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## Sex Trafficking and a Proposed Solution

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## Sex Trafficking and a Proposed Solution

### I. Introduction

The purpose of this article is to assist the international community's efforts in preventing and eradicating sex trafficking. The lack of ability to effectively prosecute and combat sex trafficking internationally can be attributed to a number of factors: (1) conceptual disagreement on what constitutes sex trafficking<sup>1</sup>; (2) diverging approaches on how to effectively combat or address sex trafficking<sup>2</sup>; (3) criminalization of prostitution<sup>3</sup>; and (4) failure of the international community as a whole to enforce accountability with regards to sex trafficking standards.<sup>4</sup>

First, due to lack of uniformity among various nations' codifications of sex trafficking conventions and regulations, it is unclear what constitutes international sex trafficking.<sup>5</sup> A lack

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<sup>1</sup> Michelle Madden Dempsey, Carolyn Hoyle & Mary Bosworth, *Defining Sex Trafficking in International and Domestic Law: Mind the Gaps*, 26 EMORY INT'L L. REV. 137 (2012))

<sup>2</sup> Kelsey Lee, *A House Divided: Divergent Approaches to Sex Trafficking in International Law*, 29 TEMP. INT'L & COMP. L.J. 383 (2015).

<sup>3</sup> Kristina Day, *Addressing the Sex Trafficking Crisis: How Prostitution Laws Can Help*, 2 CREIGHTON INT'L & COMP. L.J. 149 (2012)

<sup>4</sup> See Brittany Warren, *If You Have a Zero-Tolerance Policy, Why Aren't You Doing Anything: Using the Uniform Code of Military Justice to Combat Human Trafficking Abroad*, 80 GEO. WASH. L. REV. 1255 (2012).

<sup>5</sup> Kelsey Lee, *A House Divided: Divergent Approaches to Sex Trafficking in International Law*, 29 TEMP. INT'L & COMP. L.J. 383 (2015)(citing U.S. DEP'T OF STATE, INTERNATIONAL

of comprehension on what constitutes sex trafficking makes it difficult for the crime to be effectively addressed and prosecuted.

Second, another primary obstacle in addressing international sex trafficking is the divergent approaches often pursued in combatting the issue.<sup>6</sup> On one hand, legal professionals conceptualize sex trafficking as an international crime and focus their efforts in combatting the issue solely through prosecution and punishment of traffickers.<sup>7</sup> Conversely, other legal professionals view sex trafficking through the lens of a human rights violation and focus their attention on providing relief for victims.<sup>8</sup> Focusing on prosecuting bad actors, without considering the needs of victims undermines resources and creates encumbering tensions amongst actors, who ultimately have the common goal of eradicating sex trafficking.<sup>9</sup>

Third, universal adoption of Regulated Prostitution would allow for a more efficient international system of monitoring and detection of sex trafficking violations, and would provide

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PROGRAMS TO COMBAT HUMAN TRAFFICKING (Jun. 2014) (noting the preeminence of anti-trafficking measures in the international community)

<sup>6</sup> Kelsey Lee, A House Divided: Divergent Approaches to Sex Trafficking in International Law, 29 TEMP. INT'L & COMP. L.J. 383, 383 (2015).

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Kelsey Lee, A House Divided: Divergent Approaches to Sex Trafficking in International Law, 29 TEMP. INT'L & COMP. L.J. 383, 384 (2015).

for relief and protection for victims of sex-trafficking and sex workers as opposed to criminalization of them.<sup>10</sup>

Fourth, the international community as a whole has failed to hold governing bodies accountable for failing to adequately address the issue of sex trafficking, or for being complicit with acts of sex trafficking. A lack of punitive consequences breeds an international conception that failure to comply with international sex-trafficking conventions is more economically cost efficient than compliance.<sup>11</sup>

This article will argue that the best method for addressing sex trafficking is through the adoption of a novel comprehensive international model that incorporates multiple factors: (1) uniform terminology and conceptualization of what constitutes sex trafficking throughout international and domestic legislation ; (2) universal adoption of regulated prostitution legislation that achieves a balanced budgetary focus on the objectives of criminalization of trafficking actors AND provisional support and relief for victims; and (3) a punitive accountability system for failure to comply with international sex trafficking initiatives.

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<sup>10</sup> Kristina Day, Addressing the Sex Trafficking Crisis: How Prostitution Laws Can Help, 2 CREIGHTON INT'L & COMP. L.J. 149 (2012); Kelsey Lee, A House Divided: Divergent Approaches to Sex Trafficking in International Law, 29 TEMP. INT'L & COMP. L.J. 383 (2015).

<sup>11</sup> Brittany Warren, If You Have a Zero-Tolerance Policy, Why Aren't You Doing Anything: Using the Uniform Code of Military Justice to Combat Human Trafficking Abroad, 80 GEO. WASH. L. REV. 1255 (2012)

The first section of this article will identify both the Palermo Protocol, which is the current governing international sex trafficking legislation, and existing domestic sex trafficking legislation to highlight the terminological inconsistencies that exists amongst the international community in defining what constitutes sex trafficking. This section will then delineate the conceptual benefits and deficiencies of the divergent codifications of sex trafficking legislation, and compare the effectiveness each has in addressing the issue of sex trafficking by utilizing data from the TIP report as a metric. Section I will ultimately posit that the most effective approach the international community can take in combatting sex trafficking is adopting a single universal body of sex trafficking legislation that uses broad sweeping terminology.

Section II of this article will discuss three different legal approaches to prostitution: (1) criminalization of prostitution; (2) the Nordic model; and (3) regulated prostitution. This section will explore the pros and cons of each legal approach to emphasize that a system based on regulated prostitution will be the most efficient and effective in achieving both the objectives of prosecuting trafficking actors AND providing provisional support and relief for victims.

Section III will then discuss the weaknesses that currently exist within the international community regarding the lack of effort to ensure domestic compliance with sex trafficking initiatives. This section will identify and analyze current compliance measures that have been utilized by the international community to address sex trafficking violations that have occurred domestically in the past. Finally, this section will explore what other more effective compulsory actions can be taken by the international community as a whole to ensure domestic compliance with universal sex trafficking regulations.

Human trafficking has garnered public attention and concern as globalization and migration has caused an increase in international organized crime.<sup>12</sup> Human trafficking is a crime with international consequences and implications under which all persons regardless of age, gender, creed, or race have been affected.<sup>13</sup> The crime of human trafficking, also referred to as “trafficking of persons,” or “modern slavery,” includes forced labor, marriage, prostitution, and organ removal. *Id.* Internationally, authorities estimate approximately 20 million to 40 million individuals are victims of human trafficking today.<sup>14</sup> Determining the full extent of victims

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<sup>12</sup> Trafficking in Persons Report, U.S. Department of State, pg 3, <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf>.

<sup>13</sup> Trafficking in Persons Report, U.S. Department of State, pg 3, <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf>. ; 11 Facts about Human Trafficking, <https://www.dosomething.org/us/facts/11-facts-about-human-trafficking#:~:text=Estimates%20suggest%20that%20about%2050%2C000,trafficking%20cases%20involving%20only%20children>

<sup>14</sup> 11 Facts about Human Trafficking, <https://www.dosomething.org/us/facts/11-facts-about-human-trafficking#:~:text=Estimates%20suggest%20that%20about%2050%2C000,trafficking%20cases%20involving%20only%20children> (citing “Forced Labor, Modern Slavery, and Human Trafficking.” International Labor Organization. Accessed July 31, 2019. <http://www.ilo.org/global/topics/forced-labour/lang--en/index.htm>. “Monitoring Target 16.2 of the United Nations Sustainable Development Goals.” United Nations Office on Drug and Crime.

affected by trafficking is difficult and nearly impossible due to that fact that many cases fail to be detected or reported by authorities.<sup>15</sup> Human trafficking earns global profits of about \$150 billion annually.<sup>16</sup> With regards to sex trafficking specifically, sex trafficking in persons is the third highest grossing crime in the world.<sup>17</sup> While only about nineteen percent of human trafficking victims are trafficked for the purposes of sex or sexual exploitation, sex trafficking earns sixty-

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Accessed July 31, 2018. [https://www.unodc.org/documents/research/UNODC-DNR\\_research\\_brief.pdf](https://www.unodc.org/documents/research/UNODC-DNR_research_brief.pdf)).

<sup>15</sup> 11 Facts about Human Trafficking, <https://www.dosomething.org/us/facts/11-facts-about-human-trafficking#:~:text=Estimates%20suggest%20that%20about%2050%2C000,trafficking%20cases%20involving%20only%20children> (citing “What is Human Trafficking.” Californians Against Sexual Exploitation. Accessed July 31, 2019. [http://www.caseact.org/learn/humantrafficking/.](http://www.caseact.org/learn/humantrafficking/))

<sup>16</sup> 11 Facts about Human Trafficking, <https://www.dosomething.org/us/facts/11-facts-about-human-trafficking#:~:text=Estimates%20suggest%20that%20about%2050%2C000,trafficking%20cases%20involving%20only%20children> (citing “Human Trafficking by the Numbers.” Human Rights First. Accessed July 31, 2019. <https://www.humanrightsfirst.org/resource/human-trafficking-numbers>)

<sup>17</sup> Kelsey Lee, A House Divided: Divergent Approaches to Sex Trafficking in International Law, 29 TEMP. INT’L & COMP. L.J. 383, 383 (citing 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](http://www.unodc.org/unodc/en/about-unodc/speeches/speech_2000-11-28_1.html).) pg 383 (2015).

six percent of global human trafficking profits.<sup>18</sup> According to the Organization for Security and Co-operation in Europe (OSCE), ninety-nine billion dollars comes from commercial sexual exploitation or sexual slavery per year.<sup>19</sup> Studies show that sex trafficking and sexual exploitation can yield a return of investment ranging from 100% to 1000%.<sup>20</sup>

Although the number of individuals victimized by sex trafficking internationally ranges from approximately twenty to forty million individuals, the number of prosecutions of sex traffickers is alarmingly low in comparison.<sup>21</sup> The 2020 TIP report estimates that internationally only 11, 841 prosecutions are made for all types of human trafficking crimes; therefore, it can be inferred

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<sup>18</sup> 11 Facts about Human Trafficking, [https://www.dosomething.org/us/facts/11-facts-about-human-trafficking#:~:text=Estimates%20suggest%20that%20about%2050%2C000,trafficking%20cases%20involving%20only%20children](https://www.dosomething.org/us/facts/11-facts-about-human-trafficking#:~:text=Estimates%20suggest%20that%20about%2050%2C000,trafficking%20cases%20involving%20only%20children;); “Human Trafficking by the Numbers.” Human Rights First. Accessed July 31, 2019, <https://www.humanrightsfirst.org/resource/human-trafficking-numbers>.

<sup>19</sup> *Human Trafficking by the Numbers*. Human Rights First. Accessed July 31, 2019, <https://www.humanrightsfirst.org/resource/human-trafficking-numbers>.)

<sup>20</sup> Id.

<sup>21</sup> TIP 2020 report, pg 56-61 <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf>; Human Rights First. Accessed July 31, 2019, <https://www.humanrightsfirst.org/resource/human-trafficking-numbers>.



that prosecutions of sex trafficking only comprise only a fraction of those aforementioned prosecutions.<sup>22</sup>

## I. Various Definitions of Sex Trafficking

A uniform terminology in accordance with the Palermo Protocol and a broad interpretation of sex trafficking would be the most effective in developing a definition of sex trafficking that would be applicable internationally.

### A. International Conventions and Treaties Definitions of Sex Trafficking

#### 1. Palermo Protocol

Although previous treaties and conventions have ambiguously identified the issue of human trafficking, the Palermo Protocol, adopted by the United Nations on November 15, 2000, is the first explicit codified definition of human trafficking internationally.<sup>23</sup> Article 1 of the Palermo Protocol establishes that the protocol should be interpreted as supplementation to the United Nations Convention against Transnational Organized Crime, and offenses included

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<sup>22</sup> TIP 2020 report, pg 56-61 <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf>; Human Rights First. Accessed July 31, 2019, <https://www.humanrightsfirst.org/resource/human-trafficking-numbers>.

<sup>23</sup> Storer, Slavery in the Name of Tolerance: Whether an International Legal Obligation Exists to Criminalize Prostitution, 95 NEB. L. REV. 574 (2016). pg 581; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime art. 3(a), Nov. 15, 2000, 2237 U.N.T.S. 319, <https://www.ohchr.org/Documents/ProfessionalInterest/ProtocolonTrafficking.pdf>

within the protocol “shall be regarded as offenses established in accordance with the United Nations Convention against Transnational Organized Crime.”<sup>24</sup> The purpose of the protocol, articulated in article 2, includes the following: (1) to eradicating and prevent human trafficking, with an increased attention paid to the trafficking of women and children; (2) to ensure victims of trafficking receive adequate protection, assistance, and maintenance of their human rights; and (c) to facilitate collaboration among States Parties to meet the aforementioned objectives contained in (1) and (2).<sup>25</sup>

Article 3 of the Palermo Protocol contains the definition of human trafficking. Under Article 3 of the protocol, human trafficking is defined as the “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

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<sup>24</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime art. 3(a), Nov. 15, 2000, 2237 U.N.T.S. 319,

<https://www.ohchr.org/Documents/ProfessionalInterest/ProtocolonTrafficking.pdf>

<sup>25</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime art. 2(a) - (c), Nov. 15, 2000, 2237 U.N.T.S. 319,

<https://www.ohchr.org/Documents/ProfessionalInterest/ProtocolonTrafficking.pdf>

person having control over another person, for the purpose of exploitation.”<sup>26</sup> Article 3 further establishes that the exploitation referred to under the protocol includes at minimum sexual exploitation, forced labor, servitude, slavery, or organ removal.<sup>27</sup> Whether or not the victim in question consented is irrelevant in determinations on whether exploitation occurred if any of the aforementioned explicated forms of exploitation have occurred. 3(b).<sup>28</sup> With regards to children, a child under the statute is defined as any individual under the age of eighteen.<sup>29</sup> Additionally, under the protocol, any recruitment, transportation, harboring, or receipt of a child for the purpose of exploiting that child constitutes trafficking even if it falls outside of the definition of “exploitation” in 3(a).<sup>30</sup> Another relevant international convention with regards to sex trafficking is the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography was

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<sup>26</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime art. 3(a), Nov. 15, 2000, 2237 U.N.T.S. 319, <https://www.ohchr.org/Documents/ProfessionalInterest/ProtocolonTrafficking.pdf>

<sup>27</sup> Id.

<sup>28</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime art. 3(b), Nov. 15, 2000, 2237 U.N.T.S. 319, <https://www.ohchr.org/Documents/ProfessionalInterest/ProtocolonTrafficking.pdf>

<sup>29</sup> Id.

<sup>30</sup> Id.

adopted by resolution on May 25, 2000 at the fifty-fourth session of the General Assembly of the United Nations.<sup>31</sup> The convention entered into force on January 18, 2002.<sup>32</sup> Currently, the convention has acquired 121 signatories and 176 parties.<sup>33</sup> The purpose of this convention is to guarantee the protection of children from being exploited for economic gain, from being forced to perform work that is detrimental to a child's ability to obtain an education, or that would adversely affect a child's health, physical, mental, spiritual, moral, or social development.<sup>34</sup> The convention prohibits the sale of children, child prostitution and child pornography.<sup>35</sup> The convention defines "sale of children" as any act or transaction where a child is transferred by any individual or group of individuals to another for "remuneration or any other consideration."<sup>36</sup> Child prostitution is defined as using a child in sexual activities for

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<sup>31</sup> *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, Status of Treaties, United Nations Treaty Collection (status as of Nov. 10, 2020); [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11-c&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11-c&chapter=4&lang=en)

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> United Nations, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, Article 1 (date).

<sup>36</sup> United Nations, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, Article 2 (date).

“remuneration or any other form of consideration.”<sup>37</sup> Additionally, child pornography is defined as “any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual parts of a child for primarily sexual purposes.”<sup>38</sup>

## B. Domestic Sex Trafficking Regulations

### 1. United States Domestic Sex Trafficking Legislation

Throughout its history, the United States of America has passed multiple human trafficking laws and regulations.<sup>39</sup> The first comprehensive United States federal law to address human trafficking is The Trafficking Victims Protection Act (TVPA) of 2000.<sup>40</sup> The TVPA is structured into three main sections: (1) prevention; (2) protection; and (3) prosecution. The TVPA was reauthorized nine times through the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2003, 2005, 2008, 2013, and 2017.<sup>41</sup>

Section 102 of the TVPA delineates the purpose of the Act.<sup>42</sup> Similar to the Palermo Protocol, the Act seeks to address human trafficking by justly and effectively punishing

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<sup>37</sup> Id.

<sup>38</sup> Id.

<sup>39</sup> See *Human Trafficking Laws and Regulations*, Department of Homeland Security, (Last published: Sept. 19, 2019), <https://www.dhs.gov/human-trafficking-laws-regulations>.

<sup>40</sup> <https://humantraffickinghotline.org/what-human-trafficking/federal-law>.

<sup>41</sup> Id.

<sup>42</sup> Trafficking Victims Protection Act of 2000, 22 U.S.C. 7101.

traffickers and protecting victims.<sup>43</sup> The TVPA, in a manner similar to the Palermo Protocol also places a special emphasis on protecting women and children.<sup>44</sup> Section 103 defines the terms contained throughout the TVPA.<sup>45</sup> Under section 103.9 “sex trafficking” is defined as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”<sup>46</sup> Under the TVPA, a victim does not have to be physically transported from one location to another for trafficking to occur.<sup>47</sup> Section 103.3 defines a “commercial sex act” as any sex act done for which anything of value is given or received by any person.<sup>48</sup> Additionally, section 103.8 defines “severe forms of trafficking in persons as “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person 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 use of force, fraud, or coercion for purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”<sup>49</sup>

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<sup>43</sup> Id.

<sup>44</sup> Id.

<sup>45</sup> Trafficking Victims Protection Act of 2000, 22 U.S.C. 7101, section 103.

<sup>46</sup> Trafficking Victims Protection Act of 2000, 22 U.S.C. 7101, Section 103.9

<sup>47</sup> Trafficking Victims Protection Act of 2000, 22 U.S.C. 7101.

<sup>48</sup> Trafficking Victims Protection Act of 2000, 22 U.S.C. 7101, section 103.3

<sup>49</sup> 22 U.S.C. 7101 section 103.8 (A) - (B).

Additionally, under the TVPA, there are three forms of coercion: (1) threatening to seriously harm or use physical restraints against any other person; (2) schemes, plans, or patterns with the purpose to cause a person to believe failing to perform an act will result in serious harm or physical restraint of any other person; and (3) abuse or threatening to abuse the legal process.<sup>50</sup>

### C. Analysis of the Cohesiveness of Definition of Sex Trafficking Internationally and the Effectiveness of the Various Definitions

State parties, such as the United States to the Palermo Protocol have diverging definitions of “trafficking” in their domestic criminal codes, which frustrates the ability of the international community as a whole to identify what conduct constitutes “trafficking.”<sup>51</sup> Some parties to the Palermo Protocol, such as Bulgaria and Turkey have adopted identical definitions of trafficking in their criminal codes as it is defined in the protocol. Other state parties, such as Austria, have developed broader definitions of “trafficking,” and do not require certain elements of trafficking as defined under the protocol to be demonstrated for prosecution under their domestic jurisdictions.<sup>52</sup> Conversely, other state parties to the Palermo Protocol have adopted narrower definitions of “trafficking” than the Palermo Protocol definition.<sup>53</sup> The majority of state parties to the Palermo party have adopted definitions of “trafficking” in their domestic jurisdictions

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<sup>50</sup> Section 103.2 (A) - (C).

<sup>51</sup> Michelle Madden Dempsey, Carolyn Hoyle & Mary Bosworth, Defining Sex Trafficking in International and Domestic Law: Mind the Gaps, 26 EMORY INT'L L. REV. 137, 146 (2012).

<sup>52</sup> Michelle Madden Dempsey, Carolyn Hoyle & Mary Bosworth, Defining Sex Trafficking in International and Domestic Law: Mind the Gaps, 26 EMORY INT'L L. REV. 137, 146 (2012).

<sup>53</sup> Id.

divergent from that of the Palermo Protocol, “despite adopting the definition of trafficking set out in Article 3(a) of the Palermo Protocol, the language in Article 3(b) has not been adopted in the criminal laws of several state parties, including those of Armenia, Azerbaijan, Bosnia and Herzegovina, Denmark, Gambia, Ghana, Macedonia, Moldova, Mozambique, Montenegro, Portugal, the Russian Federation, Romania, Rwanda, Saudi Arabia, Serbia, Sierra Leone, South Africa, Sweden, Thailand, Trinidad and Tobago, Turkmenistan, Ukraine, the United States, and Zambia.”<sup>54</sup>

The broader definition of sex trafficking is the most effective in addressing sex trafficking. Additionally, differences in domestic definitions of human trafficking from that of the Palermo Protocol limit the gathering of accurate human trafficking data, which partially explains why international data is frequently challenged to determine the accurate scope and severity of the problem.<sup>55</sup>

With regards to Palermo Protocol, nearly every analysis that has been offered of the Palermo Protocol definition of trafficking in comparison to domestic law is that “the key difference between the Palermo Protocol's definition and those found in domestic anti-trafficking

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<sup>54</sup> Michelle Madden Dempsey, Carolyn Hoyle & Mary Bosworth, *Defining Sex Trafficking in International and Domestic Law: Mind the Gaps*, 26 EMORY INT'L L. REV. 137, 147-8 (2012).

<sup>55</sup> Laura L. Shoaps, *ROOM FOR IMPROVEMENT: PALERMO PROTOCOL AND THE TRAFFICKING VICTIMS PROTECTION ACT* (citing Alison Siskin & Liana S. Wyler, Cong. Research Serv., RL 34317, and *Trafficking in Persons: U.S. Policy and Issues for Congress* 8 (2012)).



criminal laws is whether the consent of the trafficked person is relevant to a determination of whether she has been trafficked.” Under Article 3(b) of the Palermo Protocol, the victim's consent to engage in prostitution is deemed irrelevant, whereas the victim's consent remains a central consideration in many state parties' domestic anti-trafficking criminal laws.”

A small number of parties to the Palermo Protocol have opted to define trafficking in a manner that covers a broader range of conduct than articulated in Article 3 of the Palermo Protocol. The successfulness of a country's definition of sex trafficking can be defined according to the TIP report.<sup>56</sup>

The most reliable, thorough metric and comprehensive resource in identifying and evaluating governmental approaches various nations take in addressing sex trafficking is the Trafficking in Persons (TIP) Report of the United States Department of State. The first TIP report was published by the United States Department of in July 2001 in response to the passing of the TVPA in 2000.<sup>57</sup> The TIP report was published with the purpose of ranking governments on their efforts to recognize and confront human trafficking.<sup>58</sup> The report ranks countries into multiple tiers based on each country's efforts in combating trafficking in adherence to the TVPA and in comparison to the country's efforts the previous year.<sup>59</sup> The highest ranking under the TIP report is the “Tier 1” ranking.<sup>60</sup> Countries receive Tier 1 status if they fully meet TVPA's minimum standards for the elimination of trafficking.<sup>61</sup> The second highest ranking under the TIP report is “Tier 2” ranking.<sup>62</sup> A country will be identified as Tier 2 if its government does

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<sup>56</sup> Trafficking in Persons Report, U.S. Department of State, <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf>.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

not fully meet the TVPA's minimum standards but are making significant efforts to comply. The third ranking under the TIP report is "Tier 2 Watch list" ranking. A country is placed on the Tier 2 Watch list if the government does not fully meet the TVPA's minimum standards, but are attempting to make significant efforts to comply, and the two factors are evident: (1) the approximated number of victims of severe forms of trafficking is considerable in size or is significantly increasing, and the country has failed to take tangible measures in response; and (2) the country has failed to provide evidence of effort to address severe forms of trafficking in persons, as identified under the TVPA, including but not limited to an increase in investigations, prosecutions, increased convictions of trafficking crimes, increased assistance and support for victims, and decreased complicity in severe form of trafficking by government officials. *Id.* The final and notably lowest ranking under the TIP report is a "Tier 3" ranking. Countries are placed in Tier 3 if their government does not fully meet the TVPA's minimum requirements, and are not making significant efforts to do so, multiple factors are relevant in determining whether a country should be ranked in Tier 3: (1) is the country one of origin, transit, or destination for severe forms of trafficking; (2) the extent the country fails to meet TVPA's minimum standards; (3) how complicit government officials are in trafficking; (4) reasonable measures the government would have to undertake to comply with the minimum TVPA standards with the government's resources and capabilities taken into account; and (5) the budgetary resources the government is willing to utilize to investigate, prosecute, convict, and sentence traffickers, and obtain restitution for victims. Under the TIP report, Austria has received Tier 1 recognition, and has been successful in preventing sex trafficking because of its broad definition of sex trafficking, "Authorities also prosecuted sex trafficking under Article 217, which criminalized all transnational prostitution and prescribed penalties of one to 10 years' imprisonment when a

trafficker induced a foreign individual to engage in prostitution by force, fraud, or coercion.” Tip report

## **II. Regulated Prostitution Combating Trafficking**

A system of regulated prostitution is the most ideal system the international community can adopt in identifying and preventing sex trafficking, and providing relief for sex trafficking victims. Criminalization of prostitution and the Nordic Model approaches to prostitution fail to appropriately identify the issue of trafficking because they isolate sex workers and perpetuate the existence of a black market, in which criminal activity such as sex trafficking thrives.

Criminalization of prostitution makes the act of prostituting and the act of patronizing a prostitute for sexual services a criminal offense.<sup>63</sup> Historically, the articulated purpose of criminalizing prostitution is to prevent violence, the objectification of women, and the spread of disease.<sup>64</sup> Often proponents of criminalization of prostitution posit that prostitution falls in line with other forms of organized crime such as drug trafficking, corruption, and homicide.<sup>65</sup> Additionally, other justifications for the criminalization of prostitution stem from theories of morality.<sup>66</sup> Under conservative moral principles, women and their sexuality should be confined to marriage and not considered in transactional exchanges.<sup>67</sup> Although it is a widely held conception that criminalizing prostitution prevents crime and violence, pragmatically there are numerous disadvantages.<sup>68</sup> First, criminalizing prostitution poses risks to sex workers because they face the threat of assault and abuse from clients, police, and pimps, however, they do not

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<sup>63</sup> Susan E. Thompson, Prostitution - A Choice Ignored, 21 WOMEN'S Rts. L. REP. 217, 239 (2000).

<sup>64</sup> Jared R. Rayborn, Regulated Prostitution as a Component in the Fight against Human Trafficking in Oregon, 50 WILLAMETTE L. REV. 115, 127 (2013).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 126.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 127.

report instances of assault out of fear they will ultimately be arrested and prosecuted for their acts of solicitation.<sup>69</sup> Additionally, if sex workers accumulate a criminal record from his or her work as a prostitute, it may inhibit them from obtaining a legitimate source of employment in the future, and force them to remain in the line of sex work for a longer period of time than originally intended.<sup>70</sup> Lastly, criminalizing prostitution takes focus from the efforts and resources that could be utilized to prevent and prosecute sex trafficking by focusing on consensual voluntary sex acts, “using state resources to prosecute all forms of prostitution may miss many cases of trafficking but criminalize instances of voluntary, consensual commercial sex.”<sup>71</sup> States spend millions to enforce the laws against prostitution, and often times this expenditure exceeds the amount spent for education, public welfare, and health services.<sup>72</sup> Criminalizing prostitution may also result in the prosecution of individuals who are sex trafficking victims, which runs in diametric opposition of the goal of eradicating sex trafficking and providing relief for sex trafficking victims.<sup>73</sup> Due to the high possibility that assault and abuse of sex workers will go unreported, and the misuse and misdirection of resources to police consensual voluntary commercial sex as opposed to the instances of trafficking that are being overlooked, it is evident that criminalizing prostitution is not the most effective form of regulating commercial sex to prevent sex trafficking, abuse against sex workers, and prosecution of sex trafficking victims.

The Nordic Model also is ineffective in addressing sex trafficking because criminalizing the purchasing of prostitution isolates sex trafficking victims. In 1999, Sweden enacted the first

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<sup>69</sup> *Id.* at 128.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Thompson* at 240-1.

<sup>73</sup> *Rayborn* at 128.

one-sided criminalization of prostitution. Under Sweden’s legislation, buyers not sellers were punished for engaging in prostitution.<sup>74</sup> The concept behind Sweden’s legislation, often referred to as “Nordic Model” was to criminalize or fine the purchase of sex as opposed to criminalizing or fining sex workers. This model is based on the idea that sex workers, as well as trafficked victims lack agency in the decision to engage in transactions that involve an exchange of some form of consideration for sexual acts. Under the “Nordic Model,” sex work is inherently a crime that cannot be consented to. The intentions under the Nordic Model are to instill in society that sex work constitutes violence against women. Additionally, the intention of the Nordic Model is to reduce the demand for sex work, which will inherently reduce the occurrence of sex work.<sup>75</sup> The criminalization of the clientele of prostitutes arguably may have negative effects. Some women and men rely on the profits of their work as prostitutes to survive, and if their clientele is dramatically decreased, it will result in them seeking career opportunities in other areas or jurisdictions in which purchasing prostitution is not prosecuted. This desire to travel to more profitable areas requires some form of capital or reliance on others to accomplish, “negative effects have been . . . increased reliance on pimps.”<sup>76</sup> Therefore, although the Nordic Model appears to be ideal, in many cases women will be forced to rely on traffickers for transportation or capital to travel, and will become indebted to the traffickers. Consequently, an increase in sex trafficking may occur, or at the minimum continue to persist, and the government will not be able to control it “merely decriminalizing the selling of sex, while criminalizing the purchasing of

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<sup>74</sup> Policy Brief, The Nordic Model of Prostitution Legislation: Health, Violence and Spillover Effects, (Apr. 21, 2019), <https://freepolicybriefs.org/2019/04/21/the-nordic-model-of-prostitution-legislation-health-violence-and-spillover-effects/>.

<sup>75</sup> [https://www.nswp.org/sites/nswp.org/files/sg\\_to\\_challenging\\_nordic\\_model\\_prf03.pdf](https://www.nswp.org/sites/nswp.org/files/sg_to_challenging_nordic_model_prf03.pdf)

<sup>76</sup> *Rayborn* at 133.

sex, would not give a state or county the ability to control the market and conditions of the practice of prostitution [or prevent the occurrences of sex trafficking] that inevitably will continue.”<sup>77</sup>

Regulated prostitution is a legal approach some governments have taken which utilizes “Licensing, registration, and mandatory health check-ups to regulate prostitution.”<sup>78</sup> Under a regulated prostitution approach, any other forms of prostitution or Sex work that occur outside the regulated sphere of prostitution is illegal.<sup>79</sup> An example of governments that practice regulated prostitution include the Netherlands and Nevada.

The most beneficial aspect of a system of Regulated Prostitution is that it enables the government to take more effective measures to identify and prevent trafficking than criminalization of prostitution, or the Nordic Model.<sup>80</sup> For example, in the Netherlands, the government has established inspections of brothels and hotlines for public reporting of instances of trafficking.<sup>81</sup> Additionally, under the Dutch’s Regulated Prostitution system, the government combats trafficking by prohibiting foreign nationals without “valid residence permits” from participating in prostitution in the Netherlands. Regulated Prostitution offers a system of labour laws to govern and protect sex workers and prevent sex trafficking in a manner that criminalization and the Nordic Model are not capable of, “transparent and legal prostitution certainly achieves this more effectively than a system that requires individuals to purchase and sell sex in the black market.”<sup>82</sup> Another one of beneficial aspects of regulated prostitution is the positive effects it has on the health of the sex workers and the clientele. Under most regulated

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<sup>77</sup> *Id.* at 134.

<sup>78</sup> *Id.* at 129

<sup>79</sup> Thompson at 242.

<sup>80</sup> Rayborn at 136.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

systems of prostitution, health checks are mandatory. <sup>83</sup> For example, in Nevada before an individual can receive employment as a prostitute, they must submit themselves to HIV, syphilis, gonorrhea, and chlamydia testing. <sup>84</sup> Once employed, sex workers must undergo monthly testing for HIV and syphilis, and weekly testing for gonorrhea and chlamydia. Mandatory health checks have been significant in reducing the rate of STDs and AIDS in prostitution, “as a result of the strict health regulations, the rate of infection from AIDS and STDs for legal prostitutes in Nevada is zero.” <sup>85</sup> If a sex trafficking victim has mandatory weekly checkups, there is a higher probability that trained healthcare professionals will detect signs of abuse common among sex trafficking victims, and be able to address them. Additionally, weekly meetings with healthcare professionals will likely enable a connection or relationship to develop with sex trafficking victims aiding them to build up the confidence to report their traffickers.

Another benefit of regulated prostitution is that the assault and abuse sex workers face is significantly reduced because sex workers are more likely to report instances of violence or trafficking without the fear of being prosecuted themselves. <sup>86</sup>

## II. Accountability Measures

A significant impediment to combating trafficking is the failure of the international community to hold nations accountable for their lack of compliance with sex trafficking initiatives. One of the instruments with the capability to hold nations accountable for failing to adequately address sex trafficking is the ranking of the TIP report. A low ranking may serve to

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<sup>83</sup> Thompson at 242.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

publicly shame or humiliate nations to reform their actions in order to rebuild esteem in the eyes of their peers.

Additionally, according to the TIP report, another measure that is employed by the United States to ensure compliance with sex trafficking initiatives is subjecting non-compliant nations to restrictions. Under the TVPA, governments that rank Tier 3 can be subjected to certain restrictions of foreign aid or assistance. 2020 TIP report pg 42 The United States President has the discretion to refuse to provide United States government non humanitarian non-trade related foreign assistance. 2020 TIP report pg 42. The President also has the discretion to withhold funding for government official or employee participation in educational and cultural exchange programs with Tier 3 countries. Under the TVPA, the United States President has the discretion “to instruct the U.S. Executive Director of each multilateral development bank and the International Monetary Fund to vote against and use their best efforts to deny any loans or other uses of the institutions’ funds to a designated Tier 3 country for most purposes (except for humanitarian, trade-related, and certain development-related assistance).” 2020 TIP report pg 42. Although these instruments may be somewhat effective, they are not stringent enough as evidenced by the number of countries that still rank in the Tier 2 Watch List and Tier 3 rankings. 2020 TIP report pg 55. Other more severe international sanctions should be applied to ensure compliance: (1) economic sanctions, such as embargoes or denial of access to financial institutions; (2) military sanctions; or (3) diplomatic solutions, such as the withdrawal of an ambassador. M/ Stefanie Rodarte-Suto, International Policies on Human Trafficking, (July 10, 2018)(citing Masters, J. (2017, August 7). What are Economic Sanctions? Council on Foreign Relations. doi:<https://www.cfr.org/backgrounder/what-are-economic-sanctions>



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