transnational criminal justice models and human rights models for confronting sex trafficking creates inefficiency throughout the international legal community.²⁴⁷ Though support for anti-trafficking initiatives has grown substantially in the past several years,²⁴⁸ the issue still faces a lack of adequate funding and support to fully tackle this global and complex issue.²⁴⁹ A unified model that could more effectively cross-utilize funds and legal professionals would maximize efficiency.

IV. RECOMMENDATION: HYBRIDIZED MODEL

As discussed above, the international community struggles to adequately address sex trafficking because it lacks a unified framework for understanding the issue. It is easy to simply criticize one model and therefore fall back on the other, but this only leads to increased stratification, which is not effective for victims or the international legal community at large. Both the transnational crime and the human rights models have advantages that should not be overlooked. Rather than abandoning either of these frameworks in favor of the other, future trafficking interventions should instead operate under a hybrid model that combines the benefits of both of these systems. This system should capitalize on the international legitimacy and funding advantages of the transnational crime model while also taking a victim-centric approach prevalent in the human rights framework. This model should include a holistic distinction between victims and perpetrators and a more comprehensive victim advocacy and community engagement system.

A. Distinction Between Victims and Perpetrators

Any intervention method that hopes to combine the benefits of both the transnational crime and human rights models must prioritize the distinction between victims and perpetrators. Some of these determinations will be self-evident. Recruiters, promoters, transporters, pimps, and launderers who represent the higher echelon of trafficking rings, and who have themselves never been subjected to physical or mental violence from their participation, are clear

246. See TIP Report, *supra* note 8, at 16–17 (advocating for rights-focused victim-witness coordinators to work directly with victims and prosecutors).

247. See Jordan, *supra* note 110, at 35 (noting serious funding gaps between governmental and NGO actors in providing basic services, largely due to a disconnect in intervention methodology).

248. U.S. DEP'T OF STATE, INTERNATIONAL PROGRAMS TO COMBAT HUMAN TRAFFICKING, *supra* note 7, at 1–2.

249. See David Esarey, *Funding Priorities in Human Trafficking*, HUM. TRAFFICKING CTR. (Apr. 24, 2014), <http://humantraffickingcenter.org/posts-by-htc-associates/funding-priorities-in-human-trafficking/> (“One of the greatest challenges in the field of anti-human trafficking is the misallocation of limited resources and funding.”).

perpetrators.²⁵⁰ However, this determination becomes more problematic when addressing those persons who have been subjected to the violence of the trafficking ring, but who have themselves committed criminal acts while in captivity.²⁵¹ Legislation already exists to protect sex trafficking *victims* from prosecution for prostitution,²⁵² but the question then becomes: when is a person a victim of sex trafficking, and when do they become a perpetrator?

The determination of who constitutes a true victim of sex trafficking is partially legal (as it deals with aspects of criminal liability), but it should also take into account a broader context for understanding mental culpability. Sex trafficking victims who have been subjected to prolonged physical and mental abuse and isolation often commit acts that fall within the scope of criminal liability.²⁵³ In some cases, sex trafficking victims move from unwilling participants to active recruiters and promoters for traffickers.²⁵⁴ However, given the extreme psychological ordeal these individuals have experienced, does it violate fundamental fairness to simply classify them as criminal actors?²⁵⁵

This issue becomes even more pivotal when victims are facing deportation or immigration charges based on their undocumented status in a country.²⁵⁶ To use the example of the United States, when a person is trafficked into the nation for commercial sexual exploitation, and then later freed, they can apply for residency under a nonimmigrant “T visa.”²⁵⁷ However, the restrictions on this visa are highly

250. See Holly Burkhalter, *Sex Trafficking, Law Enforcement and Perpetrator Accountability*, 1 ANTI-TRAFFICKING REV. 122, 123–25 (2012) (“Anti-trafficking advocates, for their part, demand that the police enforce the law by removing children and forced adults from commercial sex venues and arresting and prosecuting pimps, brothel owners and traffickers.”).

251. See Walker-Rodriguez & Hill, *supra* note 160 (“Traffickers who have more than one victim often have a ‘bottom,’ who sits atop the hierarchy of prostitutes. The bottom, a victim herself, has been with the trafficker the longest and has earned his trust. Bottoms collect the money from the other girls, discipline them, seduce unwitting youths into trafficking, and handle the day-to-day business for the trafficker.”).

252. See *Vacating Convictions*, POLARIS, <http://www.polarisproject.org/what-we-do/policy-advocacy/assisting-victims/vacating-convictions> (last visited Oct. 14, 2015) (providing information on state vacating convictions statutes, which allow survivors of sex trafficking to file a motion for a court to remove convictions of prostitution resulting from trafficking).

253. See HUMAN TRAFFICKING & THE ST. CTS. COLLABORATIVE, *supra* note 158 (showing some of the factors courts currently look to in determining whether someone is a human trafficking victim and the legal effects of coercion on criminal liability).

254. U.N. Office on Drugs and Crime, *Global Report of TRAFFICKING IN PERSONS*, at 6 (Feb. 2009), http://www.unodc.org/documents/Global_Report_on_TIP.pdf (noting the common occurrence of former sex trafficking victims becoming perpetrators and traffickers of other women).

255. See HUMAN TRAFFICKING & THE ST. CTS. COLLABORATIVE, *supra* note 158 (showing the difficulty courts have in classifying a victim as a criminal).

256. See Brown, *supra* note 128, at 25–26 (discussing how women who are victims of sex trafficking who do not want to testify often face detention and deportation).

257. *Victims of Human Trafficking: T Nonimmigrant Status*, U.S. CITIZENSHIP AND IMMIGR. SERVICES (Oct. 3, 2011), <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status>.

complex and are contingent upon the person being a true victim of sex trafficking.²⁵⁸ In order to be eligible for a T visa, an applicant must: 1) be a victim of severe human trafficking; 2) face extreme hardship if forced to leave the United States; and 3) be willing to assist law enforcement in prosecuting his or her abuser.²⁵⁹ Sex trafficking falls into the category of “severe human trafficking,” but is narrowly defined as “a commercial sex act [that] is induced by force, fraud, or coercion.”²⁶⁰ This definition would arguably not protect victims who, due to trauma, later “consented” to sex acts. Perhaps the more alarming requirement, however, is the obligation of victims to assist U.S. law enforcement in prosecution of their abusers.²⁶¹ When victims have been systematically psychologically abused by traffickers, and may have themselves committed acts of recruitment and trafficking, it is highly unlikely that they will willingly cooperate with law enforcement.²⁶² The statute does provide an exception to this requirement for victims unable to cooperate due to physical or psychological trauma²⁶³ but this provision still does not allow for an unclear separation of “victim” and “perpetrator.” When the distinction between an individual’s victimhood and criminal actions is not clear, they are at high risk of immigration consequences.²⁶⁴

One example that international organizations and regional actors might look to for guidance in determining victim culpability is the rehabilitative court system for women with repeated prostitution charges.²⁶⁵ Found in various locations

258. *See id.* (indicating a person may be eligible for a T visa if he or she is or was a victim of trafficking, as defined by law).

259. 8 U.S.C. § 1101(a)(15)(T)(i)(I)-(IV) (2012).

260. 22 U.S.C. § 7102(9)(A) (2012).

261. 8 U.S.C. § 1101(a)(15)(T)(i)(III)(aa) (2012) (providing that an applicant for a T visa must have complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking or the investigation of a crime where acts of trafficking are at least one central reason for the commission of that crime).

262. *See* TIP Report, *supra* note 8, at 19 (highlighting the hesitancy of some victims to participate in the prosecution of sex traffickers).

263. *See* 8 U.S.C. § 1101(a)(15)(T)(i)(III)(bb).

264. *See* Van Doorninck, *supra* note 5 (noting the risk of deportation for victims of trafficking).

265. After seeing women become repeat offenders of prostitution and drug offenses, courts shifted their focus from a criminal justice approach to a victim-focused approach. These rehabilitative services are similar to drug sentences where the court closely supervises the rehabilitative services. Courts will sentence women to rehab facilities instead of prison. *See* Daria Mueller, *Treatment Courts and Court-Affiliated Diversion Projects for Prostitution in the United States*, CHI. COALITION FOR THE HOMELESS 2 (Nov. 1, 2012), http://chicagohomeless.issuelab.org/resource/treatment_courts_and_court_affiliated_diversion_projects_for_prostitution_in_the_united_states (describing the new approach of using a problem-solving court specializing in prostitution offenses); Jaleesa Jones, *Rehab for Prostitutes: A Texas Program Is Helping Women Get the Guidance They Need*, BUSTLE (June 26, 2013), <http://www.bustle.com/articles/1017-rehab-for-prostitutes-a-texas-program-is-helping-women-get-the-guidance-they-need> (reporting that some city court systems are amending their approach to prostitution); Tara Murtha, *A New Dawn: Philly Court Uses Compassion to Fight Prostitution*, PHILLY WEEKLY (Aug. 3, 2010), <http://www.philadelphiaweekly.com/news-and-opinion/cover-story/A-New-Dawn-Philly-Court-Uses-Compassion-to-Fight-Prostitution.html> (“Project Dawn Court is Philadelphia’s newest

throughout the United States, these courts forgo typical evidentiary and adversarial rules.²⁶⁶ Prosecutors, defense attorneys, and judges work collaboratively to address the roots of the woman's recidivism.²⁶⁷ These courts recognize that women who engage in prostitution are often the victims of extreme trauma that overrides their independent will, and therefore diminishes their mental culpability.²⁶⁸ Legal professionals in these rehabilitative courts have taken an alternative view on the blurred line between criminal and victim that represents so many individuals forced into the life of commercial sex work.²⁶⁹

These courts do have significant drawbacks, such as limited funding, concern over their inclusiveness of minority women, and general criticism of their rehabilitative structure.²⁷⁰ While far from perfect, these courts do provide a real-world example of how legal professionals can attempt to address the underlying problems that cause victims to become “perpetrators” of selling commercial sex and even the sex trafficking of others.²⁷¹ While perhaps the specifics of these rehabilitation courts should not be exactly emulated, the core principle of victim identification could be utilized. For example, in cases concerning perpetrators of sex trafficking, both in international tribunals and domestic courts, more thorough psychological and trauma evaluation should be pursued to determine the mental state of past victims.

If an intervention method implements a more holistic approach to determining victimhood, it has a higher chance of effectively using a criminal justice model while not unjustly, or unintentionally, punishing true victims. This would allow for more effective criminal prosecutions, thus satisfying advocates of the transnational criminal model, while simultaneously taking a more victim-centric view that engages the human rights community.

problem-solving court, designed for women with repeat prostitution offenses.”).

266. See Mueller, *supra* note 265, at 2 (describing the form of “problem-solving,” or “treatment,” courts).

267. See *id.* (“Comparing arrest and conviction rates before and after graduation from Cook County’s treatment courts shows a dramatically reduced recidivism rate.”).

268. See *id.* at i (indicating trauma counseling needs to be available to women in order to make exiting the sex trade a viable option).

269. See *id.* at 3 (“Even women engaging in prostitution in their own residences—women many view as being less likely to be victimized—reported frequent violence.”).

270. See Jake Blumgart, *Therapy at Gunpoint: Can This Controversial Philly Program Put an End to Sex Work?*, THE SLICE (Feb. 24, 2015), <http://talkingpointsmemo.com/theslice/can-dawn-court-solve-a-problem-like-prostitution> (indicating African-American women are underrepresented in the court program and that there are critics of the program); Jenniffer Weigel, *Rosemary Grant Higgins, Cook County Associate Judge*, CHI. TRIB. (Aug. 17, 2014), <http://www.chicagotribune.com/lifestyles/ct-remarkable-rosemary-grant-higgins-20140817-story.html> (discussing the limited funding and resources for such a program).

271. See Chelsea Parsons et al., *Three Key Challenges in Combating the Sex Trafficking of Minors in the United States*, CTR. FOR AM. PROGRESS (Apr. 8, 2014), <https://www.americanprogress.org/issues/lgbt/report/2014/04/08/87293/3-key-challenges-in-combating-the-sex-trafficking-of-minors-in-the-united-states/> (indicating the problems of victims being treated as criminals after serious sexual abuse which causes further trauma and humiliation by the agencies designed to help victims).

B. Victim Advocacy and Community Engagement

Victims of human trafficking, once identified in a broader context, must be engaged in a more meaningful way by legal professionals. Those attorneys who intend to combat trafficking must be competent in handling the many facets of this complex issue. Prosecutors must be educated in the human rights issues victims face and must be able to identify victims in an objective, yet compassionate, manner. In order to effectively prosecute human traffickers, some level of victim witness participation is necessary.²⁷² However, international legal professionals must be able to balance effective prosecution with victim interests and understand that many victims do not trust the criminal justice system.²⁷³ Therefore, these international legal professionals should attempt to create a more transparent, truthful environment for victim-witnesses.²⁷⁴ This will not only aid victims in overcoming their psychological trauma, but may also make them more willing to participate in criminal prosecutions, an essential component of a more effective transnational criminal system for confronting sex trafficking.²⁷⁵

One way international attorneys can facilitate this victim advocacy is by encouraging persons affected by sex trafficking to advocate on their own behalf.²⁷⁶ Traditional prosecutorial mechanisms do not allow for victims to voice their experiences,²⁷⁷ and even when victims are encouraged to speak out, they often feel threatened by their traffickers or the trial process.²⁷⁸ Some examples that legal professionals can look to for guidance in empowering victims to participate are post-conflict, victim-centric tribunals and commissions.²⁷⁹ These mechanisms

272. See TIP Report, *supra* note 8, at 16 (“[v]ictims themselves often play an integral role in the successful prosecution of trafficking cases as witnesses or assisting with investigations in other ways.”).

273. See *id.* (“[a] victim-centered approach to prosecutions, however, has proven effective in bringing more victims along as participants in the investigation and prosecution of their traffickers.”).

274. See *id.* (“[v]ictims are often hesitant to cooperate with authorities. Some may not even acknowledge or realize that they are victims of a crime, or because of dependency or ‘trauma bonding’ may still harbor affection for their abusers or have conflicted feelings about criminal charges.”).

275. See *id.* at 17 (indicating a trusting relationship benefits prosecution efforts and trafficking victims alike).

276. See *id.* at 16–17 (advocating for meaningful victim participation in prosecutions and indicating that ideally victims will have access to their own legal counsel).

277. See *id.* at 27 (suggesting that for a number of reasons, including trauma bonding, distrust of law enforcement, or fear of retaliation, a victim may be reluctant to testify in open court or may be an ineffective witness).

278. See TIP Report, *supra* note 8, at 27–28 (discussing the difficulty of the traditional trial process for victims).

279. See Eric Brahn, *Truth Commissions*, BEYOND INTRACTABILITY (June 2004), <http://www.beyondintractability.org/essay/truth-commissions> (describing truth commissions); Michael Humphrey, *From Victim to Victimhood: Truth Commissions and Trials as Rituals of Political Transition and Individual Healing*, 14 AUSTL. J. ANTHROPOLOGY 171, 172 (2003) (discussing the increased use of truth commissions to reveal the truth in human rights violations rather than pursuing prosecutions); Holly L. Guthrey, *Victim Healing and Truth Commissions*, in

encourage individuals who have been injured or exploited to face their abusers in a safe environment and voice their experiences.²⁸⁰ These commissions vary from semi-formal proceedings where victims come forward in front of a legal tribunal such as the Extraordinary Chambers in the Courts of Cambodia,²⁸¹ to domestic truth commissions such as the Truth and Reconciliation Commission in South Africa,²⁸² to community-based initiatives such as the Gacaca tribunals in Rwanda.²⁸³ The central element from these mechanisms that can be applied to sex trafficking interventions is a focus on encouraging honest, open communication with victims that involves them in the prosecution and punishment of their abusers in a more meaningful way than traditional prosecutions.²⁸⁴

Likewise, humanitarian advocates should be willing to engage with prosecutorial methods, both in an advisory role and as referral mechanisms to criminal justice processes.²⁸⁵ Rather than separating human rights issues from the criminal justice sphere, human rights advocates should endeavor to infuse transnational criminal mechanisms with a strong, victim-centric, human rights base. This can also involve the education and engagement of communities that are at a high risk for trafficking.²⁸⁶

V. CONCLUSION

For the first time in the long history of sex trafficking, it seems that the international community may be ready to take significant action in confronting this

11 SPRINGER SERIES IN TRANSNAT'L JUST. 1 (Olivera Simic ed., 2015) ("Truth commissions have emerged as one of the most common post-conflict justice mechanisms created to rectify the consequences of past violence.").

280. See Cristián Correa et al., *Reparations and Victim Participation: A Look at the Truth Commission Experience*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY 383 (Carla Ferstman et al. eds., 2009) (exploring the benefits and challenges of victim participation in alternative resolution mechanisms such as truth commissions and reparations).

281. See generally *Introduction to the ECCC*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, <http://www.eccc.gov.kh/en/about-eccc/introduction> (last visited Oct. 15, 2015).

282. See generally TRUTH AND RECONCILIATION COMM'N, <http://www.justice.gov.za/trc/> (last visited Feb. 25, 2014).

283. See generally Bernard Rimé et al., *The Impact of Gacaca Tribunals in Rwanda: Psychosocial Effects of Participation in a Truth and Reconciliation Process after a Genocide*, 41 EUR. J. SOC. PSYCHOL. 695 (2011).

284. See Brahn, *supra* note 279 (indicating that truth commissions have inherent benefits of their own and are not just a second best option to criminal prosecution); see also Humphrey, *supra* note 279, at 172 (noting increased frequency in the use of truth commissions as opposed to traditional prosecution proceedings).

285. See TIP Report, *supra* note 8, at 16 (providing a suggestion for this role in a "victim-witness coordinator" who would serve as a bridge between human rights interests for victims and prosecutors and law enforcement agents).

286. See Jordan, *supra* note 111, at 30 (indicating that unless underlying causes such as unemployment, political instability, and gender discrimination in education are addressed, the trafficking of women will continue to increase).

extremely urgent issue. Sex trafficking has finally captured the attention of governments, international organizations, and private citizens. However, without significant legal intervention, this attention is likely to turn into nothing more than superficial media fodder, instead of being an actual catalyst to aid the millions still trapped in sexual slavery. The current bifurcation of sex trafficking as either a transnational crime or a human rights abuse does not adequately address the complexity of the issue and limits the effectiveness of all intervention efforts. The international legal community must get on the same page in how it will confront this multifaceted issue and take unified steps to prosecute perpetrators and assist victims. One way to do this is to implement a more hybridized model for conceptualizing trafficking, which incorporates the structural elements of the transnational criminal model with the victim focus of a rights-based approach.

Any issue that requires international cooperation is subject to political whims and strategic compromises. However, attempts to confront sex trafficking, be they domestic, regional, or international, must incorporate elements of both the transnational crime and human rights frameworks if they are to be truly effective. If the international legal community cannot unify its efforts in some way, the spotlight shining on the issue of sex trafficking will eventually move on, and victims will be left in the dark.