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Article

Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway

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Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway

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INTRODUCTION

During 1998 and 1999, I participated in a series of intergovernmental meetings in Vienna, convened under the auspices of the United Nations. Their purpose was to hammer out, as quickly as possible, an international cooperation agreement on transnational organized crime as well

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as a set of supplementary treaties on the specific issues of trafficking in persons, migrant smuggling, and the trade in small arms. My job, as representative of Mary Robinson, the then High Commissioner for Human Rights, was to use her voice in persuading states not to dilute or let go of the basic international human rights principles to which they were already committed. We had good reason to be worried. Migrant smuggling had recently been identified as a security threat by the preferred destination countries in Europe, North America, and Australia, and had moved from the margins to the mainstream of international political concern. Human trafficking, an obscure but jealously guarded mandate of the UN's human rights system, had been similarly elevated and, in the process, unceremoniously snatched away from its traditional home.

For those of us from the United Nations' human rights, refugee, and children's agencies thrown together in Vienna, the existence of a very real problem was beyond dispute. Despite an impressive array of international legal protections, it was clear to our organizations that forced labor, child labor, debt bondage, forced marriage, and commercial sexual exploitation of children and adults were flourishing, unchecked in many parts of the world. Globalization, bringing with it the promise of wider markets and greater profits, had created complex new networks and even new forms of exploitation. We all believed that trafficking was indeed an appropriate focus for international law. We also agreed that the existing international legal framework was woefully inadequate, and the chances of the human rights system coming to the rescue were slim. The goal of our informal coalition was to secure: (i) a definition of trafficking sufficiently broad to encompass the most prevalent forms of contemporary exploitation; (ii) a legal obligation on states to criminalize trafficking; (iii) a commitment to protecting and supporting victims; and (iv) a specific undertaking that established rights and obligations would remain unaffected.

Our position with respect to the proposed migrant smuggling treaty was slightly less assured. The prospect of a legal separation between (technically consensual, incidentally exploitative) migrant smuggling on the one hand, and (never consensual, always exploitative) trafficking on the other was generally considered to be a good thing. At the very least, it would force some conceptual clarity on a set of definitions that had been shrouded in mystery and controversy, which was to the clear disadvantage of both trafficked persons and smuggled migrants. The right of states to cooperate in lawful regulation of their borders was never seriously questioned. Our focus, therefore, remained squarely on ensuring

that drafters did not endorse criminalization of smuggled migrants, and that established rights relevant to entry and return, including the right to seek and receive asylum and the prohibition on refoulement, were explicitly upheld.

Although we did not walk away from what became known as the “Vienna Process” empty handed, the end result confirmed the harsh truth that these negotiations had never really been about human rights. Any victories on our side were both hard won and incomplete. The Migrant Smuggling Protocol indeed refrained from sanctioning the criminalization of smuggled migrants.¹ It included minimum guarantees with respect to nondiscrimination, refugee rights, and a critical savings clause but, in the end, very little else. At least in relation to the Trafficking Protocol, the final agreement was better than most had hoped.² After fractious debate, the first international legal definition of trafficking proved to be sufficiently broad to embrace all but a very small range of situations in which individuals are severely exploited for private profit. Importantly, the Trafficking Protocol’s general obligation to criminalize trafficking would, in practice, apply to exploitative practices taking place within as well as between national borders.³ States also agreed to a limitations clause maintaining the application of recognized rights and obligations. It was in relation to specific commitments of protection and support for victims that the Trafficking Protocol disappointed. The flaw, however, was not considered to be a fatal one. International human rights law already provided substantial, if underutilized protections, and subsequent legal developments, particularly at the regional level, were expected to provide ample authority to fill any remaining gaps. As shown below, that optimism was not misplaced.⁴ The Trafficking Protocol proved to be only the first step in the development of a comprehensive international legal framework comprising regional treaties, abundant interpretive guidance, a range of policy instruments, and a canon of state practice. This framework is truly remarkable—not just in the speed of its development, but also in its uniformity and relatively high level of consistency with international standards.

1. Protocol against the Smuggling of Migrants by Land, Sea and Air, Nov. 15, 2000, S. TREATY DOC. NO. 108-16 (2004), 2241 U.N.T.S. 480 [hereinafter Migrant Smuggling Protocol].

2. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, S. TREATY DOC. NO. 108-16 (2004), 2237 U.N.T.S. 319 [hereinafter Trafficking Protocol].

3. *See infra* Part I.C.

4. *See infra* Part II.C.

The Vienna Process provided some important and occasionally uncomfortable insights into the place of human rights within a broader international legal and political context. On the positive side, there are not many fields of international law, outside of this one, where the gains for the poor and the marginalized are potentially greater than for the rich and privileged. Making human rights the center of thinking about trafficking stops us from being sidetracked by the slick arguments of those who would prefer it be approached as a straightforward issue of migration, of public order, or of organized crime. It prevents an uncritical acceptance of the strange legal fiction, explored further below, that “trafficking” and “migrant smuggling” are two completely different crimes involving helpless, virtuous victims on the one side and foolish or greedy adventurers, complicit in their own misfortune, on the other. Perhaps most importantly, a human rights approach makes clear that trafficking is woven deeply and inextricably into the fabric of an inequitable, unjust, and hypocritical world.

On the negative side, however, the disadvantages of a traditional, rights-based response to trafficking are significant. Such disadvantages are connected fundamentally to the inherent political, legal, and structural weaknesses of the international human rights system itself. It cannot be a coincidence that nothing much happened to trafficking in the fifty years it occupied a hallowed, if irrelevant, position on the sidelines of the United Nations’ human rights system. During the entire twentieth century, when trafficking and its array of associated practices belonged exclusively to human rights, states could not even agree on a definition, much less on specific legal obligations. When trafficking belonged exclusively to human rights, there was one long ago treaty that nobody but the fringe dwellers intent on abolishing prostitution cared about,⁵ occasional, confused reports emanating from a marginal and marginalized body (the UN Working Group on Contemporary Forms of Slavery), and very little else. Furthermore, during this period not even the treaty bodies were much help. Despite the existence of relatively straightforward prohibitions in two major treaties,⁶ and a plethora of related standards in

5. *See* Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271.

6. Convention on the Rights of the Child arts. 32–36, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC] (prohibiting the abduction, sale, and trafficking of children, economic and sexual exploitation of children, as well as forced or exploitative labor); Convention on the Elimination of All Forms of Discrimination against Women art. 6, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW] (prohibiting the trafficking and exploitation of the prostitution of women).

others,⁷ trafficking was (and still is) rarely linked to the violation of a specific provision of a specific treaty. All in all, working out the “wrong” of trafficking with reference to human rights was a difficult and frustrating task for the human rights lawyer. For states intent on minimizing their legal obligations to the oppressed and exploited, it was a perfect situation: as long as the law remained unclear, they could keep arguing about it; as long as the law remained unclear, they would not be brought to task for failing to uphold it.

I was amongst those who, in the late 1990s, decried the removal of trafficking from the sacred chambers of the international human rights system to the area of the United Nations that dealt with drugs and crime. When it became clear that the UN Crime Commission was going to develop a treaty on trafficking, we human rights lawyers and practitioners were, in the best tradition of our profession, righteously outraged. Surely this was the task of human rights? Surely trafficking was too important, too sensitive, to entrust it to an alien UN environment that knew (or, we suspected, cared) little about human rights? A decade later, it is necessary to acknowledge that there is no way the international community would have a definition and an international treaty on trafficking if this issue had stayed within the realms of the human rights system. Even if that troubled system had managed to found its own treaty, such an instrument probably would not have tackled those mundane but critical issues such as criminal jurisdiction, mutual legal assistance, or extradition. No human rights treaty on trafficking (or on any contemporary forms of slavery for that matter) would have been able to link itself to a parent instrument that set out detailed obligations for tackling corruption, exchanging evidence across national borders, and seizing assets of offenders.⁸ No human rights treaty would have received the necessary number of ratifications to permit its entry into force a mere two years after its adoption. Certainly, no human rights treaty would have prompted the raft of international, regional, and national reforms that have fundamentally altered the legal and policy framework around this issue. Perhaps most significantly in the present context, no conceivable action of the international human rights system could have focused the same level of global attention and resources on debt bondage, forced labor, sexual servitude, forced marriage, and other exploitative practices that continue to plague all regions and most countries of the world.

7. *See infra* Part II.C.

8. *See* Convention against Transnational Organized Crime, Nov. 15, 2000, S. TREATY DOC. NO. 08-16 (2004), 2225 U.N.T.S. 209 [hereinafter *Organized Crime Convention*].

In a Fall 2008 article published in the *Virginia Journal of International Law*, James C. Hathaway questions whether the elimination of trafficking is a worthy objective and an appropriate focus for international law.⁹ In doing so, he contends that international legal efforts to address human trafficking originating outside the formal human rights system are fundamentally in tension with core human rights goals and have been misguided and destructive of the broader human rights project. Specifically, Hathaway charges that while the elimination of trafficking is billed as the answer to contemporary slavery, the focus on trafficking has unfairly “privileged” a small group of exploited individuals and diluted efforts that could have been better spent addressing the much wider problem of human enslavement—a problem he views as having been largely abandoned by the international community and the UN human rights system. Hathaway also asserts that those human rights advocates and practitioners engaged on the issue of trafficking have been hoodwinked by preferred destination countries into supporting a covert extension and tightening of border controls, thereby driving migratory demand into the black market and increasing the difficulties faced by refugees seeking to access their right to protection under international law.

This Article, written from the perspective of one who has been closely involved in the development of the new legal framework, as well as in its implementation at the national level in over forty countries, provides an alternative and a sharply differing perspective on the global battle to combat trafficking. In considering each of Hathaway’s major concerns and discrediting the assumptions and authorities on which they are based, I identify a number of serious flaws in both interpretation and application. In terms of the broader legal and political context, I conclude that far from damaging human rights, the issue of trafficking provides unprecedented opportunities for the renewal and growth of a legal system that, until recently, has offered only platitudes and the illusion of legal protection to the millions of individuals whose life and labor is exploited for private profit.

The body of this Article is divided into three parts. Part I examines Hathaway’s principal criticism: that the campaign against trafficking and the legal framework that resulted benefit only a negligible proportion of those who are enslaved. The charge of privileging is rejected through an analysis confirming that the definitions on which Hathaway

9. James C. Hathaway, *The Human Rights Quagmire of “Human Trafficking,”* 49 VA. J. INT’L L. 1 (2008).

relies for slavery and trafficking have both been interpreted and applied incorrectly. Slavery is more contested, and certainly much narrower, than he allows; trafficking is considerably broader. In Part II, I address the charge of institutional atrophy and dilution of effort. I look beyond Hathaway's extended criticism of the marginal and now defunct Working Group on Contemporary Forms of Slavery to consider the capacity of the broader human rights system to address contemporary exploitation. The impact of the "antitrafficking campaign" on law and policy at the international, regional, and national levels is also considered in terms of achievements, opportunities, and challenges. Part III explores the serious charge that developing countries and a credulous international human rights community were cynically manipulated by the major countries of destination into legitimizing an extension of undesirable (and implicitly unlawful) border controls. While rejecting the charge, I seek to identify the very real obstacles, inconsistencies, and frustrations to the protection of illegal migrants and refugees that appear to underlie Hathaway's condemnation of a remarkably influential global campaign.

I. THE CHARGE OF UNJUSTIFIABLE PRIVILEGING

Hathaway asserts that "the antitrafficking campaign privileges a small subset of persons subject to contemporary forms of slavery, with consequent marginalization of the majority of the world's [thirty million] slaves."¹⁰ In support of this position he cites a selective range of public pronouncements linking trafficking with slavery, as well as some perceived limitations of the new international legal definition of trafficking.¹¹ The new definition, he asserts, "amounts to a significant re-

10. *Id.* at 6.

11. I note Hathaway's somewhat disingenuous association of the global campaign against trafficking and support for the UN Trafficking Protocol with controversial conservative public figures, including former U.S. President George W. Bush, former Head of the U.S. Department of State's Office to Monitor and Combat Trafficking in Persons, Ambassador John Miller, former U.S. Secretary of State Condoleezza Rice, and the head of the Vatican's Pontifical Council for Justice and Peace, Cardinal Renato Martino. *Id.* at 2; *see also id.* at 7 ("U.S. President George W. Bush was among those particularly committed to the cause.") In fact, U.S. domestic and international action against trafficking was initiated by the administration of President Bill Clinton with the active involvement of Hillary Clinton, the then titular head of the President's Interagency Council on Women. For a detailed analysis of the early U.S. domestic campaign against trafficking in human beings, including the battle that quickly ensued between "liberals" and a conservative Congress, and its effect on the international negotiations for a global treaty, see ANTHONY M. DE STEFANO, *THE WAR ON HUMAN TRAFFICKING: U.S. POLICY ASSESSED* (2007); Jacqueline Berman, *The Left, the Right, and the Prostitute: The Making of U.S. Antitrafficking in Persons Policy*, 14 *TUL. J. INT'L & COMP. L.* 269 (2006).

treat from the already agreed upon prohibition on slavery” and is “highly circumscribed relative to the legally binding definitions of slavery already adopted.”¹² There are several serious conceptual and legal problems with this interpretation, which are best explored through an examination of the two definitions in question.

A. *Slavery in International Law*

*“If one is interested in the issue of modern day slavery and its suppression, Bales is the person to turn to. For the law, look elsewhere.”*¹³

A key question raised by Hathaway’s argument relates to the definition and substantive content of the international legal prohibition on slavery. In defining both the meaning of slavery and the scope of the problem, Hathaway relies on the work of sociologist and activist Kevin Bales.¹⁴ Hathaway accepts an expansionist claim, critiqued and rejected below, that the legal concept of slavery refers to “any form of dealing with human beings leading to the forced exploitation of their labour,” including “the exercise of any or all of the powers attaching to the right of ownership over a person.”¹⁵ He also accepts, without question or qualification, Bales’s estimate that there are currently twenty-seven million (subsequently inflated in his article, without explanation, to “more than approximately thirty million”) slaves in the world today.¹⁶ By combining this figure with an equally unverified secondary source estimate of the number of trafficked persons at 750,000,¹⁷ Hathaway con-

12. Hathaway, *supra* note 9, at 10–11.

13. Jean Allain, Book Review, 20 INT’L J. REFUGEE L. 228, 232 (2008) (reviewing KEVIN BALES, UNDERSTANDING GLOBAL SLAVERY: A READER (2005)).

14. Kevin Bales is regarded as a leading expert on contemporary forms of exploitation that he terms “slavery.” His major works include KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY (rev. ed. 2004); KEVIN BALES, ENDING SLAVERY: HOW WE FREE TODAY’S SLAVES (2007); and KEVIN BALES, UNDERSTANDING GLOBAL SLAVERY: A READER (2005) [hereinafter BALES, GLOBAL SLAVERY]. Throughout his piece, Hathaway relies on KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY (1999) [hereinafter BALES, DISPOSABLE PEOPLE].

15. Hathaway, *supra* note 9, at 9.

16. *Id.* at 11 (citing BALES, DISPOSABLE PEOPLE, *supra* note 14, at 8–9).

17. *Id.* at 5 n.21. Hathaway cites Liz Kelly, “You Can Find Anything You Want”: A Critical Reflection on Research on Trafficking in Persons Within and into Europe, 43 INT’L MIGRATION 235 (2005), to support his claim that “[c]urrent estimates suggest that as many as 750,000 persons are ‘trafficked’ in any given year.” Note that Kelly merely reproduces wildly divergent estimates provided by the U.S. State Department in its Trafficking in Persons (TIP) Reports for 2002–04, in which the figure 750,000 is not actually mentioned. Hathaway does not consider the significant body of available research literature that calls into question the reliability of global statistics on

cludes, as several scholars before him who also rely on Bales have done,¹⁸ that the conceptual framework around trafficking protects a derisory three percent of the world's enslaved population.¹⁹

Determining whether the figure of thirty million slaves in the world today is an accurate number²⁰ and whether it is true that only a negligible proportion of them have been trafficked, requires a careful consideration of the scope of Hathaway's definition of slavery. If the definition and substantive content of the international legal prohibition of slavery is different from or narrower than that proposed by Hathaway, then his claim that the definition of trafficking "amounts to a significant retreat from the already agreed upon prohibition of slavery" must be called into question.²¹ Such a finding also would impact directly Hathaway's critique of the international human rights system's response to slavery, as well as his broader argument that the creation of a special legal regime for a minor subset of the world's enslaved population has marginalized the rest of the group.

This Section shows that the expanded definition of slavery used by Bales in identifying the scope and nature of the problem of slavery, and adopted (in a modified version) by Hathaway, is fundamentally different

trafficking (thereby compromising the validity of any claim that trafficking is a minor subset of slavery). See, e.g., MEASURING HUMAN TRAFFICKING (Ernesto U. Savona & Sonia Stefanizzi eds., 2007); Frank Laczko, *Data and Research on Human Trafficking*, 43 INT'L MIGRATION 5 (2005). For a withering critique of the figures provided by the U.S. State Department, see U.S. GOV'T ACCOUNTABILITY OFFICE, HUMAN TRAFFICKING BETTER DATA, STRATEGY, AND REPORTING NEEDED TO ENHANCE U.S. ANTITRAFFICKING EFFORTS ABROAD (2006), available at <http://www.gao.gov/new.items/d06825.pdf> [hereinafter GAO REPORT].

18. See, e.g., A. Yasmine Rassam, *International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach*, 23 PENN ST. INT'L L. REV. 809, 811 (2005) ("The U.S. State Department estimates that approximately 800,000–900,000 people are trafficked annually. Yet an estimated 26 million of those currently enslaved have never been trafficked across international borders or even within national boundaries."); see also JOEL QUIRK, WILBERFORCE INST. FOR THE STUDY OF SLAVERY & EMANCIPATION, UNFINISHED BUSINESS: A COMPARATIVE SURVEY OF HISTORICAL AND CONTEMPORARY SLAVERY 46 (2008) (referring to Bales's "comparatively modest figure of 27 million slaves as a conservative estimate of documented cases of real slavery").

19. Hathaway, *supra* note 9, at 4.

20. Hathaway, like Joel Quirk, cites Bales's own estimates of approximately thirty million persons who are enslaved today as "conservative." *Id.* at 11 n.56; see also QUIRK, *supra* note 18. The underlying question is: What is being counted? For example, the UN Human Rights Council recently stated that "the minimum estimate of the number of people in slavery is over 12 million." Special Rapporteur on Contemporary Forms of Slavery, H.R.C. Res. 6/14, at 2, U.N. Doc. A/HRC/6/L.23 (Sept. 25, 2007). This figure closely coincides with the current number of persons estimated by the International Labour Office to be subjected to forced labor. DIRECTOR-GENERAL, REPORT 1(B): A GLOBAL ALLIANCE AGAINST FORCED LABOUR (2005), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/rep-i-b.pdf>.

21. Hathaway, *supra* note 9, at 10.

from that which is recognized in international law as applicable to the treaty-based and customary international law based prohibition of slavery. A review of recent developments in international law shows that, even more so than trafficking, the concept of slavery remains highly contested. Moral and political crusaders such as Bales, who rail against the “sickness of slavery” and the “human right to evil,”²² understand the political and emotional significance of the slavery label (particularly in the United States) and have a vested interest in expanding its reach.²³ Legal scholars, many of whom are complicit in the expansionist effort, also understand the label’s significance.²⁴ To identify a practice as slavery does more than raise the political and emotional ante. It also brings a very special kind of legal force to bear, because the prohibition on slavery is recognized as a rule of customary international law²⁵ and regularly is identified as a legal obligation *erga omnes*²⁶ and as part of *jus cogens*.²⁷

22. Allain, *supra* note 13, at 229 (quoting BALES, GLOBAL SLAVERY, *supra* note 14).

23. Bales is nevertheless aware that the overextension of the concept of slavery, even beyond his own very broad definition, can lead to a dilution of its political and emotional force. See Kevin Bales, *Preface* to QUIRK, *supra* note 18, at 9 (“Around the edges of the contemporary anti-slavery movement are also those groups who would believe they would benefit from stretching the meaning of the word ‘slavery’ to include such issues as all forms of prostitution, incest, all forms of child labour, all prison labour, and the coercive mental control exercised by television. The result is that the dilution of meaning leads to a dilution of effort with schismatic effect.”).

24. See, e.g., Rassam, *supra* note 18. A. Yasmine Rassam finds the 1926 definition of slavery unduly restrictive and proposes that “when viewed outside the narrow framework of legal ownership, the institution of slavery is defined as the total dominion over another through physical and/or psychological violence for the purposes of extracting unpaid labour.” *Id.* at 817. Rassam further contends that contemporary forms of slavery, including debt bondage and bonded labor, “fi[t] squarely under the definition of slavery.” *Id.* at 824. For a discussion of the academic and activist attempts to identify trafficking as a form of slavery within the terms of the 1926 definition, see Anne Gallagher, *Using International Human Rights Law to Better Protect Victims of Trafficking: The Prohibitions on Slavery, Servitude, Forced Labor, and Debt Bondage*, in THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW: ESSAYS IN HONOR OF M. CHERIF BASSIOUNI 397, 413–15 (Leila Nadya Sadat & Michael P. Scharf eds., 2008).

25. See *Prosecutor v. Kunarac, Kovac & Vukovic*, Case No. IT-96-23-T, Judgment, ¶ 520 (Feb. 22, 2001). For the development of the customary prohibition, see M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT’L L. & POL. 445 (1991).

26. A legal obligation *erga omnes* is considered to be universal in character, thereby giving a state a legal interest in its protection and a capacity to bring suit against another state in the International Court of Justice (ICJ). This legal right is vindicated irrespective of whether the state has suffered direct harm. The basis for this right was recognized by the ICJ in *Barcelona Traction, Light & Power Co.* (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5).

27. The international law principle of *jus cogens* is a “peremptory norm of general international law,” and “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980)

Unfortunately, as the concept of slavery expands to fit the needs of scholar-activists, its legal worth diminishes.²⁸ The consequent confusion and dilution of the term's legal force is not just of concern to legal purists. The prohibition on slavery is no longer confined to vaguely enforceable human rights and humanitarian law instruments. Its link with trafficking, explored further below, means that slavery is now part of a practice that has been criminalized in over one hundred countries.²⁹ It has also been formally incorporated into international criminal law, thereby carrying individual criminal responsibility.³⁰ As Jean Allain, a leading authority on slavery in international law, has observed, failure to define the substantive content of the prohibition of enslavement will directly affect the ability of the international community to bring to justice those individuals who are criminally responsible for violating the prohibition.³¹ Such failure will also lead, at both national and international levels, to a violation of the right of accused persons to be "informed promptly and in detail of the nature, cause and content of the charge [against them]."³² The current environment is not one in which international lawyers, even those with the very best intentions, can afford to manipulate or be careless with definitions.

B. *The International Legal Definition of Slavery*

What then, is the correct definition of slavery in international law? Freedom from chattel slavery was one of the first rights to be recognized under public international law. Prohibitions on slavery and the slave trade were a central feature of more than seventy-five multilateral

[hereinafter VCLT]. In *Barcelona Traction*, the ICJ stated, in regard to obligations *erga omnes*, that "[s]uch obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination." 1970 I.C.J. 3, 32. For additional information on the status of the prohibition on slavery as an obligation *erga omnes* and as a jus cogens norm, see Bassiouni, *supra* note 25.

28. Jean Allain, *The Definition of "Slavery" in General International Law and the Crime of Enslavement within the Rome Statute*, Guest Lecture Series of the Office of the Prosecutor ¶ 1 (Apr. 26, 2007), available at http://www.icc-cpi.int/NR/rdonlyres/069658BB-FDBD-4EDD-8414-543ECB1FA9DC/0/ICCOTP20070426Allain_en.pdf.

29. *See infra* Part I.C.

30. *See* Statute of the Special Court for Sierra Leone, UN-Sierra Leone art. 2(c), Jan. 16, 2002, 2178 U.N.T.S. 138; Rome Statute of the International Criminal Court arts. 5(1)(b), 7(1)(c), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; Statute of the International Tribunal for Rwanda art. 3, Nov. 8, 1994, 33 I.L.M. 1598; Statute of the International Tribunal art. 5, May 25, 1993, 32 I.L.M. 1192.

31. Allain, *supra* note 28, ¶ 1.

32. *Id.* (citing Rome Statute, *supra* note 30, art. 67(1)(a)).

and bilateral conventions from the early nineteenth century onwards.³³ It was not until 1926, however, with the League of Nations Slavery Convention (1926 Convention), that an international legal definition of slavery was articulated.³⁴ Article 1 of that instrument defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”³⁵ The same instrument also called upon states to bring about “progressively and as soon as possible, the complete abolition of slavery *in all its forms*.”³⁶ Unfortunately, the “powers attaching to the right of ownership” and the “forms” of slavery that were to be progressively abolished were not specified in the 1926 Convention. It is these ambiguous provisions that have been used by activists and scholars, including authorities upon which Hathaway relies, to propose or justify an expanded definition of slavery beyond the strict confines of Article 1 of the 1926 Convention.³⁷ But that expansionist interpretation, given wide currency through a series of UN reports, has now been rejected.³⁸ The recently compiled *travaux pré-*

33. See Bassiouni, *supra* note 25, at 454–61 (discussing seventy-nine international instruments that address the issue of slavery, including the 1815 Declaration Relative to the Universal Abolition of the Slave Trade, the 1822 Declaration Respecting the Abolition of the Slave Trade, the 1841 Treaty for the Suppression of the African Slave Trade, and the 1885 General Act of the Conference Respecting the Congo, which affirmed that the “slave trade was prohibited in accordance with the principles of [the rights of man]”); *see also id.* at 462, 465 (discussing the General Act of the Brussels Conference (1890) and the Treaty of Saint-Germain-en-Laye (1919)). For a detailed examination of relevant international and state practice during the eighteenth and nineteenth centuries, see 5 J.H.W. VERZIJL, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE* 238–63 (1976).

34. International Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253 [hereinafter 1926 Convention].

35. *Id.* art. 1.

36. *Id.* art. 2 (emphasis added).

37. See, e.g., Kevin Bales & Peter T. Robbins, *No One Shall Be Held in Slavery or Servitude: A Critical Analysis of International Slavery Agreements and Concepts of Slavery*, 2 HUMAN RIGHTS REV. J. 21–23 (2001); Joel Quirk, *The Anti-Slavery Project: Linking the Historical and Contemporary*, 28 HUMAN RIGHTS Q. 565, 568 (2006).

38. These reports were prepared for the Sub-Commission on Protection and Promotion of Human Rights (previously the Sub-Commission on Prevention of Discrimination and Protection of Minorities) by David Weissbrodt and Anti-Slavery International. The authors of the reports use a document of the Draft Committee for the Slavery Convention in addition to an earlier report of the Temporary Slavery Committee (the report that prepared the ground for drafting the 1926 Convention) to argue that the terms “any or all of the powers of ownership” as well as “abolition of slavery in all its forms” indicate that the 1926 Convention covers a broad range of practices. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on the Promotion & Prot. of Human Rights, Working Group on Contemporary Forms of Slavery, *Working Paper: Contemporary Forms Of Slavery: Updated Review of the Implementation of and Follow-up to the Conventions on Slavery*, ¶¶ 8–11, U.N. Doc. E/CN.4/Sub.2/2000/3 (May 26, 2000) (prepared by David Weissbrodt & Anti-Slavery International); ECOSOC, Sub-Comm’n on the Prevention of Discrimination & Prot. of Minorities, Working Group on Contemporary Forms of Slavery, *Consolidation and*

paratoires to the 1926 Convention confirm that the phrase “slavery in all its forms” was not intended to, and does not operate to, expand the definition beyond those practices involving the demonstrable exercise of powers attached to the right of ownership.³⁹

The *travaux préparatoires* make clear that linking the definition of slavery to the exercise of powers attached to the right of ownership was not accidental. Efforts to expand the notion of slavery, even to include the closely related concept of servitude, were explicitly rejected by states that were generally united in their efforts to ensure that the scope of the prohibition was strictly limited.⁴⁰ This limitation did not mean that institutions and practices such as debt bondage or the sale of children were automatically excluded. What it did mean, however, was that such institutions and practices, irrespective of their designations, would be considered “slavery” within the terms of the 1926 Convention *only if* they involved the exercise of “any or all of the powers attaching to the right of ownership.”⁴¹

The United Nations’ decision to elaborate a new legal instrument that would address itself, among other things, to certain institutions and

Review of the Conventions on Slavery: Executive Summary (prepared by David Weissbrodt & Anti-Slavery International), ¶¶ 6–7, U.N. Doc. E/CN.4/Sub.2/AC.2/1999/6 (June 3, 1999); ECOSOC, Sub-Comm’n on the Prevention of Discrimination & Prot. of Minorities, Working Group on Contemporary Forms of Slavery, *Consolidation and Review of the Conventions on Slavery: Working Paper*, U.N. Doc. E/CN.4/Sub.2/AC.2/1999/CRP.1 (May 25, 1999) (prepared by David Weissbrodt & Anti-Slavery International). A comprehensive compilation of the relevant *travaux préparatoires* of the 1926 Convention, undertaken by Allain, reveals that this broad interpretation of the 1926 Convention is an incorrect interpretation of the provision, as well as a misreading of the intention of the drafters. JEAN ALLAIN, *THE SLAVERY CONVENTIONS: THE TRAVAUX PRÉPARATOIRES OF THE 1926 LEAGUE OF NATIONS CONVENTION AND THE 1956 UNITED NATIONS CONVENTION* 59–60 (2008).

39. ALLAIN, *supra* note 38, at 74, 79. Allain considers the efforts of Weissbrodt and Anti-Slavery International to expand the definition of slavery to include debt bondage and trafficking (i.e., other forms of exploitation) in Jean Allain, *A Legal Consideration ‘Slavery’ in Light of the Travaux Préparatoires of the 1926 Convention*, Presented at the Wilberforce Institute for the Study of Slavery and Emancipation Conference: Twenty-First Century Slavery: Issues and Responses (Nov. 23, 2006), available at <http://www.lawvideolibrary.com/docs/Definition%20of%20Slavery.pdf>.

40. See ALLAIN, *supra* note 38, at 69–79.

41. *Report of the Advisory Committee of Experts on Slavery*, League of Nations Doc. C.189(I).M.145 1936 VI, 24–25 (1936) (“[O]ne should realise quite clearly that [debt slavery]—whatever form it may take in different countries—is not ‘slavery’ within the definition set forth in Article 1 of the 1926 Convention, unless any or all the powers attaching to the right of ownership are exercised by the master.”). This interpretation is supported by the reports of the drafting committee as well as by the 1936 Advisory Committee of Experts on Slavery established to review the 1926 Convention with a view toward determining whether amendments or a supplementary instrument were necessary. See ALLAIN, *supra* note 38, at 207–18; Allain, *supra* note 28, at 7–9.

practices resembling slavery in the 1950s provides additional grounds for rejecting an expansionist interpretation of the 1926 definition of slavery. In other words, if the international legal definition of slavery adopted in 1926 indeed had included related institutions and practices, there would have been no need to develop a new instrument. The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions, and Practices Similar to Slavery (Supplementary Convention)⁴² did not, as Hathaway asserts, “give more detail” to the prohibition of slavery set out in the 1926 Convention.⁴³ Rather, the central feature of this later instrument is its extended application to the institutions and practices held to be “similar to slavery” such as debt bondage, serfdom, servile forms of marriage, and the exploitation of children.⁴⁴ Under the Supplementary Convention, States Parties are required to

take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices, where they still exist and *whether or not* they are covered by the definition of slavery contained in the [1926 Convention].⁴⁵

In addition to retaining the 1926 definition of slavery, the Supplementary Convention added a new concept to the framework: “a person of servile status.” This concept was intended to differentiate a victim of slavery (a “slave”) from a victim of one of the institutions or practices referred to as “slave-like” (a “person of servile status”).⁴⁶

International human rights law reflects the Supplementary Convention’s distinction between slavery and slave-like practices. Both the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights prohibit slavery and the slave trade and further stipulate that no person shall be held in *servitude*—a term that, although not defined by either instrument, is related norma-

42. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery art. 1, Apr. 1, 1957, 18 U.S.T. 3201, 226 U.N.T.S. 3 [hereinafter Supplementary Convention].

43. Hathaway, *supra* note 9, at 9. Other scholars have made similar claims. See, e.g., Rassam, *supra* note 18, at 829. (“[T]he Supplementary Convention . . . expanded [the earlier definition of slavery] to include ‘Institutions and Practices Similar to Slavery’ such as debt bondage, servile forms of marriage, serfdom, and the exploitation of child labor.”).

44. The phrase “similar to slavery” appears in the title as well as in the preamble of the Supplementary Convention. For an insight into its development during the drafting process, see ALLAIN, *supra* note 38, at 219–47.

45. Supplementary Convention, *supra* note 42, art. 1 (emphasis added).

46. “‘A person of servile status’ means a person in the condition or status resulting from any of the institutions or practices mentioned in article 1 of this Convention.” *Id.* art. 7(b).

tively to the pre-human rights treaty era concept of “servile status.”⁴⁷ As such, the term “servitude” is generally understood as separate from⁴⁸ and broader than slavery, referring to “all conceivable forms of dominance and degradation of human beings by human beings.”⁴⁹ Another interpretation of the two concepts separates them according to relative severity: “Slavery indicates that the person concerned is wholly in the legal ownership of another person, while servitude concerns less far-reaching forms of restraint and refers, for instance, to the total of the labour conditions and/or the obligations to work or to render services from which the person in question cannot escape and which he cannot change.”⁵⁰ The *travaux préparatoires* to the ICCPR reveal a general acceptance of the concept of slavery as implying destruction of an individual’s juridical personality.⁵¹ Drafters of the ICCPR were also explicit on the point that the reference to the slave trade in Article 8 of that instrument was *not* meant to encompass trafficking in women.⁵²

47. International Covenant on Civil and Political Rights art. 8, Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR] (“No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. No one shall be held in servitude . . .”); Universal Declaration of Human Rights art. 4, G.A. Res. 217A, at 73, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) (“No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”).

48. Drafters of the ICCPR changed the formulation of the Universal Declaration of Human Rights by separating “slavery” and “servitude” on the grounds that “they were two different concepts and should therefore be dealt with in separate paragraphs.” MARC J. BOSSUYT, GUIDE TO THE “*TRAVAUX PRÉPARATOIRES*” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 164 (1987).

49. In his commentary on the ICCPR, Manfred Nowak cites the relevant *travaux préparatoires* to support his argument that “servitude” covers practices similar to slavery that involve economic exploitation, such as debt bondage, servile forms of marriage, and all forms of trafficking in women and children. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 199–201 (2d ed. 2005); *see also* BOSSUYT, *supra* note 48, at 167. The interpretation offered by Nowak can be justified—at least for debt bondage, servile forms of marriage, and trafficking in children—by reference to the Supplementary Convention, which defines a person of “servile status” as being a victim of such practices. *See* Supplementary Convention, *supra* note 42, art. 7(b).

50. P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 242 (2d ed. 1990) (discussing Article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)). The European Commission on Human Rights endorsed this interpretation by stating that “in addition to the obligation to provide another with certain services, the concept of servitude includes the obligation on the part of the ‘serf’ to live on another’s property and the impossibility of changing his condition.” *Van Droogenbroeck v. Belgium*, 44 Eur. Ct. H.R. (ser. B) at 30 (1980) (citing *Van Droogenbroeck*, App. No. 7906/77, 17 Eur. Comm’n H.R. Dec. & Rep. 59, 72 (1979)); *see also infra* notes 77–80 and accompanying text (discussing the 2005 judgment of the ECHR in *Siliadin v. France*).

51. BOSSUYT, *supra* note 48, at 167.

52. During the drafting process, a suggestion was made to substitute “trade in human beings”

What is the substantive content of the international legal prohibition on slavery? Do “the powers attached to the right of ownership” include Bales’s three-part definition: loss of free will, the appropriation of labor power, and the use or threat of violence?⁵³ Is Hathaway’s related definitional reference to “any form of dealing with human beings leading to the forced exploitation of their labor”⁵⁴ justifiable, or does it bring his definition within the lesser realm of “practices similar to slavery”? While the *travaux préparatoires* to the 1926 Convention are not particularly helpful on this point, historical evidence, including those aspects of the *travaux préparatoires* to the ICCPR cited above, generally support an interpretation that is consonant with the ordinary meaning of the terms found in the 1926 definition⁵⁵ and, to this extent, incompatible with the expansionist definitions adopted by both Bales and Hathaway.

Additional insight into the substantive content of the international legal prohibition on slavery is provided by a 1953 report to the Economic and Social Council in which the UN Secretary-General concluded that it “may reasonably be assumed” that the drafters of the 1926 Convention had in mind the Roman law notion of *dominica potestas*: the absolute authority of the master over the slave.⁵⁶ Significantly, the report also

for “slave trade” so that this provision would cover trafficking in women as well. The suggestion was rejected on the grounds that the clause only addressed the slave trade as such. ECOSOC, Comm’n on Human Rights, 6th Sess., 199th mtg. at 20, U.N. Doc. E/CN.4/SR.199 (May 18, 1950); ECOSOC, Comm’n on Human Rights, 5th Sess., 93d mtg. at 3–4, U.N. Doc. E/CN.4/SR.93 (May 19, 1949).

53. Bales & Robbins, *supra* note 37, at 32.

54. Hathaway, *supra* note 9, at 9 (quoting ECOSOC, Sub-Comm’n on the Promotion & Prot. of Human Rights, Working Group on Contemporary Forms of Slavery, *Updating of the Report on Slavery Submitted to the Sub-Commission in 1966*, ¶ 9, U.N. Doc. E/CN.4/Sub.2/1982/20 (July 5, 1982) (*prepared by Benjamin Whitaker*)) (emphasis added).

55. Article 31(1) of the Vienna Convention on the Law of Treaties states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” VCLT, *supra* note 27, art. 31(1). In the present context, it is submitted that application of this rule would preclude an interpretation that requires the existence of a legal right of ownership, because the ordinary meaning of the phrase “status or condition” suggests extension to both de jure and de facto situations of ownership. See *infra* notes 79–80 and accompanying text (analyzing *Siliadin v. France*). The rule would also preclude an interpretation, such as that adopted by Hathaway, which operates to significantly expand the prohibition by fundamentally changing the “ordinary meaning” of the original clause.

56. “This authority was of an absolute nature, comparable to the rights of ownership, which included the right to acquire, to use, or to dispose of a thing or of an animal or of its fruits or offspring.” The Secretary-General, *Report of the Secretary-General on Slavery, the Slave Trade, and Other Forms of Servitude*, at 27 n.1, U.N. Doc. E/2357 (Jan. 27, 1953) [hereinafter *1953 Slavery Report*]. Even though such powers may be constrained by law, those most commonly associated with slavery usually have included the right to buy, possess, and sell the slave, as well as “to compel and gain from the slave’s labour.” Allain, *supra* note 28, ¶ 16.

notes that the 1926 Convention's definition of slavery departs from the traditional Roman law concept of slavery by extending the prohibition to de facto slavery (condition) as well as de jure slavery (status). In other words, the existence of slavery does not require a legal right of ownership. Slavery can occur even where there is no legal right of ownership over the victim if the attributes that would normally be attached to the right of legal ownership are exercisable and exercised. The report identifies six characteristics of the various "powers attaching to the right of ownership," the exercise of which give rise to a situation of slavery:

1. the individual may be made the object of a purchase;
2. the master may use the individual of servile status, and in particular his capacity to work, in an absolute manner . . . ;
3. the products of labour of the individual of servile status become the property of the master without any compensation commensurate to the value of the labour;
4. the ownership of the individual of servile status can be transferred to another person;
5. the servile status is permanent, that is to say, it cannot be terminated at the will of the individual subject to it;
6. the servile status is transmitted *ipso facto* to descendants of the individual having such status.⁵⁷

Despite the obvious attractions of such a clear exposition of what constitutes slavery, it would be unwise to treat a single, outdated Secretariat report as the final word on the substantive content of the international prohibition on slavery.⁵⁸ Although additional supplementary interpretive guidance remains scarce, that which is available deserves close scrutiny.

In this regard, recent developments in international criminal law are, with the important caveat of contextual and legal differences, particularly relevant.⁵⁹ The Rome Statute of the International Criminal Court

57. *1953 Slavery Report*, *supra* note 56, at 28.

58. Note, for example, that in relation to international criminal law what is relevant is the state of customary international law at the time the crimes were committed. *See, e.g.*, Prosecutor v. Kunarac, Kovac & Vukovic, Case No. IT-96-23-T, Judgment, ¶ 515 (Feb. 22, 2001) ("What falls to be determined here is what constitutes 'enslavement' as a crime against humanity; in particular, the customary international law content of this offence at the time relevant to the Indictment.").

59. The prohibition of slavery in general international law is based in international human

(Rome Statute) identifies “enslavement” as a crime against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”⁶⁰ The definition of enslavement provided in that instrument is identical to that of slavery as set out in the 1926 Convention (“the exercise of powers attaching to the right of ownership”), with the curious addition of a clause that specifically refers to “the exercise of such power in the course of trafficking in persons, in particular women and children.”⁶¹ The interpretative guide from the Preparatory Commission for the International Criminal Court, *Elements of Crimes*, identifies the elements of the crime of enslavement as including the exercise, by the perpetrator, of “any or all of the powers attaching to the right of ownership over one or more persons.”⁶² It also enumerates modalities of exercising power over an individual, such as by “purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.”⁶³ A footnote explains that “such deprivation of liberty may in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the [Supplementary Convention]. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.”⁶⁴ The nonbinding interpretive guide⁶⁵ reveals that although the

rights law and directed to states. Violation of the prohibition will involve the international legal responsibility of the offending state. By contrast, the prohibition on enslavement, as set out in international criminal law, was developed in the context of war and carries individual criminal responsibility.

60. Rome Statute, *supra* note 30, art. 7(1)(c).

61. *Id.* art. 7(2)(c). This clause has attracted very little comment or analysis. Bales and Peter Robbins indicate that the definition of slavery has returned to its original 1926 version, but “with the addition of the practice of trafficking.” Bales & Robbins, *supra* note 37, at 26. Allain disagrees with this analysis, stating that “the definition of enslavement (not slavery) found in the Rome Statute does not add trafficking as an additional type of slavery, but the opposite: the Statute acknowledges that slavery is but one possible component part of the definition of trafficking.” Allain, *supra* note 13, at 231.

62. Preparatory Comm’n for the Int’l Criminal Court, *Report of the Preparatory Commission for the International Criminal Court, Part II: Finalized draft text of the Elements of Crimes*, at 10, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000) [hereinafter *Elements of Crimes*].

63. *Id.*

64. *Id.* at 10 n.11.

65. The Rome Statute specifies that the “Elements of Crimes shall assist the Court in the interpretation and application” of the law. Rome Statute, *supra* note 30, art. 9(1) (emphasis added). Article 9(3) further provides that “[t]he Elements of Crimes and amendments thereto shall be consistent with this Statute.” *Id.* art. 9(3). For a discussion of the negotiations surrounding the *Elements of Crimes*, see KNUT DÖRMANN ET AL., ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY 8 (2003). For a critical analysis of the *Elements of Crimes* and the development of international criminal law

Rome Statute continues the firm attachment to the attributes of ownership enshrined in the 1926 Convention's definition of slavery, it also admits a cautious expansion of the concept by acknowledging that certain practices not intrinsic to slavery could, under certain circumstances, become slavery.⁶⁶

In *Prosecutor v. Kunarac, Kovac & Vukovic*, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia analyzed charges of "enslavement as a crime against humanity" by extensively reviewing the international legal definition of slavery under customary international law.⁶⁷ The court confirmed that the core definition from the 1926 Convention applies to enslavement in customary international law,⁶⁸ defining the actus reus of enslavement as "the exercise of any or all of the powers attaching to the right of ownership over a person."⁶⁹ In a judgment that explicitly recognized the evolution of this definition in international law, the Trial Chamber identified the following factors to be taken into account in properly identifying whether enslavement was committed: "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour."⁷⁰

The Trial Chamber curbed the potential breadth of this list with several caveats. It noted, for example, that in certain situations, the presence of multiple factors may be required to reach a determination that someone has been enslaved and that no single factor or combination of factors is decisive or necessary in determining whether enslavement ex-

under the Rome Statute, see David Hunt, *The International Criminal Court—High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in Judges*, 2 J. INT'L CRIM. JUST. 56 (2004).

66. This is so, in part, because the human rights concepts of "servitude" and "forced labor" are not a formal part of international criminal law. Through the Rome Statute (in particular the identified "elements" of the crime of enslavement discussed above) and through the jurisprudence of the international criminal tribunals, examined further below, both concepts now have been introduced as possible aspects of "enslavement" (as opposed to "slavery"), thereby expanding the potential reach of the prohibition.

67. *Prosecutor v. Kunarac, Kovac & Vukovic*, Case No. IT-96-23-T, Judgment (Feb. 22, 2001).

68. *Id.* ¶ 539 ("[E]nslavement as a crime against humanity in customary international law consist[s] of the exercise of any or all of the powers attaching to the right of ownership over a person."). The *Krnjelac* judgment also upheld the customary international law basis of the prohibition against slavery. *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, ¶ 353 & nn.955–57 (Mar. 15, 2001).

69. *Kunarac*, Case No. IT-96-23-T, ¶ 540; see also *Krnjelac*, Case No. IT-97-25-T, ¶ 350.

70. *Kunarac*, Case No. IT-96-23-T, ¶¶ 542–43.

ists. For example, “[d]etaining or keeping someone in captivity, without more, would, depending on the circumstances of a case, usually not constitute enslavement.”⁷¹ Importantly, the judgment specifically noted that although buying, selling, trading, or inheriting a person or his or her labors or services could be a relevant factor in the determination, the “*mere ability*” to engage in such actions was insufficient to constitute enslavement.⁷²

In considering the *Kunarac* judgment, the Appeals Chamber accepted the Trial Chamber’s definition of enslavement as an accurate reflection of customary international law.⁷³ In so doing, it endorsed the Trial Chamber’s thesis that “the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as ‘chattel slavery’ has evolved to encompass various contemporary forms of slavery *which are also based on the exercise of any or all of the powers attaching to the right of ownership.*”⁷⁴ The Appeals Chamber noted, however, that the distinction between chattel slavery and more contemporary forms of slavery was a matter of degree and not of substance: “[I]n all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality.”⁷⁵ The Appeals Chamber also accepted the factors of enslavement identified by the Trial Chamber as a nonexhaustive list and subject to the caveats set out above.⁷⁶ In considering the issue of consent, the Appeals Chamber conceded that, while consent may be relevant from an evidentiary point of view,⁷⁷ there is no requirement that lack of consent be proven as an element of the crime because it is “often rendered impossible or irrelevant by a series of influences such as detention, captivity or psychological oppression.”⁷⁸

Unfortunately, the only other recent international jurisprudence addressing the “powers attaching to the rights of ownership” demonstrates that the concept of slavery, and the substantive content of the legal pro-

71. *Id.* ¶ 543.

72. *Id.* (emphasis added).

73. Prosecutor v. Kunarac, Kovac & Vukovic, Case No. IT-96-23/1-T, Appeal Judgment, ¶ 124 (June 12, 2002).

74. *Id.* ¶ 117 (emphasis added).

75. *Id.*

76. The Appeals Chamber notes that “the question whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement identified by the trial chamber.” *Id.* ¶ 119.

77. *Id.* ¶ 120.

78. *Id.* ¶ 113; *see also* Prosecutor v. Kunarac, Kovac & Vukovic, Case No. IT-96-23-T, Judgment, ¶ 542 (Feb. 22, 2001).

hibition, remains controversial, even within the strict realms of international law. In *Siliadin v. France*, the European Court of Human Rights (ECHR) was called upon to consider whether a situation of domestic exploitation involving a child constituted slavery.⁷⁹ In a unanimous decision, the court held that being deprived of personal autonomy, even in the most brutal way, is not of itself sufficient to constitute slavery.⁸⁰ In referring briefly to the possibility that the applicant was a slave within the meaning of Article 1 of the 1926 Convention, the court concluded:

Although the applicant was, in the instant case, clearly deprived of her personal autonomy, the evidence does not suggest that she was held in slavery in the proper sense, in other words that Mr and Mrs B exercised a genuine right of legal ownership over her, thus reducing her to the status of an “object.”⁸¹

The ECHR’s reasoning on this point has been criticized as a misinterpretation of the 1926 definition of slavery, because the court read the definition as linked to traditional chattel slavery, thereby requiring a “genuine right of legal ownership.”⁸²

79. *Siliadin v. France*, 2005-VII Eur. Ct. H.R. 333. This case concerned Article 4 of the European Convention on Human Rights, which prohibits slavery, servitude, and forced labor (without defining any of the terms). Convention for the Protection of Human Rights and Fundamental Freedoms art. 4, Nov. 4, 1950, 213 U.N.T.S. 221. In *Siliadin*, a Togolese domestic worker complained that French criminal law “did not afford her sufficient and effective protection against the ‘servitude’ in which she had been held, or at the very least against the ‘forced and compulsory’ labour which she had been required to perform.” *Siliadin*, 2005-VII Eur. Ct. H.R. at 339.

80. The court held that the applicant had been held in “servitude” within the meaning of Article 4 of the European Convention on Human Rights and that she had also been subjected to forced labor. *Id.* at 370. For a detailed analysis of the case, including the court’s finding that the state had breached its positive obligation to provide specific and effective protection against violations of the European Convention on Human Rights, see Holly Cullen, *Siliadin v. France: Positive Obligations Under Article 4 of the European Convention on Human Rights*, 6 HUM. RTS. L. REV. 585 (2006).

81. *Siliadin*, 2005-VII Eur. Ct. H.R. at 369.

82. *Id.* In his brief but dismissive analysis of this case, Allain notes the potential for a schism between international criminal law and human rights law on this point. Unlike the situation in international criminal law, human rights law generally links the prohibition on slavery with both servitude and forced labor, thereby creating an implied hierarchy of severity. The existence of “lesser” alternatives to slavery, in particular servitude, provides a possibility, perhaps confirmed by *Siliadin*, for the threshold for slavery to be elevated beyond what has been recognized in judgments such as *Kunarac*. See Allain, *supra* note 28, ¶¶ 36–38. Allain refines this argument in his critical analysis of a recent judgment of the Economic Community of West African States Community Court of Justice. Jean Allain, *Hadijatou Mani Koraou v. The Republic of Niger, Judgment No. ECW/CCJ/JUD/06/08, ECOWAS Community Court of Justice, 27 October 2008*, 103 AM. J. INT’L L. (forthcoming Apr. 2009); see also *The Queen v. Tang* (2008) 249 A.L.R. 200, 211 (Austl.) (“[I]t is to be noted that the Court [in *Siliadin*] did not refer to the definition’s reference to condition in the alternative to status, or to powers as well as rights, or to the words

This brief survey has served to confirm that the substantive content of the international legal prohibition on slavery—in relation to both the customary norm and its treaty-based equivalent—is both less settled and less expansive than Hathaway has assumed. Certainly, there is strong evidence that the legal understanding of what constitutes slavery has evolved *potentially* to include contemporary forms of exploitation such as debt bondage and trafficking. The core element of the 1926 definition, however, remains intact. A situation of trafficking, debt bondage, bonded labor, or forced labor will be identifiable as slavery only if it has involved, as required by the 1926 Convention, “the exercise of any or all of the powers attached to the right of ownership.” Hathaway’s wishful addition of “any form of dealing with human beings leading to the forced exploitation of their labor” remains unsupported in international law. This calls into question his assessment of both the scope and the nature of the “problem of slavery.”⁸³ Certainly, as a legal matter, it is unlikely that, at the present time, the international legal prohibition of slavery would apply to many of the individuals caught up in contemporary forms of exploitation.

C. *The Definition of Trafficking*

Hathaway argues that the international legal definition of trafficking incorporated into the Trafficking Protocol⁸⁴ “amounts to a significant retreat from the already agreed upon prohibition of slavery”⁸⁵ and is “highly circumscribed relative to the legally binding definitions of slavery already adopted.”⁸⁶ The conclusion he draws from this is that the advances offered by the Trafficking Protocol cover “only the tiny minority of slaves”⁸⁷ and are therefore “discriminatory.”⁸⁸ This conclusion, as well as the assumptions on which it is based, are generally incorrect. As noted in the previous Section, the international legal definition of slavery remains contested and is likely significantly narrower than that presented by Hathaway, covering only a small portion of those he identifies as “slaves,” and certainly not all those who have been trafficked.⁸⁹

‘any or all.’”).

83. Hathaway, *supra* note 9, at 9.

84. Trafficking Protocol, *supra* note 2, art. 3.

85. Hathaway, *supra* note 9, at 10.

86. *Id.*

87. *Id.* at 11.

88. *Id.* at 46–53.

89. The definition set out in Article 3 of the Trafficking Protocol identifies slavery as one of a range of exploitative practices that may constitute the end purpose of trafficking. I have noted

By contrast, the analysis presented below will show that the definition of trafficking is much more inclusive, providing a solid platform for the international community and State Parties to address comprehensively a wide range of contemporary exploitative practices not adequately addressed by international law and its enforcement mechanisms.

A summary of the definition of trafficking provides a useful introduction to a more detailed consideration of Hathaway's position on this point. Under Article 2 of the Trafficking Protocol, trafficking comprises three (not four)⁹⁰ separate elements: (i) an action (recruitment, transportation, transfer, harboring, or receipt of persons); (ii) a means (threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power, or abuse of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person); and (iii) a purpose (exploitation).⁹¹ Exploitation is defined to include, at a minimum, exploitation of prostitution, other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs.⁹² The definition includes a provision to the effect that the consent of a victim to the intended exploitation is irrelevant where any of the means set out above have been used.⁹³ That provision does not, as Hathaway claims, "acknowledg[e] the possibility of consent to enslavement."⁹⁴ Rather, it serves to make clear that the means of trafficking (coercion, deception, etc.) operate to annul meaningful, informed consent. In other words, "[o]nce it is established that deception, force or other prohibited means were used, consent is irrelevant and cannot be used as a defence."⁹⁵

elsewhere that the specific reference to slavery in the Trafficking Protocol's definition of trafficking is subject to various interpretations: "First, it could be argued that, conceptually, the definition does not seem to leave room for the possibility that trafficking itself is a form of slavery: slavery is identified as one of several end purposes for which a person may be trafficked. Second, the kind of exploitation that is traditionally linked to trafficking such as sexual exploitation and forced labor are separately identified from slavery and slave-like practices, thereby inferring that they are distinct from each other." Gallagher, *supra* note 24, at 419.

90. Hathaway, *supra* note 9, at 9 ("[T]he Trafficking Protocol's definition of trafficking is best understood as a four-part notion . . .").

91. Trafficking Protocol, *supra* note 2, art. 3.

92. *Id.*

93. *Id.* art. 3(b).

94. Hathaway, *supra* note 9, at 11.

95. U.N. OFFICE ON DRUGS & CRIME, LEGISLATIVE GUIDES FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO, at 270, U.N. Sales No. E.05.V.2 (2004) [hereinafter LEGISLATIVE GUIDE TO THE ORGANIZED CRIME CONVENTION AND ITS PROTOCOLS]. International human rights law has long recognized that the intrinsic inalienability of personal freedom renders consent irrelevant

Hathaway's principal objection to the international legal definition of trafficking is that State Parties to the Trafficking Protocol are required to take action only in respect to situations with a transnational element. Specifically, he asserts that "slavery or other forms of exploitation that occur entirely within the borders of one country without the involvement of outside parties are beyond the scope of the Trafficking Protocol."⁹⁶ This interpretation does hold up indeed with respect to the interstate *cooperation* obligations of the Trafficking Protocol, but it fails to capture accurately the nature of State Party obligations under the instrument as a whole. The central and mandatory obligation of all State Parties to the Protocol is to criminalize trafficking in their domestic legal systems.⁹⁷ The Trafficking Protocol's parent instrument, the Convention against Transnational Organized Crime (Organized Crime Convention), requires that the offense of trafficking be established in the domestic law of every State Party, *independently of its transnational nature*⁹⁸ or the involvement of an organized criminal group.⁹⁹

to a situation in which that personal freedom is taken away. This issue came before the drafters of both the Supplementary Convention and the ICCPR in the context of proposals to add the qualification "involuntary" to the term "servitude." The proposal was rejected in both instances on the grounds that "[i]t should not be possible for any person to contract himself into bondage." FRANCIS G. JACOBS & ROBIN C.A. WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 78 (2d ed. 1996) (citing Annotations on the Text of the Draft International Covenants on Human Rights, U.N. GAOR, 10th Sess., Annexes, Agenda Item 28 pt. II, at 33, U.N. Doc. A/2929 (July 1, 1955) (*prepared by the Secretary-General*)). The European Commission on Human Rights has confirmed that "[p]ersonal liberty is an inalienable right which a person cannot voluntarily abandon." *De Wilde, Ooms & Versyp v. Belgium*, 10 Eur. Ct. H.R. (ser. B) at 91 (1969) (citing *De Wilde, Ooms & Versyp v. Belgium*, 1967 Y.B. Eur. Conv. On H.R. 420 (Eur. Comm'n on H.R.)).

96. Hathaway, *supra* note 9, at 11.

97. Trafficking Protocol, *supra* note 2, art. 5; *see also* LEGISLATIVE GUIDE TO THE ORGANIZED CRIME CONVENTION AND ITS PROTOCOLS, *supra* note 95, at 269–70.

98. Organized Crime Convention, *supra* note 8, art. 34(2); *see also* Conference of the Parties to the U.N. Convention against Transnational Organized Crime, Review of the implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto: expert consultation on criminalization, Vienna, Aust., Oct. 8–17, 2008, *Criminalization within the scope of the United Nations Convention Against Transnational Organized Crime and the Protocols thereto*, ¶ 2, U.N. Doc. CTOC/COP/2008/4 (Sept. 9, 2008) ("[T]he offences need to be criminalized in domestic law independently of the transnational nature or the involvement of an organized criminal group."); LEGISLATIVE GUIDE TO THE ORGANIZED CRIME CONVENTION AND ITS PROTOCOLS, *supra* note 95, at 276 ("[T]ransnationality is not required as an element of domestic offences."); *id.* at 18–19, 275–76, 341; Gen. Assembly, Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the Work of Its First to Eleventh Sessions*, Addendum, ¶ 59, U.N. Doc. A/55/383/Add.1 (Nov. 3, 2000).

99. Hathaway identifies the involvement of an organized criminal group as an additional essential feature of the definition. Hathaway, *supra* note 9, at 10 n.47. This aspect of his interpretation also is rejected in the references provided in the preceding note. *See, e.g.*, LEGISLATIVE GUIDE TO THE ORGANIZED CRIME CONVENTION AND ITS PROTOCOLS, *supra* note 95, at 276.

The drafters' intentions in this respect have been fully realized. Since the Trafficking Protocol was adopted, close to one hundred states have either adopted new antitrafficking legislation or have modified existing statutes.¹⁰⁰ To my knowledge, not one of these statutes has limited the definition or the scope of criminalization to only trafficking offenses that take place between, or that affect, two or more countries. Subsequent legal developments, such as the 2002 Council of Europe Convention on Action against Trafficking in Human Beings, have confirmed the understanding that the international legal obligation to criminalize trafficking relates to trafficking *within* as well as *between* countries.¹⁰¹ Internal trafficking is therefore not, as Hathaway claims, in some kind of international legal limbo. Rather, as a direct result of the Trafficking Protocol, it is effectively criminalized in the many countries that have amended their laws or enacted an antitrafficking statute since the Protocol was adopted.¹⁰² That states are not required to extend particular forms of legal and operational cooperation to each other on matters such

("[T]he involvement of an organized criminal group must not be required as a proof in a domestic prosecution.").

100. In February 2009, the UN Office on Drugs & Crime (UNODC) released the most comprehensive independent study to date on the state of the world's response to trafficking in persons. The report included information on more than fifty thousand victims and offenders of trafficking officially identified by the state authorities of 155 countries and territories. It contains individual country reports focusing particularly on the legislative framework, criminal justice responses, and services provided to victims. UNITED NATIONS OFFICE ON DRUGS & CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS (2009), available at http://www.unodc.org/documents/Global_Report_on_TIP.pdf [hereinafter UNODC GLOBAL REPORT]. The report reveals that by 2008, eighty percent (125 countries) of the 155 countries surveyed had specific antitrafficking legislation. *Id.* at 22. Sixty-three percent (ninety-eight countries) of all surveyed countries had criminalized trafficking for at least forced labor and sexual exploitation, irrespective of both age and gender. *Id.* A time analysis of relevant data shows that forty-five percent of the surveyed countries had adopted an offense of trafficking in persons for the first time only after the Trafficking Protocol entered into force in December 2003 and that most of the countries with long-standing antitrafficking provisions have amended their criminal codes to more closely reflect the broader concept of trafficking set out in the Trafficking Protocol since 2003. *Id.* at 22, 24–25.

101. The European Convention against Trafficking in Persons explicitly recognizes internal trafficking and extends the rights and obligations contained in that instrument to trafficking taking place within as well as across national borders. Council of Europe, Convention on Action against Trafficking in Human Beings art. 2, May 16, 2005, C.E.T.S. No. 197 [hereinafter European Trafficking Convention]. The official commentary to the European Trafficking Convention states, unequivocally, that "trafficking in human beings does not necessarily involve a transnational element: it can exist at the national level." Explanatory Report on the Council of Europe Convention on Action against Trafficking in Human Beings ¶ 7, May 16, 2005, C.E.T.S. No. 197 [hereinafter European Trafficking Convention Explanatory Report].

102. According to the UNODC, only twenty percent (thirty countries) of the 155 states surveyed did not have specific antitrafficking legislation. UNODC GLOBAL REPORT, *supra* note 100, at 24–25.

as mutual assistance and repatriation in relation to cases of internal trafficking is unsurprising and, in practical terms, not especially detrimental.

Hathaway's remaining objections to the Trafficking Protocol's definition of the offense are concerned with its apparently narrow scope. He points out, correctly, that the definition of trafficking specifically does not require action against or criminalization of exploitative practices such as forced labor and sexual exploitation.¹⁰³ He argues that, unlike the slavery conventions, which demand that State Parties work towards ending *the condition of slavery*, State Parties to the Trafficking Protocol are under no obligation to do anything about the actual exploitation that is the end purpose of trafficking.¹⁰⁴ Hathaway contends that the definition is constrained further by the requirement of a "means," which, as noted above, he incorrectly equates to "acknowledg[ement of] the possibility of valid consent to enslavement."¹⁰⁵ It is indeed true, however, that in the case of adult victims, establishing a situation of trafficking under the terms of the Trafficking Protocol requires more than an act and an intended purpose; the "action" intended to lead to exploitation must have been made possible through the use of a specified means such as coercion, deception, or the abuse of authority.

To what extent do these two features of the definition—exploitation as an element rather than as a separate offense and a requirement of "means"—operate to limit the scope or impact of the Trafficking Protocol? The short answer is that, in its practical application, not at all. Although the Trafficking Protocol specifically does not require State Parties to address the exploitative practices that are the end purpose of trafficking, and while it does require, at least for adults, that the relevant action is secured through a specific means, it is difficult to identify a "contemporary form of slavery" that would not fall within its generous parameters. Because the definition encompasses both the bringing of a person into exploitation as well as the maintenance of that person in a situation of exploitation, it is equally difficult to identify an exploiter who would not be caught within its scope and thereby, through the requirement of national criminalization, become subject to domestic prosecution.¹⁰⁶ The most illuminating illustration of this can be found in

103. Hathaway, *supra* note 9, at 10.

104. *Id.*

105. *Id.* at 11. *Contra supra* note 95.

106. The definition captures, for example, recruiters, brokers, transporters, and exploiters, including owners and managers of the place of exploitation such as a brothel, farm, boat, factory, or household. It does not appear to cover the "end user" of the goods or services produced through

the very examples of “culturally ingrained, endemic slavery” that Hathaway himself puts forward as excluded from this new “constrained” definition.¹⁰⁷

- Traditional debt bondage systems of South Asia: individuals are harbored and/or received, often also transported and transferred (act) through coercion (means) in order to exploit their labor through debt bondage (purpose).¹⁰⁸
- Chattel slavery in Africa: individuals are bought, sold, transported, harbored, and received (act) through force and coercion (means) into situations of slavery (purpose).¹⁰⁹
- Sale of children into prostitution by their parents: children are recruited, transported, transferred, harbored, and received (act) in order to sexually exploit them (purpose).¹¹⁰ As this

the exploitation of trafficking, for example, the “clients” of individuals trafficked into sexual exploitation. Note that this issue is addressed, at least in part, through Article 19 of the European Trafficking Convention. Article 19 requires State Parties to that treaty to consider “adopting such legislative and other measures as may be necessary to establish as criminal offences under its internal law, the use of services [of a victim of trafficking] . . . with the knowledge that the person is a victim of trafficking in human beings.” European Trafficking Convention, *supra* note 101, art. 19. The European Trafficking Convention Explanatory Report confirms that this provision seeks to ensure the potential criminalization of individuals involved in trafficking against whom the requisite elements of the crime may be difficult to prove, including for example, the owner of business premises used for trafficking who may not have undertaken any of the actions set out in the definition or used any of the required “means,” such as deception or coercion. European Trafficking Convention Explanatory Report, *supra* note 101, ¶ 232. Article 19 would enable criminal prosecution of that individual if it could be shown that he or she knowingly made those premises available for the use of a trafficker. In addition, “[t]he client of a prostitute who knew full well that the prostitute had been trafficked could likewise be treated as having committed a criminal offence under Article 19, as could someone who knowingly used a trafficker’s services to obtain an organ.” *Id.* ¶¶ 231–35. The key element in the offense proposed under Article 19 is “knowledge that the person is a victim of trafficking.” While noting that evidence of such knowledge may be difficult to prove, the European Trafficking Convention Explanatory Report envisages that the perpetrator’s intention sometimes can be inferred from objective factual circumstances. *Id.* ¶¶ 234–35; *see also* LEGISLATIVE GUIDE TO THE ORGANIZED CRIME CONVENTION AND ITS PROTOCOLS, *supra* note 95, at 296–97 (noting that demand reduction as required under paragraph 5 of Article 9 of the Trafficking Convention “could be achieved in part through legislative or other measures targeting those who knowingly use or take advantage of the services of victims of exploitation”).

107. Hathaway, *supra* note 9, at 5.

108. *Id.* at 16.

109. *Id.*

110. *Id.*

situation specifically concerns children, the requirement of “means” is waived.¹¹¹

- “Slavery” in Brazil’s charcoal industry: individuals are recruited, transported, and received (act) through deception, force, and coercion (means) in order to exploit their labor (purpose).¹¹²

Trafficking is present in each of these cases. It is also present in the Australian sex industry in the form of Thai and Korean women held in debt bondage;¹¹³ in the Russian construction sector where thousands of workers from Tajikistan and Kyrgyzstan are abused and deceived;¹¹⁴ on fishing boats off the gulf of Thailand where Burmese and Cambodian men are isolated and exploited for long periods of time without being paid the wages they were led to expect;¹¹⁵ in the brothels of Bali and the private homes of Jakarta to which Indonesian girls and young women have been sent or lured with promises of a better life;¹¹⁶ on the cocoa farms of Cote d’Ivoire, made profitable through the almost zero-cost labor of child workers from Mali;¹¹⁷ and even in the houses and apartments of wealthy Americans where Guatemalan maids sleep on the floor and are not allowed outside.¹¹⁸ The fact that each and every one of

111. Trafficking Protocol, *supra* note 2, art. 3(c).

112. Hathaway, *supra* note 9, at 17.

113. See, e.g., *The Queen v. Tang* (2008) 249 A.L.R. 200 (Austl.); FIONA DAVID, AUSTL. INST. OF CRIMINOLOGY, *TRAFFICKING OF WOMEN FOR SEXUAL PURPOSES* (2008), available at <http://www.aic.gov.au/publications/rpp/95/rpp95.pdf>.

114. See, e.g., HUMAN RIGHTS WATCH, “ARE YOU HAPPY TO CHEAT US?” EXPLOITATION OF MIGRANT CONSTRUCTION WORKERS IN RUSSIA (2009).

115. See, e.g., UNITED NATIONS INTER-AGENCY PROJECT ON HUMAN TRAFFICKING, *EXPLOITATION OF CAMBODIAN MEN AT SEA* (2007), available at http://www.no-trafficking.org/content/SIREN/SIREN_pdf/SIREN%20CB-02%20Exploitation%20of%20Cambodian%20men%20at%20sea.pdf.

116. See generally HUMAN RIGHTS WATCH, *WORKERS IN THE SHADOWS: ABUSE AND EXPLOITATION OF CHILD DOMESTIC WORKERS IN INDONESIA* (2009); Anis Hamim, *Provincial Assessments: Riau Islands*, in *WHEN THEY WERE SOLD: TRAFFICKING OF WOMEN AND GIRLS IN 15 PROVINCES OF INDONESIA* 79 (Keri Lasmi Sugiarti, Jamie Davis & Abhijit Dasgupta eds., 2006); Rebecca Surtees, *Commercial Sex Work*, in *TRAFFICKING OF WOMEN AND CHILDREN IN INDONESIA* 63 (Ruth Rosenberg ed., 2005).

117. See CAROL OFF, *BITTER CHOCOLATE: INVESTIGATING THE DARK SIDE OF THE WORLD’S MOST SEDUCTIVE SWEET* 121–22, 143 (2006); see also Guy B. Nkamleu & Anne Kieland, *Modeling Farmers’ Decisions on Child Labor and Schooling in the Cocoa Sector: A Multinomial Logit Analysis in Côte d’Ivoire*, 35 *AGRIC. ECON.* 319 (2006).

118. See, e.g., *United States v. Tecum*, 48 Fed. App’x. 739 (11th Cir. 2002) (finding Jose Tecum guilty of violating several federal laws when he kidnapped a young Guatemalan woman by threats of violence and inveiglement from her family home in remote Guatemala, smuggled her across the U.S.-Mexico border, transported her to, and harbored her in, his home in Florida, and

these exploited individuals can now be identified formally as a victim of a serious crime as well as a victim of human rights violations, *and* that their exploiters are now subject to prosecution, calls into serious question Hathaway's claim that the development of an international legal framework around trafficking has resulted in a "real loss to the effort to eradicate the predominant forms of slavery—slavery within states and slavery already extant."¹¹⁹

While acknowledging the strengths of the new definition, it is important to accept that no legal definition of trafficking, no matter how carefully crafted, can ever be expected to respond fully to the shades and complexities of the real world. Unless states were prepared to invent exploitation where it did not necessarily exist—or deny it where it did—they had little option but to separate formally the (inherently exploitative) practice of trafficking from the (only incidentally exploitative) practice of migrant smuggling. As a result, states were required to disregard the reality that both trafficking and migrant smuggling are *processes* that are often interrelated and almost always involve shifts, flows, overlaps, and transitions.¹²⁰ An individual can be smuggled one day and trafficked the next. The risks of incorrect identification—in particular, the risk of trafficked persons being misidentified as smuggled and/or illegal migrants and especially the risk to the human rights of victims—was recognized during the Vienna Process¹²¹ and continues to occupy states,¹²² intergovernmental agencies,¹²³ and nongovernmental organiza-

forced her to perform domestic and agricultural work and to submit to his sexual demands); Brief for the Appellee at 2–3, *id.*, available at <http://www.usdoj.gov/crt/briefs/tecum.pdf>.

119. Hathaway, *supra* note 9, at 15. It is important to note that Hathaway's claim that the definition of slavery does not cover "slavery already extant" is incorrect, because of the breadth of the "act" element in the Trafficking Protocol. For example, in relation to each of Hathaway's examples, persons involved in controlling the trafficked victim (e.g., factory owner, brothel manager, farm supervisor/owner, head of household) would all be subject to the charge of, at minimum, "receiving" that person for the purpose of exploiting him or her.

120. Many commentators have also explored this argument. *See, e.g.*, U.N. High Comm'r for Refugees, *Guidelines on International Protection: The application of Article 1(A)(2) of the 1951 Convention and/or 1967 Protocol relating to the Statute of Refugees to victims of trafficking and persons at risk of being trafficked*, U.N. Doc. HCR/GIP/06/07 (Apr. 7, 2006) [hereinafter *UNHCR Trafficking Guidelines*]; Kelly, *supra* note 17, at 238; *see also* GLOBAL COMM'N ON INT'L MIGRATION, *MIGRATION IN AN INTERCONNECTED WORLD: NEW DIRECTIONS FOR ACTION* 34 (2005) [hereinafter *GLOBAL COMMISSION ON INTERNATIONAL MIGRATION REPORT*].

121. *See, e.g.*, Gen. Assembly, Ad-Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, *Note by the United Nations High Commissioner for Human Rights, International Organization for Migration, United Nations High Commissioner for Refugees, and the United Nations Children's Fund on the Protocols concerning migrant smuggling and trafficking in persons*, U.N. Doc. A/AC.254/27 (Feb. 8, 2000).

122. The European Trafficking Convention, for example, requires State Parties to ensure that

tions (NGOs) that are working to promote rights-based responses to trafficking.¹²⁴

II. THE CHARGE OF INSTITUTIONAL ATROPHY AND DILUTION OF EFFORT

Hathaway considers that the exploitation of individuals for private profit (“the modern problem of slavery”¹²⁵) has traditionally not been served well by the international human rights system. He is correct. In fact, it was the chronic inability of the human rights mechanisms to deal effectively with contemporary forms of exploitation that provided a number of states with the incentive to move outside that system in search of a more effective response.¹²⁶ In this sense, the Trafficking Pro-

trained and qualified individuals are involved in identifying victims, including children. It further requires different authorities to collaborate with each other and with relevant support organizations to ensure victims can be identified in a procedure that duly takes account of the special situation of both women and children. European Trafficking Convention, *supra* note 101, art. 10. The commentary to this provision notes that failure to identify quickly and accurately victims of trafficking renders any rights granted to such persons “purely theoretical and illusory.” European Trafficking Convention Explanatory Report, *supra* note 101, ¶ 131.

123. See, e.g., U.N. OFFICE ON DRUGS & CRIME, TOOLKIT TO COMBAT TRAFFICKING IN PERSONS 251–302 (2008), available at http://www.unodc.org/documents/human-trafficking/HT_Toolkit08_English.pdf; INT’L ORG. FOR MIGRATION, IDENTIFICATION AND PROTECTION SCHEMES FOR VICTIMS OF TRAFFICKING IN PERSONS IN EUROPE: TOOLS AND BEST PRACTICES (2005); see also ECOSOC, U.N. High Comm’r for Human Rights, *Report: Recommended Principles and Guidelines on Human Rights and Human Trafficking*, U.N. Doc. E/2002/68/Add.1 (May 20, 2002) [hereinafter *UN Trafficking Principles and Guidelines*].

124. See, e.g., U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 2008, at 128 (2008), available at <http://www.state.gov/g/tip/rls/tiprpt/2008> [hereinafter TIP REPORT 2008] (discussing the efforts of NGOs in Greece to collaborate with the government for accurate victim identification); GLOBAL ALLIANCE AGAINST TRAFFICKING IN WOMEN, COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD (2007) [hereinafter COLLATERAL DAMAGE].

125. Hathaway, *supra* note 9, at 15.

126. Dimitri Vlassis, the secretary of the drafting process, has noted that the origins of the Trafficking Protocol can be traced back to Argentina’s interest in the issue of trafficking in minors and its dissatisfaction with the slow progress on negotiating an additional protocol to the Convention on the Rights of the Child to address child prostitution and child pornography. Argentina was also concerned that a purely human rights perspective to this issue would be insufficient and lobbied strongly for trafficking to be dealt with as part of the broader international attack on transnational organized crime. Dimitri Vlassis, *The Global Situation of Transnational Organized Crime, the Decision of the International Community to Develop an International Convention and the Negotiation Process*, in U.N. ASIA & FAR E. INST. FOR THE PREVENTION OF CRIME & THE TREATMENT OF OFFENDERS, ANNUAL REPORT & RESOURCE MATERIALS SERIES NO. 59, at 475, 492, available at http://www.unafei.or.jp/english/pdf/PDF_rms/no59/ch24.pdf; see also DAVID McCLEAN, TRANSNATIONAL ORGANIZED CRIME: A COMMENTARY ON THE UN CONVENTION AND ITS PROTOCOLS 18–21 (2007).

protocol can be viewed, not as a contributing factor in the weakening of that system, but rather as a direct consequence of its perceived limitations.

A. *A Limited Scope of Analysis*

Unfortunately, Hathaway's analysis on the point of "institutional atrophy" is undermined by the definitional confusions explored in Part I. On the limited issues of slavery, the slave trade, and practices similar to slavery, it is relevant to note that with only one exception,¹²⁷ the applicable international legal instruments were concluded many years before the modern practice of treaty-based reporting and supervision was developed. When the 1926 Convention was adopted, the idea of a strong monitoring body with the capacity to conduct an independent investigation into the internal practices of a State Party was unthinkable. Even when the later slavery conventions entered into force, reporting and monitoring systems for international human rights treaties were more than a decade away. Javier Pérez de Cuéllar's verdict that oversight of the aged slavery conventions appeared vague and without effective influence when compared with modern human rights treaties is both accurate and unsurprising.¹²⁸ However, Hathaway's much more sweeping conclusion that "supervision of the antislavery agenda within the UN system is little short of a disaster" is on less firm ground¹²⁹—not least because it is at odds with his complaint that trafficking (a concept demonstrated above to cover the situation of almost all those he identifies as "enslaved") has been overprivileged by international law, including in the human rights system to the detriment of the vast majority of the world's enslaved.

Unfortunately, the overwhelming bulk of Hathaway's analysis on this point focuses on the antics of a marginal UN human rights body that no longer exists and that exercised almost no influence on the policies or actions of states during its lackluster tenure.¹³⁰ The verdict he pro-

127. ICCPR, *supra* note 47, art. 8.

128. See The Secretary-General, *Study on Ways and Means for Establishing an Effective Mechanism for the Implementation of the Slavery Conventions*, ¶ 21, delivered to the Sub-Comm'n on Prevention of Discrimination & Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1989/27 (May 7, 1989), cited in Hathaway, *supra* note 9, at 18–19.

129. Hathaway, *supra* note 9, at 24.

130. On September 28, 2007, Human Rights Council Resolution 6/14 ended the mandate of the Working Group on Contemporary Forms of Slavery. The same resolution established a new mandate: the Special Rapporteur on contemporary forms of slavery, including its causes and consequences. H.R.C. Res. 6/14, ¶ 5 (Sept. 28, 2007), in Gen. Assembly, Human Rights Council, *Report of the Human Rights Council on its Sixth Session*, U.N. Doc. A/HRC/6/22 (Apr. 14, 2008).

nounces on the Working Group on Contemporary Forms of Slavery is justifiably harsh, but it is essential to underscore the working group's insignificance within the broader international system. Whether that particular body limped along or died a slow death did not, in the end, matter very much to states, to international law, or indeed to those whose interests it was established to promote. That its eventual passing went unnoticed (including by Hathaway) and virtually without comment is compelling evidence of its deep irrelevance.

B. *Expanding the Scope of Enquiry*

A more interesting, and potentially more productive exercise is to examine the practice and capacities of the broader contemporary human rights system in this area. To what extent have the UN treaty bodies and special procedures addressed themselves to the range of practices that involve the exploitation of individuals for private profit? How can the human rights system most effectively use its authority and influence to guide the response of states and the international community on these matters? What are its limitations and how can these best be addressed?

While a full analysis of these questions is beyond the scope of this Article, a number of preliminary observations may be useful. The first of these relates to the need to consider the full range of rights that are potentially implicated in cases of contemporary exploitation, including trafficking. Hathaway rightly criticizes the UN Human Rights Committee for not using the strong prohibitions of Article 8 of the ICCPR to address "slavery."¹³¹ Of all the international human rights bodies, it is this committee that is in the best position to make a substantive contribution to clarifying the contested notion of slavery. The fact that the

In her first report, the Special Rapporteur, Gulnara Shahinian, indicated that she would focus her mandate "on the causes and consequences of forced labour and how it has an impact on men, women and children . . . [with] a particular focus on domestic labour and on child labour as it pertains to the economic exploitation of children." Gen. Assembly, Human Rights Council, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinian*, at 2, U.N. Doc A/HRC/9/20 (July 28, 2008).

131. A similar criticism can be sustained with respect to the slavery provisions of the regional human rights conventions. Holly Cullen notes that a search of relevant databases revealed that only twenty-four judgments of the ECHR referred to Article 4 of the European Convention on Human Rights (prohibiting slavery, the slave trade, and servitude). In addition, aspects of Article 4 had been raised a mere 104 times in admissibility decisions. Cullen further observes that until the *Siliadin* case in 2005, there had been no judgments recognizing the existence of positive obligations under Article 4. Cullen, *supra* note 80, at 586–87.

committee has studiously avoided engagement on this issue is not to its credit. The criticism is, however, too narrowly focused. The Human Rights Committee has a raft of provisions at its disposal, which directly address the situation of the thirty million individuals that Hathaway identifies as enslaved. For example, in addition to prohibiting slavery, Article 8 of the ICCPR also prohibits forced or compulsory labor¹³²—a term that is defined in a complementary International Labour Organization (ILO) instrument as “all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”¹³³ Debt bondage, a common means of maintaining control over those in situations of exploitation, is said to be included within the prohibition on servitude contained in the ICCPR and thereby potentially assimilated into the broader notion of forced labor.¹³⁴ These provisions give structure and substance to a range of rights protected in other instruments, including the right to employment that is freely chosen and accepted, the right to just and favorable conditions of work, and the right to an adequate standard of living, all of which are guaranteed in the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹³⁵

The prohibition of discrimination that is found in many major international and human rights treaties, and particularly the prohibition of discrimination on the basis of race and sex, provides another example of the intersection between human rights law and contemporary forms of exploitation.¹³⁶ It can be argued that this widely accepted norm¹³⁷ has

132. ICCPR, *supra* note 47, art. 8(3).

133. This definition of forced labor, drawn from International Labour Organization’s Convention Concerning Forced and Compulsory Labour, is still generally accepted. *See* NOWAK, *supra* note 49, at 201; *see also* International Labour Organization, Convention Concerning Forced and Compulsory Labour art. 2(1), June 28, 1930, 39 U.N.T.S. 55. It is important to observe that the prohibition contains a subjective element of *involuntariness* as well as objective requirements that are met when the state or a private individual orders personal work or service, and a punishment or sanction is threatened if the order is not obeyed. NOWAK, *supra* note 49, at 201–02 and authorities cited therein.

134. NOWAK, *supra* note 49, at 200, 255. This interpretation is supported by the Human Rights Committee’s consideration of issues of bonded labor. *See, e.g.*, U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: India*, ¶ 29, U.N. Doc. CCPR/C/79/Add.81 (Aug. 4, 1997).

135. *See* International Covenant on Economic, Social and Cultural Rights arts. 6, 7, 11, Dec. 16, 1966, 993 U.N.T.S. 3.

136. On the relationship between trafficking and the prohibition on sex-based discrimination, *see generally* ANNE GALLAGHER, *INTERNATIONAL LAW OF HUMAN TRAFFICKING* (forthcoming 2010).

137. The prohibition of discrimination is referred to in the Trafficking Protocol as well as in the Migrant Smuggling Protocol, and it is upheld in the European Trafficking Convention. *See*

been underutilized in the international human rights system's response to a range of practices considered in this Article that have disproportionately impacted individuals who are vulnerable to race- and sex-based discrimination.

While many individuals are subject to exploitation within their own countries, there is no denying the very particular and acute vulnerabilities—including cultural and linguistic isolation as well as likely irregularity in immigration status—that are particular to situations of exploitation across national borders. The extension of human rights protections to noncitizens is another aspect of international human rights law, enshrined in most of the major treaties, which is of particular relevance to individuals who find themselves in such situations,¹³⁸ as is the right to leave and return,¹³⁹ the prohibition on arbitrary expulsion,¹⁴⁰ and norms related to the right to a remedy for victims of human rights violations.¹⁴¹ In this connection, identifying trafficking itself as a violation of human rights provides an additional basis for protection for those who are subject to exploitation both within and outside their own borders.¹⁴²

European Trafficking Convention, *supra* note 101, art. 3; Migrant Smuggling Protocol, *supra* note 1, art. 19; Trafficking Protocol, *supra* note 2, art. 14. The scope of this latter provision is set out in the European Trafficking Convention Explanatory Report, *supra* note 101, ¶¶ 63–69.

138. See generally David Weissbrodt, *The Protection of Non-Citizens in International Human Rights Law*, in INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES 221 (Ryszard Cholewinski, Richard Perruchoud & Euan MacDonald eds., 2007).

139. ICCPR, *supra* note 47, art. 12. See generally HURST HANNUM, *THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE* (1987). For a more contemporary exploration of the right to leave one's country, see Colin Harvey & Robert P. Barnidge, Jr., *Human Rights, Free Movement and the Right to Leave in International Law*, 19 INT'L J. REFUGEE L. 1 (2007).

140. ICCPR, *supra* note 47, art. 13. This issue has been under consideration by the International Law Commission since 2004. See Gen. Assembly, Int'l Law Comm'n, *Third report on the expulsion of aliens by Mr. Maurice Kamto, Special Rapporteur*, U.N. Doc. A/CN.4/581 (Apr. 19, 2007); Gen. Assembly, Int'l Law Comm'n, *Second report on the expulsion of aliens by Mr. Maurice Kamto, Special Rapporteur*, U.N. Doc. A/CN.4/573 (July 20, 2006).

141. For an overview of recent developments in international legal protection of victims' rights with a particular focus on the right to a remedy, see M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS. L. REV. 203 (2006). For a detailed analysis of the right to a remedy in the specific context of trafficking in persons, see generally GALLAGHER, *supra* note 136.

142. The clear prohibition on trafficking in the CRC, and the (less clear) reference to trafficking in the Convention on the Elimination of All Forms of Discrimination against Women suggests that, at least in relation to trafficking in children and women, international law recognizes a relatively unambiguous prohibition. CRC, *supra* note 6, art. 35; CEDAW, *supra* note 6, art. 6. Over the past decade, there appears to have been a growing consensus among states that trafficking is a serious violation of human rights. See, e.g., European Trafficking Convention, *supra* note 101, pmb1. (“[T]rafficking in human beings constitutes a violation of human rights and an offence to the dignity and the integrity of the human being

Several specialized human rights treaties provide additional substance to the human rights framework within which the “modern problem of slavery” should be considered.¹⁴³ The Convention on the Rights of the Child (CRC), for example, upholds the right of children to protection from economic, sexual, and other forms of exploitation, as well as from performing hazardous or harmful work.¹⁴⁴ In addition to requiring states to promote the recovery and social integration of child victims, the CRC makes clear that in dealing with child victims of exploitation, the best interests of the child are to be paramount at all times.¹⁴⁵ There is, in short, no lack of international human rights standards that address both rights and obligations of states in relation to the issue of private exploitation.

. . . .”); Strengthening International Cooperation in Preventing and Combating Trafficking in Persons and Protecting Victims of Such Trafficking, G.A. Res. 58/137, pmb., ¶ 3, U.N. Doc. A/RES/58/137 (Dec. 22, 2003) (characterizing “trafficking in persons as an abhorrent form of modern-day slavery and as an act that is contrary to universal human rights”); Gen. Assembly, Human Rights Council, *Special Rapporteur on trafficking in persons, especially women and children*, H.R.C. Res. 8/12, pmb., U.N. Doc. A/HRC/RES/8/12 (June 18, 2008) (“[T]rafficking in persons violates human rights and impairs the enjoyment of human rights”); U.N. Comm’n on Human Rights, *Trafficking in Women and Girls*, C.H.R. Res. 2004/45, pmb., U.N. Doc. E/CN.4/2004/45 (Apr. 19, 2004) (requiring states to “eliminate all forms of sexual violence and trafficking . . . which both violate and impair or nullify the enjoyment of the human rights and fundamental freedoms of victims of trafficking”); European Trafficking Convention Explanatory Report, *supra* note 101, ¶¶ 41–45; EU Council Framework Decision on Combating Trafficking in Human Beings, pmb., 2002/629/JHA July 19, 2002 O.J. (L 203) (“[T]rafficking in human beings comprises serious violations of fundamental human rights and human dignity”).

143. I have deliberately not referenced, in this brief summary, the provisions of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 30 I.L.M. 1517 (entered into force July 1, 2003). While identified by the United Nations as one of the “core” human rights treaties, this instrument has an undistinguished history and is currently not accepted by the major countries of destination for migrant workers. *See, e.g.*, Antoine Pécoud & Paul de Guchteneire, *Migration, human rights and the United Nations: an investigation into the low ratification record of the UN Migrant Workers Convention* (Global Comm’n on Int’l Migration, Global Migration Perspectives No. 3 2004), available at http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/policy_and_research/gcim/gmp/gmp3.pdf (analyzing the results of research conducted by UN Educational, Scientific and Cultural Organization into obstacles to the ratification of the Migrant Workers Convention); Srdjan Vucetic, *Democracies and Human Rights: Why is there No Place for Migrant Workers?*, 11 INT’L J. HUM. RTS. 403 (2007) (exploring the causes of the poor ratification record of the Migrant Workers Convention in OECD countries).

144. CRC, *supra* note 6, arts. 32, 34, 36.

145. *Id.* art. 3.

C. *Achievements, Opportunities, and Challenges*

Hathaway's charge of institutional atrophy must be weighed against the full body of applicable standards mentioned above and against the multiple bodies that are involved in securing their effective implementation. On this point, my conclusions are generally more optimistic than those of Hathaway. While much remains to be done, and despite the fact that the prohibition on slavery is only rarely directly invoked, international human rights mechanisms have, particularly over the past decade, demonstrated a growing willingness to consider issues of private exploitation such as trafficking, debt bondage, forced labor, forced marriage, child sexual exploitation, and child labor, occurring *within*, as well as between, countries.¹⁴⁶ It is this fact, more than any other, that lays to rest any concerns that the global campaign against trafficking has wasted effort and resources that could better have been spent on the "broader" problem of enslavement.¹⁴⁷ Setting an example for others, the human rights bodies have also shown an admirable capacity to adjust to the fact that some of the most important standards on these issues have been generated elsewhere. All relevant parts of that system have adopted the Trafficking Protocol's definition of trafficking,¹⁴⁸ and all

146. Various UN human rights treaty bodies, such as the Human Rights Committee, have commented on these issues in their Concluding Observations on State Reports. On the issue of slavery, see U.N. Human Rights Comm., *Concluding Observations: Sudan*, ¶ 18, U.N. Doc. CCPR/C/SDN/CO/3 (Aug. 29, 2007); U.N. Human Rights Comm., *Concluding Observations: Brazil*, ¶ 14, U.N. Doc. CCPR/C/BRA/CO/2 (Dec. 1, 2005); and U.N. Human Rights Comm., *Concluding Observations: Mali*, ¶ 17, U.N. Doc. CCPR/CO/77/MLI (Apr. 16, 2003). On the issue of child labor, see U.N. Human Rights Comm., *Concluding Observations: Honduras*, ¶ 12, U.N. Doc. CCPR/C/HND/CO/1 (Dec. 13, 2006); U.N. Human Rights Comm., *Concluding Observations: Thailand*, ¶ 21, U.N. Doc. CCPR/CO/84/THA (July 8, 2005); U.N. Human Rights Comm., *Concluding Observations: Kenya*, ¶ 26, U.N. Doc. CCPR/CO/83/KEN (Apr. 29, 2005); and U.N. Human Rights Comm., *Concluding Observations: Uganda*, ¶ 20, U.N. Doc. CCPR/CO/80/UGA (May 4, 2004). On the issue of the sexual exploitation of children, see U.N. Comm. on the Rights of the Child, *Concluding Observations: Kenya*, ¶ 65, U.N. Doc. CRC/C/KEN/CO/2 (June 19, 2007); U.N. Comm. on the Rights of the Child, *Concluding Observations: Angola*, ¶ 66, U.N. Doc. CRC/C/15/Add.246 (Nov. 3, 2004); and U.N. Comm. on the Rights of the Child, *Concluding Observations: Myanmar*, ¶ 70, U.N. Doc. CRC/C/15/Add.237 (June 30, 2004). On the issue of child labor, see U.N. Comm. on the Rights of the Child, *Concluding Observations: Kyrgyzstan*, ¶ 59, U.N. Doc. CRC/C/15/Add.244 (Nov. 3, 2004) and U.N. Comm. on the Rights of the Child, *Concluding Observations: Armenia*, ¶ 60, U.N. Doc. CRC/C/15/Add.225 (Feb. 26, 2004).

147. Hathaway, *supra* note 9.

148. See, e.g., Comm. on the Elimination of All Forms of Discrimination against Women, *Concluding Observations: Hungary*, ¶ 23, U.N. Doc. CEDAW/C/HUN/CO/6 (Aug. 10, 2007); Comm. on the Elimination of Discrimination against Women, *Concluding Observations: Singapore*, ¶ 22, U.N. Doc. CEDAW/C/SGP/CO/3 (Aug. 10, 2007); Comm. on the Elimination of Discrimination against Women, *Concluding Observations: Poland*, ¶ 21, U.N. Doc.

have taken up the very specific obligations established under that regime to strengthen their position that governments have an obligation to prevent trafficking and related exploitation,¹⁴⁹ prosecute those responsible,¹⁵⁰ and protect victims.¹⁵¹

In a similar vein, the establishment of special procedures of the Human Rights Council, including rapporteurs on trafficking, the sale of children, child prostitution and child pornography, contemporary forms of slavery, rights of migrants, and violence against women, do not, as Hathaway implies, demonstrate an unfair privileging of a small group of exploited individuals.¹⁵² Rather, they provide a welcome—and much overdue—indication of an increased acceptance on the part of states that severe exploitation, even that which takes place within the private sphere, is indeed a matter for public concern and international regulation. The significance of this development in terms of its contribution to the erosion of the public/private split in international human rights law should not be underestimated.¹⁵³ In 2009, it would not be credible for

CEDAW/C/POL/CO/6 (Feb. 2, 2007); U.N. Comm. against Torture, *Concluding Observations: Poland*, ¶ 18, U.N. Doc. CAT/C/POL/CO/4 (July 25, 2007). The definition has also been adopted by the European Trafficking Convention, *supra* note 101, art 4 and in *UN Trafficking Principles and Guidelines*, *supra* note 123, at 3 n.1.

149. *See, e.g.*, Gen. Assembly, *Trafficking in Women and Girls*, G.A. Res 61/144, ¶ 3, U.N. Doc. A/RES/61/144 (Dec. 19, 2006); ECOSOC, Comm'n on Human Rights, *Trafficking in Women and Girls*, C.H.R. Res. 2004/45, ¶ 21, U.N. Doc. E/CN.4/2004/45 (Apr. 19, 2004); Comm. on the Elimination of Discrimination against Women, *Concluding Observations: Burundi*, ¶ 28, U.N. Doc. CEDAW/C/BDI/CO/4 (Feb. 1, 2008); U.N. Human Rights Comm., *Concluding Observations: Slovenia*, ¶ 11, U.N. Doc. CCPR/CO/84/SVN (July 25, 2005); U.N. Comm. on the Rights of the Child, *Concluding Observations: Angola*, ¶ 67, U.N. Doc. CRC/C/15/Add.246 (Nov. 3, 2004).

150. *See, e.g.*, G.A. Res. 61/144, *supra* note 149, ¶ 3; C.H.R. Res. 2004/45, *supra* note 149, ¶ 8; U.N. Comm. against Torture, *Concluding Observations: Togo*, ¶ 26, U.N. Doc. CAT/C/TGO/CO/1 (July 28, 2006); U.N. Human Rights Comm., *Concluding Observations: Thailand*, ¶ 20, U.N. Doc. CCPR/CO/84/THA (July 8, 2005).

151. *See, e.g.*, European Trafficking Convention, *supra* note 101, art. 12(2); Gen. Assembly, Human Rights Council, *Rights of the Child*, H.R.C. Res. 7/L.34, ¶ 36, U.N. Doc. A/HRC/7/L.34 (Mar. 26, 2008); ECOSOC, Comm'n on Human Rights, *Trafficking in Women and Girls*, C.H.R. Res. 2004/45, ¶ 2, U.N. Doc. E/CN.4/2004/45 (Apr. 19, 2004); Comm. on the Elimination of Discrimination against Women, *Concluding Observations: Lebanon*, ¶ 28, U.N. Doc. CEDAW/C/LBN/CO/3 (Apr. 8, 2008); Comm. against Torture, *Concluding Observations: Luxembourg*, ¶ 12, U.N. Doc. CAT/C/LUX/CO/5 (July 16, 2007); U.N. Human Rights Comm., *Concluding Observations: Kenya*, ¶ 25, U.N. Doc. CCPR/CO/83/KEN (Apr. 29, 2005); U.N. Comm. on the Rights of the Child, *Concluding Observations: Canada*, ¶ 53, U.N. Doc. CRC/C/15/Add.215 (Oct. 27, 2003).

152. Hathaway, *supra* note 9, at 14–15.

153. In the legal context, the “public/private distinction” operates to define what is an appropriate (public) and inappropriate (private) object of law. According to its critics, this dichotomy is not organic or inevitable but rather politically constructed. Those who have examined the operation of the public/private distinction in international human rights law charge that its influence is

any state to deny an obligation to deal with trafficking because those responsible are bad people, not bad governments (as was done, in my presence, by members of one of the lead delegations involved in drafting the Trafficking Protocol). At the very least, this development warrants a cautious optimism that the historical marginalization of these issues, in law and in practice, may be coming to an end.

While international scrutiny of the implementation of the Trafficking Protocol's core obligations remains predictably unsatisfactory, even if the scope of analysis is extended beyond the impotent and now obsolete Working Group on Contemporary Forms of Slavery, there are signs that this will change over time for the better. Human rights bodies' improved literacy with regard to contemporary exploitation, and the existence of additional rules on which they may rely, is likely to help in this regard, as is the growing range of strong supplementary and interpretive material¹⁵⁴ and the establishment of complementary monitoring and evaluation structures outside the international human rights system.¹⁵⁵

These essentially incremental changes are already being overshadowed by an alternative, unilateral monitoring regime developed and implemented by the United States. Since 2001, the State Department has

reflected in a general inability and unwillingness on the part of states and others to engage on issues of fundamental concern to the rights and dignity of those whose lives are lived within the private spheres of work, community, home, and family; these individuals are most often women. See, e.g., HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* (2000).

154. See, e.g., *UN Trafficking Principles and Guidelines*, *supra* note 123; U.N. Office of the High Comm'r for Human Rights, *Commentary to the United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking* (forthcoming 2009); *UNHCR Trafficking Guidelines*, *supra* note 120; UNITED NATIONS CHILDREN'S FUND, *GUIDELINES FOR THE PROTECTION OF CHILD VICTIMS OF TRAFFICKING* (2006); *LEGISLATIVE GUIDE TO THE ORGANIZED CRIME CONVENTION AND ITS PROTOCOLS*, *supra* note 95; European Trafficking Convention Explanatory Report, *supra* note 101.

155. Article 32(1) of the Organized Crime Convention provides for the establishment of a conference of the parties to improve the capacity of states to combat transnational organized crime and to promote and review the implementation of the convention. Organized Crime Convention, *supra* note 8, art. 32(1). While the Conference of the Parties has yet to establish a formal review mechanism, states are required to submit regular reports on compliance with obligations contained in the Organized Crime Convention and protocols to which they are a party. See Conference of the Parties to the U.N. Convention against Transnational Organized Crime, Review of the implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto: information-gathering and possible mechanisms to review implementation, Vienna, Aust., Oct. 8–17, 2008, *Possible mechanisms to review implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, U.N. Doc. CTOC/COP/2008/3 (Aug. 26, 2008). For an overview of the European Trafficking Convention's reporting and monitoring provisions, see Anne Gallagher, *Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments*, 8 EUR. J. MIGRATION & L. 163, 186–87 (2006).

issued annual Trafficking in Persons (TIP) Reports, which identify those countries deemed to be experiencing a significant trafficking problem (over 170 at last count¹⁵⁶) and assess their response against criteria established by U.S. law, which only incidentally coincide with international legal rules.¹⁵⁷ Failure of any country to live up to the mandated standard can lead to the imposition of sanctions and U.S. interference in that country's relationship with the major international banks and financial institutions.¹⁵⁸ While obligingly amenable to a variety of severe criticisms,¹⁵⁹ the TIP Reports have produced some unsettling results for the committed multilateralist, not least of which is their profound impact on the response of states to trafficking *and* the various forms of exploitation with which it is associated.¹⁶⁰ The reports also provide further confirmation that Hathaway's narrow construction of "trafficking" has not found traction in the real world. For example, the 2008 TIP Report prominently highlights a range of exploitative practices occurring solely within national borders, including exploitation of street children in the Philippines, Egypt, and countries of West Africa, forced labor in China, and bonded labor and forced begging in India.¹⁶¹ It also calls attention to even less visible forms of exploitation, such as child soldiering and

156. TIP REPORT 2008, *supra* note 124, at 1, 10. Note that, starting in 2009, the report will cover all countries. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, §§ 106, 108, 122 Stat. 5044, 5048-49 (overturning the requirement that there be "a significant number of" victims of severe forms of trafficking for a country to be considered to have a "significant trafficking problem").

157. For a brief consideration of the conflicts between international standards and the criteria used in the TIP Reports to evaluate the response of states to trafficking, see Anne T. Gallagher, *A Shadow Report on Human Trafficking in Lao PDR: The US Approach vs. International Law*, 15 ASIAN PAC. MIGRATION J. 525 (2006), available at <http://ssrn.com/abstract=954428>.

158. Trafficking Victims Protection Act, 22 U.S.C. § 7107 (2006).

159. Internally, Congress has criticized the reports' methodology and their use of data. See GAO REPORT, *supra* note 17. For a detailed critique of the sanctions regime, see Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437 (2006).

160. From 2003 to the present, I have worked with the Association of Southeast Asian Nations and its member states to support both regional standard setting and the development of more effective national criminal justice responses to trafficking and related forms of exploitation. Over that time, I have directly observed multiple instances in which the open threat of a negative grade in the U.S. TIP Report has provided the direct impetus for major reform initiatives, including the criminalization of trafficking, the decriminalization of victims, and the opening of shelters. Some of these changes have been highly problematic in human rights terms. See *infra* note 172 and accompanying text. Others appear to have resulted in more and better prosecutions of traffickers, and improvements to both victim identification procedures and victim treatment. See Anne Gallagher & Paul Holmes, *Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line*, 18 INT'L CRIM. JUST. REV. 318 (2008).

161. TIP REPORT 2008, *supra* note 124, at 4-37.

the commercial sexual exploitation of boys.¹⁶² States are, in short, under greater scrutiny in relation to contemporary forms of exploitation than ever before. That this has been achieved largely outside the formal human rights system is reason for reflection, not rejection or denial.

While international, regional, and even unilateral responses provide important insights, it is ultimately at the level of national law and policy that the real indicators of progress and change must be sought. In this context, the relevant inquiry is whether the development of an international legal regime around trafficking has helped or (as Hathaway claims) hindered national efforts to deal with what he refers to as “the problem of slavery.”¹⁶³ Once again, the signs are mixed but, in terms of what existed before, they are generally more positive than negative. In 2000, when the Trafficking Protocol was adopted, only a small handful of states specifically prohibited the process by which individuals were moved into and maintained in situations of exploitation at home or abroad. Slavery was certainly outlawed in almost every country, but these laws, like their international equivalents, were almost never invoked—certainly not against the exploitative practices such as forced labor, child labor, or debt bondage that are the focus of Hathaway’s concern. International scrutiny of state actions with respect to such exploitation was, as noted above, extremely limited and ineffective.

In less than a decade, that situation has changed dramatically and irreversibly. The overwhelming majority of states are now parties to one or more treaties that set out—with a level of particularity and detail never before found in international human rights law—their obligations with respect to the prevention of trafficking, the protection of victims, and the prosecution of perpetrators.¹⁶⁴ In relation to the two major in-

162. *Id.*

163. Hathaway, *supra* note 9, at 25.

164. As of February 2009, 124 of the 147 States Parties to the Organized Crime Convention were also party to the Trafficking Protocol. U.N. Office on Drugs & Crime, Signatories to the United Nations Convention against Transnational Crime and its Protocols, at <http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html> (last visited Feb. 14, 2009). Twenty states were party to the European Trafficking Convention. Council of Europe, Status of Signature and Ratification of the Council of Europe Convention on Action against Trafficking in Human Beings as of today, at http://www.coe.int/t/dg2/trafficking/campaign/Flags-sos_en.asp (last visited Feb. 14, 2009). These two treaties set out a range of specific obligations that leave very little room for state discretion with respect to the method and means of their implementation. These include: (1) the obligation to criminalize trafficking, European Trafficking Convention, *supra* note 101, art. 18; Trafficking Protocol, *supra* note 2, art. 5; (2) the obligation to extradite or prosecute with respect to trafficking offenses, European Trafficking Convention, *supra* note 101, art. 31(3); Organized Crime Convention, *supra* note 8, arts. 15(3), 16(10); (3) the obligation to impose effective and proportionate sanctions, European Trafficking Convention,

struments that address trafficking, the level of normative precision, combined with explicit and detailed implementation guides,¹⁶⁵ remove much of the “margin of appreciation” that is such an important aspect of states accepting obligations with respect to human rights. In response, the overwhelming majority of states have now enacted comprehensive antitrafficking laws.¹⁶⁶ Most of these laws are modeled on the definition of trafficking provided by the Trafficking Protocol and, accordingly, most now cover the full range of exploitative purposes set out in that instrument.¹⁶⁷ As such, they provide an additional avenue through which existing prohibitions of related practices, such as those on slavery, servitude, forced labor, and child sexual exploitation, can be implemented. As noted previously, all these new laws extend to trafficking taking place within national borders as well as internationally. Contrary to Hathaway’s highly selective focus on border control measures,¹⁶⁸ and his assertion that “only a minority of states has adopted mechanisms even to consider the protection of trafficked persons,”¹⁶⁹ the majority of states have taken at least some steps in this direction,¹⁷⁰ with many laws

supra note 101, art. 23; Organized Crime Convention, *supra* note 8, art. 11; (4) the obligation to seize and confiscate assets of trafficking, European Trafficking Convention, *supra* note 101, art. 23(3); Organized Crime Convention, *supra* note 8, arts. 12–14; (5) the obligation to ensure that victims have legal access to monetary compensation or that victims are provided the information and legal services necessary for them to secure compensation, which right is to be guaranteed in law, European Trafficking Convention, *supra* note 101, art. 15; Organized Crime Convention, *supra* note 8, art. 25(2); Trafficking Protocol, *supra* note 2, art. 6; and (6) the obligation to ensure that antitrafficking measures do not adversely affect established rights, Trafficking Protocol, *supra* note 2, art. 14.

165. LEGISLATIVE GUIDE TO THE ORGANIZED CRIME CONVENTION AND ITS PROTOCOLS, *supra* note 95; European Trafficking Convention Explanatory Report, *supra* note 101.

166. UNODC GLOBAL REPORT, *supra* note 100, at 22.

167. *Id.* at 24–25.

168. Hathaway, *supra* note 9, at 31–32 (citing a paragraph of a 2006 summary report on action taken by states to implement the Trafficking Protocol). The same report, and its updated version also include extensive detail of *other* actions taken by states to which Hathaway does not refer. See Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Oct. 8–17, 2008, *Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime: Consolidated Information Received From States for the Second Reporting Cycle*, ¶ 48, U.N. Doc. CTOC/COP/2006/6 (Sep. 9, 2008). These include, for example, protection of victim identity and privacy, access to information, participation in legal proceedings, and measures that offer victims the possibility of obtaining compensation; recovery and protective measures that take into account the special needs of children; and measures related to the legal status of victims in receiving states and the repatriation of victims.

169. Hathaway, *supra* note 9, at 3.

170. See the “Services provided to victims” sections of the individual country profiles in UNODC GLOBAL REPORT, *supra* note 100, and the “protection” sections in the individual country assessments of the TIP REPORT 2008, *supra* note 124.

mandating the provision of protection and support to victims including, at least in principle, access to remedies.¹⁷¹ In many cases, statutory reforms have been undertaken in the context of a broader national plan.¹⁷² They have also been accompanied by a strengthening of criminal justice institutions and procedures aimed at ending the high levels of impunity traditionally enjoyed by those who profit from the exploitation of others and, at least in some instances, securing justice for those who have been exploited.¹⁷³ It is inconceivable to imagine that these monumental shifts would have occurred without the impetus provided by the global campaign against trafficking.

Unbridled optimism can, of course, be as counterproductive as immoderate cynicism. Power balances and entrenched biases do not shift overnight and while recognizing positive change, it is also essential to accept that responses to trafficking and related exploitation have been inadequate, incomplete, and sometimes immensely problematic in human rights terms. Even where strong laws and institutions are in place, the attitudinal shifts required to deliver justice, protection, and support to those who have been exploited are often frustratingly slow.¹⁷⁴ Conflicting state interests—for example in maintaining a largely foreign and compliant sex industry or a cheap and disempowered sector of the labor market—can be inimical to effective action. Some states, aided and abetted by civil society groups, continue to manipulate the global mo-

171. See, e.g., Trafficking Victims Protection Act, 22 U.S.C. § 7105 (2006); An Act to Amend the Criminal Code (Trafficking in Persons) 2005 S.C., ch. 43 (Can.); Misura contro la tratta di persone, Gazz. Uff. No. 195 (Aug. 23, 2003), Le Leggi No. 228 (Aug. 11, 2003) (Italy); Decreto por el que se expide la Ley para Prevenir y Sancionar la Trata de Personas, y se reforman, adicionan y derogan diversas disposiciones de la Ley Federal contra la Delincuencia Organizada; el Código Federal de Procedimientos Penales y el Código Penal Federal, Diario Oficial de la Federación [D.O.], 27 de noviembre de 2007 (Mex.); Trafficking in Persons (Prohibition) Law Enforcement and Administration Act (2003) Cap. 24, § 9-(3)(a) (Nig.); The Anti-Trafficking in Persons Act, B.E. 2551 (2008) (Thail.); see also SOUTH AFRICAN LAW REFORM COMMISSION, REPORT ON TRAFFICKING IN PERSONS 71–117 (2008) (analyzing and making recommendations for improvement of legislative protections for victims of trafficking).

172. In 2003, only five percent of the 155 countries surveyed by the UNODC had in place a national plan to deal with trafficking. By 2008, that figure had risen to fifty-three percent. UNODC GLOBAL REPORT, *supra* note 100, at 25. The authors of the report conclude, perhaps optimistically, that the existence of such a plan “can generally be seen as a sign of the importance that trafficking in persons has in a country’s political agenda.” *Id.*

173. See generally Gallagher & Holmes, *supra* note 160; see also UNODC GLOBAL REPORT, *supra* note 100, at 25 (revealing that fifty-two percent of the 155 countries surveyed had established a specialist law enforcement response to trafficking in persons).

174. Gallagher & Holmes, *supra* note 160. The UNODC confirms that despite a general trend of increased criminal proceedings, the rate of prosecutions for trafficking-related offenses remains extremely low relative to the estimated number of victims and relative to the prosecution rates for similar serious crimes. UNODC GLOBAL REPORT, *supra* note 100, at 38, 44.

mentum against trafficking to wage their own wars against perceived social harms such as prostitution and illegal migration. The contribution of the United States in regard to the former has been identified as particularly intense and damaging.¹⁷⁵

In many parts of the world, measures taken in the name of addressing trafficking and related exploitation have had a highly adverse impact on individual rights and freedoms. Evidence-based examples of such “negative human rights externalities” identified by me and others include: detention of trafficked persons in immigration or shelter facilities; prosecution of trafficked persons for status-related offenses including illegal entry, illegal stay, and illegal work; denial of exit or entry visas or permits; raids, rescues, and “crack downs” that do not include full consideration of and protection for the rights of individuals involved; forced repatriation of victims in danger of reprisals or re-trafficking; conditional provision of support and assistance; denial of a right to a remedy; and violations of the rights of persons suspected or convicted of involvement in trafficking and related offenses, including unfair trials and inappropriate sentencing.¹⁷⁶ These obstacles may be daunting, but they serve to underscore the strong relationship between trafficking and human rights, and the fundamental importance of international institutions, including the human rights bodies, using the full range of tools at their disposal to hold states accountable for their actions and omissions.

Responses to trafficking and related practices such as forced labor and commercial sexual exploitation can also operate to reinforce detrimental gender—and even racial—stereotypes. There is a growing backlash against the facile and highly gendered characterization, adopted by

175. See, e.g., Gretchen Soderlund, *Running from the Rescuers: New U.S. Crusades Against Sex Trafficking and the Rhetoric of Abolition*, 17 NAT'L WOMEN'S STUDIES ASS'N J. 64 (2005); Ronald Weitzer, *The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade*, 35 POL. & SOC'Y 447, 464–75 (2007).

176. See, e.g., ECOSOC, Comm'n on Human Rights, *Integration of the Human Rights of Women and a Gender Perspective: Report of the Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children*, ¶¶ 63, 68, 70, 94, 158, U.N. Doc. E/CN.4/2006/62/Add.1 (Mar. 27, 2006) (prepared by Sigma Huda) (citing examples of conditional support, detention, forced repatriation, prosecution, denial of a remedy); COLLATERAL DAMAGE, *supra* note 124; Anne Gallagher & Elaine Pearson, *Detention of Trafficked Persons in Shelters: A Legal and Policy Analysis* (2008), at http://www.artipproject.org/01_aboutartip/ARTIP_Detention-Study_0808_final.pdf; see also Comm. on the Elimination of Discrimination against Women, *Concluding Comments: Uzbekistan*, ¶ 25, U.N. Doc. CEDAW/C/UZB/CO/3 (Aug. 25, 2006) (citing criminalization of status-related offenses); Comm. on the Elimination of Discrimination against Women, *Concluding Comments: Cambodia*, ¶¶ 19–20, U.N. Doc. CEDAW/C/KHM/CO/3 (Jan. 25, 2006) (citing criminalization of status-related offenses); U.N. Human Rights Comm., *Concluding Observations: Belgium*, ¶ 15, U.N. Doc. CCPR/CO/81/BEL (Aug. 12, 2004) (citing conditional support).

Hathaway, of victims of contemporary exploitation as weak, gullible, and deprived.¹⁷⁷ Those working directly with trafficked persons and groups identified closely with those who are trafficked, including migrant women and unaccompanied children, are offering insight into much more complex realities and experiences.¹⁷⁸ The contributions of scholars from other fields, including anthropology, the health sciences, economics, sociology, and geography are also helping to expand and deepen the discourse beyond its traditionally narrow legal and activist focus.¹⁷⁹ Perennial and apparently irreconcilable controversies continue to rage, particularly over the relationship between prostitution and trafficking.¹⁸⁰ Despite such obstacles, it is evident that the elaboration of a

177. Hathaway, *supra* note 9, at 17 (quoting BALES, DISPOSABLE PEOPLE, *supra* note 14, at 11). See generally LAURA MARÍA AGUSTÍN, SEX AT THE MARGINS: MIGRATION, LABOUR MARKETS AND THE RESCUE INDUSTRY (2007); Denise Brennan, *Competing Claims of Victimhood? Foreign and Domestic Victims of Trafficking in the United States*, 5 SEXUALITY RES. & SOC. POL'Y 45 (2008); Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1 (2002); Patrizia Testai, *Victim Protection Policy in Italy: Between 'Emancipation' and 'Redemption'*, 4 ST. ANTHONY'S INT'L REV. 37 (2008). On challenging the notion that trafficked persons, particularly women trafficked into the sex industry, are naive and helpless, see Julia O'Connell Davidson, *Will the Real Sex Slave Please Stand Up?*, 83 FEMINIST REV. 4 (2006). For a book review that critically considers the highly divergent approaches of AGUSTÍN, *supra*, and BALES, GLOBAL SLAVERY, *supra* note 14, see Bridget Anderson, *Sex, Slaves and Stereotypes*, 8 GLOBAL NETWORKS 363 (2008).

178. See, e.g., ANETTE BRUNOVSKIS & REBECCA SURTEES, FAFO INST. (OSLO) & NEXUS INST. (VIENNA), LEAVING THE PAST BEHIND: WHEN VICTIMS OF TRAFFICKING DECLINE ASSISTANCE (2007); Mike Dottridge, *Young People's Voices on Child Trafficking: Experiences from South Eastern Europe* (United Nations Children's Fund Innocenti Research Centre, Working Paper No. IWP-2008-5, 2008), available at http://www.unicef-irc.org/publications/pdf/iwp_2008_5.pdf.

179. See, e.g., Elizabeth Bernstein, *Sexual Commerce and the Global Flow of Bodies, Desires, and Social Policies*, 5 SEXUALITY RES. & SOC. POL'Y 1 (2008); Sealing Cheng, *Muckraking and Stories Untold: Ethnography Meets Journalism on Trafficked Women and the U.S. Military*, 5 SEXUALITY RES. & SOC. POL'Y 6 (2008); Svati P. Shah, *South Asian Border Crossings and Sex Work: Revisiting the Question of Migration in Anti-Trafficking Interventions*, 5 SEXUALITY RES. & SOC. POL'Y 19 (2008); see also CATHY ZIMMERMAN, LONDON SCH. OF HYGIENE & TROPICAL MEDICINE, THE HEALTH RISKS AND CONSEQUENCES OF TRAFFICKING IN WOMEN AND ADOLESCENTS: FINDINGS FROM A EUROPEAN STUDY (2003); Saskia Sassen, *Women's Burden: Counter-geographies of Globalization and the Feminization of Survival*, 53 J. INT'L AFF. 503 (2000); Yuji Tamura, *Migrant Smuggling* (Inst. for Int'l Integration Studies, Discussion Paper No. 207, June 2008), available at <http://ssrn.com/abstract=964011>.

180. See, e.g., *supra* notes 176, 178; see also Laura Agustín, *Sex and the Limits of Enlightenment: The Irrationality of Legal Regimes to Control Prostitution*, 5 SEXUALITY RES. & SOC. POL'Y 73 (2008); Beverly Balos, *The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation*, 27 HARV. WOMEN'S L.J. 137 (2004); Joyce Outshoorn, *The Political Debates on Prostitution and Trafficking in Women*, 12 SOC. POL. 141 (2005). For a concise outline of the position of the George W. Bush administration on this issue (not yet amended at the time of writing), see U.S. DEP'T OF STATE, THE LINK BETWEEN PROSTITUTION

conceptual and legal framework has been critical in shifting the parameters of the debate, providing both space and structure for the development of new ideas and the constructive challenging of old, tired ones.¹⁸¹

III. TRAFFICKING, REFUGEES, AND BORDER CONTROLS

The final element of Hathaway's rejection of the "campaign against trafficking" is that it has resulted in significant, collateral human rights damage by "providing a context for developed states to pursue a border control agenda under the cover of promoting human rights."¹⁸² Hathaway argues that a small coterie of powerful governments took strategic advantage of the political and humanitarian momentum against trafficking to trick their less sophisticated counterparts, as well as the United Nations and international civil society, into accepting a parallel treaty on the "superficially related issue" of migrant smuggling.¹⁸³ The result, in his view, "converts an issue traditionally conceived as purely a matter of domestic law (the right of states to sanction persons who aid or assist persons unlawfully to enter their territory) into a transnational legal obligation."¹⁸⁴

While Hathaway's cause and effect argument is unsubstantiated and subject to challenge, it is difficult for the humanist, whether lawyer or advocate, to fault the underlying sentiment. If borders were truly open, the market for smugglers would cease to exist. If individuals were allowed to move wherever and whenever they wanted, then the competition to be regulated would be between transport companies, not organized criminal syndicates. If international labor migration were as free as the trade in goods and services, then there would be no need to develop legal regimes to combat smuggling. In human rights terms, there can be no doubt that current migration regimes reinforce discrimination and

AND SEX TRAFFICKING (2004), at <http://www.state.gov/documents/organization/38901.pdf>.

181. For example, Janet Halley, Prabha Kotiswaran, Hila Shamir, and Chantal Thomas identify the creation of a legal framework around trafficking as a major impetus for the emergence of "governance feminism," a new way of feminists engaging with political and legal power. Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. L. & GENDER 335 (2006). A very different example is provided by recent successes in expanding the focus of the debate around trafficking beyond trafficking for sexual exploitation to encompass the full range of exploitative practices recognized in the international legal definition. Both the TIP REPORT 2008, *supra* note 124, and the UNODC GLOBAL REPORT, *supra* note 100, confirm this trend.

182. Hathaway, *supra* note 9, at 26.

183. *Id.*

184. *Id.* at 27.

inequality and contribute to global suffering. Dismantling those regimes is fully compatible with the broader goals of the human rights project.

It is nevertheless not the task of the international legal practitioner to work within imagined universes. The reality of the present international system is that states take full advantage of the carefully preserved international legal right to control their own borders. States also exploit a weak and outdated legal framework around asylum to ensure that their humanitarian obligations do not conflict with perceived national self-interest. Migration regimes will likely only be free, fair, and consistent when states, particularly the most powerful and the most desired, decide that it is in their best interests and not before. International law must, in the meantime, be used to hold states to account for violation of established rules. One can hope that it may also play a “civilizing” role in shaping state perception of obligation, responsibility, and self-interest.¹⁸⁵ The role of law in this situation is necessarily limited. Unless and until a radical shift occurs in the structure and orientation of current migration regimes, there will be a market distortion; more people prepared (or forced) to move than safe and legal opportunities are available. Traffickers and smugglers are a result of this anomaly. Their existence and their future are tied up with its continuity.¹⁸⁶

What of the vaguely conspiratorial allegation that the development and adoption of the Migrant Smuggling Protocol was nothing more than a clever confidence trick? Certainly, during the late 1990s, several European states, backed by Australia and the United States, were pushing for greater international legal cooperation against the organized movement of migrants for profit.¹⁸⁷ However, their intentions were much less furtive than Hathaway suggests. Almost all of the preferred destination countries in Europe, North America, and elsewhere had experienced a significant increase in the number of “unauthorized arrivals.”¹⁸⁸ There was growing evidence that criminal groups who were

185. This concept of international law as a “gentle civilizer of national self-interest” is taken from MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* (2001).

186. For a detailed consideration of these issues, see GLOBAL COMMISSION ON INTERNATIONAL MIGRATION REPORT, *supra* note 120.

187. MCCLEAN, *supra* note 126, at 21–24; Vlassis, *supra* note 126.

188. See generally FIONA DAVID, AUSTL. INST. OF CRIMINOLOGY RES. AND PUB. POL’Y, *HUMAN SMUGGLING AND TRAFFICKING: AN OVERVIEW OF THE RESPONSES AT THE FEDERAL LEVEL* (2000); ANDREAS SCHLOENHARDT, *MIGRANT SMUGGLING: ILLEGAL MIGRATION AND ORGANISED CRIME IN AUSTRALIA AND THE ASIA PACIFIC REGION* (2003); Sheldon Zhang & Kolin Chin, *Characteristics of Chinese Human Smugglers: A Cross-National Study* (June 24, 2003) (unpublished report), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/200607.pdf>.

organized and sophisticated enough to exploit legislative, policy, and law enforcement weaknesses were facilitating much of this movement.¹⁸⁹ Deficiencies in international law were seen as particularly acute and detrimental; there was no definition of smuggling, no domestic obligation to criminalize smuggling, and no obligation to extradite or prosecute perpetrators,¹⁹⁰ resulting in a “legal lacuna under international law [that] is increasingly perceived as an obstacle to the effort of the international community to cope, in an efficient manner, with the phenomenon of smuggling of illegal migrants for criminal purposes.”¹⁹¹ The major receiving countries were quick to understand that the default position—a purely national approach to sanctioning those who facilitated such migration, supplemented by ad hoc and largely ineffective international cooperation—played directly into the hands of smugglers and traffickers.¹⁹² That most if not all states saw an interest in addressing such an obvious lacuna should not come as a surprise.

While it makes for a more compelling narrative, there is no evidence cited or available to support Hathaway’s central contention: that the powerful countries of destination were able to trick the rest of the international community into accepting a covert extension of border controls. More than one hundred states were actively involved in the negotiation process for both protocols and their parent convention¹⁹³ and it would be a serious mistake to dismiss the overwhelming majority of this group as naive and easily manipulated.¹⁹⁴ It is also inaccurate, as a mat-

189. DAVID, *supra* note 188; SCHLOENHARDT, *supra* note 188; Zhang & Chin, *supra* note 188.

190. Letter from the Government of Austria to the Secretary-General (transmitting a draft of the proposed convention), *cited in* MCCLEAN, *supra* note 126, at 21–22.

191. MCCLEAN, *supra* note 126, at 22.

192. *See generally* Vlassis, *supra* note 126.

193. MCCLEAN, *supra* note 126, at 12.

194. According to Dimitri Vlassis, the Western group did not particularly want a convention on transnational organized crime. “The vast majority of developing countries favored the idea of a new convention. Dealing with transnational crime in a global forum such as the UN offered developing countries relative parity with their Western counterparts because the UN tended to prefer consensus decisionmaking Smaller countries lack the resources and negotiating power to influence the content of bilateral agreements in criminal matters. Developing states thus threw their support behind a new convention.” Dimitri Vlassis, *The UN Convention against Transnational Organized Crime*, in *TRANSNATIONAL ORGANIZED CRIME AND INTERNATIONAL SECURITY: BUSINESS AS USUAL?* 83, 85 (Mats R. Berdal & Mónica Serrano eds., 2002). Vlassis refers to the first meeting of what was to become the highly influential and inclusive “Friends of the Chair” in 1998: “This meeting marked the formation of a core group of delegates, experts in their fields The core group was highly participatory, in the sense that it included representatives from virtually all regions and all systems of the world.” *Id.* at 90. Mats Berdal and Mónica Serrano also reject any simplistic assessment of power relations and influence within the drafting

ter of historical record, to claim that a small group of clever countries “[took] advantage of the momentum” against trafficking to slip in the migrant smuggling agreement.¹⁹⁵ The more prosaic reality on the ground was that most, if not all, states involved in the Vienna Process supported action against a phenomenon that was widely felt to represent a threat to stability and public order.¹⁹⁶ As Hathaway himself observes, developing countries and their allies were successful in ensuring that the Migrant Smuggling Protocol focused only on the international criminal aspects of migrant smuggling and not, as its early promoters may have wished, on the smuggled migrants themselves.¹⁹⁷ Early proposals to include all individuals moved illegally across international borders, except women and children trafficked into sexual exploitation, under the rubric of “migrant smuggling” also failed.¹⁹⁸

As noted above, none of the international agencies participating in the negotiations seriously questioned states’ right to develop a conceptual framework around smuggling and to attach certain legal obligations of criminalization and cooperation, *provided* the final instrument did not detract from existing norms and standards. A public record of strong and persistent intervention on the subject confirms that these agencies

group: “The energy and urgency that characterized the process was not limited to the contribution of dominant powers, but was also the result of ‘entrepreneurial middle-power action’ by States as diverse as Italy, Colombia, Poland and Argentina. The distinct interests of these countries was reflected not only in the three additional protocols to the UN Convention, but also in the emphasis placed upon the need to financially assist developing countries in order to bolster their capacity to prevent and combat transnational organized crime.” Mats R. Berdal & Mónica Serrano, *Introduction to TRANSNATIONAL ORGANIZED CRIME AND INTERNATIONAL SECURITY: BUSINESS AS USUAL?*, *supra*, at 1, 4.

195. Hathaway, *supra* note 9, at 26. The drafting history of both agreements reveals that the Smuggling Protocol had a much longer genesis than the Trafficking Protocol. *See generally* MCCLEAN, *supra* note 126, at 4–28; Andree Kirchner & Lorenzo Schiano Di Pepe, *International Attempts to Conclude a Convention to Combat Illegal Migration*, 10 INT’L J. REFUGEE L. 662 (1998).

196. *See* MCCLEAN, *supra* note 126; Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975 (2001).

197. Hathaway, *supra* note 9, at 28–29.

198. Initial proposals were for three separate agreements: one on smuggling of migrants by sea, one on smuggling and trafficking of migrants, and one on trafficking of women and children. *See* Gallagher, *supra* note 196, at 983 nn.52–57. As the accepted understanding of trafficking expanded to embrace all children moved into exploitation and all adults moved into exploitation through force, deception, or other means, the definition of migrant smuggling was consequently narrowed to include only those individuals moved across an international border for profit. Under the terms of both protocols, a smuggled migrant who ends up in a situation of exploitation at the destination point (e.g., a migrant who is forced to work to pay off transport debts) is also a trafficked person, and, provided intent can be proved, the smuggler involved is also a trafficker. *See* Trafficking Protocol, *supra* note 2, art. 3.

(and their nongovernmental allies)¹⁹⁹ were aware of potential risks, in particular to the rights of asylum seekers.²⁰⁰ For example, in March 2000, an informal coalition (“the Inter-Agency Group”), comprising the Office of the High Commissioner for Human Rights (OHCHR), the UN High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM), and the United Nations Children’s Fund (UNICEF), made a detailed joint submission to the working group responsible for drafting the Organized Crime Convention and its two protocols, addressing key themes that these same organizations had, individually and collectively, been pursuing over the past two years.²⁰¹ On the issue of asylum, the submission stated:

The Office, [UNHCR,] UNICEF and IOM welcome the explicit references [in the draft text] to obligations of States Parties under the 1951 Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees of 1967 as safeguards aimed at ensuring that the adoption of the Migrant Protocol does not jeopardize the obligations of States Parties to the 1951 Convention or impinge on the ability of asylum seekers to secure protection from persecution.

The Office, [UNHCR,] UNICEF and IOM urge that the above-mentioned safeguards be maintained and, where appropriate, further strengthened.

199. The focus of this Section is on the intergovernmental contribution to the Migrant Smuggling Protocol negotiations, of which I have first-hand knowledge. In relation to the NGO contribution, which is severely criticized by Hathaway, it is relevant to note that first-person accounts do not support his claim that “nongovernmental leadership was in the hands of religious and feminist antiprostitution advocates.” Hathaway, *supra* note 9, at 45. *Contra* Melissa Ditmore & Marjan Wijers, *The Negotiations on the UN Protocol on Trafficking in Persons*, 4 NEMESIS 79 (2003), available at <http://www.nswp.org/pdf/NEMESIS.PDF>; Jo Doezema, *Now You See Her, Now You Don't: Sex Workers at the UN Trafficking Protocol Negotiation*, 14 SOC. & LEGAL STUD. 61 (2005). As I concluded previously, however, Hathaway is indeed correct that battles over the definition of trafficking and the related issue of prostitution served to distract NGOs from broader human rights concerns, in particular those related to the Smuggling Protocol. See Gallagher, *supra* note 196, at 1001–02.

200. See, e.g., Gen. Assembly, Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, *Note by the Office of the United Nations High Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees, the United Nations Children’s Fund and the International Organization for Migration on the draft protocols concerning migrant smuggling and trafficking in persons*, U.N. Doc. A/AC.254/27 (Feb. 8, 2000), U.N. Doc. A/AC.254/27/Corr.1 (Feb. 22, 2000) [hereinafter *Inter-Agency Submission*]; Gen. Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Informal Note by the United Nations High Commissioner for Human Rights*, U.N. Doc. A/AC.254/16 (June 1, 1999).

201. *Inter-Agency Submission*, *supra* note 200.

In this context, it is essential to acknowledge that increasing numbers of asylum seekers, including those with genuine claims to refugee status, are being transported by means covered in the draft Migrant Protocol. The principle of *non-refoulement*, which is the core of international refugee protection, and which is recognized as a norm of customary international law, must be explicitly preserved in the Migrant Protocol. The Office, [UNHCR,] UNICEF and IOM strongly advocate the inclusion of a provision to the effect that illegality of entrance into a State will not adversely affect a person's claim for asylum. Further, in order to make such a provision effective, signatories should be required to ensure that smuggled migrants are given full opportunity (including through the provision of adequate information) to make a claim for asylum or to present any other justification for remaining in the country, and that such claims be considered on a case-by-case basis. Such a provision could be inserted as a safeguard clause or, if more appropriate, added to the [proposed] savings clause.²⁰²

The Inter-Agency Group also pointed out the conceptual confusion between "smuggled migrants" and "trafficked persons" as embodied in the border protection provisions in the draft Trafficking Protocol:

The current draft provisions on border controls [in Article 8 of the Trafficking Protocol] appear somewhat at odds with the stated purposes of the Trafficking Protocol, and call into question the distinction between trafficked persons and smuggled migrants. The Office, [UNHCR,] UNICEF and IOM agree with the comments made by several delegations at the sixth session of the Ad Hoc Committee that such provisions could operate to restrain the liberty of movement of the persons who are subject to protection under the Protocol. Given that the majority of trafficked persons are women and girls, the imposition of such restrictions would be, *prima facie*, discriminatory. It is clear that the strengthening of border controls is an important aspect of preventing trafficking. However, emphasis should be placed, in Ar-

202. *Id.* ¶¶ 16–18. The point about illegality of entry not affecting a person's claim for asylum was also made in a joint NGO submission to the same session of the working group. Gen. Assembly, Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, *NGO Joint Submissions on the Protocol against the Smuggling of Migrants by Land, Air and Sea AND Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (2000), available at <http://www.december18.net/jointsubVienna.htm>.

ticle 8, on measures to assist border authorities in identifying and protecting victims as well as intercepting traffickers.

In addition, while States have a legitimate interest in strengthening border controls in order to detect and prevent trafficking, the Office, [UNHCR,] UNICEF and IOM are concerned that these measures do not limit the rights of individuals to seek and enjoy in other countries asylum from persecution as provided for under the Convention relating to the Status of Refugees. In particular, provisions of the draft Protocol should not undermine the fundamental principle of *non-refoulement*.²⁰³

In its final version, the Migrant Smuggling Protocol does indeed require states to criminalize smuggling and related conduct, to strengthen their borders against smugglers, and to cooperate in preventing and combating smuggling. The caveats and limitations are much broader, however, and more significant than implied by Hathaway's analysis. Protection of the rights of migrants is identified as one of the three purposes of the Migrant Smuggling Protocol.²⁰⁴ That this instrument does not aim to punish or criminalize persons who have been smuggled is also clearly stated.²⁰⁵ States Parties are required to take all appropriate measures, consistent with their obligations under international law, to preserve and protect the rights of smuggled migrants including the right to life; the right not to be subject to torture or other cruel, inhuman, or degrading treatment or punishment; and the right to consular access.²⁰⁶ They are further required to afford migrants protection against smuggling-related violence and appropriate assistance if their lives and safety

203. *Inter-Agency Submission*, *supra* note 200, ¶¶ 10–11.

204. Migrant Smuggling Protocol, *supra* note 1, art. 2.

205. *Id.* art. 5; *see also* LEGISLATIVE GUIDE TO THE ORGANIZED CRIME CONVENTION AND ITS PROTOCOLS, *supra* note 95, at 340 (“[It was] the intention of the drafters that the sanctions established in accordance with the Protocol should apply to the smuggling of migrants by organized criminal groups and not to mere migration, or migrants, even in cases where it involves entry or residence that is illegal under the laws of the State concerned.”). The interpretive notes to the Migrant Smuggling Protocol also make clear that its provisions on possession of fraudulent documentation do not apply to a migrant who is in possession of fraudulent documents to enable his or her own smuggling. Gen. Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, Interpretive notes for the official records (travaux préparatoires) of the negotiations of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, ¶ 93, U.N. Doc. A/55/383/Add.1 (Nov. 3, 2000). On the function and status of the Interpretive Notes to the Organized Crime Convention and its Protocols, *see* MCCLEAN, *supra* note 126, at 13.

206. Migrant Smuggling Protocol, *supra* note 1, arts. 16(1), (5).

are endangered through the smuggling process.²⁰⁷ The Migrant Smuggling Protocol's savings clause is very specific:

Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.²⁰⁸

The savings clause was hard won,²⁰⁹ and its significance and impact should not be trivialized. While a collision of norms may still occur, the correct outcome has been clearly articulated: a state that acts against the letter or spirit of international law, including international refugee law, in implementing its obligations under the Migrant Smuggling Protocol is in violation of one of its central provisions. It is the task of the international community, including the human rights system, to ensure that such violations do not go unnoticed and unchallenged.

Is Hathaway correct that asylum seekers are now in a worse position because international law defines and requires the criminalization of both trafficking and migrant smuggling? The genesis of this allegation lies in a central feature of international refugee law: individuals are required to be outside their country of origin before they can make a claim for asylum.²¹⁰ Countries that are easy for asylum seekers to reach are often unable or unwilling to provide them with the protection and support they need.²¹¹ As Hathaway observes, measures intending to—or having the effect of—strengthening border controls are, ipso facto, detrimental to asylum seekers because they close off the opportunity for such per-

207. *Id.* arts. 16(2)–(4).

208. *Id.* art. 19(1).

209. As late as March 2000, the draft of the Migrant Smuggling Protocol did not contain a savings clause, despite states agreeing on the inclusion of such a clause in the Trafficking Protocol. In its joint submission to the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, the Inter-Agency Group “recommended that a savings clause such as that contained in the Trafficking Protocol be inserted, with reference being made to the rights, obligations and responsibilities of States and individuals under international law, including applicable international humanitarian law and international human rights law and, in particular, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees.” *Inter-Agency Submission, supra* note 200, ¶ 17. The proposal received support from many states and was finally taken up at the end of the drafting session.

210. Convention relating to the Status of Refugees art. 1A(2), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

211. See generally Stephen H. Legomsky, *Addressing Secondary Refugee Movements, in* INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES, *supra* note 138, at 177, 177–80.

sons to reach a country in which they can claim and receive protection.²¹² Particularly over the past decade, restrictions on entry to the preferred countries of asylum have become more onerous and appear increasingly directed toward exploiting this requirement to thwart the arrival of those who may claim asylum.²¹³ While the link with trafficking remains uncertain, it is widely accepted that this development has had the effect of pushing individuals who want or need to cross international borders into the hands of smugglers. Criminalizing smuggling (and trafficking), it is argued, will increase the human and financial costs of the migration services that are critical to the survival or well-being of many of the world's poor and persecuted.

Unfortunately, the research necessary to vindicate a claim that migrants, including asylum seekers, are worse off as a result of international efforts to curb smuggling and trafficking is yet to be done. Certainly Hathaway does not advance any substantive evidence to support his own informal and nonreplicable "cost-benefit analysis," the results of which are central to his overall objection to the campaigns against trafficking and migrant smuggling.²¹⁴ There is also no empirical evidence cited or available to support Hathaway's other claim that criminalization of smuggling will "drive inelastic migratory demand into the black market,"²¹⁵ thereby increasing the risk of human trafficking.

212. Hathaway, *supra* note 9, at 35–39 and references contained therein.

213. *See infra* note 216.

214. The little work that has been done in this area demonstrates the complexity of the issues and the risks involved in drawing conclusions on the basis of untested assumptions. For example, Yuji Tamura has recently undertaken extensive economic analysis of the migrant smuggling market, in particular focusing on the impact of antiexploitation (trafficking) and anti-illegal migration (migrant smuggling) efforts. *See* Tamura, *supra* note 179. The results of this theoretical exercise appear to moderate Khalid Koser's conclusion (cited by Hathaway) that increased controls over smuggling will lead to an increase in the costs of smuggling. Khalid Koser, *Why Migrant Smuggling Pays*, 46 INT'L MIGRATION, June 2008, at 3, 8–12. Tamura's work supports a conclusion that (relying on certain fixed assumptions in the theoretical model which he constructs) the most likely effect of substantially increasing the penalty (risk and cost of apprehension) for trafficking is to reduce the proportion of traffickers relative to smugglers. Tamura, *supra* note 179, at 28–29. Importantly, Tamura notes the interrelationship between different policies: "the effect of one policy might be to offset the effect of another." *Id.* at 30. This effect has been explored in the context of policies against child trafficking with startling results. *See* Sylvain E. Dessy & Stéphane Pallage, *Some Surprising Effects of Better Law Enforcement Against Child Trafficking*, 8 J. AFR. DEV. 115 (2008); *see also* Guido Friebel & Sergei Guriev, *Smuggling Humans: A Theory of Debt-Financed Migration*, 4 J. EUR. ECON. ASS'N 1085 (2006) (concluding that while stricter border controls appear to decrease overall immigration, they may also result in an increase of debt-financed migration); Koser, *supra*.

215. Hathaway, *supra* note 9, at 32.

Evidentiary shortcomings aside, it is difficult to refute a well-crafted claim that (in the absence of moderating countermeasures) truly effective international action against migrant smuggling would likely operate to disrupt, if not close off, a crucial avenue of escape for refugees, as well as for millions of economic migrants. At least in the case of refugees, such a result would seriously compromise the spirit, if not the letter, of international legal obligations with respect to protection. It does not follow, however, that the implied alternative of decriminalizing smuggling—or at least turning a blind eye to the actions of smugglers, because amongst their illegal cargo are undoubtedly individuals with a valid claim for asylum—provides a solution to this problem. In the case of asylum seekers, the underlying problems that Hathaway is trying to address through his critique of the campaigns against smuggling and trafficking and the solutions to those problems are to be found within the legal and political frameworks of international refugee protection.²¹⁶ Neither is to be discovered in a set of instruments whose ultimate purpose was always to deal with the political, social, and financial consequences of organized criminal activity.²¹⁷

216. The challenges facing international refugee law in the twenty-first century have been widely acknowledged, not least by Hathaway in his seminal study. JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* (2005); *see also* MATTHEW J. GIBNEY, *THE ETHICS AND POLITICS OF ASYLUM: LIBERAL DEMOCRACY AND THE RESPONSE TO REFUGEES* (2004). Few disagree that the body of law set up to deal with post-World War II refugee flows is straining under the burden of providing an adequate framework of protection for the growing number of people who are forced to leave their countries because of poverty, conflict, persecution, or a lack of opportunity for a decent life. The current situation has been characterized by one commentator as “a battle between the strategies of states and counter-strategies of asylum seekers . . . in the market place of protection.” Rosemary Byrne, *Changing Paradigms in Refugee Law*, in *INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES*, *supra* note 138, at 163, 163. States that are in a position to assist migrants have come up with an ingenious array of obstacles and deterrents to minimize the impact of their already highly circumscribed international legal obligations. These efforts have included the introduction of a range of procedural barriers, such as visa requirements, carrier sanctions, detention, the deflection of asylum claims through the concept of “safe third countries,” and resistance to efforts to reinterpret the core definitions of the relevant international agreements. *See generally* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION (Erika Feller, Volker Türk & Frances Nicholson eds., 2003). Refugees and their advocates have been equally enterprising in their attempts to both locate and create flexibility within current legal constraints, in particular, by seeking expansion of the substantive criteria for refugee status through, for example, recognition of persecution perpetrated by nonstate actors, broader interpretation of the term membership of a particular social group, “the most ambiguous of the five grounds of persecution,” Byrne, *supra*, at 165, and increased reliance on complementary or “subsidiary” protection against *nonrefoulement* for individuals who do not meet the criteria for asylum. *See generally* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION, *supra*.

217. MCCLEAN, *supra* note 126, at 3–8 and references cited therein; *see also* Vlassis, *supra*

Very few practitioners or scholars working in the area of migrant smuggling, including those cited by Hathaway, appear to argue against the need for an international legal regime to deal with migrant smuggling.²¹⁸ I am also not convinced that the development of a legal regime around trafficking and smuggling has been an unequivocal disaster for refugees and asylum seekers. All of the major international and regional instruments dealing with these issues have explicitly affirmed the right to seek and receive asylum, as well as the prohibition on *nonrefoulement*.²¹⁹ These affirmations have served to strengthen understanding and acceptance of the critical principle of international refugee law that asylum claims are to be considered on their substantive merits and not on the basis of the applicant's means of entry.²²⁰ That the international community has flatly refused to endorse the criminalization of migrants who secure entry through the services of smugglers is another hopeful sign, one that is already being used by advocates to reject national attempts in this direction as "a disproportionate measure which exceeds a state's legitimate interest in controlling its borders."²²¹

note 126.

218. Koser, for example, laments the "striking lack of specific laws and policies on migrant smuggling," especially when compared to those on trafficking. Koser, *supra* note 214, at 5, *cited in* Hathaway, *supra* note 9, at 1, 33–34. In his recent research on the financing of migrant smuggling, Koser posits that an understanding of this aspect of migrant smuggling "can inform policies specifically targeting migrant smuggling, by transforming it from a 'low risk, high return' operation for smugglers into a 'high risk, low return' one." Koser, *supra* note 214, at 5. Claire Brolan concludes after lengthy analysis that, despite serious limitations, the Smuggling Protocol "has the potential to help combat the inherently dangerous smuggling of people . . . especially so since [it] specifically aims not to criminalise migrants themselves and includes a Savings Clause demanding refugee protection." Claire Brolan, *An Analysis of the Human Smuggling Trade and the Protocol Against the Smuggling of Migrants by Land, Air and Sea (2000) from a Refugee Protection Perspective*, 14 INT'L J. REFUGEE L. 561, 596 (2002), *cited in* Hathaway, *supra* note 9, at 37, 39, 42. On the serious problems associated with migrant smuggling and the need for states to address them effectively, see generally GLOBAL COMMISSION ON INTERNATIONAL MIGRATION REPORT, *supra* note 120, at 31–34.

219. European Trafficking Convention, *supra* note 101, art. 40; Migrant Smuggling Protocol, *supra* note 1, art. 19; Trafficking Protocol, *supra* note 2, art. 14. In referring to the right to asylum and the prohibition on *nonrefoulement*, the commentary to Article 40 of the European Trafficking Convention confirms that "[t]he fact of being a victim of trafficking in human beings cannot preclude the right to seek and enjoy asylum and Parties shall ensure that victims of trafficking have appropriate access to fair and efficient asylum procedures." European Trafficking Convention Explanatory Report, *supra* note 101, ¶ 377.

220. See Refugee Convention, *supra* note 210, art. 31; see also Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION, *supra* note 216, at 185, 187.

221. Thomas Hammarberg, Council of Europe, It is wrong to criminalize migration (Sept. 29, 2008), at http://www.coe.int/t/commissioner/Viewpoints/080929_en.asp (statement by the Com-

Trafficking, in particular, has helped refugee advocates in their effort to explore and extend the boundaries of international refugee law including the principle of *nonrefoulement*. It is now accepted, for example, that while “not all victims or potential victims of trafficking fall within the scope of the refugee definition,” and being a victim of trafficking does not represent a valid ground for claiming refugee status *per se*,²²² trafficked persons could well “qualify for international refugee protection, if the acts inflicted by the perpetrators would amount to persecution for one of the reasons contained in the 1951 Convention definition, in the absence of effective national protection.”²²³ Acceptance of the possibility that trafficking can form the basis for a valid asylum claim has paved the way for reinterpretations of core aspects of the much contested refugee definition. The link between trafficking and membership of “a particular social group,” for example, has been established in international refugee law²²⁴ and continues to be explored at the

missioner for Human Rights, Council of Europe).

222. *UNHCR Trafficking Guidelines*, *supra* note 120, ¶ 6. On the UNHCR Trafficking Guidelines, see generally Ryszard Piotrowicz, *The UNHCR's Guidelines on Human Trafficking*, 20 INT'L J. REFUGEE L. 242 (2008).

223. UNHCR, Global Consultations on International Protection, *Refugee Protection and Migration Control: Perspectives from UNHCR and IOM*, ¶ 32, U.N. Doc. EC/GC/01/11 (May 31, 2001); *UNHCR Trafficking Guidelines*, *supra* note 120; see also Gen. Assembly, Exec. Comm. of the High Comm'r's Programme, *Agenda for Protection*, at 48, U.N. Doc A/AC.96/965/Add.1 (June 26, 2002) (urging “[s]tates to ensure that their own asylum processes are open to receiving claims from individual trafficked persons, especially women and girls”). What constitutes a well-founded fear of persecution will depend on the facts of each individual case. The following factors are considered relevant in the context of trafficking: (i) forms of exploitation inherent in the trafficking experience (such as incarceration, rape, sexual enslavement, forced prostitution, and forced labor) constitute serious violations of human rights that will generally amount to persecution; and (ii) individuals who have been trafficked may face reprisals and re-trafficking, as well as ostracism, discrimination, or punishment should they be returned. Reprisals from traffickers could amount to persecution depending on the seriousness of the acts feared; re-trafficking will usually amount to persecution. Severe ostracism, discrimination, or punishment may amount to persecution particularly if aggravated by trafficking-related trauma or if linked to an increased risk of re-trafficking. *UNHCR Trafficking Guidelines*, *supra* note 120, ¶¶ 15, 17–18; see also Piotrowicz, *supra* note 222, at 246–51. In relation to situations involving women or children who have been trafficked, or who are at risk of trafficking, UNHCR has further noted that “[trafficking] of women and children for purposes of forced prostitution or sexual exploitation is a form of gender-related violence, which may constitute persecution,” within the legal definition of “refugee.” *UNHCR Trafficking Guidelines*, *supra* note 120, ¶ 19; UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, ¶ 18, U.N. Doc. HCR/GIP/02/01 (May 7, 2002). “Trafficked women and children can be particularly susceptible to severe reprisals by traffickers after their escape and/or upon return, as well as to a real possibility of being re-trafficked or of being subjected to . . . ostracism and/or severe discrimination.” *UNHCR Trafficking Guidelines*, *supra* note 120, ¶ 19.

224. The *UNHCR Trafficking Guidelines* rely on an earlier set of UNHCR guidelines on

national level in the context of specific refugee determination procedures.²²⁵ National case law has also considered a range of related issues, including trafficking as persecution, trafficking as a form of gender-based persecution, re trafficking and reprisals against victims and their families as persecution, trafficking-related trauma, discrimination and ostracism as persecution, traffickers as agents of persecution, and the question of state protection against trafficking.²²⁶ Ultimately, however, these advances are as constrained as international refugee law itself. They are but minor expansions to a “strictly limited safety valve”²²⁷ that will likely only permit a small fraction of individuals moved into exploitation across national borders to secure the protection they need.

In summary, there is as yet no evidence that the development of an international legal response to trafficking and migrant smuggling has resulted in a worsening of the already dire plight of asylum seekers and refugees. In marked contrast, from a purely legal perspective, the response has served to reinforce the principle that asylum claims are to be considered on their substantive merits and not on the basis of the applicant’s means of entry. It has also affirmed the applicability of international refugee law to asylum seekers who are smuggled and/or trafficked and expanded the potential basis for the determination of refugee

“membership of a particular social group,” in confirming that “[v]ictims and potential victims of trafficking may qualify as refugees where it can be demonstrated that they fear being persecuted for reasons of their membership of a particular social group.” *Id.* ¶ 37; see also *UNHCR Trafficking Guidelines*, *supra* note 120, ¶¶ 37–39; UNHCR, *Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, ¶¶ 11–13, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter UNHCR, *Social Group Guidelines*]. The Social Group Guidelines note that women, men, and children (as well as subsets of these groups such as unaccompanied children) may constitute a particular social group for the purposes of refugee determination. UNHCR, *Social Group Guidelines*, *supra*, ¶¶ 12, 15, 19. The fact of belonging to one of these groups might be one of the factors contributing to an individual’s fear of being subject to persecution such as sexual exploitation through trafficking. *Id.* ¶ 14. The Trafficking Guidelines note that former victims of trafficking might also be considered a social group for whom future persecution could involve reprisals, punishment, and ostracism. *Id.* ¶ 39.

225. For a comprehensive analysis of recent trafficking-related asylum applications and relevant case law in four major destination countries (e.g., Australia, Canada, the United Kingdom, the United States), see Kaori Saito, *International protection for trafficked persons and those who fear being trafficked* (United Nations High Comm’r for Refugees, Research Paper No. 149, 2007), available at <http://www.unhcr.org/research/RESEARCH/476652742.pdf>. In her conclusion, Kaori Saito notes that asylum is an essential measure to protect those targeted by trafficking and that it may, in fact, be “the only option available in countries where there is no other means of protection.” *Id.* at 27.

226. *Id.*

227. Jacqueline Bhabha, *Internationalist Gatekeepers? The Tension Between Asylum Advocacy and Human Rights*, 15 HARV. HUM. RTS. J. 155, 161 (2002).

status to include those whose flight was caused by the threat or fact of trafficking. The likelihood that stronger border controls against smugglers and traffickers will make it even harder for asylum seekers to meet the technical requirements of international refugee law serves to highlight the failings and inadequacies of the international system for refugee protection. To propose, however, that states refrain from dealing with organized, profit-driven migrant smuggling (and trafficking) because doing so will inevitably make access to asylum more difficult is to confuse the problem and to obscure its most obvious solutions.

CONCLUSION

Jean d'Aspremont has recently warned of the dangerous tendency of lawyers "to consider that any legal instrument is better than no legal instrument at all"²²⁸ This propensity would appear to be particularly acute among practitioners of international law. The participatory and consensual nature of the international lawmaking process means that securing agreement on *anything* is often assumed to be a good thing, irrespective of the quality and impact of the resulting accord. It also means that bad laws do not tend to reveal themselves—or be revealed—as quickly and as comprehensively as they might in a domestic setting. In this sense, Hathaway has performed an important service: critiquing a new legal regime that is, most certainly, flawed; providing a partial response to what is, quite possibly, an unsolvable problem; and forming a response that is the product of conflicting agendas and widely differing levels of commitment to equality and to human rights.

On balance however, the Trafficking Protocol is "better than no [protocol] at all" and the new international legal framework is certainly an improvement on anything that existed previously. The protocol has served international law very well as both a framework and impetus for the generation of a comprehensive range of rights-based international, regional, and national norms and standards that articulate, with much greater clarity than was ever previously possible, the obligations of states in relation both to ending impunity for traffickers and providing support, protection, and justice for those who have been exploited. The level of normative precision secured through this new legal framework and the nature and intensity of oversight are, for the human rights lawyer, particularly striking.

228. Jean d'Aspremont, *Softness in International Law: A Self-Serving Quest for New International Legal Materials*, 19 EUR. J. INT'L L. 1075, 1088, (2008).

It is not helpful to be aggrieved about the fact that these changes were generated outside the formal human rights system, nor is it productive to sound dire, *ex post facto* warnings about the dangers of consorting with the enemy.²²⁹ The international human rights system amply demonstrated, over many years, that it was, on its own, incapable of taking any serious steps towards eliminating trafficking and other forms of private exploitation. The prohibition on slavery did not help then and, for reasons explored above, is unlikely to be the major force of change in the future that some have hoped. Through the Trafficking Protocol and related legal developments, the human rights system has now been given new and better tools with which to work. The real test of its effectiveness, relevance, and resilience will lie in the way it responds to this challenge.

Accepting the limits of human rights law does not require one to renounce the faith. The suggestion that efforts to stamp out trafficking are in tension with core human rights goals completely misunderstands both the nature of the phenomenon and the central place of human rights in any effective and credible response. Trafficking goes to the very heart of what human rights law is trying to prevent. From its earliest days to the present, human rights law has loudly proclaimed the fundamental immorality and unlawfulness of one person appropriating the legal personality, labor, or humanity of another. Human rights law has battled the demons of discrimination on the basis of race and sex; it has demanded equal or at least certain key rights for aliens; it has decried and outlawed arbitrary detention, forced labor, debt bondage, forced marriage, and the commercial sexual exploitation of children and women; and it has championed freedom of movement and the right to leave and return to one's own country. There can be no doubt that the spirit of the entire corpus of human rights law rejects, absolutely, the practices and results that are integral to the human trafficking process. The possibility or even the reality of "negative human rights externalities" is a poor reason to deny this connection. Human rights law and its enforcement mechanisms are critically important when it comes to ensuring that national responses to trafficking do not violate established rights or circumvent the obligations that states owe to all persons. Ultimately, however, trafficking and its associated harms are multidimensional problems that do not, in the end, belong to one discipline or one branch of law. Combating contemporary exploitation may not be possible but

229. Hathaway, *supra* note 9, at 54–57 (identifying high levels of risk associated with negotiating human rights "under the umbrella of a non-rights-dedicated arrangement").

any serious attempt will require a full arsenal of modern, smart weapons, not just one precious but blunted sword.