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Economic Hardship as Coercion under the Protocol on International Trafficking in Persons by Organized Crime Elements

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ARTICLE

ECONOMIC HARDSHIP AS COERCION UNDER THE PROTOCOL ON INTERNATIONAL TRAFFICKING IN PERSONS BY ORGANIZED CRIME ELEMENTS

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80,000 women and children from Myanmar, Cambodia, Laos, and China have been sold into Thailand's sex industry since 1990.

5,000-7,000 Nepali girls, some as young as nine, are trafficked into the red light districts of India each year. 200,000 Nepali girls, mostly under fourteen, have been trafficked into India in the last decade.

Afghani women are sold into prostitution in Pakistan for 600 rupees per kilogram.

Albanian women are regularly trafficked into Italy, more than 10,000 in the last five years.

45,000-50,000 women and children from Asia, Latin America, and Eastern Europe are trafficked for sexual exploitation into the United States. The going rate for a woman or child sold to the U.S. sex trade is between $12,000 and $18,000.

10,000 children between six and fourteen are enslaved in brothels in Sri Lanka.

5,000 children from ten to sixteen are sold into sexual slavery in Cambodia every year.

300,000 women have been trafficked into the Western European sex trade in the last ten years.

20,000 women are in brothels in the Czech Republic, most are from the former U.S.S.R.

10,000 Albanian women have been trafficked into Italy in the last five years and forced into prostitution.

250 women from Romania, Moldova, and the Ukraine were discovered in Bosnia in the last two years having been trafficked and forced into prostitution.

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Five women from Moldova were discovered in a Phnom Penh, Cambodia brothel in 2000.

Lithuania, Latvia, and Estonia have become sex centers for Western Europeans. The women trafficked there are from the former Soviet Union.

1,000 women trafficked from the former U.S.S.R. into Israel became prostitutes in exchange for legal documentation.

3,000 Nigerian women have been forced into prostitution in Italy.

2,000,000 women and children are held in sexual servitude. Eighty percent of them are under the age of twenty-four and roughly fifty percent of them were internationally trafficked from one country to another.

Fifteen percent of the sexually exploited population, or 30,000 women and children, die every year equivalent over a ten-year span to the number killed by atomic bombs in Hiroshima and Nagasaki.[1]

INTRODUCTION

The United Nations ("U.N.") in December 2000 adopted an International Convention Against Transnational Organized Crime[2] with a Protocol on international trafficking by organized crime elements.[3] In part, the adoption of the Protocol was a response to the inadequacy, and disgracefully inadequate ratification, of the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others[4] ("1949 Convention"). Only twenty-five percent of the world's States had ratified the 1949 Convention. In addition, there are no regional treaties addressing the problem of sexual trafficking.

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1. INT'L HUM. RTS. L. INST., DEPAUL UNIV. COLLEGE OF LAW, INVESTIGATING INTERNATIONAL TRAFFICKING IN WOMEN AND CHILDREN FOR COMMERCIAL SEXUAL EXPLOITATION 1 (2001).

2. United Nations Convention Against Transnational Organized Crime, U.N. Doc. A/55/383, Dec. 12-15, 2000, *available at* http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf [hereinafter Convention Against Organized Crime].

3. 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/55/383, Dec. 12-15, 2000, *available at* http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf [hereinafter Protocol on Trafficking].

4. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, *opened for signature* Mar. 21, 1950, 96 U.N.T.S. 272 (entered into force July 25, 1951) [hereinafter 1949 Convention].

Formulation of a universal treaty on sexual trafficking was complicated by a normative debate over whether and when a woman could "consent" to prostitution and trafficking. Although there are certainly some situations in which the outcome of that debate is significant, these situations are hardly representative of, or relevant to, the vast majority of the victims of sexual trafficking, and totally irrelevant to the plight of the millions of children who have been sexually exploited. At the very least the harsh reality of prostitution and sexual trafficking mandates a presumption that prostitution generally, and sexual trafficking in particular, are not truly consensual practices on the part of the women involved. This presumption is manifest in the new Protocol. The focus of this Article is two-fold: (1) to distinguish the situations in which a woman's "choice" is compelled by economic hardship from the limited situations in which a woman chooses prostitution and trafficking in a fully informed and unfettered, and thus, consensual decision; and (2) to demonstrate that decisions compelled by economic hardship as a matter of international law fall within the definition of coercion for sexual offenses generally and sexual trafficking in particular.

I. *EXISTING INTERNATIONAL LEGAL PROTECTIONS AGAINST TRAFFICKING*

The international prohibition of trafficking is set out in the 1949 Convention.[5] This Convention stems from the amalgamation of preceding treaties drafted to address the phenomenon of "white slavery."[6] The 1949 Convention binds States to three general obligations: an anti-trafficking principle, specific enforcement measures, and the use of social welfare to "rehabilitate" survivors.[7] Both acts of procurement and exploitation of prostitution, such as pimping and brothel management, are prohibited and rendered punishable by the 1949 Convention. Additionally, States parties to the Convention agree to undertake de-

5. *See* Protocol amending the International Agreement for the Suppression of the White Slave Traffic, May 18 1904; International Convention for the Suppression of the White Slave Traffic, May 4 1910, May 4, 1949, 2 U.S.T. 1997.

6. *See* Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT'L L. & POL. 445 (1991) (profiling these historical treatises).

7. *See* Susan Feanne Toepfer & Bryan Stuart Wells, *The Worldwide Market for Sex: A Review of International and Regional Legal Prohibitions Regarding the Trafficking in Women*, 2 MICH. J. GENDER & L. 83, 93 (1994).

fined measures of international coordination to combat trafficking as well as to take social and economic action for the prevention of prostitution and rehabilitation of victims.[8]

The Convention on the Elimination of All Forms of Discrimination Against Women[9] ("CEDAW") binds States to actively combating discrimination against women in all aspects of social and economic life. The trafficking provision, Article 6, mandates that "States parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."[10] The Optional Protocol to CEDAW now provides a mechanism through which victims of trafficking and others can communicate a complaint against a State party and seek enforcement of States parties' obligations under the Convention.[11] The CEDAW committee has addressed trafficking under the rubric of violence against women calling for the elimination of such violence through the Declaration on the Elimination of Violence Against Women and General Recommendations on Violence Against Women.[12] Additionally, the Beijing Declaration and Platform for Action calls for the elimination of trafficking and advocates assistance for the victims.[13]

The League of Nations Slavery Convention of 1926 and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1957) indirectly address aspects of trafficking by prohibiting slavery,[14] debt bondage[15] and forced marriages.[16] The Interna-

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8. *See id.* (giving a more in-depth analysis of the 1949 Convention).

9. Convention on the Elimination of All Forms of Discrimination Against Women, Mar. 1, 1980, 1249 U.N.T.S. 14 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

10. *Id.* art. 6.

11. *See* Optional Protocol to the Convention on the Elimination of Discrimination against Women, *opened for signature* Dec. 10, 1999, arts. 2, 5, 11.

12. *See id.* (defining violence against woman as, in part, "[p]hysical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution.").

13. *See id.* (citing Strategic Objective D.3. to eliminate trafficking in women and assist victims of violence due to prostitution and trafficking).

14. *See* League of Nations Slavery Convention, 60 L.N.T.S. 253 [hereinafter 1926 Convention], *reprinted in* 21 AM. J. INT'L L. 171 (Supp. 1927) (defining slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."); Charles Jacobs & Mohamed Athie, *Bought and Sold*, N.Y. TIMES, July 13, 1994, at A19. Traditional forms of slavery are practiced today in places such as the Sudan and Mauritania.

tional Labor Organizations ("ILO") Forced Labor Convention[17] and the 1957 Abolition of Forced Labor Convention[18] are integral for legally defining the broad phenomenon of trafficking because they provide the international legal definition of forced labor and mandate the end to forced labor practices.[19]

In respect to the trafficking of girls and boys under eighteen, States parties to the Convention on the Rights of the Child ("CRC") are bound to take "all appropriate national, bilateral and multilateral measures to prevent the abduction of, sale of or traffic in children for any purpose or in any form."[20] In addition, other substantive provisions of the CRC further address States parties' obligations regarding the sexual and economic exploitation of children.[21]

Finally, there are international and regional human rights instruments, which both directly and indirectly address trafficking. The International Covenant on Civil and Political Rights[22] ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights[23] ("ICESCR") are relevant to framing traf-

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15. *See* 1926 Convention, *supra* note 14. The Convention defines debt-bondage as:

> The status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

Id. In the trafficking context, debt-bondage is used to hold victims in slavery-like conditions. Victims are told that they must pay off the debt of their transportation by working. Usually, victims are not told how much they owe, how much their work is bringing into the exploitative establishment, nor how long they will need to work to pay off the debt.

16. *See id.*

17. International Labour Organization, Forced Labour Convention 1930, No. 29, *available at* http://ilolex.ilo.ch:1567/english/convdispl.htm.

18. Abolition of Forced Labour Convention 1957, No. 105, *available at* http://ilolex.ilo.ch:1567/english/convdispl.htm.

19. *See* Stephanie Farrior, *The International Law on Trafficking in Women and Children for Prostitution: Making it Live Up to its Potential*, 10 HARV. HUM. RTS. J. 213, 219-24 (1997).

20. *See* Convention on the Rights of the Child, art. 12, G.A. Res. 44/25, Annex, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/44/49 (1989), *revised by* U.N. Doc. A/RES/44/25/Corr.1 (1990), *reprinted in* 28 I.L.M. 1457 (1989).

21. *See* Farrior, *supra* note 19, at 233 (discussing the Convention on the Rights of the Child ("CRC") and these provisions).

22. The International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

23. The International Covenant on Economic, Social and Cultural Rights, Dec. 16,

ficking as a human rights issue, as they detail and ensure the collection of core human rights.[24] Victims of trafficking experience multiple violations of individual rights guaranteed them through these documents. For example, rights violated through the trafficking process include, among others, the right to life, and the right not to be tortured or subjected to cruel and degrading treatment;[25] the right to liberty and security of person and to be free from physical violence;[26] the right to freedom of choice of residence and movement;[27] the right to consensual marriage, and equal rights in divorce and marriage;[28] the right to work and just, fair, and safe work conditions;[29] and the right to education, health, and social services.[30]

Regional treatises, specifically the European Convention for the Protection of Human Rights and Fundamental Freedoms[31] ("European Convention") and the American Convention on Human Rights[32] ("American Convention") prohibit trafficking either implicitly or explicitly.[33] The American Convention explicitly prohibits "traffic in women" in Article 6(1) and the European Convention prohibits slavery, servitude, and forced labor in Article 4. The practice of trafficking clearly fits within this prohibition.[34]

Although there are international legal norms that prohibit different aspects of trafficking and bind States to the elimination of trafficking, there is a pervasive failure of international instruments to be precise about both the meaning of trafficking and specific actions that must be taken to combat it. For instance,

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1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

24. *See* Farrior, *supra* note 19, at 225-33.

25. ICCPR, *supra* note 22, art. 9.

26. *Id.* arts. 6, 9.

27. *Id.* art. 12(1).

28. *Id.* art. 23(2)-(4); ICESCR, *supra* note 23, art. 10(1).

29. ICESCR, *supra* note 23, arts. 6-7.

30. *Id.* art. 12.

31. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter European Convention].

32. American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (1970) (entered into force July 18, 1978).

33. *See* Toepfer & Wells, *supra* note 7, at 113-28 (providing a broader discussion of these documents' applicability to trafficking).

34. *See id.*

until such time as a complaint regarding trafficking is made under the Optional Protocol to CEDAW, CEDAW's provision on trafficking has vague language and undefined terms making the legal contours and implications of this provision unclear.[35] As a result, the U.N. by way of its Special Rapporteur on Violence Against Women has recognized the lack of a coherent international definition on trafficking.[36] Advocates for trafficked women agree; for example, the Global Alliance Against Traffic in Women ("GAATW") asserts that "a fundamental problem in responding to the issue of trafficking in women is the lack of a precise and coherent definition."[37]

The 1949 Convention is currently the only international legal instrument that provides a definition of trafficking. The Convention sets out to punish a person who, in relevant part, "procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person" and a person who "exploits the prostitution of another person, even with the consent of that person."[38] The critical aspects of this definition are: 1) its connection of physical recruitment with commercial exploitation as aspects of trafficking;[39] 2) its limitation on trafficking as only for the purpose of prostitution; 3) its failure to define both "prostitution" and particularly "exploitation;"[40] and 4) the element of "with or without consent."

A. *From "With or Without Consent" to "Coercion and Deception"*

The 1949 Convention states that persons cannot consent to being trafficked. The European Parliament and advocates for trafficking victims have argued that instead of focusing on the issue of consent, the emphasis of any rights-based definition should be on whether a person was trafficked by deceptive or

35. *See* Farrior, *supra* note 19, at 227; Toepfer & Wells *supra* note 7, at 100 (analyzing CEDAW's trafficking provision more deeply).

36. *See* Report of the Special Rapporteur on Violence Against Women, U.N. Economic and Social Council, 53d Sess., Agenda Item 9(a), at 19 (1997).

37. *See* FOUND. AGAINST TRAFFICKING IN WOMEN AND THE GLOBAL ALLIANCE AGAINST TRAFFICKING IN WOMEN, SUMMARY INTERNATIONAL REPORT ON TRAFFICKING IN WOMEN, FORCED LABOR AND SLAVERY-LIKE PRACTICES IN MARRIAGE, DOMESTIC LABOR AND PROSTITUTION [hereinafter GAATW SUMMARY REPORT], *available at* http://www.inet.co.th/org/gaatw/sum-irp.htm.

38. *See* 1949 Convention, *supra* note 4, art. 1.

39. *See* GAATW SUMMARY REPORT, *supra* note 37.

40. *See* Toepfer & Wells, *supra* note 7, at 99.

coercive means.[41] Although both the 1949 Convention and the current U.N. contemporary definition do not include the element of coercion and/or deception, adding such an element to an international trafficking prohibition would clarify issues left ambiguous by the 1949 Convention and more clearly shape the legal analysis.

A shift away from the issue of consent refocuses the legal inquiry from the victim and onto the actions of the trafficker/exploiter, reflecting a recognition that deception or coercion nullifies any meaningful, fully informed consent. This would make clear that a person, in the absence of coercion and/or deception, has a right to choose to migrate and to choose their form of labor. The increased attention on deception and/or coercion serves to clearly distinguish trafficking from other forms of cross-border movement of persons. Voluntary migration within and across borders with the assistance of profiting third parties, both legal and illegal, is standard practice in the economically motivated migration flows of today. By virtue of the deception and/or coercion aspect of the definition, trafficking is rendered a separate offense from alien smuggling and other such practices.

To shed light on what constitutes coercion and deception, GAATW provides an illustrative list of forms that "coercion" can take in their Draft Minimum Standards for the Treatment of Victims of Trafficking in Persons, Forced Labor and Slavery-like Practices.[42] This list includes:

- violence or threat of violence, including deprivation of freedom of movement and of personal choice, abuse of authority or dominant position: which "can range from confiscation of personal documents to the placing of another in a dependent position, abusing one's dominant social position, abusing one's parental authority or abusing the vulnerable position of persons without legal status,"
- deception: with regard to the working conditions or the

41. *See* European Parliament Resolution of January 18, 1996 (calling for a new convention on trafficking which should consider coercion and deception); *see also* GAATW SUMMARY REPORT, *supra* note 37.

42. *See* GAATW, Draft Standard Minimum Rules for the Treatment of Victims of Trafficking in Persons, Forced Labor and Slavery-like Practices (1997) [hereinafter GAATW Draft Standard Minimum Rules], *available at* http://www.inet.co.th/org/gaatw/SMR.htm.

nature of work to be done.[43]

Notably, GAATW does not include economic circumstances as a form of coercion in its guidelines or in the Human Rights Standards. Some activists have advocated that extremely harsh economic circumstances can constitute coercion.[44] It has been highly controversial, however, to categorize dire economic circumstances that motivate women and female children to migrate and seek clandestine labor, particularly in the case of prostitution, as coercion for the purposes of defining trafficking.

B. *Defining Forced Labor*

Forced labor is a component of the trafficking phenomenon and its legal definition in turn impacts upon trafficking definitions. The ILO Convention defines forced labor as "all work or service that is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[45] The inquiry into whether a person is subject to forced labor hinges on assessing the willingness or consent of the victim to the coercive labor situation. Many advocates have argued that the meaning of voluntary in a definition of trafficking for forced labor would require that any consent to labor must be full and informed as to the coercive nature of the situation for it to be valid.[46] Thus, in an expansive prohibition against trafficking, a person would be a victim of trafficking for forced labor if that person was not fully informed as to the coercive conditions and exploitative nature of their resulting work situation and therefore was not able to offer their labor voluntarily.

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43. *See id.*

44. *See* Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 HARV. HUM. RTS. J. 65, 93 (1998) (stating that the issue of economic deprivation amounting to coercion is particularly relevant for women who return to their country and region of origin after being trafficked and take part in recruiting new girls to take their place. This cyclical aspect of trafficking is rooted in the harsh social and economic realities that women face when they are released from their original coercive situation, particularly from sex work. Some advocates believe these and similar circumstances can amount to economic coercion into the trade in human beings).

45. *See* Convention Concerning Forced or Compulsory Labor (1930), *modified* 38 U.N.T.S. 3 (1949), *available at* http://ilolex.ilo.ch:1567/english/convdispl.htm.

46. *See* Alison Steward, Report from the Roundtable on the Meaning of "Trafficking in Persons": A Human Rights Perspective (1998) (unpublished draft, on file with author).

The definition of forced labor reflects that a person, if fully informed, may opt to work in exploitative circumstances because other options, such as returning to their country of origin in the case of migrants or being unemployed in a country which provides little or no governmental subsistence, are less socially and economically attractive. In the Human Rights Standards, GAATW agrees with this implication and explicitly recognizes the right of adults to "chose abusive or exploitative working conditions as preferable to other available options."[47] In the area of trafficking for sexual exploitation, many advocates have argued that a person can consent to prostitution as a form of labor if the person is not "forced" through coercive or deceptive means.[48]

Even meaningful consent to exploitative working conditions, however, does not relieve exploiters from prosecutions for trafficking when other forms of coercion and deception, such as restrictions on freedom of movement or appropriating the legal identity of the person, are used to maintain control over the person.[49] Any use of coercion or deception in the migration, working, or living conditions of a person should render facilitators and exploiters vulnerable to trafficking prosecutions.

C. *A New International Agreement*

To address this growing transnational crime, the United States introduced a resolution on trafficking in women and children at the April 1998 session of the U.N. Commission for Crime Prevention and Criminal Justice. The proposed resolution called for the development of a protocol on trafficking in women and children under the proposed U.N. Convention Against Transnational Organized Crime[50] ("Convention"). The resolution was subsequently adopted, and the United States and Argentina introduced a draft protocol at the first negotiation session of the Convention in January 1999. The resulting Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[51] ("Protocol") promises to be the

47. *See* GAATW, Foundation Against Trafficking in Women, International Human Rights Law Group, Human Rights Standards for the Treatment of Trafficked Persons, Jan. 1999.

48. *See id.*

49. *See id.*

50. Convention Against Organized Crime, *supra* note 2.

51. Protocol on Trafficking, *supra* note 3.

first comprehensive international anti-trafficking agreement with tough law enforcement and victim protections.

Five factors contributed to the development of the Protocol. First, nongovernmental organizations ("NGOs") lobbied their governments on behalf of trafficking victims who had suffered egregious human rights violations and exposed the practices of traffickers. Traffickers frequently exercise complete control over their victims by seizing travel and identification documents, withholding wages, restricting or banning movement, prohibiting communication with family and friends, taking advantage of language barriers, selling victims to another owner to keep them disoriented, threatening family members, inflicting beatings and rapes, forcing abortions, starving the victims, forcing drug use, imposing twenty-hour workdays, and using contraction of HIV/AIDS and sexually transmitted diseases against the victims.

Second, it is widely projected that the sheer number of trafficking victims will continue to increase without intensified controls. Currently, the International Organization for Migration estimates that 150 million people migrate annually in search of economic opportunity or to escape gender discrimination, armed conflict, political instability, and poverty. According to a U.S. State Department study, approximately two million of these migrants are trafficked each year because traffickers take advantage of migration, crisis, and economic and social disadvantages to procure their victims.

Third, trafficking is a transnational organized crime that requires a global response. Trafficking is the third most profitable illegal industry, behind drugs and arms, estimated at U.S.$7 billion by the International Organization for Migration. Fourth, few nations have enacted laws to combat this growing transnational crime. Finally, as noted above, the existing body of international trafficking law is inadequate as a tool to combat trafficking. Given the increase in trafficking and inadequate laws to combat it, the global community was ready for the creation of a new agreement governing trafficking in persons.[52]

On November 15, 2000, the U.N. General Assembly adopted the Convention Against Organized Crime,[53] which con-

52. *See generally* Kelly E. Hyland, *The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, 8 HUM. RTS. BRIEF 30 (2001).

53. Convention Against Organized Crime, *supra* note 2.

tains a Protocol on migrant smuggling[54] and a protocol on trafficking in persons.[55] From December 12-15, 2000, the Convention was opened for signature in Palermo, Italy. The trafficking Protocol is the first international instrument to define trafficking, and it does so comprehensively. Under the Protocol, Article 3 defines trafficking as:

> "the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs."[56]

The success of achieving consensus on a definition cannot be understated. The Protocol reflects the first international consensus on the definition of trafficking, which is the first step toward a concerted international effort to combat trafficking.

Debates over the significance of consent also occur with respect to trafficking, or the recruitment or transportation of women for forced labor/slavery-like practices, although the trafficking debates tend to be less sharply divided[57] and differ in other ways from those over prostitution. The prostitution debates threaten to remove the distinction between prostitution and forced prostitution in contrast to the trafficking debates which focus more on trafficking as distinct from the broader category of illegal immigration. Despite this difference in focus a comparison between the prostitution and trafficking debates is use-

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54. Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime, U.N. Doc. A/55/383, Dec. 12-15, 2000, *available at* http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_smug_eng.pdf.

55. Protocol on Trafficking, *supra* note 3.

56. *Id.* art. 3.

57. Whereas those who view prostitution as inherently exploitative can invoke the imagery of prostitution as a physical act of violence against womens' bodies, those who view trafficking as inherently exploitative lack recourse to such visceral representations. Instead, any inherently exploitative nature of the trafficking lies in the ill intentions of the traffickers ultimately to place a woman in the hands of someone who will subject her to forced labor/slavery-like practices. *See generally* Chuang, *supra* note 44.

ful because these two debates share similar questions regarding the significance of consent.

As with its definition of forced labor/slavery-like practices, the GAATW definition of trafficking requires coercion in the recruitment or transportation of the woman.[58] In contrast, the U.N. General Assembly ("UNGA") definition of trafficking does not require coercion as a necessary element of the violation:

> [Trafficking is defined as the] illicit and clandestine movement of persons across national or international borders, largely from developing countries and some countries with economies in transition, with the end goal of forcing women and girl children into sexually or economically oppressive and exploitative situations for the profit of recruiters, traffickers and crime syndicates, as well as other illegal activities related to trafficking, such as forced domestic labor, false marriages, clandestine employment and false adoption.[59]

By not requiring coercion, the UNGA definition does not appear to admit the possibility that a woman could consent to the trafficking. Assuming that the act of recruitment is inherently exploitative, the UNGA's definition reflects the view that women should not be able to engage in consensual trafficking.[60] To allow a woman to consent to the trafficking would make it extremely difficult to distinguish trafficking from illegal migration, an outcome which the UNGA views as unacceptable because a person's voluntary migration across frontiers without authorization is substantively different from trafficking of a person

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58. Coercion includes "violence or threat of violence, abuse of authority or dominant position, debt bondage, deception or other forms of coercion." *See infra* text accompanying note 67.

59. Report of the Special Rapporteur on Violence Against Women, *supra* note 36, at 19.

60. In its report to the 50th session of the General Assembly, the Secretary-General of the United Nations commented that:

> The question must be asked . . . whether trafficking is the same as illegal migration. It would seem that the two are related, but different. Migration across frontiers without documentation does not have to be coerced or exploitative. At the same time, persons can be trafficked with their consent. A distinction could be made in terms of the purpose for which borders are crossed and whether movement occurs through the instrumentality of another person. Under this distinction, trafficking of women and girls would be defined in terms of "the end goal of forcing women and girl children into sexually or economically oppressive and exploitative situations" and the fact that it is done "for the profit of recruiters, traffickers and crime syndicates."

See NOTRAF, Background Study, 2.4.

with that person's consent. Unlike illegal migration, trafficking occurs at the control of another person, and has the purpose of forcing the person into a forced living or working situation.

The UNGA distinction between illegal migration and trafficking has the distinct advantage of focusing attention on the violation of the woman's rights, rather than on the illegality of her act.[61] Characterization of a woman who consents to be trafficked as simply engaging in illegal migration is treating the woman as a collaborator of the trafficker and overlooks the trafficker's underlying exploitative purposes. Acknowledging the distinction between trafficking and illegal migration has the significant practical advantage of encouraging States to provide trafficked women protections that States might otherwise deny to illegal immigrants. Otherwise States might conclude that a woman who consented to the trafficking, as any other illegal migrant, does not deserve special protections for having knowingly violated State sovereignty by illegal border-crossing.[62] In this way a State could deny protections to a woman who consented to be trafficked, even if she was later subjected to a forced or slavery-like living or working situation.[63]

Insisting on the distinction between trafficking and illegal immigration in theory negates a woman's autonomy to migrate to another country or region. The UNGA view may be characterized as paternalistically denying the possibility that a woman might consciously and freely choose to use a trafficker for the purposes of her own migration.[64] In both the prostitution and the trafficking contexts, the issue of whether to require coercion as a material element at least in theory raises difficult normative choices. Eliminating the coercion requirement might render more women eligible to receive protection and remedy under international laws against trafficking and forced labor/slavery-like practices. Eliminating the coercion requirement also risks

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61. Similarly, in the prostitution context, a focus on the abusive conditions under which a forced prostitute works could draw attention away from the illegality of her activity in countries that prohibit prostitution.

62. *See infra* notes 135-138 and accompanying text.

63. Indeed, a woman who also initially intended to engage in illegal but voluntary prostitution in the destination country, but ended up in a forced prostitution situation, could be denied protections by the State on grounds that, in addition to intending to immigrate illegally, she intended to engage in another crime once within the destination country.

64. Chuang, *supra* note 44, at 89-90.

treating women as victims, incapable of making choices about their bodies and their means of migration.

Whether to require a coercion element in the definitions of prostitution does not determine whether coercion should be required for trafficking. A coercion requirement for prostitution could be maintained and yet coercion could be irrelevant to the question of whether one has been victimized by trafficking. Assuming coercion to be relevant to the determination of whether a woman has been victimized by trafficking and/or forced labor/slavery-like practices, the question of how coercion is to be assessed must still be determined.

Fundamentally, the determination of whether the circumstances of a woman's decision to engage in prostitution, domestic labor, or marriage amount to the requisite level of coercion turns on two questions: (1) procedurally, at what point in a sequence of events is coercion or a lack of consent dispositive of a woman's victimization; and (2) more substantively, what constitutes coercion or lack of consent. The complexity of these inquiries has perhaps best been illustrated with reference to what has been referred to by one commentator as the "Re-entry Scenario."[65] The Re-entry Scenario describes the situation of a woman who, having escaped or having been released from debt bondage as a forced prostitute, "voluntarily" decides to re-enter the trafficking industry as a prostitute, believing that alternative forms of employment would be unavailable to her due to the social stigma against former prostitutes. The fact that the woman was initially trafficked and forced into prostitution gives rise to the question of when in the trafficking scenario the lack of a woman's consent becomes dispositive of her status as victim. Furthermore, the possibility that the woman's decision to reenter prostitution in this scenario may have been driven by economic hardship gives rise to the substantive question of what constitutes coercion.

This scenario illustrates how the question of whether or not economic hardship constitutes a form of coercion can drastically affect the outcome of the analysis. If economic hardship does not constitute coercion, the woman in the Re-entry Scenario would not be considered a victim of forced prostitution. If it does constitute coercion the question then becomes whether or

65. Chuang, *supra* note 44, at 90.

not the "choice" to re-enter prostitution was genuinely voluntary in the context of extreme hardship.[66] For instance, had job training programs been available to these women as part of an effort to facilitate their reintegration into mainstream society, perhaps these women would have had a viable opportunity to leave prostitution and pursue some other means of survival.

The current proposed definitions of trafficking and forced labor/slavery-like practices differ in the extent to which economic hardship serves as an indicator of coercion. For instance, the GAATW definitions do not explicitly identify economic coercion in their list of coercive factors: "violence or threat of violence, abuse of authority or dominant position, debt bondage, deception or other forms of coercion." Admittedly, "other forms of coercion" could be construed to include economic coercion. However, given that GAATW probably was familiar with the debates over whether or not prostitution is inherently exploitative and with the claims that economic conditions are a source of that exploitation, the absence of "economic coercion" in the list is most likely to be the result of a conscious exclusion. In elaborating on the meaning of "violence or threat of violence," "deception," "abuse of authority," and "debt-bondage and practices similar to debt-bondage" in its definitions of trafficking and forced labor/slavery-like practices, NOTRAF, a network of European organizations, which includes member organizations of the GAATW, makes no mention of economic coercion.[67] In con-

66. Case histories compiled by Human Rights Watch/Asia indicate that there are a number of women who feel that after having been forced to work in a brothel, their only alternative is to continue prostituting themselves.

67. In its Basic Principles for a Code of Conduct, NOTRAF explains that [f]orce can take various forms, including, but not limited to:

- violence or threat of violence, including deprivation of freedom (e.g., of movement, or personal choice);
- deception, inter alia with regard to working conditions and/or the nature of the work to be done;
- abuse of authority, ranging from confiscation of personal documents to bringing or keeping a person in a position of dependence by abusing one's dominant social position or abusing the vulnerable position of persons without legal status;
- debt-bondage and practices similar to debt-bondage, i.e., pledging the personal services or labor of a person as security for a debt, if the value of those services or labor as reasonably assessed is not applied towards the liquidation of the debt, or the length and nature of those services or labor are not limited and defined.

NOTRAF, *supra* note 60, at 2.

trast, the UNGA at least acknowledges economic need to be a contributing factor of trafficking. By describing trafficking as a phenomenon that originates largely in developing countries and economies in transition, and by including "economically oppressive" situations in its description of the end goals of trafficking, the UNGA acknowledges the role of economics in both the recruitment process and the exploitative living and working conditions.

While including economic hardship as a form of coercion certainly would increase the number of trafficked women eligible for protection under international law, it is undeniably difficult to identify clearly the level of economic hardship sufficient to constitute coercion. If the baseline were economic equality between men and women, most women would be considered victims or potential victims, given their generally lower economic status relative to men. Unlike physical or emotional coercion, defining economic coercion poses the necessity of a comprehensive understanding of the socio-economic factors that can influence women's decision-making.

II. *DECISIONS OF THE INTERNATIONAL CRIMINAL TRIBUNALS IN YUGOSLAVIA AND RWANDA*

The statute of the International Criminal Tribunal for the former Yugoslavia[68] ("ICTY") contains no explicit references to sexual violence despite the systematic use of rape, sexual enslavement, forced impregnation, and forced births during the war in Bosnia. Prosecutions for sexual violence were due in large part to the commitment of the first prosecutor, Richard Goldstone, and women's advocacy groups to see that the Tribunal addressed these offenses in its development of international criminal law. By contrast, one year later, the statute of the International Criminal Tribunal for Rwanda[69] ("ICTR") contained detailed provi-

68. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute].

69. Statute of International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States, between January 1, 1994 and December 31, 1994, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

sions concerning sexual violence in its definitions of war crimes, crimes against humanity, and genocide. The first trial held before the ICTY, the *Tadic* case,[70] resulted in several decisions of significance to sexual violence against women, although the most critical allegations leading to his conviction involved forced sexual violation of males by other males.

The *Jelisic* and *Cesic "Brcko"* indictment is unique because it focuses exclusively on sexual assaults, with particular emphasis on the humiliation and degradation inflicted by the assaults. The *Gagovic and others, "Foca"* indictment charges Gagovic with crimes against humanity, grave breaches, and war crimes for raping a woman to punish her for reporting other rapes to him, and for intimidating her by "saying that he would find her in five different countries if she told anyone."[71]

Akayesu[72] before the ICTR was the first international tribunal decision finding an individual guilty of genocide. Leading to a decision of expansive significance for gender-related violence, the indictment defined sexual violence to include "sexual abuse, such as forced nudity."[73] Testimony addressed the forced nudity of women and young girls "in the close or immediate presence" of Akayesu for the purpose of their humiliation. The judgment included as crimes of sexual violence forced nudity, as well as forced marriage, forced abortion, forced miscarriage, rapes specifically intended to humiliate, sexual slavery, forced prostitution, and sexual enslavement. The expansive inclusion of these offenses supports the view that sexual violence can be predicated on mental abuse and coercion, independent of physical force.

Several of the pending indictments have far-reaching consequences for further elaboration of the concept of coercion short of physical force. As noted above, the "*Brcko*" indictment[74] is a landmark indictment because it involves exclusively sexual as-

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70. Prosecutor v. Tadic, Case no. IT-94-1-T, Opinion and Judgment (May 7, 1997). Decisions of the ICTY are available at http://www.un.org/icty/index.html.

71. *See generally* Kelly D. Askin, *Developments in International Law*, 93 AM. J. INT'L L. 97 (1999).

72. Prosecutor v. Akayesu, Case no. ICTR-96-4-I, Judgment (June 17, 1997). Decisions of the ICTR are available at http://www.ictr.org.

73. Prosecutor v. Akayesu, Case no. ICTR-96-4-I, *amended* Indictment, ¶ 10A (June 17, 1997).

74. Prosecutor v. Jelisic and Cesic, "Brcko," Case no. IT-95-10 (Jul. 21, 1995), *amended* Case no. IT-95-10-PT (Mar. 3, 1998).

saults. In the "*Foca*" indictment,[75] as mentioned earlier, one of the accused threatened his rape victim that " . . . he would find her in five different countries if she told anyone"[76] and for that he is charged with crimes against humanity (torture, rape), grave breaches (torture) and war crimes (torture). More significantly with respect to coercion, in counts related to the operation of a brothel, the accused was charged with crimes against humanity (enslavement and rape), grave breaches (inhuman treatment), and war crimes (outrages upon personal dignity). These counts are exceptional not only because enslavement was charged for crimes of sexual violence, but also because the detainees were neither guarded nor locked in, but could not escape because the territory was surrounded by Serbs. Several counts of the indictment are based on detention of women in various dwellings by only one individual.

The sexual terrorism in the former Yugoslavia and Rwanda has inevitably led to further exploitation and prostitution of many of the victims. Within these cultures the sexual violence will continue, only in a different form brutal poverty, social exclusion, and, unavoidably in many cases, prostitution.

III. *THE WOMEN'S INTERNATIONAL WAR CRIMES TRIBUNAL 2000 FOR THE TRIAL OF JAPANESE MILITARY SLAVERY*

The Tokyo Tribunal 2000 grew out of the demand of Asian women for apology and compensation for their exploitation as "comfort women" by the Japanese military during World War II. A minimum of 200,000 women and girls were subjected to rape, sexual slavery, trafficking, torture, and other forms of sexual violence. The Charter of the Tribunal[77] established jurisdiction over crimes against humanity, including, but not limited to, sexual slavery, rape, and other forms of sexual violence, enslavement, torture, deportation, persecution, murder, and extermination. In addition to determinations of individual responsibility,

75. Prosecutor v. Gavovic and others, "Foca," Case no. IT-96-23, (June 23, 1996) (primary sexual violence indictment), *amended* Case no. IT-96-23 (July 13, 1998) (bringing solo charges against one of the accused, Kunarac).

76. *Id.*

77. Charter of the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery (Incorporating Modifications Agreed Upon During The Hague Meeting, Oct. 26-27, 2000), *available at* http://www.iccwomen.org/tokyo/charter.htm.

the Charter authorized the Tribunal to determine State responsibility for "international wrongs" including concealment or failure to find and disclose the truth concerning these crimes; failure to prosecute and provide reparations; failure to take measures to protect the integrity, well being, and dignity of the human person; discrimination; and failure to take the necessary measures to prevent recurrence.

In its preliminary factual findings, the Tribunal found that "comfort stations," other sexual slavery facilities, and a complex trafficking network were established to compel women to provide sexual services. This "coercion" often included recruitment by deceptive promises. The Tribunal concluded that rape and sexual slavery committed on a widespread, systematic, or large-scale basis constitute crimes against humanity. According to the Tribunal, "enslavement" includes "forced or deceptive transfer" of a human being as one's property.

IV. *PERSECUTION COMPELLING FLIGHT FOR PURPOSES OF REFUGEE STATUS UNDER INTERNATIONAL LAW*

In the landmark case of *In re Kasinga*,[78] Fauziya Kasinga appealed an immigration judge's decision of August 25, 1995, denying her political asylum, which she had claimed on the grounds that she would be forced to undergo female circumcision in her own country. The Board of Immigration Appeals ("Board") reversed, granted asylum, and ordered her admitted to the United States as an asylee. The Board held: (1) that the practice of female genital mutilation ("FGM")[79] can be the basis for a claim of persecution; (2) that young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to FGM as practiced by that tribe, and who oppose that practice, are recognized as members of a particular "social group" within the definition of the term "refugee" under section 101(a)(42)(A) of the Immigration and Nationality

78. *In re* Fauziya Kasinga, 20 I & N Dec. 357, 361 (BIA 1996), 1996 WL 379826, 35 I.L.M. 1145 (1996).

79. This practice has also been termed "female circumcision," "traditional female genital surgery" ("FGS"), and "Irua." The nomenclature alone is a controversial subject. *See* Hope Lewis, *Between Irua and Female Genital Mutilation: Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1, 2-3 (1995). In *In re Kasinga*, the court uses the term "FGM." For purposes of consistency, this Article will use the same terminology.

Act (8 U.S.C. § 1101 (a)(42)(A)); and (3) that Kasinga had established that a reasonable person in her circumstances would fear countrywide persecution in Togo on account of her membership in this recognized social group, justifying an award of political asylum.

In re Kasinga was brought before the Board for a hearing *en banc* in an unusual posture. In its first hearing *en banc*, the general counsel of the Immigration and Naturalization Service ("INS") argued for a broader formulation of political asylum based on FGM than did counsel for the applicant. Counsel for applicant argued her client's position within "traditional principles of asylum jurisprudence,"[80] narrowly tailoring the grounds for asylum to the specific facts of the case. In contrast, the general counsel proposed a framework of analysis for all asylum petitions premised on the practice of FGM. The result is a narrowly written majority decision that seems deliberately minimalist to de-emphasize its significance, with two concurring opinions joined by three Board members and one dissent without opinion. Given the INS's acknowledgment that FGM could be grounds for asylum, the majority claimed it need only address whether this particular applicant was entitled to asylum on the basis of the record.[81]

Kasinga, a nineteen year-old native of Togo, is a member of the Tchamba-Kunsuntu Tribe of northern Togo. Young women of that tribe normally undergo FGM "of an extreme nature causing permanent damage" at age fifteen.[82] Kasinga's influential father protected her from the practice until his death. On his death, however, her father's sister became the family authority figure under tribal custom and her mother was driven from the home. The aunt arranged a polygamous marriage to a man, and with him she planned to force Kasinga to submit to the procedure before consummation of the marriage. After fleeing to Ghana and Germany, Kasinga sought asylum in the United States where she had other relatives. Her aunt had reported her to the Togolese police, who were looking for her.[83]

The Board evaluates asylum cases on their merits only if it

80. *In re Kasinga*, 20 I & N Dec. at 361.
81. *Id.* at 369.
82. *Id.*
83. *Id.* at 358-59.

first finds that the facts asserted by an asylum applicant are true by a preponderance of the evidence. Thus, the Board's comprehensive review of the initial asylum hearing began with an independent inquiry into the credibility of Kasinga and her factual claims. Although the immigration judge had found Kasinga irrational, unpersuasive, and inconsistent, the Board, in a lengthy discussion, found Kasinga rational, plausible, and consistent.[84]

The Board next considered whether Kasinga's factual claims met the statutory criteria for asylum under 8 U.S.C. § 1101(a)(42)(A). The Board found that Kasinga feared "persecution," her fear was well-founded, her "persecution" was "on account of" her membership in a specific "social group," and she was unable to return to her country of nationality.

With little discussion, the Board found Kasinga's fear that she would be forcibly circumcised to be well-founded. Several documents, including a report by a sociologist who had studied the various cultures of Togo and a memorandum prepared by the Department of State on FGM in Togo, confirmed that the traditions and mores of Kasinga's tribe mandate the mutilation of women intending to marry. Mutilation rates in Kasinga's tribe range from eighty-five to ninety-eight percent.

The Board devoted somewhat more discussion to the first of the two central questions in this case: whether or not FGM as practiced by Kasinga's tribe constitutes "persecution." This question has sparked fierce debate among academics and activists. Universalists argue that fundamental human rights norms transcend culture; cultural relativists argue that defining FGM as

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84. *Id.* at 357. Kasinga's story was subsequently corroborated by her family in Togo. *See* Cindy Shiner, *Persecution by Circumcision: Woman Who Fled Togo Convinced U.S. Court but Not Town Elders*, WASH. POST, July 3, 1996, at A1. Her mother, who had given her almost all of her own U.S.$3,500 inheritance, eventually had to ask the family patriarch to forgive her and allow her to live in his home. Celia W. Dugger, *A Refugee's Body is Intact but her Family is Torn*, N.Y. TIMES, Sept. 11, 1996, at A1. The INS sought a remand in part based on credibility determinations. The majority had little difficulty dispensing with these issues because they were based on purported inconsistencies in the applicant's statements that did not affect the issues to be resolved. The opinion also emphasized that a remand was not necessary given the length of time her application had been pending. *In re Kasinga* 20 I & N Dec. at 364. The applicant spent eight months in INS detention in several facilities, including one closed by a riot. Questioning this long-term detention in light of the applicant's age, the novel issue presented by her case, and the lack of any known criminal record, the majority members suggested that "the Commissioner and the General Counsel might well wish to review the policy should future cases of this type arise." *Id.* at 35 I.L.M. 1145 n.1.

"persecution" challenges the cultural autonomy of the nations in central Africa and the Arabian Peninsula that practice FGM. The World Health Organization, among other organizations, takes a universalist position, proclaiming FGM a form of violence against women and girls that violates "universally recognized human rights standards."[85]

Kasinga's case extensively documented the effects of female genital mutilation, its international condemnation, and the poor human rights record of Togo, particularly with respect to women. In describing female genital mutilation and finding that the described level of harm constituted persecution, the majority relied heavily on the FGM Alert prepared by the INS Resource Information Center[86] and a memorandum of May 26, 1995, from Phyllis Coven in the Office of International Affairs of the INS on the 1995 gender guidelines.[87] The opinion also noted two State Department reports on human rights abuses in Togo.

The court, implicitly adopting the universalist approach, accepted the position shared by Kasinga and the INS that there is no legitimate reason for FGM. Documents in the Board proceeding accurately defined FGM as the partial or total removal of the prepuce, clitoris, and inner and outer labia. In Togo, the practice involves clitorectomy, usually performed with crude instruments and without anesthetic. A State Department research report conducted and compiled by the Demographic Research Unit in the record of the Board's proceeding indicated that most Togolese excisors interviewed perform mutilations with razor blades, claiming that surgical knives are expensive and too difficult to clean. Girls in Kasinga's tribe are typically mutilated at fifteen years of age; mutilation just prior to marriage would not be uncommon.[88]

The Board defined persecution as "the infliction of harm or suffering by a government, or person a government is unwilling or unable to control, to overcome a characteristic of the vic-

85. In addition to condemnation by international governmental organizations, the International Federation of Gynecology and Obstetrics, the Council on Scientific Affairs, the International Medical Association, and the American Medical Association have also condemned FGM. *In re Kasinga* 20 I & N Dec. at 366.

86. *Id.* at 361.

87. *Id.* at 362.

88. *Id.*

tim."[89] Intent to punish is not a necessary element of persecution. Kasinga clearly established both harm and suffering: if circumcised, she could expect severe pain, shock, hemorrhage, tetanus or sepsis, urine retention, ulceration of the genital region, and injury to adjacent tissue. These effects alone might prove fatal; assuming her survival of the procedure, long-term consequences could include cysts and abscesses, keloid scar formation, damage to the urethra resulting in urinary incontinence, dyspareunia, and a severely compromised, if not eradicated, capacity to experience sexual pleasure.

The Board never addressed the second element of persecution: whether the harm or suffering was inflicted by a government or persons a government is unable to control. Yet this statutory element lies at the core of feminist critique of asylum law, as most torture experienced by women—including FGM—is inflicted by private, rather than public, agents. Indeed, persecution within the meaning of 8 U.S.C. § 1101(a)(42)(A) has been difficult to establish in FGM cases because the perpetrators are often private citizens acting in a private capacity—usually, as here, relatives—without express State authority. Here, as is typical, the government does not perform the mutilations, and did not threaten to do so in Kasinga's case. At most, the Board had documents noting that no laws in Togo specifically outlaw FGM. The Board presumably accepted this as proof that the Togolese Government is unable or unwilling to control the agents of persecution.

The Board then turned to the second central question: whether FGM, once designated persecution, is persecution against a protected group. The Refugee Convention[90] and the Refugee Act of 1980[91] confer refugee status only upon those persons who can show persecution on the basis of their membership in one of five statutorily defined groups.[92] Gender—the group in which Kasinga would most logically claim membership—is not

89. *Id.* at 365 (citing *In re* Acosta, 19 I & N Dec. 211 (BIA 1985), *modified on other grounds, In re* Moghrabi, 19 I & N Dec. 439 (BIA 1987)).

90. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 UST 6223, 606 U.N.T.S. 267.

91. Immigration and Nationality Act, Title VII, ch. 2, 8 U.S.C. § 1521 (1999).

92. These categories are race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42)(A) (1994).

among them.[93] Like all women seeking asylum on the basis of forms of persecution that exclusively or predominantly affect women (e.g., rape, FGM), Kasinga had to establish that she was a member of a "social group" singled out for persecution by persons whom her government was unable or unwilling to control.

Kasinga relied upon, and the Board accepted, her designation as a member of a social group otherwise persecuted. The Board narrowly tailored the definition of social group to the facts of the case: young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice. The Board applied the test for social groups set forth in *Acosta*, which defines a "social group" under the 1980 Refugee Act as a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. Whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.[94]

Applying the *Acosta* criterion, the Board declared gender and tribal affiliation to be immutable characteristics. The court found intact genitalia to be a characteristic so fundamental to the individual identity of a young woman that she should not be required to change it. This categorization of "intact genitalia" as "fundamental to the individual identity of a young woman" sets an important precedent for immigration judges previously reluctant to acknowledge FGM as a form of persecution.[95] Having

93. Feminist critics of current asylum law note that while "political opinion" protects male-dominated activities (such as guerrilla activity, political agitation, and union activity) and thus persecution of men, no comparable category exists to protect against the kinds of oppression women generally experience. For example, in a 1987 case, the applicant had been raped by a military officer who threatened to expose her as a "subversive" if she resisted. To grant her asylum, the U.S. Court of Appeals for the Ninth Circuit characterized the Salvadoran woman as a person persecuted on the basis of "political opinion" by imputing to her a "political opinion" against the Salvadoran Government in power at the time. Lazo Majano v. INS, 813 F.2d 1432, 1435 (9th Cir. 1987).

94. In re Acosta, 19 I & N Dec. 211, 233 (BIA 1985), *modified on other grounds*, In re Moghrabi, 19 I & N Dec. 439 (BIA 1987).

95. For example, an immigration judge in Baltimore considering the asylum claim of a woman from Sierra Leone found, as did the court in *Kasinga*, that the applicant could not change her gender. The court concluded, however, that the applicant could

established FGM as a form of persecution, and Kasinga as a member of a "social group" worthy of refugee status, the Board had little difficulty in finding the necessary nexus: that Kasinga faces persecution "on account of" her membership in the class of women from her tribe who oppose FGM.

The analysis of the critical definition of social group is the least satisfactory aspect of the majority opinion. What degree of affiliation or homogeneity is necessary to a social group? Can the social group be defined primarily by the harm that constitutes the persecution, or is a separate element of linkage necessary? In this respect the concurring opinion of Lory D. Rosenberg is the most thoughtful and helpful to future advocacy of women's claims.

Citing various authorities for the proposition that the social group category is to be broadly construed as a "catchall" category beyond political opinion, race, religion or ethnicity, Rosenberg emphasizes that social group claims, unlike political opinion claims, are status based and do not necessarily require a showing that the specific individual's opinions or activities were the cause of the persecution. In the context of female genital mutilation, therefore, it is not necessary to demonstrate that the applicant voiced opposition to the practice. Acknowledging that the 1995 gender guidelines refer INS employees to international human rights instruments in assessing claims for asylum, Rosenberg finds support for consideration of gender-related asylum claims under the social group category based on Canadian jurisprudence, the guidance of the U.N. High Commissioner for Refugees,[96] and the U.S. and Canadian gender guidelines.[97]

In their concurring opinion, Board members Filppu and

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change her mind with regard to her opposition to the FGM practices. The judge made no effort to determine if her attitudes about FGM (and, thus, her attitudes about the physical integrity of her genitalia) were "so fundamental to the individual's identity or conscience that she ought not to be required to change." Memorandum of Decision and Order [name and case number redacted] (U.S. Immigration Ct., Baltimore, Apr. 28, 1995), *available at* http://www.uchastings.edu/cgrs/law/ij/40.pdf.

96. United Nations High Commissioner for Refugees, UNHCR, Division of International Protection, Memorandum: Female Genital Mutilation, U.N. Doc. SUS/HCR/001 (May 10, 1994) [hereinafter U.N. High Commissioner for Refugees].

97. 8 C.F.R. pts. 103, 204, 205, & 216 (2001); *see also* Lena H. Sun, *INS Expands Asylum Protection for Women*, WASH. POST, June 3, 1995, at A4; Judith Gaines, *INS Eases Asylum Guidelines for Women*, BOSTON GLOBE, May 27, 1995, at 13; Michael J. Sniffen, *Immigration Rules Focus on Sexual Violence*, PORTLAND OREGONIAN, May 27, 1995, at A12; CANADIAN IMMIGRATION AND REFUGEE BOARD, GUIDELINES ISSUED BY THE CHAIRPERSON

Heilman respond to the comprehensive arguments offered by the INS; the concurring opinion of Rosenberg elaborates on the terse majority opinion. Both concurring opinions illuminate the broader implications of this purportedly narrow, fact-specific decision. Filppu and Heilman emphasize that both parties agreed that female genital mutilation could amount to persecution, that there was an identifiable social group, and that the persecution was "on account of" the applicant's inclusion in that group.[98] The parties differed, however, on the need for a remand and, most significantly, on the basis for finding FGM to be grounds for asylum.

The Board's inclusion of "opposition to FGM" as a factor in defining Kasinga's social group suggests that the Board was not prepared to address the potential for widespread application for asylum in the United States by women of Kasinga's tribe in Togo, or any country in which FGM is widely practiced. The Board itself pointed out that Kasinga's tribe circumcises young women and girls at rates approaching one hundred percent. This concern is explicit in the INS's formulation that persecution encompasses only practices that "shock the conscience" (although intent to punish is not deemed necessary). As previously noted, this formulation also anticipates the challenge of cultural activists that granting asylum to all victims of FGM is an invasion of a nation's cultural autonomy. Yet cultural relativists focus on "survival and liberation of African women through their own activism,"[99] and Kasinga has done precisely that—by literally flying away from a culture whose values she rejects. The Board in *Kasinga* would simply support an applicant's decision to condemn and reject FGM.

The INS's formulation also seeks to exclude previously cir-

PURSUANT TO SECTION 65(B) OF THE IMMIGRATION ACT: WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION (1993).

98. *In re Kasinga*, 20 I & N Dec. at 370 (Filppu, J. & Heilman, J., Concurring). These Board members suggest that the comprehensive framework offered by the INS would be more appropriately proposed through the legislative or regulatory process.

99. Lewis, *supra* note 79. Canada was the first country to formulate gender guidelines for asylum; the United States was the second to do so. *See* Kristin E. Kandt, *United States Asylum Law: Recognizing Persecution Based on Gender Using Canada as a Comparison*, 9 GEO. IMMIGR. L.J. 137 (1995). The gender guidelines are not technically binding on the Board of Immigration Appeals ("Board") and, therefore, their use in the majority opinion is itself significant. Moreover, concurring Judge Rosenberg questions the failure of the INS to refer to the gender guidelines in the case. *In re Kasinga*, 20 I & N Dec. at 370 (Rosenberg, J., Concurring).

cumcised women because "a woman once circumcised cannot ordinarily be subjected to FGM a second time."[100] This interpretation ignores the larger context in which FGM typically occurs: cultures that severely limit women's expression, choices, and actions. The INS's example of a small child as a consenting party is even more disturbing. This presumption of acquiescence for children directly conflicts with the recognized rights of children in the CRC and directly contradicts the position of the U.N. High Commissioner for Refugees on the inclusion of children who may be subject to female genital mutilation as refugees.[101] Surely with any such permanent and debilitating invasion of bodily integrity, there should be a presumption of non-acquiescence until the individual has reached a level of maturity to make such a significant personal decision.

The INS also argued for remand on the question of whether the applicant could avoid female genital mutilation by moving to another part of Togo. The majority refused to remand, noting that (1) FGM is widely practiced in Togo; (2) acts of violence and abuse against women in Togo are tolerated by the police; (3) the Government of Togo has a poor human rights record; (4) most African women can expect little government protection from FGM; and (5) Togo is a small country of approximately twenty-two thousand square miles, slightly smaller than West Virginia. The majority also noted that the police were looking for the applicant, and her husband was a well-known individual who was a friend of the police. This line of argument and analysis is itself quite troubling in the context of gender-based violence. The conditions necessary to establish persecution *a fortiori* demonstrate at the least a failure on the part of the relevant government to provide effective protection. The majority's opinion suggests that the availability of asylum might turn on the status (or lack of status) of the woman's spouse, the size of the country, or generally unrealistic expectations that women within tightly woven tribal cultures and oppressive societies may simply move from one area of the country to another.

In re Kasinga is one of several cases in recent years brought before immigration judges by women seeking asylum in the

100. Convention on the Rights of the Child, *supra* note 20, arts. 12, 19, 24(3), 37.
101. U.N. High Commissioner for Refugees, *supra* note 96.

United States to protect themselves[102] or their children[103] from FGM. These cases are the latest development in the discussion of whether and, if so, when, treatment uniquely affecting women—such as rape,[104] domestic violence,[105] hejab[106] and FGM—can meet the elements required for asylum.

The decision evades many thorny issues presented by such cases. It limits its protective impact to "young women not yet circumcised," and in so doing declines to take a position as to whether or not the practice of FGM alone suffices to render the women of a tribe or nation members of a persecuted group. An immigration judge in Virginia recently took that step, granting asylum in part on the basis of a woman's resistance to and subsequent forcibly imposed circumcision.[107] In that case the experience of FGM established past persecution, and so created a showing of a "well-founded fear of persecution," itself a rebuttable presumption of future persecution. This ruling contravenes the INS's proposed formulation, which would exclude all women already circumcised. At stake is whether women living in a society that practices FGM can be considered a persecuted class by virtue of living in such a society—meaning that all such women, circumcised or not, would meet the "other social group" criterion of section 101(a)(42)(A).

In re Kasinga is therefore a qualified success for women's rights advocates. The door has been opened by the INS's position and the Board's decision to recognize FGM as grounds for asylum. Yet that door may remain closed as a practical matter to many applicants without the representation, documentation, and extraordinarily compelling facts available to this particular applicant. Kasinga was seventeen years old when her saga began; most children are mutilated much younger, far too young to al-

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102. *See, e.g.*, Oral decision of the Immigration Judge [name and case number redacted] (Office of the Immigration Judge, Oklahoma City, Aug. 30, 1995); Memorandum of Decision and Order [name and case number redacted] (U.S. Immigration Ct., Baltimore, Apr. 28, 1995); In re M.K., No. A-72-374-558 (Office of the Immigration Judge, Arlington, Va., Apr. 20, 1995).

103. *See, e.g.*, *In re* Oluloro, No. 172-147-491 (Office of the Immigration Judge, Seattle, Wash., Mar. 23, 1994).

104. Lazo-Majano v. INS, 813 F.2d 1432 (9th Cir. 1987).

105. In re Pierre, 15 I & N Dec. 461 (BIA 1975).

106. Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993); *but see* Fisher v. INS, 79 F.3d 955 (9th Cir. 1996).

107. In re M.K., Deportation Proceedings, A-72-374-558 (U.S. Immigration Ct., Arlington, Va., Aug. 9, 1995).

low them to seek asylum independently in the United States or anywhere else.

The inability or unwillingness of the majority to elaborate on its findings of "persecution," "social group," and the "on account of" nexus may be nothing more than an exercise in judicial economy, given the general consensus of the opposing parties. The eagerness of the majority to find agreement between the parties, however, even when in fact they disagreed on some elements (as in the precise definition of the social group with respect to personal opposition), suggests that critical points of analysis may yet be undecided or contentious among the Board members.

Beyond its surface acceptance of FGM as grounds for asylum, the position of the INS on many of these critical points would exclude many more applicants than it would accept. First, only FGM "in its more severe forms" (such as would "shock the conscience") would qualify. Past victims would almost always be excluded, and there is, at the very least, the suggestion that small children who would be subject to the procedure might be excluded as well. A claimant would have to demonstrate that on return she would be seized and forcibly subjected to female genital mutilation; any pressure short of physical force would be insufficient. A possibility of relocation to another part of the country might defeat the claim, posing the problem that laws that ostensibly protect women from violence but are never enforced might yet bar women from being given asylum, and that societal and family pressure to submit short of physical force, however severe, would be insufficient grounds for asylum. Also, according to the INS brief, the "on account of" nexus is not demonstrated by a showing that the practice "may play a deeper political role or help perpetrate a system of male domination."[108] With its emphasis in *Kasinga* on the extreme form of genital mutilation, the police searching for the applicant, and the unavailability of relocation, as well as its definition of the social group with reference to opposition to the practice, the majority opinion (deliberately or otherwise) provides implicit support for a number of the INS's limiting formulations.

In re Kasinga is, however, the first time a court with national jurisdiction has recognized that the circumcision of women can

108. Brief of the INS, at 20.

be a form of persecution. The majority opinion, unfortunately, is not an easy "road map" for upcoming adjudications, as Rosenberg's concurring opinion suggests[109] (indeed, her own opinion is much more helpful to future claimants).[110] In short, it is difficult to posit a more striking example of how exclusion of gender from recognized categories of discrimination and persecution has precluded full realization of women's rights. Those concerned about protecting women and girls facing FGM will still have many legal and practical hurdles to overcome in representing the women who will undoubtedly follow in Kasinga's footsteps.

V. *SEXUAL VIOLENCE AND EXPLOITATION THROUGH DECEPTION AND ABUSE OF AUTHORITY UNDER DOMESTIC LAW*

The Thirteenth Amendment prohibits involuntary servitude[111] and federal law prohibits importation of any person in a condition of involuntary servitude.[112] Since 1903, U.S. federal courts have recognized that "voluntary" acceptance of a contract does not preclude a finding of involuntary servitude if the contractual relationship becomes involuntary due to threats of physical or legal coercion.[113] Moreover, failure to escape from involuntary servitude when an opportunity is provided does not pro-

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109. 20 I & N Dec., at 373.

110. The importance of Board decisions should not be underestimated. Federal district and circuit courts of appeals have been very deferential to Board decisions as an administrative law matter. *See generally* Krishna R. Patel, *Recognizing the Rape of Bosnian Women as Gender-Based Persecution*, 60 BROOK. L. REV. 929, 946 (1994).

111. The Thirteenth Amendment states: "Neither slavery nor involuntary servitude . . . shall exist within the United States . . . ." U.S. CONST. amend. XIII, § 1. It is not limited, by its terms, to State action.

112. 18 U.S.C. § 1584 (1994). Indentured servitude, a form of involuntary servitude, is also illegal under the Thirteenth Amendment and an enforcing statute, 18 U.S.C. § 1581 (1994), which prohibits peonage. Peonage is a form of involuntary servitude in which labor is coerced to pay off debt, whether through physical force, legal sanctions, or threats of either. *See* Clyatt v. United States, 197 U.S. 207, 215 (1905); Peonage Cases, 123 F. 671, 682 (M.D. Ala. 1903). Section 1581 would thus seem to be the most applicable section for the typical mail-order bride situation, in which a woman provides sexual and domestic services in exchange for residency in the United States and the husband's tacit agreement not to have her deported. However, peonage represents a subset of the activities prohibited by § 1584, and courts have thus generally tended to focus on § 1584, since its definition of involuntary servitude is conveniently broad.

113. *See Peonage Cases*, 123 F. at 682.

hibit a finding of involuntary servitude.[114] In *United States v. Kozminski,* the U.S. Supreme Court held that use or threatened use of physical or legal coercion is sufficient for a determination of involuntary servitude.[115] Although the Court stated that psychological pressure alone is insufficient, the victim's "special vulnerabilities" are a factor in determining whether the actual or threatened physical or legal coercion rendered the servitude involuntary.[116] The Court specifically noted that threatening an immigrant with deportation could be sufficient legal coercion for a finding of involuntary servitude.[117] Under the First Circuit Court of Appeals decision in *United States v. Alzanki,*[118] the "special vulnerability" of the victim may include a lack of sophistication or knowledge on the part of the victim, raising the possibility of utilizing a more subjective, less objective standard of involuntariness.

An extensive body of state law has also developed in the United States on the elements of coercion and fraud with respect to rape and other sexual contact. Generally rape by fraud cases involves fraud in medical and other treatment contexts, false impersonation, sexual scams, and sexual theft. Rape by coercion may involve abuse of authority and sexual extortion. Most courts addressing these situations have held that the requirement of force or non-consent in rape statutes has not been satisfied, while noting that the defendant's conduct is morally reprehensible. Some courts, however, have found "constructive force" in the coercion situations. In reaction, state legislatures have adopted a variety of statutes criminalizing such conduct. These statutes: (1) punish individuals who abuse positions of trust, or positions of authority to secure sexual conduct; (2) specifically prohibit use of fraud or deception; (3) substitute coercion and other types of nonphysical force for the physical force requirement; and (4) prohibit nonconsensual intercourse without reference to force, fraud, or coercion. In many of these stat-

114. *See, e.g.*, Bernal v. United States, 241 F. 339, 341-42 (5th Cir. 1917), *cert. denied,* 245 U.S. 672 (1918) (finding threats of deportation sufficient to show coercion).

115. 487 U.S. 931, 952 (1988).

116. *Id.* at 948. Justice Brennan, in his concurring opinion, supported an interpretation of involuntary servitude that would prohibit any means of coercion that breaks another person's will such that she or he is reduced to a condition of servitude resembling that of a chattel slave. *See id.* at 961-65.

117. *See id.* at 948.

118. 54 F.3d 994 (1st Cir. 1995), *cert. denied,* 516 U.S. 1111 (1996).

utes sexual contact obtained without physical force is subject to a lesser punishment.[119]

Most cogent to the current analysis are the possible normative standards for criminalization of the solicitor's conduct for fraud or coercion in obtaining sexual relations. The traditional test in the fraud context is the highly criticized distinction between fraud in the *factum* versus fraud in the inducement.[120] The rule is that if there is fraud in the fact itself (a doctor tells a woman that sexual intercourse is a pelvic exam) there is invalid consent and rape; if there is only fraud in the inducement (the doctor says sexual intercourse is the cure for her cancer) there is consent and thus no rape.[121] The examples given above illustrate one of the principal criticisms of the rule: the distinction has no correlation to the level of coerciveness involved. The rule has been widely criticized by academic commentators and rejected in some form or another by most state statutes addressing rape by fraud.

The academic literature proposing other formulations can be generally divided into three concepts: (1) voluntariness or autonomy; (2) materiality; and (3) totality of the circumstances.[122] Feinberg proposes that the central question should be whether the fraud reduces the voluntariness of consent to a level that should not be recognized as legally effective. Under his proposal, criminal law should punish the wealthy man who falsely promises to financially assist the mother of a sick child in return for sexual favors but not if he offers a desirable but not desperately needed alternative to the woman.[123] Shulhofer focuses on which inducements infringe on sexual autonomy, specifically mentioning as subject to criminalization falsehoods about pecuniary interest, nondisclosure, or misrepresentation involving significant health risks and deceptions "intended to create feelings of isolation, physical jeopardy, or economic insecurity."[124] The broadest formulations, by Bogart, Larson, and

119. Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39 (1998).

120. *Id.* at 157.

121. *Id.* at 158.

122. *Id.* at 162.

123. Joel Feinberg, *Victims' Excuses: The Case of Fraudulently Procured Consent*, 96 ETHICS 330, 344-45 (1986).

124. Stephen J. Schulhofer, *Taking Sexual Anatomy Seriously: Rape Law and Beyond*, 11 L. & PHIL. 35, 92 (1992).

Bok, encompass any situation "(w)here participation is not willing, not chosen freely, not chosen without the application of external pressures. . . ."[125] The difficulty with all these formulations in the trafficking context is that autonomy is illusory for many women in cultures in which they are subordinated.[126] West suggests that each of these formulations is misguided in focusing on consent rather than the legitimacy or illegitimacy of the pressures utilized.[127]

Under the materiality approach: (1) the misrepresentation must be material, (2) the victim's reliance must be reasonable, and (3) the actor must have intended to mislead when making the misrepresentation.[128] The difficulty frequently noted with this approach is the evaluation of emotional inducements under the materiality standard.[129] Harris is a principal proponent of "totality of the circumstances" test in deciding whether the victim consented to sexual intercourse.[130]

Academic and state legislative formulations are more expansive than the traditional test and thus more protective of victims' rights. Although the materiality test seems to be gaining the most acceptance, the coerciveness of the pressures brought to bear on the victim is also gaining acceptance.[131]

There is more widespread agreement among courts, legislatures, and commentators that rape by coercion should be criminalized, struggling more over drawing the line between coercion and bargain. The Model Penal Code[132] and several court decisions[133] identify coercion as overwhelming the victim's will, while a bargain is merely offering "an unattractive choice to avoid some unwanted alternative."[134] Estrich[135] and Dripps[136]

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125. *Id.* at 93.

126. *See* J. H. Bogart, *On the Nature of Rape*, 5 PUB. AFF. Q. 117, 118 (1991); *see also* Jane E. Larson, *"Women Understand So Little, They Call My Good Nature Deceit:" A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374 (1993); SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (1999).

127. Robert L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1459 (1993).

128. Falk, *supra* note 119, at 166.

129. *Id.* at 167.

130. Lucy Reed Harris, *Comment Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613 (1976).

131. Falk, *supra* note 119, at 169-72.

132. Model Penal Code § 213.1 cmt. at 312.

133. *See, e.g.*, Commonwealth v. Mlinarich, 542 A.2d 1335 (Pa. 1988).

134. Model Penal Code § 213.1 cmt. at 314.

propose that obtaining sex by extortion should be punished in the same way as the law prohibits obtaining money by extortion. Consistent with his criticism of the autonomy approach to fraud, West suggests the line should be drawn between legitimate and illegitimate inducements.[137] Shulhofer[138] and Chamallas[139] have attempted to draw the line more precisely. Schulhofer recognizes four categories of illegitimate pressures: (1) extortionate behavior; (2) institutional or professional authority; (3) economic power; and (4) deception.[140] Chamallas proposes a test of "mutuality" to separate acceptable from exploitative sexual offenses, similarly concluding that mutuality does not exist if there is physical force, deception, or economic pressure.[141] Chamallas recognizes the difficulty of distinguishing between coercion and bargain, but concludes: "I discern a trend here to regard economic pressure as an unacceptable inducement to sex and to create a range of legal sanctions to discourage economically coerced encounters, even if such sex is not subject to direct criminal sanctions."[142] Although both of these commentators recognize economic pressure as coercion, the least developed area of the law and commentary on coercion is the line between unacceptable economic pressure and acceptable economic inducement.

VI. *ECONOMIC COERCION VITIATING A STATE'S CONSENT UNDER INTERNATIONAL LAW*

In all of the voluminous academic debate over whether a woman can consent to prostitution or other sexual services, there appears to be no mention of international law provisions which recognize that even a State's consent can be negated by economic coercion. Article 50 of the Vienna Convention on the Law of Treaties allows invalidation of a State's consent when it

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135. Susan Estrich, *Rape*, 95 YALE L. J. 1087, 1120 (1986).

136. Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780 (1992).

137. West, *supra* note 127, at 1459.

138. Stephen Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2180 (1995).

139. Martha Chamallas, *Consent Equality and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 814 (1988).

140. Schulhofer, *supra* note 138.

141. Chamallas, *supra* note 139, at 836-37.

142. *Id.* at 830.

has been procured through "corruption" of the State's representative,[143] or under Article 51 through undefined "coercion" of the State's representative.[144] The Charter of the Organization of American States[145] contains explicit prohibitions on the use of economic force by one State against another. In the prohibition on intervention in another State's affairs in Article 18, the Charter states that the principle "prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements."[146] The concept is reaffirmed in Article 19: "No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind."[147] There are also any number of international declarations and other instruments prohibiting economic coercion to obtain advantages from another State. In this context it is sufficient to note the obvious implication. If a State's consent to relationships and contracts can be negated by economic coercion under international law, why shouldn't the consent of economically powerless women be treated the same?

VII. *DRAWING THE LINE BETWEEN ECONOMIC COERCION AND ECONOMIC INDUCEMENT*

Under the Protocol, "trafficking in persons" occurs whenever any of the following means are used or threatened: (1) force; (2) other forms of coercion; (3) abduction; (4) fraud; (5) deception; (6) the abuse of power or of a position of vulnerability; and (7) the giving or receiving of payments or benefits to achieve the consent of a person having control over another person. Under these provisions, deliberate exploitation of economic hardship, without any accompanying deceptive or misleading measures, is most appropriately addressed as "coercion" or "abuse of power or . . . vulnerability." Although it may be

143. Vienna Convention on the Law of Treaties, concluded at Vienna, May 23, 1969 (entered into force, Jan. 27, 1980), U.N. Doc. A/CONF. 39/27, 8 I.L.M. 679 (1969), art. 50.

144. *Id.* art. 51.

145. Charter of the Organization of American States, concluded at Bogota, Apr. 30, 1948 (entered into force, Dec. 13, 1951) 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3.

146. *Id.* art. 18.

147. *Id.* art. 19.

argued that the placement of "coercion" in Article 3 following "force" suggests it is limited to physical force, the expansive definition in Article 3 and the broadly inclusive intent of the drafters demonstrates otherwise.

Initially, three fundamental points of interpretation bear repeating. First, exploitation of economic hardship is arguably one of several means of procuring sexual services that is prohibited by the definition of sexual trafficking. There are other elements, most importantly that the acts be done "for the purpose of exploitation," which must be satisfied. Secondly, it is clear that the intent of Article 3 was to cover as broadly as possible the means prohibited, so long as the prohibited acts and *mens rea* for trafficking are satisfied. Third, the broad inclusion of impermissible means is underlined by the clarification in Article 3(b) that consent of the victim is irrelevant when any of the impermissible means are utilized or threatened. The Protocol itself, therefore, in its intent and language, is susceptible to the broadest possible interpretation of "coercion" and "abuse of power and . . . vulnerability."

Trafficking under the Protocol is in and of itself a form of conduct which has been deemed to cause sufficient societal harm to merit criminal punishment, aside from whether the means utilized are in and of themselves criminal. Moreover, there is a vigorous moral and academic debate over whether prostitution is so exploitative of women that any woman could ever be said to have freely engaged in prostitution. Regardless of the outcome of that normative debate, in the context of trafficking anyone who procures and benefits from the sexual services of another with the necessary *mens rea* and acts for trafficking has engaged in sufficient conduct and manifested sufficient will to cause the harms the crime of trafficking was designed to punish. Even if a woman can freely and voluntarily choose to engage in prostitution, that does not mean that the person who procures her services and transports her, intending to exploit her, should be immune from criminal punishment.

If all procurement and transport for exploitation is not to be criminalized as trafficking, however, the question remains as to when exploitation of economic necessity or hardship is sufficiently coercive within the Protocol's definition. A woman may be economically powerless as a result of her individual circumstances, her lack of status in civil society, or both. The *Kasinga*

case is instructive in this context. Kasinga came from a prominent, well-to-do family. Due to the inheritance laws and customs upon her father's death, however, she had no financial resources and no control over what could be done to her own body. The Board of Immigration Appeals considered both the societal circumstances in Togo and Kasinga's own personal situation in finding that her fear she would be "forcibly" circumcised was reasonable. Evaluating the coerciveness of the situation to distinguish coercion from bargain is unavoidably fact-specific, as are so many other legal determinations, which have not been excluded from criminalization for that reason alone. A "totality of the circumstances" test would allow for evaluation of the individual's circumstances, as well as consideration of the societal and human rights background of the country and culture from which she comes.

Allowing for economic coercion to satisfy the "means" element of the Protocol is not only consistent with the intent of the Protocol, it is necessary to effectuate its intent. The sparse statistical information on trafficking does indicate that recruitment of women and children for trafficking is, not surprisingly, concentrated on women from States and cultures in which they have few or no economic alternatives to prostitution and other forms of sexual services. These women are chosen precisely because they are in no position to negotiate other options. The trafficker's offer is, quite simply, an offer they cannot refuse.

The limited but needed consequences of recognizing economic coercion under the Protocol must be fully understood. "Broadening" the definition of coercion in the Protocol allows for States to recognize economic coercion with their domestic implementation laws. Any State choosing not to adopt such an interpretation would not be found to be in violation of the treaty because it could not be said that the Protocol so unequivocally demands this interpretation that the State would be in material breach of its treaty obligations. As a result, a more restrictive interpretation of coercion would unnecessarily curtail a permissible, and socially preferable, State option.

As a practical matter, recognizing economic coercion would in almost all cases expand only the group of victims to be protected under Article 6, and not the group of perpetrators under Articles 3 and 4. A putative sexual trafficker will in all likelihood utilize at least one of the other prohibited means in addition to

economic coercion. There may, however, be identifiable groups of putative victims who have been exploited solely through exploitation of their otherwise unescapable and dire economic circumstances by that trafficker. If a State has manifested its willingness to make its social resources available to these victims in adopting or allowing for economic coercion in implementation and interpretation of its domestic legislation, there is a clear social benefit to providing protection and services to these victims. The more difficult normative question at that point becomes why these victims, motivated solely by economic hardship, are more deserving of protection than any other economic refugee. Having chosen to differentiate between alien workers and victims of sexual trafficking by having two separate Protocols, the drafters of the Protocols have recognized such a distinction, however fine it may be in some factual circumstances. The question remains as to whether it is a valid distinction as a matter of public policy.

First, the formulation for economic coercion as posited above would require extreme economic hardship on a personal level, or what may be termed "economic persecution" on the basis of gender on a more widespread basis. Such a formulation differentiates the victim of sexual trafficking through economic coercion from the illegal alien seeking escape generally from economic circumstances in the State of origin. The systemic lack of economic alternatives makes the trafficking victim's situation more exploitative than the worker who continues to have at least the possibility of alternative employment, however difficult or insufficient that alternative may be. The most difficult case to distinguish is that of the purported victim of sexual trafficking whose economic desperation is limited to her own personal circumstances rather than a lack of other economic alternatives within the State, culture, or locale of her origin. Again, as a practical matter, such a situation may be assumed to be relatively uncommon, but relevant nevertheless to the normative question of what the standard should be. To put this question in a factual context, why is the woman who places herself in the hands of a sexual trafficker in order to feed her children deserving of more protection than the father with the same motivation who is smuggled into another country to seek employment?

A distinction may be drawn on both the level of the trafficker/alien smuggler and the trafficking victim/illegal alien.

The smuggler of illegal aliens under the relevant Protocol benefits from the act of transportation alone. However horrendous the conditions of transport may be, the alien worker enters into the transaction willing to undergo a short-term risk and hardship for long-term economic gain. If the promise of economic gain never materializes, it is a risk the worker has assumed and from which the smuggler receives no loss or benefit. If the smuggler does have a financial interest in the employment of the worker and the conditions are abusive, deceptive, or otherwise exploitative, the smuggler may then be treated as a trafficker rather than simply a smuggler and subject to the criminal provisions of the Trafficking Protocol.

More importantly, the victim of sexual trafficking is necessarily subjected to harm, deceit, and hazards the risk of which she did not assume by virtue of the fact that trafficking must have as its ultimate purpose "exploitation." By analogy to general principles of contract law, there is not simply unequal bargaining power between the parties—there is not and could not be a "meeting of the minds." Inherent in the definition of exploitation is the imposition of harm that no rational person, however desperate, would ever accept willingly. With both the alien worker and the victim of trafficking, they are drawn into an agreement by the promise of being "better off" than before. With the alien worker, there is at the least that possibility or, to put it more precisely, the smuggler is not involved in actions which prevent or impede that possibility. In the trafficking situation, the victim may hope for a better situation, but that possibility is precluded by the trafficker and the plans he or she has made for the victim. The trafficker benefits directly from the exploitation of the victim and, in the case of prostitution, from the victim's sexual services. The trafficker has every incentive to ensure the exploitative working relationship continues, which the victim does not. In short, what the trafficker contemplates as the bargain from the victim is not what any person would be willing to provide—a lifetime subject to exploitation. It is not necessary to conclude that prostitution itself is always or almost always exploitative to accept this conclusion that what the trafficker contemplates for his victim is fundamentally and irreconcilably different from what the victim contemplates as her own future. The means which must be utilized by a trafficker to ob-

tain and maintain the exploitation of the victim would not be necessary otherwise.