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Article

The Human Rights Quagmire of "Human Trafficking"

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The Human Rights Quagmire of "Human Trafficking"

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INTRODUCTION

Support for the international fight against "human trafficking" evolved quickly and comprehensively. The campaign launched by the UN General Assembly in December 1998[1] led to adoption just two

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1. G.A. Res. 53/111, U.N. GAOR, 53d Sess., 85th plen. mtg., U.N. Doc. A/RES/53/111 (Jan.

years later of the Trafficking Protocol to the UN Convention against Organized Crime.[2] U.S. President George W. Bush was among those particularly committed to the cause, calling for collective effort to eradicate the "special evil" of human trafficking, said by him to have become a "humanitarian crisis."[3] One hundred and twenty-two countries have now ratified the Trafficking Protocol, agreeing in particular to criminalize trafficking and to cooperate in investigating and prosecuting allegations of trafficking.[4] The antitrafficking cause is not simply of interest to states; it has been firmly embraced by prominent feminists,[5] leading international human rights organizations,[6] and all key international agencies.[7]

This is not to say that there is universal agreement on the specific *means* adopted by the Trafficking Protocol. The Trafficking Protocol is most commonly criticized for being overly focused on criminal investigation and prosecution.[8] In particular, it is said that the accord fails meaningfully to protect the victims of human trafficking,[9] who normally

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20, 1999) (regarding transnational organized crime).

2. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, S. TREATY DOC. NO. 108-16 (2004), 40 I.L.M. 335, 377 [hereinafter Trafficking Protocol].

3. George W. Bush, Address to the United Nations General Assembly (Sept. 23, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/09/20030923-4.html.

4. United Nations Office on Drugs and Crime, Signatories to the United Nations Convention against Transnational Crime, *at* http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html (last visited Sept. 5, 2008).

5. *See, e.g.*, Kathleen Barry, *The Network Defines Its Issues: Theory, Evidence and Analysis of Female Sexual Slavery*, *in* INTERNATIONAL FEMINISM: NETWORKING AGAINST FEMALE SEXUAL SLAVERY 32, 41 (Kathleen Barry et al. eds., 1984); Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109, 128 (2006); Catharine A. MacKinnon, Pornography as Trafficking, Speech at the Captive Daughters and the International Human Rights Institute of DePaul University Conference: Pornography: Driving the Demand in International Sex Trafficking (Mar. 14, 2005), *in* 26 MICH. J. INT'L L. 993, 999 (2005).

6. *See e.g.*, Kelly E. Hyland, *The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, HUM. RTS. BRIEF, Winter 2001, at 30, 30; LeRoy G. Potts, Jr., Note, *Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons*, 35 GEO. WASH. INT'L L. REV. 227, 238 (2003).

7. *See* Patrick Twomey, *Europe's Other Market: Trafficking in People*, 2 EUR. J. MIGRATION & L. 1, 3 (2000).

8. *See, e.g.*, Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 345–46 (2007).

9. *See* Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 990–93 (2001).

are granted access only to discretionary relief[10] under processes that may not be explained to them.[11] Indeed, only a minority of states has adopted mechanisms even to consider the protection of trafficked persons,[12] and these programs generally offer no more than strictly provisional assistance.[13] The Trafficking Protocol's drafters, moreover, rejected a proposal to require that repatriation of trafficked persons be "voluntary" in favor of a duty on the part of countries of origin to "facilitate and accept" their trafficked citizens back "without undue or unreasonable delay,"[14] albeit "with due regard for the safety of that person."[15] Similar inattention to the human dimension of trafficking is said also to be evident in the Trafficking Protocol's failure to move beyond rhetorical support for efforts to address the social and economic phenomena that make people vulnerable to traffickers in the first place.[16]

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10. Only one human rights obligation—namely, the duty to provide the victims of trafficking with access to a system to seek compensation—is obligatory. "Each State Party *shall ensure* that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered." Trafficking Protocol, *supra* note 2, art. 6(6) (emphasis added).

11. *See* Gallagher, *supra* note 9, at 990.

12. *See* Linda Smith & Mohamed Mattar, *Creating International Consensus on Combating Trafficking in Persons: U.S. Policy, the Role of the UN, and Global Responses and Challenges*, FLETCHER F. WORLD AFF., Winter 2004, at 155, 160–61.

13. For example, the Council of Europe Convention on Action against Trafficking in Human Beings leaves it to "the competent authorit[ies]" of states to decide if the issuance of a residence permit to a victim of trafficking is "necessary" for personal or prosecutorial reasons. Council of Europe Convention on Action against Trafficking in Human Beings art. 14(1), May 16, 2005, C.E.T.S. No. 197.

14. The draft originally presented by the United States did insist on "safe and voluntary return" of trafficked persons. Gen. Assembly, Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, *Draft Protocol to Combat International Trafficking in Women and Children Supplementary to the United Nations Convention against Transnational Organized Crime*; *Proposal Submitted by the United States of America*, art. 4(1)(a), U.N. Doc. A/AC.254/4/Add.3 (Nov. 25, 1998) [hereinafter *U.S. Proposal*]. The competing Argentinean draft, however, included no comparable requirement. Gen. Assembly, Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, *Draft Elements for an Agreement on the Prevention, Suppression and Punishment of International Trafficking in Women and Children, Supplementary to the Convention against Transnational Organized Crime; Proposal Submitted by Argentina*, art. 1(2)(e), U.N. Doc. A/AC.254/8 (Jan. 15, 1999) [hereinafter *Argentinean Proposal*]. The consensus draft presented at the Fifth Session of the Ad Hoc Committee adopted the Argentinean approach. Gen. Assembly, Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, *Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, art. 6(1), U.N. Doc. A/AC.254/4/Add.3/Rev.3 (Sept. 24, 1999).

15. Trafficking Protocol, *supra* note 2, art. 8(1).

16. *See* David Kyle & Rey Koslowski, *Introduction* to GLOBAL HUMAN SMUGGLING: COMPARATIVE PERSPECTIVES 1, 20–22 (David Kyle & Rey Koslowski eds., 2001).

Yet it is striking that despite these concerns, there has really been no fundamental, overarching criticism of the effort to stamp out human trafficking as a worthy objective and, more specifically, as an appropriate focus of international law. At best, critique of the Trafficking Protocol leads to calls for enhanced commitments to address the "root causes" of trafficking—in particular, global socioeconomic inequality and the various forms of marginalization that make subgroups particularly vulnerable to trafficking[17]—and/or to demands that the protection of the victims of trafficking be made either mandatory or at least more substantively durable.[18] In essence, the concerns expressed accept that the fight against human trafficking could and should be retooled in a way that enhances its overall net positive contribution to the human rights arsenal.[19] Indeed, with human trafficking having been equated by virtually every faction as a clear moral wrong,[20] who would want to argue against the marshaling of international resolve and resources to bring it to an end?

My own view, in contrast, is that the fight against human trafficking is more fundamentally in tension with core human rights goals than has generally been recognized.

First, the newfound commitment to the fight against human trafficking, while billed as key to the modern fight against slavery, has actually promoted a very partial perspective on the problem of modern slavery. By hiving off a relatively minor part of the slavery issue—no more than about three percent of modern slaves meet the definition of a "trafficked

17. Late in the drafting process, the United States submitted a significantly strengthened draft, which appears to have shaped the final language of Article 9 of the Trafficking Protocol. *See* Gen. Assembly, Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, *Proposals and Contributions Received From Governments: United States of America: Amendments to Article 10 of the Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, U.N. Doc. A/AC.254/5/Add.33 (Sept. 25, 2000). As a result, the Trafficking Protocol specifically requires states to "take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors, such as poverty, underdevelopment and lack of equal opportunity," that make persons, especially women and children, vulnerable to trafficking, as well as "to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking." Trafficking Protocol, *supra* note 2, art. 9(4)–(5).

18. *See, e.g.*, Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157 (2007).

19. *See* Gallagher, *supra* note 9, at 1003–04.

20. Raimo Väyrynen, *Illegal Immigration, Human Trafficking, and Organized Crime* 6 (Univ. World Inst. for Dev. Econ. Research, Discussion Paper No. 2003/72, 2003), *available at* http://www.wider.unu.edu/publications/working-papers/discussion-papers/2003/en_GB/dp2003-072/files/78091733799863273/default/dp2003-072.pdf.

person" under the Trafficking Protocol[21]—the world has found a means of seeming to be active on the slavery front without really addressing its predominant manifestations. This partial vision allows governments to avoid the thorny issue of culturally ingrained, endemic slavery that persists in many parts of the world today and that is often convenient for (if not essential to) the project of globalized investment and trade.[22] In short, the decision to take action against "human trafficking," rather than against slavery in all of its contemporary forms, has given comfort to those who prefer not to tackle the claims of the majority of enslaved persons.

Second, the focus of the transnational effort against human trafficking on the prevention of cross-border movements created a legal slippery slope in which it proved possible to set a transnational duty to criminalize not only "human trafficking"—characterized by coercive dealings leading to exploitation[23]—but also the much broader phenomenon of "human smuggling."[24] While it is true that smuggling efforts *sometimes* transform themselves into the abusive situations defined as trafficking, this is far from the usual case. To the contrary, most smuggling has historically been a consensual and relatively benign market-based response to the existence of laws that seek artificially to constrain the marriage of surplus labor supply on one side of a border with unmet demand for certain forms of labor on the other side of that border.[25] Indeed, the criminalization of smuggling may actually increase the risk of human trafficking by driving up the cost of facilitated transborder movement and leaving the poor with no choice but to mortgage their futures in order to pay for safe passage.[26] And even if it is felt that pure

21. In 1999, Kevin Bales estimated that there were 27 million slaves. KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY 8–9 (1999). Current estimates suggest that as many as 750,000 persons are "trafficked" in any given year. *See* 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, 239 (2005).

22. BALES, *supra* note 21, at 23.

23. *See* discussion of trafficking definition *infra* notes 44–57 and accompanying text.

24. Prohibited human smuggling consists of "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident." Protocol against the Smuggling of Migrants by Land, Sea and Air, Nov. 15, 2000, S. TREATY DOC. NO. 108-16 (2004), 40 I.L.M. 335, 384 [hereinafter Smuggling Protocol]. The Smuggling Protocol has been ratified by 114 countries. United Nations Office on Drugs and Crime, *supra* note 4.

25. *See infra* notes 188–90.

26. "A feature of trafficking economics . . . is deferred payment. This serves both to recruit trafficking victims not in a position to pay fees in advance and extends the trafficker's control after arrival in the destination country when those trafficked are tied into an extended period of debt and often criminal activity." Twomey, *supra* note 7, at 20 (citation omitted).

smuggling should be the subject of domestic criminal law, there is reason to question whether a *transnational* duty to criminalize simple smuggling is appropriate, as smuggling is more of an affront to particularized sovereign interests than a threat to the general well being.

Third and related, the border control emphasis inherent in the Trafficking Protocol and its companion Smuggling Protocol has provided states with a reason—or at least a rationalization—for the intensification of broadly based efforts to prevent the arrival or entry of unauthorized noncitizens. While in many, perhaps even most, cases those intercepted have no legitimate claim to enter the destination state, this is not universally true. In particular, refugees must routinely rely upon smugglers and even traffickers in order to escape their own country because no state grants refugees legal authorization to travel for the purpose of seeking asylum. The practical imperative to ensure that protection is not denied to refugees who arrive without authorization is formally recognized in Article 31 of the Convention relating to the Status of Refugees (Refugee Convention), which denies States Parties the right to penalize refugees for illegal entry or presence.[27] Yet this binding guarantee is of little practical value when migration control efforts are implemented in an indiscriminate way, precisely the approach required by the antitrafficking and antismuggling treaties.

In sum, the new commitment to combat human trafficking raises real human rights concerns. 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 slaves. The initiative's focus on transborder movement is particularly problematic, having provided cover for a companion commitment to criminalize smuggling—an approach that may in practice exacerbate the risk of human rights abuse by creating the conditions within which simple smuggling is transformed into trafficking. Moreover, the requirement in both the Trafficking and Smuggling Protocols that States Parties intensify border control measures has provided a justification for generalized deterrent measures, rendering illusory the formal guarantee to refugees of immunity from immigration penalties consequent to their search for protection.

Taken together—and especially given the backdrop of more general concerns regarding the minimal human rights utility of a treaty that contains no more than a rhetorical commitment to fight the root causes of

27. Convention relating to the Status of Refugees art. 31, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

human trafficking and that is content to recommend, rather than to require, remedies for victims—there is reason to question the wisdom of support for the antitrafficking cause.

I. UNJUSTIFIABLE PRIVILEGING

Those who champion the human rights value of the Trafficking Protocol most commonly do so on the ground that it is a critical means of updating the fight against slavery.[28] President Bush, for example, declared that "trafficking is nothing less than a modern form of slavery; an unspeakable and unforgivable crime against the most vulnerable members of the global society."[29] Secretary of State Condoleezza Rice has described the struggle to end human trafficking as an "abolitionist movement,"[30] while the State Department's top antitrafficking official compares the antitrafficking effort to the work of abolitionists William Wilberforce, Frederick Douglass, and Harriet Beecher Stowe and has called for the fight against trafficking to be understood as a "21st century movement to fight the scourge of human slavery."[31] Human Rights Watch similarly condemns human trafficking as "a slavery-like practice that must be eliminated."[32] The head of the Vatican's Pontifical Council for Justice and Peace, Cardinal Renato Martino, has gone farther still, arguing that human trafficking is "worse than the slavery of those . . . taken from Africa and brought to other countries."[33]

The assertion that the antitrafficking effort is central to combating contemporary forms of slavery is, of course, a very strong claim. The fight against slavery is one of the very few human rights imperatives

28. *See, e.g.*, Joan Fitzpatrick, *Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking*, 24 MICH. J. INT'L L. 1143, 1144 (2003).

29. George W. Bush, Remarks at the White House Conference on Missing, Exploited, and Runaway Children (Oct. 2, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/10/20021002-4.html.

30. OFFICE OF THE UNDER SEC'Y FOR GLOBAL AFFAIRS, U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 1 (2006), *available at* http://www.state.gov/documents/organization/66086.pdf.

31. Jane Morse, *Top U.S. Official Cites Progress in Human Trafficking Battle*, AMERICA.GOV, Dec. 13, 2006, *at* http://www.america.gov/st/washfile-english/2006/December/20061212160214ajesrom0.4522211.html.

32. *International Trafficking of Women and Children: Hearing Before the Subcomm. on Near Eastern and South Asian Affairs of the S. Comm. on Foreign Relations*, 106th Cong. 48 (2000) (statement of Regan E. Ralph, Director, Women's Rights Division, Human Rights Watch).

33. Associated Press, *Vatican Official Says Human Trafficking Now is Worse than African Slave Trade*, INT'L HERALD TRIB., Nov. 14, 2006, *at* http://www.iht.com/articles/ap/2006/11/14/europe/EU_GEN_Vatican_Human_Trafficking.php.

that attracts no principled dissent. Indeed, the duty to eradicate slavery is one of only two human rights clearly identified by the International Court of Justice as an *erga omnes* norm; that is, an obligation owed by states to the international community as a whole.[34] The claim that the struggle to end human trafficking is at the core of modern antislavery efforts would therefore be a weighty factor in assessing the human rights value of the Trafficking Protocol.

But if the real human rights goal is to establish a new mechanism with which more effectively to tackle contemporary slavery, it is curious that governments did not say so explicitly—for example, by enacting a Slavery Protocol (or at least a Slave Trade Protocol[35]) rather than a Trafficking Protocol.[36] The divergence of nomenclature is all the more striking given that the antislavery effort has a long history and central place on the international human rights agenda, whereas the antitrafficking effort has traditionally focused on only a subset of the slavery problem—specifically, on the so-called "white slave trade" in women and children for purposes of prostitution.[37] If there really was a determination to launch a fight against modern slavery, why frame the effort by reference to an arguably anachronistic term[38] traditionally understood to respond to only a small part of a much larger issue?[39]

To be clear, the original Slavery Convention of 1926 specifically requires states to bring about "the complete abolition of slavery in all its

34. Barcelona Traction, Light and Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5). The other human right so identified by the Court is freedom from racial discrimination.

35. "The trafficking of persons today can be viewed as the modern equivalent of the slave trade of the nineteenth century." UN High Comm'r for Human Rights, *Abolishing Slavery and its Contemporary Forms*, ¶ 62, U.N. Doc. HR/PUB/02/4 (2002) [hereinafter *Abolishing Slavery*] (*prepared by* David Weissbrodt & Anti-Slavery International) (citation omitted).

36. One possibility, as Joel Quirk rightly remarks, is that "[i]nvoking slavery can be a . . . polarizing move, narrowing space for ameliorative strategies that rely on the goodwill of those involved." Joel Quirk, *The Anti-Slavery Project: Linking the Historical and Contemporary*, 28 HUM. RTS. Q. 565, 595 (2006).

37. Elizabeth M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 STAN. J. INT'L L. 1, 2–3, 7–11 (2004).

38. Joan Fitzpatrick rightly characterizes the approach of the traditional trafficking treaties as "anachronistic and culturally biased." Fitzpatrick, *supra* note 28, at 1144.

39. In fairness, the exclusive prostitution orientation of classic trafficking definitions was dropped in favor of a much more open-ended focus on exploitation, which includes, but is not limited to, sexual exploitation. Gen. Assembly, Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, *Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, at 3 n.9, 5 n.25, U.N. Doc. A/AC.254/4/Add.3/Rev.2 (May 18, 1999). In a particularly sensitive compromise, exploitative forms of prostitution (but not all prostitution) are similarly deemed to be within the meaning of proscribed exploitation.

forms" and to "prevent and suppress the slave trade."[40] The Supplementary Slavery Convention of 1956 gives more detail, expressly defining as prohibited forms of servile status debt bondage, serfdom, and systems for the delivery of women for marriage or inheritance without their consent and of children for exploitation.[41] Taken together, the extant international legal definition of prohibited slavery comprises "any form of dealing with human beings leading to the forced exploitation of their labor,"[42] including "the exercise of any or all of the powers attaching to the right of ownership over a person."[43]

In contrast, the Trafficking Protocol's definition of trafficking is best understood as a four-part notion limited to particular forms of prohibited dealing in persons, implemented by means deemed to be inappropriate, for the purpose of exploitation, and having a transnational character.

First, the process orientation of the trafficking definition makes clear that the focus of the Trafficking Protocol is not to prohibit exploitation as such. As in the case of the early nineteenth-century treaties outlawing the "slave trade" (rather than "slavery"), the Trafficking Protocol is limited to prohibiting only specific forms of dealing by which people become exploited, now defined to include "recruitment, transportation, transfer, harbouring or receipt" of persons.[44] Second, these forms of dealing in persons are of concern only if they are conducted by inappropriate means, specifically

> by means of the threat or use of force or other forms of coercion, or abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person . . . .[45]

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40. Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention art. 2, Mar. 9, 1927, 46 Stat. 2183, 60 L.N.T.S. 253 [hereinafter Slavery Convention].

41. 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 Slavery Convention].

42. UN Econ. & Soc. Council [ECOSOC], *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), *cited with approval in Abolishing Slavery*, *supra* note 35, at 6 n.23.

43. Rome Statute of the International Criminal Court art. 7(2)(c), July 17, 1998, 2187 U.N.T.S. 90, *cited with approval in Abolishing Slavery*, *supra* note 35, at 6 n.23.

44. Trafficking Protocol, *supra* note 2, art. 3(a).

45. *Id.* Importantly, the "consent" of the victim is deemed irrelevant where any of these prohibited means is involved. *Id.* art. 3(b). Only in the case of children, defined to include any person under eighteen years of age, is this second inappropriate means requirement inapplicable (i.e., any prohibited form of process or dealing for the purpose of exploitation amounts to trafficking). *Id.*

Third, there must be evidence that the prohibited forms of dealing, implemented by inappropriate means, are directed to exploiting the victim, defined to "include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."[46] Finally, there must be a transnational element to the offense—either where it is committed, planned, or controlled, or where its effects are felt.[47]

The trafficking definition thus amounts to a significant retreat from the already agreed upon prohibition of slavery.[48] First, the Trafficking Protocol does not equate "exploitation" (or even the slavery subset thereof) with trafficking but is concerned only with prohibiting forms of dealing which facilitate or lead to exploitation. There is, in consequence, no obligation flowing from the Trafficking Protocol to do anything about the condition of being exploited, much less to provide a remedy to exploited persons. This contrasts sharply with the traditional legal understanding of the duty to end slavery, which requires an end to the condition of slavery as such (and not just to the forms of dealing that lead to it).[49] Second, the trafficking prohibition may even be more constrained than the traditional prohibition of the slave trade,[50] because the "inappropriate means" requirement of the modern trafficking construct—requiring, for example, use of force or coercion—suggests that there is no Trafficking Protocol based duty to prohibit dealings leading

art. 3(c)–(d).

46. *Id.* art. 3(a).

47. *Id.* arts. 1(2), 4; *see also* Convention against Transnational Organized Crime, Nov. 15, 2000, S. TREATY DOC. NO. 108-16 (2004), 2225 U.N.T.S. 209. There is actually a fifth requirement, namely that the prohibited dealings "involve an organized criminal group . . . ." Trafficking Protocol, *supra* note 2, art. 4. In truth, though, this final requirement does not amount to a major limitation, since an "organized criminal group" may involve as few as three persons, may be of a purely transitory nature, and may exist to commit no more than a single crime punishable by imprisonment of four years or more. Convention against Transnational Organized Crime, *supra*, art. 2(a)–(b).

48. The prohibition of trafficking may actually be broader than the extant definition of slavery in at least one way: "exploitation" under the Trafficking Protocol explicitly includes "slavery or practices similar to slavery" but is not limited to those conditions. *See* Trafficking Protocol, *supra* note 2, art 3(a).

49. *See* Slavery Convention, *supra* note 40.

50. *Cf. id.* arts. 1(2), which require the prevention and suppression of "all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves."

to all forms of exploitation.[51] Third, the Trafficking Protocol does not require cooperation to combat all forms of trafficking, but only such trafficking as is "transnational in nature."[52] As such, there is no commitment to take action against even forms of prohibited dealing, implemented by inappropriate means, and for the purpose of exploitation unless such dealing occurs in, affects, or implicates more than one state.[53] This final requirement makes clear 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.

In sum, while clearly less constrained than traditional definitions of trafficking,[54] and while concerned about at least some forms of exploitation not covered by the slavery construct,[55] it remains that the Trafficking Protocol's trafficking definition is highly circumscribed relative to the legally binding definitions of slavery already adopted. It thus seems to respond neatly to the quandary of states that wish to be seen to be active on the antislavery front, but which do not have the will meaningfully to tackle the problem as a whole. By rechanneling energies towards only the slave trade rather than slavery, there is no need to take action to address the plight of the more than approximately thirty million persons who are already enslaved today.[56] By prohibiting only dealings in people affected by "inappropriate means" (e.g., by acknowledging the possibility of valid consent to enslavement), the Trafficking Protocol does not even tackle the slave trade as a whole. And perhaps most serious of all, the international community's new antislavery initiative offers nothing to the overwhelming majority of future slaves whose enslavement will (assuming current patterns persist[57]) occur within their own countries at the hands of individuals or organizations of purely domestic provenance. Measured against these empirical reali-

51. *See generally* Kara Abramson, Note, *Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, 44 HARV. INT'L L.J. 473, 477 (2003) (arguing that the "inappropriate means" requirement should not have been included in the definition as it "prolongs the debate over consent").

52. Trafficking Protocol, *supra* note 2, art. 4.

53. *See* Convention against Transnational Organized Crime, *supra* note 47.

54. *See supra* text accompanying notes 37–39.

55. *See supra* note 48.

56. BALES, *supra* note 21, at 8–9. Other social scientists characterize Bales's calculation as conservative. *See* Christien van den Anker, *Contemporary Slavery, Global Justice and Globalization*, *in* THE POLITICAL ECONOMY OF NEW SLAVERY 15, 18 (Christien van den Anker ed., 2004); *see also* Quirk, *supra* note 36, at 578.

57. BALES, *supra* note 21, at 9–10.

ties, it must surely be said that the Trafficking Protocol is of marginal significance to the fight against modern slavery, contrary to the rhetoric of President Bush, leading human rights groups, and others.

There are at least two possible responses to this charge. First, there is little doubt that the struggle to fight slavery—like international human rights generally—has always been constrained by political pragmatism. Because international human rights law is implemented by states, the promotion of new rights must be pursued in ways that fit—or, at least, that do not directly conflict with—other priorities of governments. Given the determination of states to take action against transnational organized crime, it has been suggested that it was politically astute of nongovernmental and other advocates to exploit that political window to make at least some progress, albeit highly constrained, on the antislavery agenda.[58] Because human rights are constrained by the "art of the possible," we ought to celebrate even the modest victories secured rather than criticize the Trafficking Protocol as a partial and attenuated effort to tackle slavery.[59]

Second, the Trafficking Protocol did not replace existing treaties requiring action against slavery, in particular the 1926 Slavery Convention[60] and the 1956 Supplementary Slavery Convention.[61] Nor did it call into question the role of the UN Working Group on Contemporary Forms of Slavery, the main international forum for coordination of antislavery efforts.[62] As such, even if the progress achieved on the antislavery front via the Trafficking Protocol is minimal, at the very least no damage was done to existing norms and procedural mechanisms, in consequence of which even minimal progress remains net progress in the fight against slavery.

My view is that neither of these arguments is persuasive. While human rights activists must at times accept partial victories rather than hold out for ideal solutions, there is a responsibility to be alert to the possibility of real collateral damage to the human rights cause. As is outlined below in Parts III and IV, the minor human rights progress made with the advent of the Trafficking Protocol was secured at the cost of accepting provisions that require the transnational criminalization of

58. Fitzpatrick, *supra* note 28, at 1165.

59. The Trafficking Protocol encourages (though it does not require) states to address, among other things, such concerns as privacy; medical, psychological, and material assistance; and employment, education, and training opportunities. Trafficking Protocol, *supra* note 2, art. 6.

60. Slavery Convention, *supra* note 40.

61. Supplementary Slavery Convention, *supra* note 41.

62. *See infra* notes 108–11 and accompanying text.

(nonabusive) smuggling and the generic intensification of border controls. Such measures may endanger would-be migrants, in particular by converting simple smuggling into highly risky trafficking situations. More specifically, they stymie access to protection for refugees who, despite a legal entitlement under the Refugee Convention to arrive in asylum states without authorization, are increasingly prevented from doing so in practice by generic migration control regimes. When these human rights externalities are factored in, the net human rights value of the antitrafficking effort is likely to be negative.

Even if these important negative externalities did not exist, time, attention, and resources were captured by the antitrafficking effort[63] that could have been expended on a more balanced effort to eradicate slavery.[64] At the nongovernmental level, for example, Amnesty International has incorporated analysis of trafficking in its annual country reports, testified on the issue before legislative bodies, produced a prodigious number of issue briefs on point, and run a lobbying campaign to secure a European regional treaty on trafficking.[65] Human Rights Watch logs thirty-nine publications on human trafficking produced between 1993 and 2006, with the overwhelming majority of these generated since the drafting of the Trafficking Protocol.[66] Even the highly specialized organization Anti-Slavery International—long the leading voice in the drive to end slavery—now devotes a major part of its energy to the trafficking issue.[67] Indeed, Anti-Slavery International's directors list trafficking as one of the organization's three main activity areas.[68]

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63. Bruch, *supra* note 37, at 3.

64. The importance of taking care to decide precisely which normative projects are most sensibly pursued is argued in Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607 (1984).

65. Amnesty Int'l, Human Trafficking: Background, *at* http://www.amnestyusa.org/women/trafficking/background.html (last visited Sept. 5, 2008).

66. Human Rights Watch, Work on Trafficking of Women and Girls, *at* http://www.hrw.org/doc/?t=women_trafficking (last visited Sept. 5, 2008).

67. Anti-Slavery Int'l, Trafficking Programme, *at* http://www.antislavery.org/archive/other/trafficking-program.htm (last visited Sept. 5, 2008).

68. The other two are bonded labor and child labor. ANTI-SLAVERY INT'L, ANNUAL REVIEW 5–9 (2005).

UN agencies,[69] including both the UN High Commissioner for Human Rights[70] and the UN High Commissioner for Refugees,[71] have similarly reoriented their efforts to be seen as visible on the antitrafficking front. There is even a UN Special Rapporteur "on the human rights aspects of the victims of trafficking in persons, especially women and children,"[72] who conducts trafficking-focused investigatory missions on behalf of the Human Rights Council[73] with a view to "raising the profile of the issue in the international debate and strengthening, through increased coordination, the work of the human rights machinery on the issue of trafficking."[74] More generally, there is a sense—particularly palpable among governments—that their efforts to implement the Trafficking Protocol are appropriately financed as the core of the antislavery effort.[75] The U.S. government, for example, has spent some $447 million between 2001 and 2006 to fund international antitrafficking efforts.[76] The same enthusiasm to fight trafficking has been formalized at the international level, where the Conference of the Parties to the UN Convention against Transnational Organized Crime has now de-

69. The UN Office on Drugs and Crime manages the Global Programme against Trafficking in Human Beings, the objective of which is to "assist countries in their efforts to combat" human trafficking to promote the development of effective criminal justice-related responses. UN Office on Drugs and Crime, UNODC and Human Trafficking, *at* http://www.unodc.org/unodc/en/human-trafficking/index.html (last visited Apr. 12, 2008).

70. *See, e.g.*, ECOSOC, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, U.N. Doc. E/2002/68/Add.1 (May 20, 2002); *see also* Fitzpatrick, *supra* note 28, at 1154.

71. *See, e.g.*, UN 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 Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, U.N. Doc. HCR/GIP/06/07 (Apr. 7, 2006), *available at* http://www.unhcr.org/refworld/pdfid/443679fa4.pdf.

72. This post was established by ECOSOC, Comm'n on Human Rights, Dec. 2004/110, U.N. ESCOR, 60th Sess., Supp. No. 3, U.N. Doc. E/CN.4/DEC/2004/110 (Apr. 19, 2004).

73. *See* 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*, U.N. Doc. E/CN.4/2006/62 (Feb. 20, 2006) (*prepared by* Sigma Huda).

74. 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*, ¶ 55, U.N. Doc. E/CN.4/2005/71 (Dec. 22, 2004) (*prepared by* Sigma Huda).

75. *See, e.g.*, Anna Diamantopoulou, Comm'r for Employment and Soc. Affairs, European Comm'n, Fighting Modern Slavery: The EU's Role in Supporting Victims of Trafficking, Address at the European Conference on Preventing and Combating Trafficking in Human Beings (Sept. 19, 2002).

76. U.S. GOV'T ACCOUNTABILITY OFFICE, HUMAN TRAFFICKING: MONITORING AND EVALUATION OF INTERNATIONAL PROJECTS ARE LIMITED, BUT EXPERTS SUGGEST IMPROVEMENTS, GAO–07–1034, at 7 (July 2007).

cided regularly to supervise compliance with the Trafficking Protocol (including via a state reporting mechanism).[77] At the 2006 session of the Conference, devoted specifically to review of implementation of the Trafficking Protocol, 111 states, 12 intergovernmental organizations, and 25 nongovernmental organizations (NGOs) were in attendance,[78] and nearly three million dollars was budgeted for technical assistance to promote meaningful scrutiny of antitrafficking efforts.[79]

There is, in short, a pervasive belief that the modern fight against slavery is by and large appropriately fought under the antitrafficking rubric, despite its highly partial nature.[80] To the extent that the fight against trafficking has either drained limited nongovernmental and international agency resources away from a more holistic attack on slavery, and to the extent that governments believe that they can (and perhaps should) attack slavery via the antitrafficking initiative rather than in a more comprehensive fashion, there is a real loss to the effort to eradicate the predominant forms of slavery—slavery within states and slavery already extant (not simply that which could result from prohibited forms of facilitation). And to be frank, as detailed below in Part II, this is a depletion of resources and a redirection of effort that the antislavery campaign can ill afford, because the procedural mechanisms in place to address slavery are woefully inadequate.

II. INSTITUTIONAL ATROPHY UNADDRESSED

The modern problem of slavery is both pervasive and poorly addressed by international institutions. As Bales's pathbreaking study makes clear, the modern face of slavery is largely the same as its historical face. The majority of the roughly thirty million slaves alive today

77. Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Oct. 10–21, 2005, *Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime*, 7–8, U.N. Doc. CTOC/COP/2005/8 (Dec. 1, 2005) [hereinafter Conference of the Parties].

78. *See* Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Oct. 9–18, 2006, *Final List of Participants*, U.N. Doc. CTOC/COP/2006/INF.1/FINAL (Oct. 18, 2006).

79. Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Oct. 9–18, 2006, *Technical Assistance Activities and Budgetary and Financial Questions*, tbl. 3, U.N. Doc. CTOC/COP/2006/11 (Oct. 4, 2006).

80. *See, e.g.*, *Trafficking of Women and Children in the International Sex Trade: Hearing Before the Subcomm. on International Operations and Human Rights of the H. Comm. on International Relations*, 106th Cong. 2 (1999) (statement of Harold Hongju Koh, Asstistant Secretary of State, Bureau of Democracy, Human Rights and Labor, U.S. Department of State).

are held under the traditional debt bondage systems of South Asia.[81] Enslavement through debt bondage is usually the result of debt incurred—even if long ago and inherited by subsequent generations—and exacerbated by the perceived need to borrow further sums to pay the costs of coping with emergencies or arranging and celebrating marriages, coupled with endemic cheating on wages paid by employers.[82] It is enforced by violence to stymie escape, often with official participation. While some countries have made real efforts to attenuate the prevalence of debt bondage,[83] the reality is that the industries (such as brick making) that rely most heavily on debt bondage would likely be unviable without the slave labor—a concern that has limited real progress.[84]

In addition to debt bondage, traditional slavery is alive and well in the form of chattel slavery systems, especially in parts of Africa.[85] In contrast to most debt bondage systems, "[v]iolence is rarely needed to keep slaves obedient since the entire social system maintains a culture of order and obedience."[86] Not only is chattel slavery deeply rooted in custom and tradition,[87] but it may seem to many slaves the least bad option in a society of endemic scarcity where freedom is often a foreboding prospect.[88]

Moreover, technically illegal but nonetheless pervasive forms of modern slavery are swelling the ranks of the traditionally enslaved. In some instances, such as the sale of children into prostitution by their parents, the impetus for slavery may derive less from the need to satisfy basic economic needs than from unchecked consumerism abetted by

81. Bales estimates that fifteen to twenty million persons are held in bonded labor in Bangladesh, India, Nepal, and Pakistan. BALES, *supra* note 21, at 9. The UN Working Group on Contemporary Forms of Slavery, on the other hand, estimates that there are between 44 to 100 million persons in bondage in India alone. ECOSOC, Sub-Comm'n on Promotion & Prot. of Humun Rights, *Report of the Working Group on Contemporary Forms of Slavery on its Twenty-fifth Session*, ¶ 21, U.N. Doc. E/CN.4/Sub.2/2000/23 (July 21, 2000) (*prepared by* Halima Embarek Warzazi).

82. BALES, *supra* note 21, at 201–03.

83. *But see* HUMAN RIGHTS WATCH, HIDDEN APARTHEID: CASTE DISCRIMINATION AGAINST INDIA'S "UNTOUCHABLES" 82 (2007).

84. *See* BALES, *supra* note 21, at 170–94.

85. *See* Mary Ross Hendriks, *Modern Slavery and the Production of Consumer Goods in a Global Economy: Consumer Choice—Not Law—Will Trigger the Next Diaspora*, 20 T.M. COOLEY L. REV. 431, 444 (2003); A. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 VA. J. INT'L L. 303, 322 (1999).

86. BALES, *supra* note 21, at 88.

87. Quirk, *supra* note 36, at 572.

88. BALES, *supra* note 21, at 108.

unhelpful religious and discriminatory attitudes.[89] But more commonly, slavery is on the rise "where old rules, [and] old ways of life break down."[90] Bales gives the example of widespread slavery in Brazil's charcoal making industry, hidden in that country's dense interior. After agricultural mechanization drove more people to the cities than new industries could absorb, recruiters appeared in the slums offering work. Once the recruited workers arrive in the rainforest and other isolated locations, their documents are confiscated to prevent their departure and a merciless pattern of backbreaking work under terrible conditions ensues. In many ways, this new slavery is much worse than the traditional variant: "The [recruiters] and their bosses don't want to *own* these workers, just to squeeze as much work out of them as possible . . . . Rather than keep on those who can no longer work at full strength, it is more cost-efficient to discard them and recruit fresh workers to take their places."[91]

Modern slavery, then, "is not about owning people in the traditional sense of old slavery, but about controlling them completely":[92]

> [T]he new slavery appropriates the economic value of individuals while keeping them under complete coercive control—but without asserting ownership or accepting responsibility for their survival. The result is much greater economic efficiency: useless and unprofitable infants, the elderly, and the sick or injured are dumped. Seasonal tasks are met with seasonal enslavement . . . . In the new slavery, the slave is a consumable item, added to the production process when needed, but no longer carrying a high capital cost.[93]

In sum, the number of slaves in the world is not decreasing, but increasing. Not only is traditional slavery far from being eradicated, but there are also millions of people—the collateral damage of modern economic and resultant social change—who have become enslaved out of a combination of "weakness, gullibility, and deprivation."[94] Yet the overwhelming majority of these slaves are victimized, at least in direct terms, by persons or organizations of domestic origin, thus excluding their predicament from the definition of trafficked persons under the

89. *Id.* at 38–40.
90. *Id.* at 121.
91. *Id.* at 129.
92. *Id.* at 4.
93. *Id.* at 25.
94. *Id.* at 11.

Trafficking Protocol. And where foreign entities are involved, the process-oriented prohibitions of the Trafficking Protocol guarantee no relief to the presently exploited (given that treaty's exclusive focus on criminalizing forms of dealing that *lead to* exploitation), rather than criminalizing the exploitation itself. Yet the circumstances of persons already enslaved inside their own countries are grievous and endemic. Their numbers are more than thirty times greater than the ranks of the trafficked population. How can it possibly make sense to devote no new international resources to fighting their enslavement even as trafficked persons move to center stage? On what possible basis can the antitrafficking effort be grounded in the importance of fighting modern forms of slavery, even as it neglects the predicament of the huge majority of modern slaves?

The failure to devote new resources to the core of the slavery problem is all the more egregious when account is taken of the inefficacy of the international machinery now in place to combat slavery. Despite the world community's continued insistence that slavery be ended, the truth is that action has never matched the rhetoric.[95] Supervision has been entrusted to a series of ineffectual oversight bodies that have issued pious pronouncements about the evils of slavery, almost never accompanied by any meaningful action to enforce relevant legal duties. The pattern of formal rather than substantive oversight was set by the 1890 Brussels Act, which established the first international secretariat to oversee slavery prohibitions, but allowed that agency only to "catalog" relevant state practice on slavery.[96] None of the successor bodies—including the League of Nations' Permanent Mandates Commission and later its Temporary Slavery Commission and Advisory Committee of Experts on Slavery, and the UN Economic and Social Council (ECOSOC), and UN Slavery Committee—was entrusted with even modestly coercive authority to take states to task over slavery.[97] The modern system is little better, with former UN Secretary-General Javier Pérez de Cuéllar having bluntly concluded that "[c]ompared with the reporting or monitoring systems of other human rights instruments . . . the reporting clauses of

95. *See, e.g.*, *Abolishing Slavery*, *supra* note 35, ¶ 188 ("There is no . . . international mechanism for the monitoring and enforcement of States' obligations to abolish slavery and related practices. The right of all individuals to be free from slavery is a basic human right; yet this lack of an adequate implementation procedure does little to encourage States to establish safeguards against all contemporary forms of slavery.").

96. *See* SUZANNE MIERS, SLAVERY IN THE TWENTIETH CENTURY: THE EVOLUTION OF A GLOBAL PROBLEM 22–23 (2003).

97. *See generally id.* at 19–400.

the Slavery Conventions [of 1926, 1949, and 1956] appear vague and without effective influence on the implementation . . . of their provisions."[98]

Slavery in fact always has been something of an orphaned issue within the United Nations.[99] As Suzanne Miers writes, upon the establishment of the United Nations, "slavery was the last thing on the minds of politicians. The Slavery Convention was not even among the treaties the [United Nations] took over from the League of Nations at its demise."[100] Some important antislavery initiatives are, of course, undertaken by the International Labour Organization (ILO), a specialized agency associated with the United Nations.[101] And some UN special rapporteurs have taken up slavery concerns, at times drawing upon the ILO's work.[102] But it is surely telling that despite the clear prohibition of slavery in Article 8 of the International Covenant on Civil and Political Rights (Civil and Political Covenant),[103] the generally well-regarded

98. 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.2/1989/37 (May 17, 1989) [hereinafter *Study on Ways and Means*].

99. Indeed, this was precisely the characterization offered at each of the 2004 and 2006 sessions of the UN Working Group on Contemporary Forms of Slavery. ECOSOC, Sub-Comm'n on Promotion & Prot. of Human Rights, *Report of the Working Group on Contemporary Forms of Slavery on its Twenty-ninth Session*, ¶ 26, U.N. Doc. E/CN.4/Sub.2/2004/36 (July 20, 2004) (*prepared by* Paulo Sérgio Pinheiro); Gen. Assembly, Sub-Comm'n on Promotion & Prot. of Human Rights, *Report of the Working Group on Contemporary Forms of Slavery on its Thirty-first Session*, ¶ 20, U.N. Doc. A/HRC/Sub.1/58/25 (Aug. 22, 2006) (*prepared by* Abdul Sattar).

100. MIERS, *supra* note 96, at 319. The United Nations ultimately took over supervision of the 1926 Slavery Convention by execution of a protocol to that effect in 1953. G.A. Res. 794 (VIII), U.N. Doc. A/2630 (Oct. 23, 1953).

101. The ILO, established in 1919, has drafted three treaties of particular relevance: the Forced Labour Convention of 1930 (No. 29), the Abolition of Forced Labour Convention of 1957 (No. 105), and the Worst Forms of Child Labour Convention of 1999 (No. 182). These treaties are supervised under the ILO's Committee of Experts monitoring system. *Abolishing Slavery*, *supra* note 35, ¶¶ 38–43, 43 n.52, 164–70. More generally, the ILO has taken action to combat forms of slavery under the rubric of its general responsibility to combat "forced or compulsory labor." Yet even this organization's efforts have been reoriented significantly to focus on "human trafficking." Int'l Labour Org., *A Global Alliance against Forced Labour: Global Report Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, Int'l Labour Conf. (2005), ¶ 312.

102. Gen. Assembly, Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, ¶ 43, U.N. Doc. A/HRC/4/14 (Feb. 12, 2007) (*prepared by* Paulo Sérgio Pinheiro); ECOSOC, Comm'n on Human Rights, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, ¶ 53, U.N. Doc. E/CN.4/2006/67 (Jan. 12, 2006) (*prepared by* Juan Miguel Petit).

103. "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. . . . No one shall be required to perform forced or compulsory labour . . . ." International Covenant on Civil and Political Rights art. 8, Dec. 16,

Human Rights Committee that oversees that treaty—and that undertakes serious review of State Party reports, receives individual complaints under the Optional Protocol, and issues authoritative general comments to guide state compliance—has never engaged in the fight against slavery.[104] Incredibly, the Human Rights Committee has referred to Article 8 of the Covenant in only three decisions (one concerning military conscription,[105] another related to child custody,[106] and the most recent concerning prison labor[107]) and has never issued a general comment on point.

Instead, primary UN responsibility for the slavery issue was entrusted in 1975 to a much less visible body, the Working Group on Slavery (renamed the Working Group on Contemporary Forms of Slavery in 1988).[108] The Working Group is not a formal treaty supervisory body,[109] but is rather a subsidiary body of the Sub-Commission on the Promotion and Protection of Human Rights, from which its members are drawn.[110] The use of a relatively informal mechanism of this kind was dictated by necessity, because none of the antislavery treaties provides for the establishment of a true supervisory body.[111] But in practice, the lack of

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1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

104. While its mandate is focused less directly on slavery than that of the Human Rights Committee, the Committee on Economic, Social and Cultural Rights could also be faulted for having engaged insufficiently with closely related concerns, particularly in view of Article 6 ("the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts") and Article 7 ("just and favorable conditions of work") of the International Covenant on Economic, Social and Cultural Rights arts. 6–7, Dec. 16, 1966, 993 U.N.T.S. 3.

105. L.T.K. v. Finland, Commc'n No. 185/1984, Human Rights Comm., U.N. Doc. CCPR/C/OP/2 ¶ 5.2 (July 9, 1985).

106. A.J. v. G. v. Netherlands, Commc'n No. 1142/2002, Human Rights Comm., U.N. Doc. CCPR/C/77/D/1142/2002 ¶ 5.6 (Apr. 14, 2003).

107. Radosevic v. Germany, Commc'n No. 1292/2004, Human Rights Comm., U.N. Doc. CCPR/C/84/D/1292/2004 ¶ 7.3 (Aug. 5, 2005).

108. The renaming was designed to ensure jurisdiction over such nontraditional slavery concerns as "exploitation of sex, debt-bondage, sale of children, [and] apartheid." ECOSOC, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *Report of the Working Group on Slavery on its Twelfth Session*, ¶ 114, U.N. Doc. E/CN.4/Sub.2/1987/25 (1987).

109. *Study on Ways and Means*, *supra* note 98, ¶ 36.

110. As originally constituted in 1974, the Working Group was comprised of five members of the Sub-Commission and authorized to meet for not more than three days prior to the general meeting of the Sub-Commission. ECOSOC, Social Comm., Dec. 16 (LVI), U.N. ESCOR, 56th Sess., Supp. No. 1, U.N. Doc. E/5514 (May 17, 1974). The Working Group's mandate was "to review developments in the field . . . to consider and examine any information from credible sources on the subject . . . with a view to recommending remedial action." ECOSOC, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Twenty-sixth Session*, res. 7, ¶¶ 1, 3, U.N. Doc. E/CN.4/Sub.2/343 (Dec. 28, 1973).

111. *Study on Ways and Means*, *supra* note 98, ¶ 44. But Article 8(3) of the 1956 Supplemen-

treaty-based authority has proved a significant impediment to meaningful oversight, because the Working Group cannot even require states to provide it with information on implementation of any kind, much less compel governments to account for their actions.

As a result, and given the real time and budgetary limitations imposed on it,[112] the Working Group has become nearly entirely dependent on NGOs to serve as both its primary source of information and its de facto secretariat.[113] For example, even when taking up its arguably most fundamental responsibility—overcoming the problem of pervasive nonratification of the antislavery treaties—the Working Group felt compelled to ask NGOs to undertake the relevant analysis and to prepare the required briefing note.[114] While some NGOs, notably Anti-Slavery International, have genuinely sought to provide the Working Group with relevant and broadly based information and strategy proposals, other NGOs have exploited the Working Group nearly single-mindedly to advance their own parochial agendas.[115] The Working Group has largely acquiesced to these efforts, apparently content to serve as little more than a forum for the airing of NGOs' views on slavery.[116] Indeed, the then Chairperson of the Working Group justified its existence in precisely those terms:

> For years . . . the Working Group had represented a forum of expression and a platform for . . . non-governmental organizations working in the field and even former victims of various forms of exploitation, and government representatives. No Special Rap-

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tary Slavery Convention does at least oblige the UN Secretary-General to communicate relevant information received to ECOSOC, which information has been periodically considered by ECOSOC resulting in "various actions in this regard." *Id.* ¶ 20.

112. In the mid-1980s there was even an attempt to cut off all funds for servicing of the Working Group. Kathryn Zoglin, *United Nations Action Against Slavery: A Critical Evaluation*, 8 HUM. RTS. Q. 306, 337 (1986).

113. *See Abolishing Slavery*, *supra* note 35, ¶ 181. Zoglin refers to the Working Group as "almost the private creation" of NGOs. Zoglin, *supra* note 112, at 314–15.

114. ECOSOC, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *Report of the Working Group on Contemporary Forms of Slavery on its Twentieth Session*, ¶¶ 13–18, U.N. Doc. E/CN.4/Sub.2/1995/28 (June 13, 1995) (*prepared by* Ioan Maxim).

115. The International Abolitionist Federation, for example, not only demanded that the Working Group seek the abolition of prostitution, but asked it also to take up the question of the relationship among the "sex industry," "drug industry," and "arms industry." *Id.* ¶¶ 47, 56.

116. This characterization was offered by the government of France. ECOSOC, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *Report of the Working Group on Contemporary Forms of Slavery on its Twenty-fourth Session*, ¶ 46, U.N. Doc. E/CN.4/Sub.2/1999/17 (July 20, 1999) (*prepared by* Halima Embarek Warzazi); *see also* Gen. Assembly, *supra* note 99, ¶ 30.

> porteur could fulfil the role of mediator as well as the Working Group. . . . [M]aintenance of the Working Group was a victory for the non-governmental organizations and the victims of exploitation, who could continue to make their voice heard before the international community.[117]

In truth, the Working Group has done little beyond periodically revising a catalog of the causes of slavery that is so vague and all encompassing that it is a meaningless standard around which to design real action. At its thirtieth anniversary meeting in 2005, for example, the Working Group unhelpfully opined "that poverty, social exclusion, illiteracy, ignorance, rapid population growth, HIV/AIDS, poor governance, corruption, irregular migration, impunity, discrimination in all its forms and armed conflicts are among the main root causes of contemporary forms of slavery . . . ."[118] Members of the Working Group have, moreover, at times proposed policy responses—for example, "a mutually-supportive and ethical globalization that would bring an end to the perpetuation of poverty and exploitation"[119]—that are so patently vague and grandiose[120] that it should come as no surprise that no more than a small number of states (and not even most relevant intergovernmental organizations[121]) even bother to attend its sessions.[122] Indeed, even Anti-Slavery International has recently decided that it will no longer invest any significant resources in the Working Group's activities.[123]

Most tragic of all, the Working Group seems largely oblivious to its own shortcomings. While serious operational reform proposals have

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117. ECOSOC, *supra* note 81, ¶ 6.

118. ECOSOC, Sub-Comm'n on Promotion & Prot. of Human Rights, *Report of the Working Group on Contemporary Forms of Slavery on its Thirtieth Session*, ¶ 36(17)(c), U.N. Doc. E/CN.4/Sub.2/2005/34 (July 7, 2005) (*prepared by* Marc Bossuyt).

119. ECOSOC, Comm'n on Human Rights, *Report of the Working Group on Contemporary Forms of Slavery on its Twenty-seventh Session*, ¶ 10, U.N. Doc. E/CN.4/Sub.2/2002/33 (June 17, 2002) (*prepared by* Halima Embarek Warzazi).

120. "Unfortunately, many of the recommendations [of the Working Group] constitute little more than unhelpful and unimaginative generalities." Zoglin, *supra* note 112, at 323.

121. "United Nations specialized agencies and other I.G.O.s, with the exception of the I.L.O., have made only a minor contribution to the Working Group." *Id.* at 316.

122. In 2005, for example, only thirteen states—and no intergovernmental organizations—were listed as having attended the Working Group's meetings. ECOSOC, *supra* note 118, at 17. Governmental attendance improved significantly in 2006, however, with twenty-eight states present at the Working Group's meeting. Gen. Assembly, *supra* note 99, at 14.

123. ANTI-SLAVERY INT'L, REPORT AND FINANCIAL STATEMENT: 31 MARCH 2006, at 8 (2006).

been presented by the Secretary-General,[124] by some NGOs,[125] and in expert studies,[126] the net result seems to be negligible.[127] In a 1999 review of its procedures, for example, the Working Group took no action on two potentially significant proposals for change—aggressively pursuing a formal state reporting system[128] or replacing the Working Group with a more agile special rapporteur structure[129]—opting instead for the tamest alternative on the table, namely organizing Working Group discussions to include a thematic focus.[130] Yet another opportunity for meaningful change was lost in 2005 when the Working Group's decision to scrutinize its own activities to mark its thirtieth anniversary yielded only endorsement of the status quo.[131] The Working Group opted to continue to define its main task simply as the publicizing of

124. *See Study on Ways and Means*, *supra* note 98.

125. At its twenty-first session, for example, Anti-Slavery International presented the Working Group with a very helpful note with a proposed agenda of action organized with distinct points of focus on each of the traditional forms of slavery, more modern slavery-like practices, and an analysis of factors predisposing some groups to slavery. ECOSOC, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *Report of the Working Group on Contemporary Forms of Slavery on its Twenty-first Session*, ¶ 13, U.N. Doc. E/CN.4/Sub.2/1996/24 (July 19, 1996) (*prepared by* Halima Embarek Warzazi).

126. At its twenty-third session, the Working Group requested comprehensive reviews of its work, leading to the preparation of a study by David Weissbrodt and Anti-Slavery International. *See Abolishing Slavery*, *supra* note 35. Earlier studies include REPORT ON SLAVERY, U.N. Doc. E/4168/Rev.1, U.N. Sales No. 67.XIV.2 (1966) and SLAVERY: REPORT UPDATING THE REPORT ON SLAVERY SUBMITTED TO THE SUB-COMMISSION IN 1966, U.N. Doc. E/CN.4/Sub.2/1982/20/Rev.1, U.N. Sales No. E.84.XIV.1 (1984).

127. An expert report concluded that while the supervision "defect in the existing regime under the slavery conventions has been discussed many times . . . no change has been effected, although numerous suggestions on how to improve the system have been made." *Abolishing Slavery*, *supra* note 35, ¶ 180.

128. The Working Group belatedly endorsed the idea of an optional protocol to facilitate supervision of the three antislavery treaties in 2001. ECOSOC, Sub-Comm'n on Promotion & Prot. of Human Rights, *Report of the Working Group on Contemporary Forms of Slavery on its Twenty-sixth Session*, 28, U.N. Doc. E/CN.4/Sub.2/2001/30 (July 16, 2001) (*prepared by* Rajendra K. Goonesekere). This request was endorsed by the Sub-Commission, but has not been pursued. ECOSOC, Sub-Comm'n on Promotion & Prot. of Human Rights, *Report of the Working Group on Contemporary Forms of Slavery*, Sub-Comm'n on Human Rights Res. 2001/14, U.N. Doc. E/CN.4/SUB.2/RES/2001/14 (Aug. 15, 2001).

129. The Sub-Commission has recommended that the new Human Rights Council give consideration to strengthening the Working Group's monitoring capacity and to the establishment of a special rapporteur. Gen. Assembly, Sub-Comm'n on Promotion & Prot. of Human Rights, *Specific Human Rights Issues: Contemporary Forms of Slavery*, ¶ 6, U.N. Doc. A/HRC/Sub.1/58/L.9 (Aug. 21, 2006).

130. ECOSOC, *supra* note 116, ¶ 41.

131. ECOSOC, Sub-Comm'n on Promotion & Prot. of Human Rights, *Report of the Working Group on Contemporary Forms of Slavery on its Twenty-eighth Session*, 15, U.N. Doc. E/CN.4/Sub.2/2003/31 (June 27, 2003) (*prepared by* Paulo Sérgio Pinheiro).

relevant concerns[132] and, more generally, to "provide a unique platform for non-governmental organizations and victims of slavery and slavery-like practices to appear before an international forum . . . ."[133] The one shift agreed to ironically mirrored the commitment to reform already made in 1999, namely "to sharpen its thematic focus."[134] Incredibly, even that modest concession to the importance of reform seems to have had little real impact, as the first thematic focus selected was its traditional favorite: "the human rights dimensions of prostitution."[135] In any event, the promised "sharpened focus" did not materialize. The Working Group failed even to ensure that a background paper was ready for the session,[136] and it spent most of its time listening to pleas from a variety of groups committed to ensuring that the Working Group not deviate from its hardline opposition to any legalization of prostitution.[137]

In sum, supervision of the antislavery agenda within the UN system is little short of a disaster. The Human Rights Committee, despite clear jurisdiction over slavery by virtue of Article 8 of the Civil and Political Covenant, has remained aloof from the issue. The governments of the world, having refused to include any form of meaningful supervisory provisions in the specialized antislavery treaties, have by and large opted also to ignore the informal Working Group established to fill the oversight void.[138] And sadly, their failure to take the Working Group's efforts seriously is understandable: its process has amounted to little more than an endless cycle of repetitive conversations in which Working Group members receive NGO reports and consecrate them as official recommendations, virtually none of which is taken up by the Work-

132. ECOSCOC, *supra* note 118, ¶ 12.

133. *Id.* ¶ 36(1).

134. *Id.* ¶ 36(8).

135. *Id.* ¶ 36(16).

136. Gen. Assembly, *supra* note 99, ¶ 13.

137. *Id.* ¶ 14.

138. A request issued by the Secretary-General in 2000 for governments to report on their antislavery efforts (intended to serve as the basis for Working Group analysis) generated only seven responses. *See* The Secretary-General, *Review of Developments in the Field of Contemporary Forms of Slavery: Measures to Prevent and Repress All Contemporary Forms of Slavery, Including the Consideration of Corruption and International Debt as Promoting Factors of Contemporary Forms of Slavery and Other Forms of Exploitation, delivered to the Sub-Commission on the Promotion and Protection of Human Rights*, U.N. Doc. E/CN.4/Sub.2/AC.2/2000/4 (May 23, 2000). When a similar request was made in 2005, only four governments responded. *See* The Secretary-General, *Review of Developments in the Field of Contemporary Forms of Slavery and Measures to Prevent and Repress All Contemporary Forms of Slavery, delivered to the Sub-Commission on the Promotion and Protection of Human Rights*, U.N. Doc. E/CN.4/Sub.2/AC.2/2005/4 (June 3, 2005).

ing Group's parent bodies as the basis for action in any event.[139] With the Working Group unable even to generate a sophisticated analysis of the problems that give rise to slavery, much less to design a credible strategy to combat it, its meetings have become ritualized and largely symbolic rather than substantive and action-oriented. It is, as Miers concludes, "a paper tiger."[140]

It is in this context that we must assess the ethicality of the decision effectively to abandon the antislavery effort in favor of a highly partial fight against human trafficking and to devote new resources to the design and operation of an oversight system limited to consideration of a very small sliver of the slavery problem. In essence, governments have walked away from the problem of slavery conceived in holistic terms. They have opted to leave the traditional antislavery treaties in place, supervised by a largely irrelevant and clearly ineffective body,[141] which is content to define itself as "a unique forum for the exchange of information and views with NGOs."[142] Yet they simultaneously claim the moral high ground on slavery, proclaiming their determination to end modern slavery via the antitrafficking fight despite the fact that the steps taken are of no relevance to most slaves.

III. PRETEXT FOR THE GLOBALIZATION OF BORDER CONTROL

As bad as it is that the antitrafficking effort has resulted in a highly selective privileging of a small subset of the slavery problem and as duplicitous as it undoubtedly is for states to trumpet antitrafficking efforts

139. The Sub-Commission typically simply "takes note" of the Working Group's report, occasionally "expresses its deep concern" about the issues raised, and "expresses its appreciation" for the efforts of the Working Group. *See, e.g.*, ECOSOC, Sub-Comm'n on Human Rights Res. 1993/5, U.N. Doc. E/CN.4/SUB.2/RES/1993/5 (Aug. 20, 1993). The Commission on Human Rights (predecessor to the current UN Human Rights Council) was even less supportive, at times actually declining to take up the antislavery fight in favor of continued relegation of the issue to the Sub-Commission. ECOSOC, Comm'n on Human Rights Res. 1994/25, U.N. Doc. E/CN.4/RES/1994/25 (Mar. 4, 1994). Indeed, in 2000 the Commission responded to concerns about the effectiveness of the Working Group by reducing the length of the Working Group's session from eight to five days. ECOSOC Comm'n on Human Rights, Dec. 2000/109, ¶ 22, U.N. Doc. E/CN.4/DEC/2000/109 (Apr. 26, 2000).

140. MIERS, *supra* note 96, at 396.

141. For example, when confronted with the continuing failure of states to ratify the antislavery conventions, the Working Group simply abandoned its efforts rather than aggressively pursue ratification. "Owing to a sense of discouragement . . . it had not invited States which had not yet ratified the Convention [on Slavery] to meet members of the Working Group for an informal exchange of views, as it had done regularly since its nineteenth session." ECOSOC, *supra* note 81, ¶ 49.

142. ECOSOC, *supra* note 118, ¶ 13.

as proof of their strong commitment to fight modern slavery, the failure of the antitrafficking effort has a second dimension. In addition to amounting to a diversion from the core commitment of the international community meaningfully to combat modern slavery, the antitrafficking campaign has also 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.

Taking advantage of the momentum to address trafficking, several powerful governments successfully promoted the simultaneous adoption of an additional instrument, the Smuggling Protocol.[143] The principles codified in that treaty had been on the Austrian and Italian political agendas for some time and were earlier promoted in the Commission on Crime Prevention and Criminal Justice and before the International Maritime Organization.[144] Sensing that the interest in trafficking would allow action to be taken on the superficially related issue of smuggling, these governments authored the seminal draft of what became the Smuggling Protocol[145]—initially proposing that smuggling and trafficking be treated as a single, undifferentiated concern.[146] While the issues of trafficking and smuggling were ultimately dealt with in separate treaties, agreement was achieved to establish a transnational duty to criminalize any compensated effort[147] to move unauthorized persons[148] across a border. The migrants unlawfully smuggled do not themselves become liable to criminal penalties under the Smuggling Protocol (though they

143. *See supra* text accompanying notes 23–26.

144. Gallagher, *supra* note 9, at 983.

145. Gen. Assembly, Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, *Draft Protocol against the Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Convention against Transnational Organized Crime*, 1 n.3, U.N. Doc. A/AC.254/4/Add.1/Rev.1 (May 13, 1999).

146. It was proposed to create a combined offense of "illegal trafficking and transport of migrants" which would have applied to "[a]ny person who intentionally procures, for his or her profit, repeatedly and in an organized manner, the illegal entry of a person into another State of which the latter person is not a national or not a permanent resident." Gen. Assembly, Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, *Draft Elements for an International Legal Instrument against Illegal Trafficking and Transport of Migrants, Proposal Submitted by Austria and Italy*, art. A, U.N. Doc. A/AC.254/4/Add.1 (Dec. 15, 1998).

147. The facilitation must be carried out "in order to obtain, directly or indirectly, a financial or other material benefit." Smuggling Protocol, *supra* note 24, art. 6(1).

148. "Smuggling of migrants" is defined to mean "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident." *Id.* art. 3(a). "Illegal entry" is defined to mean "crossing borders without complying with the necessary requirements for legal entry into the receiving State." *Id.* art. 3(b).

remain subject to whatever domestic laws otherwise apply).[149] But everyone who is part of a "structured group of three or more persons"[150] that commits, attempts, acts as an accomplice, organizes, or directs smuggling must, by virtue of the Smuggling Protocol, be subject to criminal law penalties.[151] Even more significantly, the Smuggling Protocol mandates a series of steps to stymie smuggling, including cooperating in interdicting smuggling at sea,[152] making it more difficult to secure or use false travel documents,[153] and agreeing expeditiously to accept back any nationals who have been smuggled.[154]

Importantly, the Smuggling Protocol—unlike the Trafficking Protocol—does not limit the duty to criminalize to forms of dealing likely to lead to exploitation.[155] Rather, it sets a transnational duty to criminalize *all* forms of unauthorized border crossing. In essence, it 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. By virtue of these provisions for mandatory criminalization and cooperation in enforcement of border control laws, a host of states—including both countries of origin and of transit—have been effectively conscripted as agents of first world states of destination.

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149. *Id.* arts. 5, 6(4); *see* Gen. Assembly, Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, *Proposals and Contributions Received From Governments*, 4, U.N. Doc. A/AC.254/5/Add.21 (Feb. 11, 2000) (Austria, Canada, Germany, and Netherlands); *id.* at 6 (Austria and Italy); *id.* at 8 (Canada); *id.* at 10 (France).

150. The Smuggling Protocol, like the Trafficking Protocol, applies only to acts involving an "organized criminal group." Smuggling Protocol, *supra* note 24, art. 4. An "organized criminal group" is defined as a "structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with [the Convention against Transnational Organized Crime] in order to obtain, directly or indirectly, a financial or other material benefit." Convention against Transnational Organized Crime, *supra* note 47, art. 2(a).

151. Smuggling Protocol, *supra* note 24, art. 6.

152. *Id.* arts. 7–8.

153. *Id.* arts. 12–13.

154. *Id.* art. 18.

155. The drafters of the Smuggling Protocol were of the view that smuggling, which poses a risk to human rights, was already dealt with in the Trafficking Protocol. Gen. Assembly, Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, *Draft Protocol against the Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Convention against Transnational Organized Crime*, 8 n.47, U.N. Doc. A/AC.254/4/Add.1/Rev.2 (Sept. 24, 1999). But human rights concerns that fall short of the Trafficking Protocol's definition of relevant exploitation can occur in smuggling situations. *See* Tom Obokata, *Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors Under International Human Rights Law*, 17 INT'L J. REFUGEE L. 394, 397–401 (2005).

The initial drafts of the Smuggling Protocol were particularly one-sided and unremittingly enforcement-oriented, drawing heavily on language and approaches rooted in the antismuggling work of the International Maritime Organization and in UN treaties dealing with narcotics.[156] No more than mention was made of the root causes of smuggling,[157] and human rights issues were viewed simply as constraints to be dealt with.[158] In line with the original Austrian and Italian goals, the essential strategy proposed for the Smuggling Protocol was to require all States Parties to criminalize in their own law the breach of any other State Party's migration control laws.[159] Not only would all States Parties become the de facto enforcers of each other's immigration laws, but they would be required to accept jurisdiction over all relevant offenses[160] and to take steps to suppress smuggling,[161] including cooperation on the high seas.[162] On the initiative of the United States, it was proposed further that States Parties would "facilitate and accept, without delay," the return of any of their nationals who had been smuggled into another country.[163] In short, the proposed treaty was an effort to secure the contracting out of much of the developed world's migration control agenda to countries of origin and of transit.

To be sure, the developed world's goals were not realized in full. Objection was taken early on to the proposed duty to criminalize breach of any other state's immigration laws,[164] leading that clause to be dropped by the midpoint of the drafting exercise.[165] Similarly, the parties agreed

156. Gen. Assembly, *supra* note 145, at 3 n.8, 7 n.27.

157. *Id.* at 2 n.4.

158. *Id.* at 2 n.5, pmbl. ¶¶ f, j, l.

159. *Id.* arts. 2(2), 3(a), 4.

160. *Id.* art. 6.

161. *Id.* arts. 8–9, 11.

162. *Id.* art. 7.

163. *Id.* art. 15.

164. Gen. Assembly, Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, *Revised Draft Protocol against the Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Convention against Transnational Organized Crime*, 6 n.32, U.N. Doc. A/AC.254/4/Add.1/Rev.3 (Nov. 22, 1999) [hereinafter *Sixth Session Revised Draft Protocol*]; Gen. Assembly, *supra* note 155, at 6 n.28.

165. In a note to the draft produced at the Ad Hoc Committee's ninth session—which omitted the clause in question—it was agreed that if smuggling were defined to include the procurement of illegal entry into "any" State Party, there would be an effective duty to criminalize breach of another state's immigration laws, whereas if framed as the procurement of illegal entry into "a" state, there would be no such duty. Gen. Assembly, Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, *Revised Draft Protocol against the Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Convention against Transnational Organized Crime*, 13 n.22, U.N. Doc. A/AC.254/4/Add.1/Rev.5 (Mar. 20, 2000). The lan-

to delete the provision requiring states to take legislative measures in order to establish jurisdiction over relevant offenses, with the result that jurisdictional questions are to be settled by ordinary conflict of laws rules.[166] Several other developed world proposals to impose additional duties were also defeated, including an effort to expand the definition of smuggled persons to include "irregular" (rather than just "illegal") entrants[167] and an initiative of the European Community to promote the stationing of "liaison officers" abroad to "facilitat[e] the secure and rapid exchange of information" related to smuggling.[168]

In most other respects, however, the thrust of the original draft Smuggling Protocol was affirmed. A proposal to make the duty to criminalize smuggling optional did not survive;[169] a limitation on the duty of cooperation only to situations in which migrants would be at risk was rejected;[170] and agreement was not forthcoming to recognize any limitations on the duty of states to receive back their smuggled nationals or permanent residents.[171] Indeed, some of the original proposals were actually strengthened. For example, the definition of unlawful smuggling was expanded beyond "for profit" efforts to include any measures in which the unlawful border crossing was intended to secure "directly or indirectly, a financial or other material benefit";[172] the duty to cooperate to prevent smuggling was extended to include cooperation in preventing even smuggling not shown to be intentional;[173] the obliga-

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guage as finally adopted took the latter course. Smuggling Protocol, *supra* note 24, art. 3(a).

166. Gen. Assembly, Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, *Draft Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 4, U.N. Doc. A/AC.254/L.250/Add.3/Rev.1 (Oct. 26, 2000).

167. *See Sixth Session Revised Draft Protocol*, *supra* note 164, at 4 n.14.

168. Gen. Assembly, Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, *Proposals and Contributions*, 14, U.N. Doc. A/AC.254/5/Add.24 (Apr. 7, 2000).

169. Gen. Assembly, *supra* note 155, at 7 nn.34, 40.

170. *Id.* at 7 n.31.

171. Gen. Assembly, Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, *Revised Draft Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 20 n.116, U.N. Doc. A/AC.254/4/Add.1/Rev.4 (Dec. 27, 1999).

172. Smuggling Protocol, *supra* note 24, art. 3(a); Gen. Assembly, Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, *Proposals and Contributions Received From Governments, Austria and Italy: Amendment to Article 2 of the Revised Draft Protocol against the Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Convention against Transnational Organized Crime*, art. 2(1)(a), U.N. Doc. A/AC.254/L.179 (Feb. 28, 2000).

173. Smuggling Protocol, *supra* note 24, arts. 3(a), 7; Gen. Assembly, *supra* note 172.

tion of states to impose sanctions on carriers failing to enforce migration control laws was framed more forcefully;[174] and states of origin were required not simply to readmit their nationals and permanent residents, but also to take affirmative steps to facilitate their "travel and reentry."[175] The only real concessions exacted by migrant producing states were, first, recognition of the duty to "preserve and protect the rights" of smuggled persons,[176] including those accruing under international humanitarian, human rights, and refugee law;[177] and second, affirmation of a duty in principle to "promote or strengthen, as appropriate," development programs aimed at "economically and socially depressed areas" of countries of origin, "taking into account the socio-economic realities of migration."[178] While these additions were clearly of symbolic value, it remains that the final agreement secured the developed world's goal of enlisting global participation in its migration control project at a decidedly minimal cost.

Indeed, the migration control objectives of the Smuggling Protocol became in a real sense the metaphorical tail that wagged the antitrafficking project. While neither the original American nor Argentinean drafts of the Trafficking Protocol sought to impose any duty on states to intensify border controls,[179] the governments of Australia and Canada suc-

174. Gen. Assembly, Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, *Revised Draft Protocol against the Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Convention against Transnational Organized Crime*, 18 nn.97, 99, U.N. Doc. A/AC.254/4/Add.1/Rev.6 (July 19, 2000).

175. Gen. Assembly, Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, *Recommendations of the Informal Working Group on Article 15 of the Revised Draft Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 2, U.N. Doc. A/AC.254.L.274 (Oct. 24, 2000); Smuggling Protocol, *supra* note 24, art. 18(4).

176. Smuggling Protocol, *supra* note 24, art. 16. Mexico led an unsuccessful effort to make the Smuggling Protocol a migrant protection treaty. *See* Gen. Assembly, Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, *Proposals and Contributions Received From Governments, Mexico: Amendments to the Revised Draft International Legal Instrument against Illegal Trafficking in and Transporting of Migrants*, U.N. Doc. A/AC.254/L.61 (July 6, 1999); *see also Sixth Session Revised Draft Protocol*, *supra* note 164, at 6 n.35. There was, however, simply no willingness to include any additional provisions requiring the criminalization of the violation of migrant rights, though there was agreement that such violations could be treated as "aggravating circumstances" in criminal prosecutions of smugglers. Smuggling Protocol, *supra* note 24, art. 6(3); *accord* Gen. Assembly, *supra* note 165, at 10 n.18, 16 n.28.

177. Smuggling Protocol, *supra* note 24, art. 19.

178. *Id.* art. 15(3). The original lack of attention to "root causes" was protested, in particular, by China, Colombia, the Holy See, Libya, and Syria. Gen. Assembly, *supra* note 149, at 9, 12, 15, 20; Gen. Assembly, *supra* note 168, at 8, 12, 26.

179. *U.S. Proposal*, *supra* note 14; *Argentinean Proposal*, *supra* note 14.

cessfully pushed for amendments to align the Trafficking Protocol with the goals of the Smuggling Protocol.[180] As a result, border control requirements are not limited to the Smuggling Protocol; the final version of the Trafficking Protocol[181] requires states "[w]ithout prejudice to international commitments in relation to the free movement of people . . . [and to] strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons."[182] States Parties to the Trafficking Protocol agree specifically to require transportation companies to carry out document screenings of persons to be transported,[183] enforced by carrier sanctions,[184] and more generally to take steps to "strengthen[] cooperation among border control agencies."[185] There is, moreover, clear evidence that governments are taking these duties seriously, as confirmed by a summary of relevant actions reported to the Conference of the Parties in August 2006:

> The vast majority of national replies reported on measures for strengthening border controls to prevent and detect trafficking in persons . . . . Such measures included, for example, the establishment of joint commissions on border cooperation with neighbouring States (Indonesia); the increase in naval patrols, the control of territorial waters and the search of ships (Kuwait); public information campaigns in airports (Costa Rica); training of immigration officers (Finland and Myanmar); stricter inspection of entries and exits at border checkpoints and strengthening the Anti-Trafficking Unit of the national police force (Myanmar); strengthening of human resources and technical equipment for border controls (Slovakia); training courses for investigative and law enforcement authorities, focusing on the identification of victims (Slovenia and United States) . . . ; strengthening of offshore borders through the use of airline liaison officials and an advance passenger protecting system to detect lost, stolen or invalid travel documents (New Zealand); the recent establishment

180. Gen. Assembly, Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, *Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime; Proposal Submitted by Argentina and the United States*, 6 n.15, 7 nn.17–19, U.N. Doc. A/AC.254/4/Add.3/Rev.1 (Feb. 22, 1999).

181. This same clause is found in Smuggling Protocol, *supra* note 24, art. 11(1).

182. Trafficking Protocol, *supra* note 2, art. 11(1).

183. *Id.* art. 11(2)–(3).

184. *Id.* art. 11(4).

185. *Id.* art. 11(6).

> of the National Immigration Branch controlling entry to and from the national territory and development of relevant pilot projects (South Africa); the establishment of a department at the border police level specialized in combating trafficking in persons and the establishment of a telephone alert system for border police (Romania); and strengthening of the Schengen visa mechanisms (Czech Republic, Germany, Italy, Slovakia and Slovenia).[186]

The globalization and intensification of the developed world's migration control project required by the Smuggling Protocol (and by the related clause included in the Trafficking Protocol itself) raise at least two human rights based concerns: (1) the criminalization of smuggling will drive inelastic migratory demand into the black market; and (2) the difficulties raised by refugees attempting to exercise their international law rights, as discussed in the next Part below.

First and most fundamentally, antitrafficking obligations are likely to increase the risk of human smuggling.[187] It is simply unrealistic to imagine that illegal migration can be stopped, or even significantly attenuated, in a world characterized by massive disparity of wealth and opportunity[188] coupled with rigid migration control regimes that afford virtually no possibility for the entry of minimally skilled but hardworking persons for whom there is evident demand.[189] No set of rules, no enforcement regime, and no form of physical barrier has ever been able dependably to prevent migration in such circumstances.[190] Even some

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186. Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Oct. 9–18, 2006, *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: Information Received From States for the Second Reporting Cycle*, ¶ 48, U.N. Doc. CTOC/COP/2006/6 (Aug. 16, 2006).

187. Raimo Väyrynen reports that "there seems to be a direct correlation between the increasingly restrictive policies by the EU and its member states and the level [of] risks and fees associated with human smuggling. In other words, receiving states are creating by their policies a lucrative market for . . . traffickers." Väyrynen, *supra* note 20, at 20. There is, however, a paucity of hard data to show a clear correlation between heightened border controls and increased human smuggling and/or trafficking. A carefully conceived analytical tool to measure such correlations has recently been proposed. *See Measuring Responses to Trafficking in Human Beings in the European Union: an Assessment Manual* (Sept. 2007), *available at* http://www.childtrafficking.com/Docs/dottridge_2007measuring_1007.pdf.

188. *See* PETER STALKER, WORKERS WITHOUT FRONTIERS: THE IMPACT OF GLOBALIZATION ON INTERNATIONAL MIGRATION 139 (2000).

189. *See* Gerry Van Kessel, *Global Migration and Asylum*, 10 FORCED MIGRATION REV. 10, 10 (2001) ("The problem . . . is that the rich industrialised countries do not accommodate the demand through legal migration. Demand far exceeds supply, with only between 2.5 and 3 million places available annually for immigrants.").

190. *See* Kelly, *supra* note 21, at 257 ("Extending our thinking . . . requires recognizing that

governmental voices concede that the effect of strengthened border controls has likely been simply to drive noncitizens, determined to cross a border, increasingly to rely on the services of professionals.[191] As David Kyle and Rey Koslowski's comprehensive study concludes:

> [C]ontinuing to locate the problem exogenously within a transnational crime framework outside the past actions and current conditions of the countries of origin and destination would seem to ensure that, at least in the short run, many more will be tempted into the hands of human smugglers; they will continue to be perceived, correctly or incorrectly, as the only credible hope of attaining the political freedoms and economic opportunities we enjoy in the world's most developed countries.[192]

In short, desperate people determined to migrate will need smugglers more than ever.

Indeed, because border crossing is itself more challenging and because smugglers are now subject to internationally mandated criminal sanctions if caught, the prices that smugglers can command may be expected to rise.[193] To the extent that the persistence of demand, coupled with enhanced risks associated with criminalization of smuggling means that an enhanced premium can be commanded to move people across borders, the smuggling business will logically become increasingly attractive to organized crime[194]—ironically, the very phenomenon that the Trafficking Protocol's mother treaty, the Convention against Transnational Organized Crime, is committed to deterring. And more tragically still, if those determined to cross cannot afford the higher prices demanded, they will be more vulnerable to exploitation[195] and even to

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many will continue to accept offers of work, despite prevention campaigns, because the scale of need and of recruitment is so extensive."); Twomey, *supra* note 7, at 36.

191. "Greater controls have resulted in the emergence of persons, often criminally organised, who have the knowledge, the ability and the resources to find ways around access controls." Van Kessel, *supra* note 189, at 11; *see also* Helga Konrad, *The OSCE and the Struggle against Human Trafficking: The Argument for a Comprehensive Multi-Pronged Approach*, 1 INTERCULTURAL HUM. RTS. L. REV. 79, 86 (2005–06).

192. Kyle & Koslowski, *supra* note 16, at 22.

193. *See* Khalid Koser, *Why Migrant Smuggling Pays*, 46 INT'L MIGRATION 3 (2008); Melanie Petros, *The Costs of Human Smuggling and Trafficking* 8–12 (Global Comm'n on Int'l Migration, Global Migration Perspective Series No. 31, 2005).

194. "The success of organised crime depends on there being an illegal market, the existence of which directly relates to the actions of Governments . . . ." John Morrison & Beth Crosland, *The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy?* 41 (UN High Comm'r for Refugees, Working Paper No. 39, 2001).

195. David A. Feingold, *Human Trafficking*, FOREIGN POL'Y, Sept./Oct. 2005, at 26, 27.

postcrossing enslavement to repay the smuggling debt.[196] Simply put, the agreement of states to criminalize smuggling and to strengthen border control efforts, coupled with inelastic demand for border crossing by mostly less-than-wealthy persons, will logically create the conditions within which traditionally benign forms of smuggling are transmuted into the clearly rights-abusive practices characteristic of trafficking.[197]

More generally, the transnational criminalization of human smuggling per se should raise important concerns for the human rights community. In at least some contexts, (nonabusive) human smuggling—as contrasted with human trafficking—may actually enhance respect for human rights.[198] Kyle and Koslowski conclude, for example, that there is often a symbiotic relationship between smugglers and migrants that challenges absolutist assumptions.[199] There is, in particular, mounting evidence that remittances from migrants are the single most effective tools of economic and social rights empowerment, dwarfing the impact of official foreign aid programs. As World Bank senior economist Dilip Ratha concludes, "Remittances are large, counter-cyclical, and pro-poor. They are better targeted to the needs of the poor than official aid or foreign direct investment."[200] Lant Pritchett has determined that if wealthier countries allowed an increase in immigration equivalent to just three percent of their labor force, the citizens of less developed countries would gain about $300 billion per annum[201]—three times more than the direct gains that would accrue from abolishing all remaining trade barriers, four times more than the foreign aid now given by

196. Jacqueline Bhabha, *Lone Travelers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children*, 7 U. CHI. L. SCH. ROUNDTABLE 269, 285 (2000).

197. Kelly, *supra* note 21, at 247–48.

198. More generally, it has even been suggested that "[t]he truth about human trafficking is that for desperate people it is usually a good bet. They are at the mercy of ruthless [traffickers], but atrocities are rare because they are bad for business." Rory Carroll, Op-Ed., *Willing Sex Slaves: Human Traffickers are Always Demonized, but Most Help Desperate People*, GUARDIAN (London), Mar. 1, 2001, at 21.

199. Kyle & Koslowski, *supra* note 16, at 9. In the case of migrants smuggled from Afghanistan and Pakistan, Koser reports that "on average it would have required just less than two years of remittances at the current level to repay the initial investment in smuggling . . . ." Koser, *supra* note 193, at 18.

200. Dilip Ratha, Senior Economist and Manager, Dev. Prospects Group at the World Bank, Why Should Financial Institutions Care About Remittances?, Remarks at the Organisation for Economic Cooperation and Development and Spanish Ministries of Foreign Affairs and Finance Workshop: The Impact of Remittances on Finance for Development: Analyzing Operational Frameworks (Mar. 12, 2007), *available at* http://dilipratha.com/index_files/WhyshouldFinancialIinstitutionscareaboutRemittances.pdf.

201. LANT PRITCHETT, LET THEIR PEOPLE COME: BREAKING THE GRIDLOCK ON GLOBAL LABOR MOBILITY 3 (2006).

governments, and one hundred times more than the value of debt relief.[202] As such, any holistic analysis of the human rights consequences of seeking to prohibit simple smuggling should take real account of the critical role in global wealth redistribution played by migration (which is in turn dependent on smuggling), not to mention the real and immediate enhancement of life possibilities for the persons smuggled into more prosperous and less threatening states.[203] It is too simplistic to assume that all, or even most, smuggling is rights diminishing.

The need for a more nuanced understanding of smuggling is especially clear when consideration is given to the case of refugees, who must often turn to smugglers in order to secure in practice the legal protections to which they are formally entitled.

IV. SHORING UP THE DETERRENCE OF REFUGEES

A second and more specific human rights cost of the increased commitment to border controls required by the Trafficking and Smuggling Protocols is the increased difficulty faced by refugees seeking the legal protections to which they are formally entitled under the Refugee Convention. In recognition of the inability of the international community truly to guarantee protection unless an at-risk person has successfully exited his or her own country, the refugee definition in the Refugee Convention requires that a person be "outside the country of his nationality" in order to qualify for protection.[204] More specifically still, the various rights to which refugees are entitled can be asserted in relation to a State Party only once a refugee comes under its jurisdiction.[205] Critically, then, even a person who is a refugee (because he or she has successfully left his country and reasonably fears being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion) is not in a position to claim any refugee rights until and unless he accesses a state's jurisdiction.

In an era when states have become increasingly resistant to their duty to grant refugees their Refugee Convention based rights—yet are disin-

202. Sebastian Mallaby, Op-Ed., *Migrating to Modernity*, WASH. POST, Sept. 18, 2006, at A17.

203. "The bulk of economic gains from migration accrue to migrants and their families, and these gains are often large." WORLD BANK, GLOBAL ECONOMIC PROSPECTS 2006: INTERNATIONAL REMITTANCES AND MIGRATION xii–xiii (2006).

204. Refugee Convention, *supra* note 27, art. 1(A)(2).

205. *See generally* JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 156 (2005).

clined to be seen formally to renounce those obligations—the Refugee Convention's restriction of refugee rights to refugees who can somehow bring themselves under the jurisdiction of a state party has proved a valuable loophole for the governments of destination countries.[206] States have increasingly enacted a variety of *non-entrée* policies, the goal of which is to avoid the arrival of refugees—and hence the need even to assess claims to protection—by taking steps to prevent refugees from reaching their jurisdiction. The legal efficacy of such policies is clear from a recent English case in which it was argued unsuccessfully that the Refugee Convention was breached when at-risk Czech Roma were prevented from boarding flights by U.K. immigration officials operating a prescreening system at the Prague Airport:

> The 1951 Convention could have, but chose not to, concern itself also with enabling people to escape their country by providing for a right of admission to another country to allow them to do so. . . .
>
> . . . .
>
> In an ideal world there would no doubt be provision for states to facilitate the escape of persecuted minorities. . . . I am satisfied, however, that on no view of the 1951 Convention is this within its scope. The distinction between on the one hand a state preventing an aspiring asylum seeker from gaining access from his own country to its territory, and on the other hand returning such a person to his own country . . . can be made to seem a narrow and unsatisfactory one. In my judgment, however, it is a crucial distinction to make and it is supported by both the text of the Convention and by the authorities dictating its scope.[207]

While some other states operate comparably blunt deterrent systems, the classic mechanism of *non-entrée* is simply to impose a visa requirement on the nationals of even genuine refugee-producing countries, enforced by sanctions against any carrier that agrees to transport a person without a visa.[208] Because a visa will not be issued by any state for the purpose of seeking refugee protection,[209] persons who would be entitled to refugee rights if able physically to leave their country and travel to a State

206. *See generally id.* at 291.

207. Regina (European Roma Rights Ctr.) v. Immigration Officer at Prague Airport, [2003] EWCA (Civ) 666, [37], [43] (Eng.), *aff'd* [2004] UKHL 55, [13]–[17].

208. HATHAWAY, *supra* note 205, at 291–93.

209. "There is no such thing as a 'refugee visa' to gain entry into the European Union explicitly for the purpose of claiming asylum." Morrison & Crosland, *supra* note 194, at 27.

Party are simply trapped inside their own country. This leaves refugees with only two real options: either secure forged documentation so as to be able successfully to satisfy inquiries of the transportation company employees or find some way clandestinely to slip across the border into an asylum state. Because of the increasing sophistication of document checks and border controls, refugees—like all other would-be entrants—must increasingly turn to smugglers (and if poor, often to traffickers[210]) in order to secure the requisite documents, or otherwise to find ways to get across the border.[211]

In theory, refugees are allowed to do precisely this.[212] Under Article 31 of the Refugee Convention, governments agree "not [to] impose penalties, on account of their illegal entry or presence, on refugees"[213] so long as the refugees come forward and explain why the urgency of their circumstances justified the breach of migration control laws. The drafters of the Refugee Convention were aware that it would be unreasonable to ask governments to dismantle their migration controls in order to ensure the ability of refugees to enter; yet they were equally aware that a refugee "is rarely in a position to comply with the requirements for legal entry,"[214] and should therefore not be sanctioned "on a charge of illegal entry."[215] The compromise was that the general con-

210. *See supra* note 26 and accompanying text.

211. "Given the lack of legal entry possibilities resulting from tighter migration and security-related controls, resort [by refugees] to people-smugglers is a growing feature." UN High Comm'r for Refugees, *Activities of the UNHCR in the Area of International Migration and Development*, 2, U.N. Doc. UN/POP/MIG-FCM/2005/05 (Oct. 13, 2005) [hereinafter *Activities of the UNHCR*], *available at* http://www.un.org/esa/population/meetings/fourthcoord2005/P05_UNHCR.pdf; *accord* Khalid Koser, *The Smuggling of Asylum Seekers into Western Europe: Contradictions, Conundrums, and Dilemmas*, *in* GLOBAL HUMAN SMUGGLING: COMPARATIVE PERSPECTIVES, *supra* note 16, at 58, 62.

212. *See* 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, 561 (2002). Indeed, the General Assembly has insisted that governments not "inhibit legal migration or freedom of travel or undercut the protection provided by international law to refugees." G.A. Res. 48/102, ¶ 9, U.N. GAOR, 85th Sess., U.N. Doc. A/RES/48/102 (Dec. 20, 1993).

213. Refugee Convention, *supra* note 27, art. 31(1).

214. The Secretary-General, *Memorandum by the Secretary-General*, 46, *delivered to the Ad Hoc Committee on Statelessness and Related Problems*, Annex Preliminary Draft Convention Relating to the Status of Refugees (and Stateless Persons), art. 24 cmt. ¶ 2, U.N. Doc. E/AC.32/2 (Jan. 3, 1950).

215. Gen. Assembly, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirteenth Meeting*, 14, U.N. Doc. A/CONF.2/SR.13 (Nov. 22, 1951) (statement of Mr. Hoare of the United Kingdom); *see also id.* at 13 (statements of Mr. Colemar of France and Mr. De Drago of Italy); *id.* at 14 (statements of Mr. Herment of Belgium); *id.* at 15 (statements of Mr. Larsen of Denmark); Gen. Assembly, *Conference of Plenipotentiaries*

trols could remain, but that refugees would be exempted from them.[216] As Lord Justice Simon Brown cogently observed:

> The need for [Article] 31 has not diminished. Quite the contrary. Although under the convention subscribing states must give sanctuary to any refugee who seeks asylum . . . they are by no means bound to facilitate his arrival. Rather they strive increasingly to prevent it. The combined effect of visa requirements and carrier's liability has made it well nigh impossible for refugees to travel to countries of refuge without false documents.
>
> . . . .
>
> . . . Self-evidently, [the purpose of Article 31] was to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law.[217]

Yet the practical problem is that the principled exemption to which refugees are entitled may be of little real value if migration control steps are taken outside the asylum country's jurisdiction to prevent arrival in the first place.[218] It is in relation to this concern that the enhanced border control provisions of the Trafficking and Smuggling Protocols are relevant. Under Common Article 11 of the two treaties, States Parties agree to "establish[] the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving state."[219] More generally, they agree to "strengthen, to the extent possible, such border controls as may be necessary to prevent and detect [trafficking and smuggling]."[220] And under the more specific provisions of the Smuggling Protocol, States Parties must criminalize "producing a fraudulent travel or identity document"[221] as well any other actions that facilitate illegal entry, broadly defined to mean "crossing borders without complying

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on the Status of Refugees and Stateless Persons: Summary Record of the Thirty-fifth Meeting, 12, U.N. Doc. A/CONF.2/SR.35 (July 25, 1951) (statements of Mr. van Heuven Goedhart of the Office of the UN High Commissioner for Refugees (UNHCR)).

216. *See generally* HATHAWAY, *supra* note 205, at 405.

217. R. v. Uxbridge Magistrates Court *ex parte* Adimi, [1999] 4 All E.R. 520, at 523, 527 (Q.B.) (U.K).

218. Morrison & Crosland, *supra* note 194, at 27.

219. Trafficking Protocol, *supra* note 2, art. 11(3); Smuggling Protocol, *supra* note 24, art. 11(3).

220. Trafficking Protocol, *supra* note 2, art. 11(1); Smuggling Protocol, *supra* note 24, art. 11(1).

221. Smuggling Protocol, *supra* note 24, art. 6(1)(b).

with the necessary requirements for legal entry into the receiving State."[222]

Governments seeking to implement these obligations cannot realistically do so in a way that avoids impact on refugees seeking to flee to protection.[223] Airline and other agents checking documents will not be willing (and do not have the legal competence) to assess the refugee status of a traveler without a visa in hand so as to grant him the benefit of Article 31. Much less will generalized efforts to shut down the operations of smugglers be capable of being conducted in ways that preserve access to their services by refugees. In short, the strengthened border control obligations in the new treaties will exacerbate the difficulties already faced by refugees in search of protection and are likely to negate in practice much of the theoretical value of the legal duty to exempt refugees from generalized migration control rules.

More generally, this dilemma highlights the fact that smuggling—simple unlawful border crossing, not characterized by the exploitative conduct that defines trafficking—may in the modern context be a necessary evil. Smuggling is regrettably essential to the ability of most refugees to claim their right under the Refugee Convention to be protected, at least in developed states with sophisticated border control regimes.[224] Assuming that governments will not return to earlier policies under which migration controls were implemented only at their own borders, there is generally no pragmatic means by which refugee protection duties can be honored absent the intervention of smugglers. Far from the Smuggling Protocol's caricature of smugglers as agents of evil, there is little doubt that smuggling is today a key component in the search for protection of an increasing number of refugees.[225]

The response of the Trafficking and Smuggling Protocols to this conundrum is inadequate. While each of these treaties expressly safeguards "international commitments in relation to the free movement of people"[226] and declares that "nothing" in either Protocol "shall affect the rights, obligations and responsibilities of States and individuals under

222. *Id.* art. 3(a)–(b).

223. *See* Brolan, *supra* note 212, at 574.

224. *See* Twomey, *supra* note 7, at 29–30.

225. This concern has spawned discussions of the "asylum/migration nexus," defined by the UNHCR as "the phenomenon whereby refugees and other migrants move from the poorer and less stable parts of the world, usually by irregular or illegal means, so as to seek asylum and/or take up residence in more prosperous and secure regions." *Activities of the UNHCR*, *supra* note 211, at 2.

226. Trafficking Protocol, *supra* note 2, art. 11(1); Smuggling Protocol, *supra* note 24, art. 11(1).

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 *nonrefoulement* as contained therein,"[227] such commitments are more formulaic than substantively meaningful.

While freedom of movement beyond the borders of one's own state is guaranteed under some regional agreements, there is no general human right to international freedom of movement to be safeguarded by relevant provisos in the Protocols. Article 12(2) of the Civil and Political Covenant guarantees that "[e]veryone shall be free to leave any country, including his own."[228] Notably, however, there is no companion right of a noncitizen to enter any other country, in consequence of which the Protocols' preservation of free movement rights may be of little practical value to refugees. At most, they may be a means of contesting initiatives akin to the British regime operated at the Prague Airport, the goal of which was to preclude departure (rather than simply to deny entry to the United Kingdom).

Nor is it clear that the safeguarding of Refugee Convention rights will be of much practical assistance in enabling refugees to secure access to asylum in the face of intensified visa controls, carrier sanctions, and other forms of border control required by the Protocols. Article 31 of the Refugee Convention would assist if—but only if—the refugee were in fact able to secure access to a State Party's territory where he or she faced prosecution for unlawful entry. But where controls are operationalized extraterritorially, the risk of prosecution does not exist—making exemption from penalties of no real value. It is, of course, absolutely clear that the intent of the Refugee Convention was to enable refugees to circumvent controls that would prevent access to protection, but it is equally true that the way in which Article 31 is framed does not allow it to be invoked in aid of dismantling the legalized barriers to access.

The other Refugee Convention right that might be thought relevant—indeed, the only right that is expressly mentioned in the saving clause of the Protocols—is Article 33's duty of *nonrefoulement*, requiring that no refugee be returned "in any manner whatsoever" to the risk of being persecuted.[229] Yet as already noted, controls that operate so as to prevent exit from an at-risk person's own state cannot be successfully at-

227. Trafficking Protocol, *supra* note 2, art. 14; Smuggling Protocol, *supra* note 24, art. 19.
228. ICCPR, *supra* note 103, art. 12(2).
229. Refugee Convention, *supra* note 27, art. 33(1).

tacked by reliance on Article 33, because individuals impacted have not yet become refugees (due to failure to meet the alienage requirement of the definition) and hence cannot claim the benefit of any refugee right, including protection against *refoulement*. And even if able to leave the country of origin, the refugee must still bring himself under the jurisdiction of a State Party before any country is obliged to avoid conduct that could result in the refugee's return to the country of origin. Contrary to the views of some states, Article 33 duties do attach where states take control over refugees on the high seas, and even where they operate migration control systems on some other country's territory.[230] But where the denial of entry is effected indirectly by visa controls and carrier sanctions—precisely the means favored by both the Trafficking and Smuggling Protocols—Article 33 is likely of little avail. This is because nothing in the Refugee Convention, including Article 33, establishes an obligation to facilitate the arrival or admission of refugees into a particular asylum country. Not only the drafters of the Refugee Convention, but also delegates to the subsequent and abortive Conference on Territorial Asylum, rejected the notion that there is or should be any duty affirmatively to reach out to refugees.[231]

In sum, when governments intensify generic and broadly based externalized deterrent efforts—even if aimed, at least in principle, only at persons with no claim to enter the destination state—those measures will inevitably impact not only would-be unauthorized migrants, but equally refugees who are legally entitled to breach border controls in order to claim asylum. As such, whether by design or simple happy coincidence, states of destination, which have made their desire to avoid the arrival of refugees abundantly clear, are, thanks to the Smuggling Protocol and related provisions in the Trafficking Protocol itself, better positioned than previously to avoid their duty to ensure that flight to seek asylum is not hampered by the application of immigration rules. Indeed, given the new duty of governments in countries of origin and of transit to act in concert with destination states, the traditional *non-entrée* regimes of developed states are now reinforced by efforts in the less developed world.

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230. HATHAWAY, *supra* note 205, at 335; *see also* UN High Comm'r for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, ¶ 23 (Jan. 26, 2007), *available at* http://www.unhcr.org/refworld/pdfid/45f17a1a4.pdf.

231. HATHAWAY, *supra* note 205, at 112, 300–01.

V. WHY WERE THE NONGOVERNMENTAL VOICES SILENT?

The antitrafficking project is not just a lopsided effort that fails to tackle slavery in a meaningful and comprehensive way; nor is it just a regime that globalizes border control obligations likely to exacerbate the very problem it purports to condemn and more generally to constrain the ability to vindicate socioeconomic rights that international freedom of movement promotes. It is also an endeavor that has facilitated (or at least legitimated) the denial of human rights to refugees entitled to exemption from border control rules. The failure of human rights advocates to oppose the draft Trafficking Protocol on these grounds is thus puzzling. Why was it that even as nongovernmental and academic commentators voiced concerns about operational issues—for example, the Trafficking Protocol's overemphasis on criminalization as the core response and its failure to make truly binding commitments to either protect victims or to take action against root causes[232]—virtually nothing was said about more fundamental substantive issues,[233] including the skewed allocation of antislavery resources and the exacerbation of constraints on migratory freedom, with particularly acute consequences for refugees?[234]

The answer lies partly with the identity of the key nongovernmental actors in the antitrafficking context. The nongovernmental commitment to fight human trafficking emerged from the successful effort in the United States to secure passage of domestic antitrafficking laws—an effort led by conservative Christian groups.[235] They were attracted to the antitrafficking cause because it drew on the historical precedent of religious activism against slavery,[236] even as it facilitated the fundamental-

232. *See supra* notes 17–19 and accompanying text.

233. For a notable exception, see Brolan, *supra* note 212.

234. The question is important because international nongovernmental organizations (INGOs) increasingly enjoy real influence on the evolution of the international human rights regime. *See, e.g.*, ETHICS IN ACTION: THE ETHICAL CHALLENGES OF INTERNATIONAL HUMAN RIGHTS NONGOVERNMENTAL ORGANIZATIONS (Daniel A. Bell & Jean-Marc Coicaud eds., 2006) [hereinafter ETHICS IN ACTION]; *see also* Dianne Otto, *Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society*, 18 HUM. RTS. Q. 107, 140 (1996).

235. *See* Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 359–60 (2006) (citations omitted). The religious advocates allied themselves with a select group of academics interested in the issue. *See, e.g.*, Donna M. Hughes, *Humanitarian Sexploitation: The World's Sex Slaves Need Liberation, Not Condoms*, WKLY. STANDARD, Feb. 24, 2003, at 16, 16.

236. *See* Nina Shapiro, *The New Abolitionists*, SEATTLE WKLY., Aug. 25, 2004, at 1, *available at* http://www.seattleweekly.com/2004-08-25/news/the-new-abolitionists.php.

ists' contemporary interest in advocating a conservative position on sex.[237] They correctly perceived that the graphic images of young girls working in brothels were hugely powerful[238] and would enable them to mount an impressive campaign with real social and political traction.[239]

The Christian lobby astutely recognized that it could broaden the conservative political base to fight trafficking by enlisting radical feminists to its cause.[240] By narrowly defining human trafficking in a way that equated trafficking with prostitution,[241] the religious groups were able to garner the support of such key organizations as Equality Now, the National Organization for Women, and the Feminist Majority to win congressional approval of domestic antitrafficking legislation.[242] It is, of course, a central tenet of radical feminism[243] to oppose any conduct that objectifies women—including, in particular, prostitution.[244] On this point at least, radical feminists and religious conservatives agreed. While their alliance was not a true meeting of the minds, the cautious alliance made sense for radical feminists anxious to harness the power of faith-based groups in America in their fight against prostitution.[245] Moreover, the rhetorical shift to condemn trafficking in order to fight prostitution could easily be accommodated. Catharine MacKinnon, for example, has argued:

> [T]o distinguish trafficking from prostitution, as if trafficking by definition is forced and prostitution by definition free, is to ob-

237. *See* Jennifer Block, *Why the Faith Trade is Interested in the Sex Trade*, CONSCIENCE, Summer/Autumn 2004, at 32, *available at* http://www.catholicsforchoice.org/conscience/archives/c2004sum_sextrafficking.asp.

238. "[W]hat's enthralled the media, the Christian right and the Bush administration is not the demanding, multi-layered narrative of migrants, but the damsels in distress, the innocents lured across borders." *Id.*

239. *See generally* ALLEN D. HERTZKE, FREEING GOD'S CHILDREN: THE UNLIKELY ALLIANCE FOR GLOBAL HUMAN RIGHTS (2004).

240. Shapiro, *supra* note 236; *see also* Jerry Markon, *Human Trafficking Evokes Outrage, Little Evidence*, WASH. POST, Sept. 23, 2007, at A1.

241. "Prostitution and trafficking are heavily conflated in the United States by our current administration's political agenda to abolish prostitution." Haynes, *supra* note 8, at 363.

242. HERTZKE, *supra* note 239, at 328.

243. "Radical feminism explains women's inequality as the product of domination of women by men—inequality is presented as political and sexual in nature." HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 42 (2000).

244. *See generally* KATHLEEN BARRY, FEMALE SEXUAL SLAVERY (1979); KATHLEEN BARRY, THE PROSTITUTION OF SEXUALITY (1995); ANDREA DWORKIN, INTERCOURSE (1987); ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1979); Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13 (1993).

245. HERTZKE, *supra* note 239, at 326.

> scure that both use money to compel sexual use, that the whole point of sex trafficking is to deliver women and children into prostitution, and that not crossing a jurisdictional line does not make the unequal equal or the forced free.[246]

Radical feminists became so committed to the antitrafficking cause that they (rather than religious conservatives) assumed primary carriage of the abolitionist agenda once the struggle against trafficking moved from the purely domestic to the international plane.[247] Whatever appeal the antitrafficking rubric had enjoyed at the domestic level, the case for international engagement with trafficking was even stronger since the obstacles thrown up against the struggle to secure meaningful equality for women at the global level have, of course, been nothing short of massive.[248] More specifically, and despite the clear influence of radical feminists within such bodies as the UN Working Group on Contemporary Forms of Slavery,[249] it was clear that negotiation of the Trafficking Protocol presented an extraordinary opportunity to advance the antiprostitution agenda. Thanks to the lobbying efforts of the religious right, the U.S. administration was on board,[250] with President Bush personally committed to the antitrafficking effort.[251] Because it was clear that real political muscle was poised to combat prostitution under the banner of ending human trafficking, radical feminists could see that it was politically astute to endorse the cause.[252] The most influential nongovernmental force that participated in drafting the Trafficking Protocol was the American-led Coalition Against Trafficking in Women, supported by

246. MacKinnon, *supra* note 5, at 998.

247. The primary radical feminist group was the Coalition Against Traffic in Women (CATW), which declared that "CATW, in conjunction with the International Human Rights Network, has led and won a decisive battle to effect a strong and inclusive definition of trafficking that is at the core of a new UN Protocol." Coalition Against Traffic in Women, Victory in Vienna (2000), *at* http://www.utopia.pcn.net/puta3-i.html.

248. *See* CHARLESWORTH & CHINKIN, *supra* note 243, at 14–18.

249. *See supra* notes 115–16, 136–37 and accompanying text.

250. For the U.S. administration, taking action against trafficking not only afforded an opportunity to engage an issue of importance to the government's conservative Christian base, but also simultaneously provided a newfound human rights justification for pouring funds into the security apparatus. Markon, *supra* note 240, at A1.

251. President Bush's allies have suggested that his "passion about fighting trafficking is motivated in part by his Christian faith and his outrage at the crime." *Id.*

252. To be clear, not all internationally oriented feminists supported the antitrafficking effort, much less the abolitionist agenda of radical feminists. *See generally* Jo Doezema, *Who Gets to Choose? Coercion, Consent, and the UN Trafficking Protocol*, *in* GENDER, TRAFFICKING, AND SLAVERY 20 (Rachel Masika ed., 2002).

the European Women's Lobby and the International Abolitionist Federation.[253]

The fact that nongovernmental leadership was in the hands of religious and feminist antiprostitution advocates is critical to understanding the failure of leading NGOs to condemn the human rights pitfalls of the draft Trafficking and Smuggling Protocols. These two groups approach the issue of human rights protection from an anti-instrumentalist perspective,[254] borrowing from Kant the commitment that "man and generally every rational being exists as an end and must never be treated as a means alone."[255] Because the essence of the anti-instrumentalist human rights struggle is to avoid human objectification, other concerns—migratory freedom in general and even the protection of refugees—either simply do not arise, or are at best deemed to be of a lesser order of magnitude. And because radical feminists and religious conservatives define their anti-instrumentalism in particularly narrow terms—directed specifically at ending prostitution—not even all enslaved persons fall within the bounds of their core concern.

While the simplicity of the anti-instrumentalist optic has appeal, it (and most assuredly the antiprostitution subset of the same) is problematic when mapped onto the existing universe of international human rights law. The anti-instrumentalist concern to ensure that human beings are treated as ends rather than simply as means to ends is, of course, very much a part of the international rights project; but it by no means explains the whole of the international human rights regime.[256] As such, when advocacy proceeds from an anti-instrumentalist or other constrained conceptualization of human rights, it is unlikely to be framed in a way that strives for balance or accommodation with the whole corpus of extant binding rights. Partiality of this kind can—and did, in the case of the antitrafficking effort—result in support for an initiative that has unintended negative human rights externalities (in this case, for slaves, migrants, and refugees). Because the goals of the most influential nongovernmental actors were framed narrowly,[257] the critical human rights

253. Melissa Ditmore & Marjan Wijers, *The Negotiations on the UN Protocol on Trafficking in Persons*, 4 NEMESIS 79, 81 (2003).

254. *See* Christopher McCrudden, *Human Dignity* 23 (Univ. of Oxford Faculty of Law, Working Paper No. 10/2006, 2006), *available at* http://www.ssrn.com/abstract=899687.

255. Pepita Haezrahi, *The Concept of Man as End-in-Himself*, *in* FOUNDATIONS OF THE METAPHYSICS OF MORALS: IMMANUEL KANT 292, 292 (Robert Paul Wolff ed., 1969) (author's translation of Immanuel Kant's *Grundlegung zur Metaphysik der Sitten*).

256. *See, e.g.*, ICCPR, *supra* note 103, art. 8 (prohibition of slavery); *id.* art. 9 (security of person); *id.* art. 16 (recognition as a person).

257. "NGOs seek to maximize their influence and augment their power-bases. The notion that

concerns canvassed in Parts II-IV above—including the privileging of a small subset of modern slaves, the rights-diminishing effects of a clampdown on human smuggling, and the impossibility of ensuring access to protection by refugees faced with the generic control measures mandated by the Protocols—simply did not arise. Even more tragically, those pluralist nongovernmental voices around the international negotiating table[258] were so preoccupied by internecine conflict with the abolitionists over the legitimacy of sex work[259] that not even they raised the alarm about the serious negative human rights externalities that were built into the Protocols.[260]

VI. THE NEED TO AVOID PARTIALITY

What lessons can be learned from the unhappy experience of the Trafficking Protocol and its companion Smuggling Protocol? In this Part, I canvass the importance of guarding against even inadvertent negative human rights externalities and suggest a practical test rooted in international law's fundamental duty of nondiscrimination, which I believe should bind states and guide the work of human rights advocates.[261] In Part VII, I turn to the question of context and suggest that the risk of negative human rights externalities is particularly great when human rights norms are advanced outside the *domaine reservé* of international human rights law itself. While human rights "mainstreaming" may be valuable or at least inevitable in contemporary context, its inherent pitfalls require a heightened level of awareness and a preparedness among nongovernmental advocates to withdraw support when unforeseen negative human rights consequences are identified.

Turning first to the substantive question, how should states (and advocates) insure against partiality of the kind that characterizes the anti-

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human rights activism shuns power and influence is counter-intuitive as well as counter-productive." UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS 63–64 (2d ed. 2006).

258. The key group opposed to the rigid abolitionist position of the CATW was the Human Rights Caucus, including among its members the International Human Rights Law Group, the Global Alliance Against Traffic in Women, and the Prostitutes' Education Network. Halley et al., *supra* note 235, at 350–51.

259. Ditmore & Wijers, *supra* note 253, at 85.

260. Halley et al., *supra* note 235, at 389–90.

261. There is an emerging body of scholarship that questions the traditional assumption that INGOs should be free to spend their resources and orient their advocacy in whatever ways they see fit (at least insofar as the fiduciary duty to their funders is honored). *See, e.g.*, Joseph H. Carens, *The Problem of Doing Good in a World That Isn't: Reflections on the Ethical Challenges Facing INGOs*, *in* ETHICS IN ACTION, *supra* note 234, at 257, 260; Thomas Pogge, *Moral Priorities for International Human Rights NGOs*, *in* ETHICS IN ACTION, *supra* note 234, at 218, 222–28.

trafficking regime? In my view, the critical starting point is to appraise any initiative from the optic of compliance with the overarching legal duty of nondiscrimination, which requires that all persons be equally protected with regard to all agreed rights.[262] Even initiatives allegedly oriented to the promotion of human rights should themselves be critically vetted for compliance with the seminal commitment of the international human rights law system, namely to avoid any unjustified privileging in the allocation of protective resources.

How would an appraisal of the antitrafficking initiative have fared under such an analysis? To start, suspicion should have been aroused by the very idea of a proposal to do something good for only part of a group of similarly situated persons. Why this subgroup and not some other? The decision to resuscitate the anachronistic trafficking label—a notion long ago subsumed within the broader notion of slavery and slavery-like practices—signaled an intention to differentiate.[263] That is, by choosing to identify the problem as "trafficking," proponents of the Trafficking Protocol clearly indicated that their goal was to address only a part of the slavery problem.

Such partiality would not necessarily mean that the Trafficking Protocol was discriminatory and hence unworthy of support. Respect for the duty of nondiscrimination would, however, have required that the Trafficking Protocol's allocation of international resources to only "trafficked persons" rather than to all slaves be demonstrably reasonable and objective.[264] Most obviously, there is no discrimination where selectivity is predicated on the need to respond to empirically demonstrated greater relative need or vulnerability.[265] For example, the traditional concern of international human rights law to single out racial minorities,

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262. The most comprehensive and compelling legal standard is Article 26 of the ICCPR, the scope of which is *not* restricted to nondiscrimination in relation to rights codified in that treaty. ICCPR, *supra* note 103, art. 26. I have analyzed the interpretation of this provision in HATHAWAY, *supra* note 205, at 123–47.

263. The use of alternative language to signal an intention to move away from accepted norms has been commented upon also in the context of the UN's Millennium Development Goals. Philip Alston, *Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals*, 27 HUM. RTS. Q. 755, 760 (2005).

264. *See, e.g.*, Broeks v. Netherlands, Commc'n No. 172/1984, ¶ 13, Human Rights Comm., U.N. Doc. CCPR/C/29/D/172/1984 (Apr. 9, 1987) ("The right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination . . . ."). *See generally* HATHAWAY, *supra* note 205, at 128–45.

265. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 45–46 (2d ed. 2005).

women, and children for enhanced protections beyond those generically available is readily understood to be reasonable given the divergent circumstances of such traditionally disfranchised groups.[266]

A somewhat more subtle example of reasonable differentiation is provided by Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[267] Despite the otherwise broad-ranging nature of the treaty's beneficiary class—all persons facing severe risks to their physical security are covered, as the treaty's very title makes clear—it is nonetheless the case that Article 3 requires states to refrain from deporting only persons at risk of "torture."[268] Those who face the prospect of the more pervasive phenomena of "cruel, inhuman or degrading treatment or punishment" are not legally enabled to resist deportation. Yet despite the clearly partial nature of the protection secured, there is little doubt that the particularly grave nature of the harm implied by the notion of "torture"—including its intentionality, its severity, its explicitly invidious purpose, and its sanctioning by those in power—provides a reasonable basis to set the minority of persons at risk of torture apart from the broader class.[269] This is not to say that persons at risk of cruel, inhuman, or degrading treatment or punishment are unworthy of protection against return. The point is rather that there is a principled logic to the privileging of torture victims vis-à-vis the other members of the Convention's beneficiary class.

Is there a case to be made that there are reasonable grounds for privileging trafficked persons over other enslaved persons? As noted above, the definition of a "trafficked person" is more constrained than the "slavery" definition in three key ways.[270] First, the Trafficking Protocol

266. While it is often assumed that women and children are the main intended beneficiaries of the Trafficking Protocol, see, for example, OFFICE OF THE UNDER SEC'Y FOR GLOBAL AFFAIRS, U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT, JUNE 2007, at 8 (2007) [hereinafter TRAFFICKING IN PERSONS REPORT], *available at* http://www.state.gov/documents/organization/82902.pdf, showing that neither the personal scope of the Trafficking Protocol nor its definition of a trafficked person is so limited. And in any event, because the overwhelming majority of enslaved women and children would be outside the scope of the Trafficking Protocol because of its transnationality requirement, any alleged commitment to advance the protection of women and children through the treaty is conceived in an arbitrarily narrowed way.

267. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85.

268. "No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." *Id.* art. 3.

269. *See generally* ECOSOC, Comm. against Torture, *General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22*, U.N. Doc. A/53/44, Annex IX (Sept. 16, 1998).

270. *See supra* text accompanying notes 48–53.

is not concerned with tackling "exploitation" as such, or even the slavery subset thereof. It is instead directed exclusively to the transactional dimension, prohibiting forms of dealing that lead to exploitation rather than exploitation itself. Second, it does not prohibit even all forms of dealing that lead to exploitation (including slavery), but only those carried out by "inappropriate means"—in particular, the use of force or coercion. And third, it does not even require states to take action against all forms of inappropriate dealing that lead to exploitation, but only to end the subset of inappropriate transactions that are transnational in nature.

The second facet of the definitional narrowing is the part that can most easily pass muster as a reasonable form of differentiation. The "inappropriate means" requirement of the trafficking definition parallels the Torture Convention's Article 3: as bad as any form of dealing that leads to exploitation may be, dealing predicated on fraud or coercion is surely objectively and reasonably worse. While perhaps less than ideal, the delimitation of the beneficiary class by reference to the fundamental wrongfulness of the means employed to the end of exploitation—leaving most other exploited persons to benefit from only the less aggressive prohibition of the slave trade—is at least based on a principled concern to do something more about something arguably worse.

On the other hand, the justifiability of the first and third constraints inherent in the trafficking definition is less clear. Taking the first, it is doubtful that the Trafficking Protocol's exclusion of persons already exploited (e.g., those who are already enslaved) from its ambit in favor of an exclusive focus on those at risk of dealing that *facilitates or leads to* (future) exploitation is reasonable.[271] It is true that there is clear precedent in the historical focus of international law on ending the slave trade as a subject distinct from slavery itself.[272] There is also the obvious appeal to pragmatism, suggesting that it is reasonable to require only that which is most doable in practice and that it is much easier to stop future slavery than it is to abolish all present slavery. But on closer examination, these arguments prove to be shallow.

The narrow slave trade prohibitions were products of the early abolitionist movement and reflected international law's tentative—and pre-human rights law—effort to infiltrate what had been a classic subject of purely domestic concern. All contemporary efforts to address slavery have, in contrast, focused not simply on the wrongfulness of the transac-

271. *See supra* note 49 and accompanying text.
272. *See supra* text accompanying notes 37, 44.

tional dimension, but equally on the inherent wrongfulness of the condition of enslavement itself.[273] Nor is it clear that stopping exploitative transactions is really any easier than stopping extant exploitation. Even assuming that pragmatism is an appropriate factor in assessing reasonable differentiation—surely a proposition open to contestation—the cost of eliminating present day slavery is well within the means of the international community. Slavery today is, as previously shown,[274] inextricably bound up with the persistence of extreme poverty—a phenomenon that could be eradicated by the reallocation of less than one percent of developed states' annual income.[275] And, in any event, is there really a credible argument to be made that it is possible somehow to eliminate the market in exploitation (including slavery) while simultaneously allowing the practice of slavery to persist? There is, in particular, clear evidence that the predominant form of contemporary slavery, debt bondage, is replicated from generation to generation as debts are increased and passed along.[276] If no effort is made to end present slavery, there will then be little practical likelihood of stopping the transactions said to be the focus of the antitrafficking project's concern.

But whatever view is taken of the reasonableness of attacking exploitative dealing without simultaneously tackling exploitation, it is the Trafficking Protocol's third conceptual retreat from the slavery prohibition that is most clearly not justifiable. The Trafficking Protocol does not seek to end even all inappropriate dealings that lead to exploitation, but only those dealings that are transnational in nature. The "transnational" requirement *is* substantively important: unless the commission or effects of the inappropriate dealing implicates more than one state, the Trafficking Protocol turns a blind eye to it.[277] Since the overwhelming majority of slavery occurs within the borders of one country without the involvement of parties outside that country, this exclusion is devastating for most enslaved persons.

Might the exclusion of the internally enslaved nonetheless be "reasonable"? Is there a principled basis for privileging the position of only the tiny minority of slaves whose predicament is somehow deemed

273. *See supra* notes 40–43, 50–51 and accompanying text.

274. *See supra* notes 188–190 and accompanying text.

275. JEFFREY D. SACHS, THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME 290–91 (2005); *see also* THOMAS W. POGGE, WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS 2 (2002).

276. *See supra* note 82 and accompanying text.

277. *See supra* notes 52–53 and accompanying text.

transnational relative to those who suffer at least as much inside their own countries?

One argument that should be quickly dismissed relates to the appropriate role of international law, specifically that the transnationality requirement reflects appropriate deference to the primacy of domestic law. Framed in less apologetic terms, the definition of the Trafficking Protocol's ambit by reference to purely transnational transactions is meant to identify a practical void where domestic law is, on its own, incapable of providing an answer to a real problem of mutual concern. Domestic law can deal with purely internal transactions, some may suggest, but it cannot reach all transactions that straddle borders. It could be said that it is thus reasonable that international law as codified in the Trafficking Protocol limit itself to requiring the prohibition of such transactions as cannot meaningfully be prohibited internally.

The history of human rights protection in the UN era, however, suggests the illogic of such a limited role for international law. While international law generally may well exist primarily to enable states to cooperate and coordinate in the interest of advancing a relatively narrowly conceived sense of self-interest, even the conservative analysis of Jack Goldsmith and Eric Posner acknowledges that there is something unique about international human rights law. Specifically, "[s]tates have always been willing to pay, but not willing to pay much, to relieve visible suffering in other countries . . . ."[278] International human rights law is a "code of conduct"[279] largely predicated on "altruistic interests,"[280] which justifies efforts by states to speak out against conduct that would otherwise fall within the protected realm of domestic jurisdiction. As among the issues readily understood to form part of the agreed code of conduct, the prohibition of slavery and related practices ranks particularly highly.[281] It is therefore difficult to conceive any truly principled basis for the decision of the drafters of the Trafficking Protocol to ignore—indeed, explicitly to exclude—scrutiny of, and action to combat, fundamentally exploitative dealings (including slavery) that take place within national borders.

An alternative justification for excluding the internally enslaved from the ambit of the Trafficking Protocol might be based on analogy to the legal dichotomy between the rights afforded refugees and so-called in-

278. JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 121 (2005).

279. *Id.* at 128.

280. *Id.* at 134.

281. *See supra* note 34 and accompanying text.

ternally displaced persons (IDPs). Despite calls for the assimilation of these populations on the basis of their shared circumstance of coerced movement to avoid severe risk, governments have not granted IDPs access to the bundle of rights guaranteed to refugees under international law.[282] In limiting the scope of the Trafficking Protocol to exploitative dealings of a transnational character, the drafters of that instrument might therefore be thought to have acted in much the same way as their predecessors who, in preparing the Refugee Convention, limited refugee status to those at-risk persons who are outside their own country.[283] But this analogy is flawed.

Most fundamentally, the logic of a conceptual and operational disaggregation of refugees from IDPs follows from the protective goals of the refugee regime. The fundamental purpose of the Refugee Convention is to identify a class of persons to whom the international community has unconditional access and to whom it can, in consequence, actually guarantee a remedy. Closely related, the actual rights that refugees are guaranteed under the Refugee Convention are expressly designed to enable refugees to overcome the disadvantages of involuntary *alienage*, a concern obviously of no relevance to IDPs who, by definition, remain inside their own country. The exclusion of IDPs from the refugee regime is, in other words, clearly reasonable in view of the real differences between the two populations relative to the goals of the protection regime.[284] In contrast, the Trafficking Protocol purports to guarantee nothing by way of a remedy to trafficked persons, but is content to focus its energies instead on mandatory criminalization and related steps to stop the harm of exploitative dealing. Systemic objectives of this kind—in contrast to the protection-oriented and rights-based objectives of the Refugee Convention—require neither unconditional access to the victims nor any other sort of transborder element to make the regime operational. To the contrary, as domestic antitrafficking efforts pursued by the United States, which ties its foreign aid allocations to progress on the antitrafficking agenda,[285] affirm, the potential for international

282. *See* James C. Hathaway, *Forced Migration Studies: Could We Agree Just to 'Date'?*, 20 J. REFUGEE STUD. 349, 360 (2007).

283. "[T]he term 'refugee' shall apply to any person who . . . owing to well-founded fear of being persecuted . . . *is outside the country of his nationality* . . . ." Refugee Convention, *supra* note 27, art. 1(A)(2) (emphasis added).

284. Hathaway, *supra* note 282, at 357–59.

285. "A country that fails to make significant efforts to bring itself into compliance with the minimum standards for the elimination of trafficking in persons, as outlined in the TVPA [Trafficking Victims Protection Act], receives a 'Tier 3' assessment in this Report. Such an assessment could trigger the withholding by the United States of non-humanitarian, non-trade-related foreign

action to combat trafficking inside national borders is clear.[286]

In sum, analysis of engagement with the international antitrafficking project by reference to nondiscrimination law yields one set of reasons why the project did not deserve support. First, the Trafficking Protocol's exclusion of persons already exploited from its ambit in favor of an exclusive focus on those at risk of dealing that *facilitates or leads to* (future) exploitation is not reasonable given both the general acknowledgment of the inherent wrongfulness of the condition of enslavement itself and the lack of a credible argument that it is somehow possible to eliminate the market in exploitation (including slavery) while simultaneously allowing the practice of slavery to persist. Second, the Trafficking Protocol's refusal to engage with exploitative dealings wholly within the boundaries of a single state is also unreasonable given both the well-accepted propriety of international law engaging with even purely internalized rights-abusive behavior and the absence of any principled operational objective that would make international engagement either unworkable or otherwise inappropriate.

From the perspective of human rights advocates, the failure to recognize and abstain from support for the antitrafficking initiative facilitated the ability of governments to market the project as compelled by human rights concerns despite the fact that new international resources were allocated to fighting only a tiny part of the slavery problem.[287] A second and related consequence is that having blessed the Trafficking Protocol as a positive initiative to combat modern slavery, the human rights community is now hard pressed to challenge the increasingly common assertion of governments that their antitrafficking efforts stand them in good stead in relation to their commitments to end slavery in general. Third, and most generally, the imperative to respect human rights was degraded by reliance on human rights language to advance what is in substance a discriminatory initiative.

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assistance. . . . Consistent with the TVPA, governments subject to sanctions would also face U.S. opposition to assistance (except for humanitarian, trade-related, and certain development-related assistance) from international financial institutions such as the International Monetary Fund and the World Bank." TRAFFICKING IN PERSONS REPORT, *supra* note 266, at 5–6, 15.

286. A vivid account of positive U.S. influence on Israel's antitrafficking efforts is offered in Halley et al., *supra* note 235, at 363–65.

287. There is an interesting parallel here to proposals more aggressively to promote respect for a selective set of human rights within the World Trade Organization. *See* Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT'L L. 815, 836 (2002).

VII. "MAINSTREAMING" HEIGHTENED THE RISK

Had the antitrafficking project been advanced within the usual UN human rights structures, it is likely that the harm done by the advent of the Trafficking Protocol would have been limited to these three concerns. While clearly regrettable, these losses would probably not be thought tragic. Yes, new enforcement resources were poorly allocated, nongovernmental advocates hemmed themselves in and could not therefore credibly contest official assertions of antislavery activism, and the human rights cause more generally was sullied by support for a discriminatory initiative. But with the possible exception of the third, admittedly diffuse, form of harm, the errors were more in the nature of forgivable blunders than major mistakes.

The human rights damage occasioned by support for the Trafficking Protocol was, however, much greater because it was conceived and adopted within the UN's transnational crime infrastructure, as part of a project designed primarily to tackle issues other than the advancement of human rights. Following on the heels of the growing trend to embed human rights provisions within trade agreements, the Trafficking Protocol effectively moved the (highly partial) fight against slavery out of the core of the United Nations' human rights institutions and into the international law mainstream.

There is, of course, an undeniable attraction to "doing human rights" in the mainstream of international law.[288] Most fundamentally, there is a sense that states are likely to take human rights more seriously when pursuit of their interests in core areas (such as trade and security) is made contingent on respect for human rights. At least in principle, there is real potential for enhanced scrutiny of human rights when oversight of state compliance is entrusted to bodies that states feel compelled to take seriously—in the case of the human rights provisions of the Trafficking Protocol, to the Conference of the States Parties to the UN Convention against Transnational Organized Crime.[289] But there are also real risks associated with such mainstreaming efforts.[290] Whenever human rights are negotiated under the umbrella of a non-rights-dedicated arrangement—for example, as part of a treaty focused on trade or crime—there is a much higher risk of negative human rights external-

288. *See* Thomas Cottier, *Trade and Human Rights: A Relationship to Discover*, 5 J. INT'L ECON. L. 111, 111 (2002).

289. *See supra* text accompanying note 77.

290. *See* Jonathan Bach & David Stark, *Link, Search, Interact: The Co-Evolution of NGOs and Interactive Technology*, THEORY, CULTURE & SOC'Y, June 2004, at 101, 106–07.

ities because human rights protection is by definition merely part of what is under negotiation.

Moreover, while the risk of negative human rights externalities arises in relation to trade treaties,[291] my view is that human rights mainstreaming in that context is likely less problematic than in the organized crime setting. This is because the interests of more developed states—or at least of powerful interests within such states[292]—are often served by the inclusion of at least some genuine human rights obligations in trade treaties.[293] In particular, requiring respect for core worker rights as part of a trade package has positive spin-offs for (developed) rights regarding states anxious to avoid the dumping of products effectively subsidized by the mistreatment of workers abroad.[294] Human rights provisions in trade arrangements are in this sense usually instrumentalist adjuncts to trade goals.[295] They are thus comparable to rules on environmental protection also sometimes included in trade deals in order to ensure that countries cannot artificially reduce the price of their goods by sloppy environmental stewardship.[296] The inclusion of human rights provisions in trade treaties may therefore be of real value because there is likely to be a consonance of interest between meaningful enforcement of human rights and the promotion of the self-interest of powerful states. While there are issues of nondiscrimination that I believe should be considered before supporting human rights mainstreaming in even this context (e.g., is the commitment to enforcing worker rights truly general or focused solely on export-oriented industries?), it is understandable that human rights advocates will be inclined to support mainstreaming projects as part of trade accords.

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291. One important risk is that human rights language will be used to disguise other agendas. *See, e.g.*, Alston, *supra* note 287, at 816; Robert Howse, *Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann*, 13 EUR. J. INT'L L. 651, 654 (2002).

292. Human rights concepts may be particularly valuable to the protection of foreign investment and intellectual property interests. Robert Wai, *Countering, Branding, Dealing: Using Economic and Social Rights in and around the International Trade Regime*, 14 EUR. J. INT'L L. 35, 42 (2003).

293. This is not to understate the ways in which market based regimes can threaten human rights. *See* Howse, *supra* note 291, at 651.

294. *See* Wai, *supra* note 292, at 60.

295. *Id.* at 51. But the simple fact of "unclean motives"—what Wai refers to as "contingent protectionism"—may take nothing away from the human rights value of what is secured. *Id.* at 60.

296. Charles R. Fletcher, *Greening World Trade: Reconciling GATT and Multilateral Environmental Agreements within the Existing World Trade Regime*, 5 J. TRANSNAT'L L. & POL'Y 341, 366 (1996).

The transnational organized crime context, however, is quite different. Whereas improving worker rights or environmental protection abroad normally has a clear linkage to trade-based concerns and hence will usually serve the economic interests of developed countries,[297] it is far from clear that ending the slave trade or other forms of exploitative dealing is more than a peripheral interest of the governments that drafted the Trafficking Protocol and its companion Smuggling Protocol. In contrast to the general salience of workers' rights in the trade context (where protecting most workers is generally in the interest of powerful states), ending most slave trading offers nothing to the anti-organized crime project—hence its (explicable) exclusion from the treaty's ambit.

But the unrecognized human rights dangers were actually much graver. As analyzed above, there is good reason to believe that the primary purpose of the Protocols was not (or at least did not remain) to advance the fight against transnational organized crime, but was rather to conscript less developed countries to join the developed world's migration control project.[298] The decision of governments to negotiate a package of anti-organized crime agreements gave a core of powerful states a venue controlled by them within which to push the migration control project already lobbied for in a variety of less influential fora, including both the duty to criminalize all forms of human smuggling and to intensify generalized border controls.[299] Once the (not illogical) commitment to fight trafficking under the organized crime umbrella had been secured, it was a short step then to push for a companion Smuggling Protocol, and then for the revision of the Trafficking Protocol to include antimigration provisions drawn from the Smuggling Protocol, despite the fact that there is no necessary correlation between (nonabusive, consensual) smuggling and organized crime.[300]

To sum up this second concern, the Trafficking and Smuggling Protocols should have been recognized to be dangerous projects for the advancement of human rights. These treaties did not offer the prospect of allowing at least some good to be accomplished with minimal downside risk to human rights. To the contrary, the drafts tabled evinced a clear commitment to doing real human rights damage to migratory freedom and refugee protection even as they took up no more than a sliver of the antislavery cause.

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297. A clear exception would exist where a given state's corporations operate abroad in situations where they may avail themselves of slavery in order to lower production costs.

298. *See* discussion *supra* Part III.

299. *See supra* text accompanying note 144.

300. *See supra* note 194 and accompanying text.

My point is not that advocates should refuse to "do human rights" outside of the inner sanctum of international human rights law as traditionally conceived, or even that they should necessarily restrict their mainstreamed efforts to contexts such as trade where a consonance of interests is likely to exist. Mainstreaming offers real opportunities to engage new constituencies and marshal additional resources;[301] but involvement in mainstream initiatives should be predicated on clear analysis of upsides and risks (rather than based on facile assumptions of human rights value).[302] Framed simply, it does not make sense to assume that human rights mainstreaming is a good thing. As such, it is not wise to seize every opportunity that seems to afford the possibility of raising the profile of human rights. To the contrary, at least where careful analysis suggests that the enforcement of human rights is not closely related to the dominant concerns of powerful states participating in the proposed regime, the risk of negative human rights externalities may well outweigh the value of the human rights return.

CONCLUSION

It is doubtful that the advent of the Trafficking Protocol deserves anything approaching the nearly unanimous support it has received from those committed to the promotion of international human rights. To the contrary, the Trafficking Protocol has enabled governments to hive off a tiny part of the global problem of slavery as the focus of international attention and resources, leaving the overwhelming majority of slaves to depend on largely irrelevant and ineffective supervisory structures. Governments invoked the Trafficking Protocol to recast the duty to end slavery as best pursued through antitrafficking efforts, allowing states to claim the moral high ground in the fight against slavery despite the irrelevance of the new commitments made to most slaves.

But the antitrafficking effort is objectionable not just because it promotes the highly selective privileging of a small subset of the slavery problem. At least as important, the fight against human trafficking has also resulted in significant human rights damage by providing a context for developed states to pursue a border control agenda under the guise of promoting human rights. The Trafficking Protocol and its companion Smuggling Protocol have set a transnational duty to end all forms of unauthorized border crossing and conscripted states in regions of origin to

301. *See* Alston, *supra* note 263, at 766.
302. *Id.* at 788, 802, 807.

abet the developed world's efforts to stymie international migration, in particular by routinized implementation of generic deterrence schemes. Broad brush deterrent schemes of this kind tend perversely to promote human smuggling—and even trafficking—since they make unassisted migration that much more difficult, even as they do nothing to open up channels for authorized migration needed to meet evident demand for foreign labor. Perhaps most gravely, the Protocols' insistence on the intensification of generalized constraints on transnational movement promotes new barriers to the departure and safe passage of refugees, rendering illusory in practice the formal commitment of governments to ensure the exemption of refugees from rules prohibiting unauthorized entry or presence.

There are indicia that at least some powerful governments intended all of these results and viewed the antitrafficking effort as an extraordinary opportunity to both refocus their antislavery commitments in a more politically and economically comfortable fashion and aggressively to pursue border control (including refugee control) strategies under a human rights banner. Other, less influential, states often had "dirty laundry" to hide on the antislavery front, making the narrowing of international attention to slavery politically palatable to them as well. And despite initial efforts by many poorer countries to resist the antimigration aspects of the treaties, they were ultimately persuaded to accept most of the developed world's terms in exchange for promises in principle to ramp up funding not only for development assistance, but also for enhanced border control and other security initiatives in partner states.

The more vexing question is why most nonstate human rights actors bought into the antitrafficking agenda. In part, the narrowly framed anti-instrumentalist conception of human rights embraced by key players—an approach very much more limited than the pluralist understanding of human rights codified in international law—explains the lack of attention to the full range of human rights concerns. There is, in particular, no evidence that leading nongovernmental actors engaged in anything approaching an analysis of options predicated on nondiscrimination principles. This raises the very important challenge of defining the ethical responsibility of advocacy groups possessed of de facto power within the international system but formally accountable to promote only a part of the human rights agenda.

In the case of the antitrafficking effort, however, the risks associated with nongovernmental narrowness of vision were significantly in-

creased by the criminal law context within which the Trafficking Protocol was negotiated. Because there was no necessary consonance of interests between powerful states and the advancement of a strong antislavery or migratory freedom agenda, nongovernmental advocates needed to be much more attentive to the potential for negative human rights externalities than was the case. The criminal law context of the drafting process was, simply put, not an inherently safe space for human rights advocacy. While real human rights gains are of course possible (and at times clearly more effective) when realized outside the usual human rights lawmaking venues, there is an acute need for advocates to redouble their attentiveness in such settings, since nonspecialist fora exist to promote ends other than, even if not necessarily inconsistent with, the advancement of human rights. There can, in short, be no assumption that the worst downside of negotiating in the international law mainstream is a lack of forward momentum. To the contrary, as vividly illustrated by analysis of the Trafficking and Smuggling Protocols, there is the clear risk of overall net human rights regression.