

## Internet-Era Human Trafficking and the Need for a Better International Legal Instrument

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## INTERNET-ERA HUMAN TRAFFICKING AND THE NEED FOR A BETTER INTERNATIONAL LEGAL INSTRUMENT

WESLEY SCHROCK\*

### INTRODUCTION

[A]round the world, there's no denying the awful reality . . . a little boy is kidnapped, turned into a child soldier, forced to kill or be killed—that's slavery. When a little girl is sold by her impoverished family . . . runs away from home, or is lured by the false promises of a better life, and then imprisoned in a brothel and tortured if she resists—that's slavery. It is barbaric, and it is evil, and it has no place in a civilized world.<sup>1</sup>

Human trafficking has existed in some form—from slavery to sex trafficking—around the world for centuries.<sup>2</sup> It is an inherently difficult activity to measure not only because of its changing definition over the years, but also because of the covert nature and political sensitivities surrounding the act.<sup>3</sup> Despite this inability to precisely account for all trafficking activity, a 2014 report by the International Labour Office (ILO) estimated that worldwide profits from forced labor—which they define as encompassing human trafficking<sup>4</sup>—

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<sup>1</sup> President Barack Obama, Remarks by the President to the Clinton Global Initiative (Sept. 25, 2012) (transcript available at <https://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative>).

<sup>2</sup> Ivy C. Lee & Mie Lewis, *Human Trafficking from a Legal Advocate's Perspective: History, Legal Framework and Current Anti-Trafficking Efforts*, 10 U.C. DAVIS J. INT'L L. & POL'Y 169, 170-71 (2003).

<sup>3</sup> INT'L LAB. OFF., PROFITS AND POVERTY: THE ECONOMICS OF FORCED LABOUR 3 (2014).

<sup>4</sup> *Id.* at 4 (“[T]he ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) has provided guidance on the scope of the definition of forced labour, stressing that it encompasses trafficking in persons for the purpose of labour and sexual exploitation, as defined by the Palermo Protocol.”).

amounted upwards of \$150 billion.<sup>5</sup> In 2016, governments officially identified 66,520 victims of trafficking around the world,<sup>6</sup> though the total number of actual victims is certainly significantly more. To demonstrate this, the 2014 version of the same ILO report estimated a worldwide total of 20.9 million victims of forced labor.<sup>7</sup> While this number is not exclusively of trafficking victims, it suggests that the actual number of trafficking victims is significantly higher than in the tens of thousands. Of all trafficking victims worldwide, an estimated 71% are women and girls, with girls alone making up almost 75% of all trafficked children.<sup>8</sup> However, data based on gender are also misleading because the trafficking of males, particularly boys for sexual exploitation, often goes underreported.<sup>9</sup>

Examining and combatting human trafficking, particularly online human trafficking, needs to be carried out with an international perspective. For example, a significant challenge for European Union (EU) law enforcement in combatting human trafficking is Nigerian organized crime groups.<sup>10</sup> These Nigerian groups bring non-EU child victims into the EU through countries such as Spain and Italy and later divert them to other countries where the child is forced into prostitution.<sup>11</sup> Additionally, crime groups that carry out human trafficking are usually involved in other related crimes with international consequences, including money laundering, document counterfeiting, and drug trafficking.<sup>12</sup>

In addition to victims being transported across borders, online human trafficking must particularly be analyzed through an international lens since the internet allows traffickers to operate from anywhere without a fixed location.<sup>13</sup> This Comment examines the current international legal framework on human trafficking and points out significant gaps in which traffickers can operate. Additionally, this

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<sup>5</sup> *Id.* at 13.

<sup>6</sup> LIANA W. ROSEN, CONG. RSCH. SERV., IN10803, HUMAN TRAFFICKING: NEW GLOBAL ESTIMATES OF FORCED LABOR AND MODERN SLAVERY 2 (2017).

<sup>7</sup> INT'L LAB. OFF., *supra* note 3 at 7.

<sup>8</sup> INTER-AGENCY COORDINATION GRP. AGAINST TRAFFICKING IN PERS., THE GENDER DIMENSIONS OF HUMAN TRAFFICKING 1 (2017).

<sup>9</sup> *Id.* at 2; *see also* EUROPOL, CRIMINAL NETWORKS INVOLVED IN THE TRAFFICKING AND EXPLOITATION OF UNDERAGE VICTIMS IN THE EUROPEAN UNION 6 (2018).

<sup>10</sup> EUROPOL, *supra* note 9, at 12.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*; *see also* U.N. OFF. ON DRUGS AND CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 2020, at 44 (2020) [hereinafter 2020 TRAFFICKING REPORT].

<sup>13</sup> *Yea See* Kathleen A. McKee, "It's 10:00 P.M. Do You Know Where Your Children Are?", 23 REGENT U. L. REV. 311, 329 (2010).

paper identifies an ideal next step that the international legal regime can take to address this issue. Part I examines how the definition of human trafficking evolved over the past century. It will also address how the fluctuating means of trafficking, and shifts in focus on the different aspects of the activity, results in a constantly changing definition of human trafficking and who is subsequently considered a victim.<sup>14</sup>

A further complicating factor in both measuring and curbing human trafficking over the past two decades is the rise of the internet and information and communication technologies.<sup>15</sup> Internet technology poses a unique and significant challenge to international law because of its borderless nature and the differing perspectives around the globe pertaining to liability for online activity.<sup>16</sup> Part II will examine how and to what extent the internet changed the landscape of human trafficking. Additionally, it will discuss new avenues through which trafficking is conducted and how these technology platforms complicate prosecution and curbing the activity on an international scale.

Several legal instruments were implemented to combat trafficking, notably, the United Nations (UN) Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Palermo Protocol); however, no widely encompassing international agreement applies to trafficking activities that are carried out online.<sup>17</sup> Part III dives into the Palermo Protocol as well as other components of the international legal framework that can be utilized to combat online human trafficking.<sup>18</sup> An international instrument applying to online human trafficking would drastically change the landscape of human trafficking law to the benefit of its victims. Unfortunately, a new international instrument is not likely in the immediate future. Part IV looks at the United States' legislation Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) to assess whether this is an ideal template for anti-trafficking legislation in the absence of another international tool.<sup>19</sup>

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<sup>14</sup> See *infra* Part I.

<sup>15</sup> See *infra* Part II.

<sup>16</sup> See *infra* Part II.

<sup>17</sup> See *infra* Part II.

<sup>18</sup> See *infra* Part III.

<sup>19</sup> See *infra* Part IV.

I. THE EVOLVING INTERNATIONAL DEFINITION OF TRAFFICKING<sup>20</sup>

Human trafficking has existed throughout the world for centuries. Its far-reach and ability to take place across borders as well as be entirely domestic led to differing views of what constituted trafficking throughout the twentieth century. The current internationally accepted definition of human trafficking is:

[T]he recruitment, transportation, transfer, harbouring 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.<sup>21</sup>

However, this definition did not appear until late in the twentieth century. With the ratification of the Palermo Protocol, this definition became the first widely accepted international definition of human trafficking.<sup>22</sup>

A. *Human Trafficking Throughout the Twentieth Century*

Activity that is now considered human trafficking originated simply as prohibited conduct and did not have a defined term.<sup>23</sup> Later uses of the term throughout the twentieth century focused on different timepoints within trafficking. Trafficking was first analyzed with a focus on recruitment; later, the focus shifted to the process and result, and then, at the end of the century, it changed again to focus on the victim.<sup>24</sup>

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<sup>20</sup> Part I details the evolution of the definition of human trafficking over the past century through various international legal instruments. It also provides the currently accepted definition from the 2000 Palermo Protocol.

<sup>21</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, art 3(a), Nov. 15, 2000, S. TREATY DOC. NO. 108-16, 2237 U.N.T.S. 319 [hereinafter Palermo Protocol].

<sup>22</sup> See *infra* Section I.B.

<sup>23</sup> ANNE T. GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 12-14 (2010).

<sup>24</sup> *Id.* at 13-16.

The first international use of “trafficking,” as it pertains to humans,<sup>25</sup> came about in regard to white slavery.<sup>26</sup> The 1904 Convention Against White Slavery aimed to criminalize the “procur[ement] of women or girls for immoral purposes abroad.”<sup>27</sup> Six years later, another League of Nations<sup>28</sup> treaty to combat white slavery used nearly the exact language but included in its terms, “even when the procured female gave her consent.”<sup>29</sup> This focus on white slavery, however, was ultimately deemed not central to the problem of trafficking and was abandoned in 1927.<sup>30</sup> Subsequent agreements by the League of Nations continued to focus on the organized procurement of women and girls but opted to leave “trafficking” undefined.<sup>31</sup>

By the middle of the century, the focus of international trafficking legislation moved to the process and the outcome for trafficked individuals.<sup>32</sup> The 1949 United Nations (UN) Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others, again, did not define trafficking per se, but gave the framework for a definition through the outlined prohibited conduct.<sup>33</sup> The 1949 Convention required Parties to punish persons who who procured or exploited another person for prostitution, even if it was done with their consent<sup>34</sup> as well as those who engage in financing a brothel or rent a building for prostitution.<sup>35</sup> This interpretation continued through the 1980s until the early 1990s when trafficking women and girls became the subject of mainstream academic research.<sup>36</sup>

By the 1990s, the average woman being trafficked was different than at the beginning of the century. Now, instead of being white and

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<sup>25</sup> Throughout this Comment, “trafficking” when used alone is in reference to human trafficking unless otherwise indicated.

<sup>26</sup> GALLAGHER, *supra* note 23, at 13.

<sup>27</sup> International Agreement for the Suppression of the “White Slave Traffic” art. 1, Mar. 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83.

<sup>28</sup> The League of Nations was succeeded by the United Nations in 1946, following World War II.

<sup>29</sup> International Convention for the Suppression of the White Slave Traffic art. 1, May 4, 1910, 3 L.N.T.S. 278.

<sup>30</sup> GALLAGHER, *supra* note 23, at 14.

<sup>31</sup> International Convention for the Suppression of Traffic in Women and Children, *opened for signature* Sept. 30, 1921, 9 L.N.T.S. 415; International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431.

<sup>32</sup> Gallagher, *supra* note 23, at 14-15.

<sup>33</sup> *Id.* at 14.

<sup>34</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others art. 1, *opened for signature* Mar. 21, 1950, 96 U.N.T.S. 271.

<sup>35</sup> *Id.* at 96 U.N.T.S. 274.

<sup>36</sup> GALLAGHER, *supra* note 23, at 15-16.

from developed countries, the women being trafficked were increasingly women of color and from less affluent countries.<sup>37</sup> It was also around this time that academics began to see the links between trafficking and broader migration and refugee movements.<sup>38</sup> In 1994, the UN set out a resolution that referred to:

[T]he illicit and clandestine movement of persons across national and international borders . . . with the end goal of *forcing women and girl-children* into sexually or economically oppressive and exploitative situations for the profit of recruiters, traffickers, crime syndicates as well as other illegal activities related to trafficking such as forced *domestic labour, false marriage, clandestine employment and forced adoption*.<sup>39</sup>

This resolution, combined with a report by the UN Secretary-General one year later,<sup>40</sup> marked a turning point in the understanding of what conduct amounted to trafficking—that purposes existed beyond that of sexual exploitation.<sup>41</sup> The lack of a clear definition for human trafficking continued to gain attention as organizations such as the International Organization for Migration and the Council of Europe began to take notice of the effect of trafficking throughout the 1990s,<sup>42</sup> predominantly on women and children.<sup>43</sup>

### B. *The 2000 Definition and Beyond*

Despite the attention on trafficking by governments and organizations around the world, arguably the biggest impact on the current accepted international definition was made by the United States' enactment of the Trafficking Victims Protection Act (TVPA), which

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<sup>37</sup> *Id.* at 16.

<sup>38</sup> *Id.* at 17.

<sup>39</sup> G.A. RES. 49/166, ¶ 5, Traffic in Women and Girls (Feb. 24, 1995) (emphasis added).

<sup>40</sup> U.N. Secretary-General, *Traffic in Women and Girls*, U.N. Doc. A/50/369 (Aug. 24, 1995).

<sup>41</sup> GALLAGHER, *supra* note 23, at 18.

<sup>42</sup> *Id.* at 19 (citing INT'L ORG. FOR MIGRATION, *TRAFFICKING IN WOMEN TO ITALY FOR SEXUAL EXPLOITATION* (1996) (identifying a list of "elements" for trafficking)); *see also* MARJAN WIJERS & LIN LAP-CHEW, *TRAFFICKING IN WOMEN, FORCED LABOUR AND SLAVERY-LIKE PRACTICES IN MARRIAGE, DOMESTIC LABOUR AND PROSTITUTION* 26-27, 32 (1999).

<sup>43</sup> *See, e.g.*, Joint Action 97/154/JHA, 1997 O.J. (L 63) 2 (concerning action to combat trafficking in human beings and sexual exploitation of children).

removed restrictions on gender.<sup>44</sup> Still, settling on a definition of trafficking when drafting the Palermo Protocol was one of the most grueling aspects of the negotiations.<sup>45</sup> Ultimately the drafters defined “trafficking in persons” as:

[T]he recruitment, transportation, transfer, harbouring 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.<sup>46</sup>

This now commonly accepted definition is widely understood to consist of three elements: (1) an action, (2) a means, and (3) a purpose,<sup>47</sup> shifting from prior definitions focusing on the process or the victim. The “action” is an *actus reus* element that uses broad, general terms “recruitment . . . harbouring, or receipt.”<sup>48</sup> These terms solidified the scope of the Palermo Protocol to encapsulate both the process and the result—meaning any action taken at the beginning, middle, or end of the trafficking process falls within the definition.<sup>49</sup> “Means” is another *actus reus* element that mostly<sup>50</sup> uses similarly broad language to allow for wide interpretation by State Parties (States).<sup>51</sup> It is noteworthy that the “means” element only applies to adults and does not apply to the trafficking of children.<sup>52</sup> Finally, the “purpose” element introduces a *mens rea* requirement of “for exploitation,” which the Palermo Protocol

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<sup>44</sup> GALLAGHER, *supra* note 23, at 23; Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. § 7101; *see also* Sabrina Féve & Christina Finzel, *Trafficking of People*, 38 HARV. J. ON LEGIS. 279 (2001).

<sup>45</sup> GALLAGHER, *supra* note 23, at 25.

<sup>46</sup> Palermo Protocol, *supra* note 21, 2237 U.N.T.S. at 344.

<sup>47</sup> INTER-AGENCY COORDINATION GRP. AGAINST TRAFFICKING IN PERS., THE INTERNATIONAL LEGAL FRAMEWORKS CONCERNING TRAFFICKING IN PERSONS 2-3 (2012).

<sup>48</sup> Palermo Protocol, *supra* note 21, 2237 U.N.T.S. at 344.

<sup>49</sup> GALLAGHER, *supra* note 23, at 30.

<sup>50</sup> Indicators for determining “abuse of power” are in discussion at the international level. *See, e.g.*, INT’L LAB. OFF., OPERATIONAL INDICATORS OF TRAFFICKING IN HUMAN BEINGS (rev. ed. Sept. 2009) (2009), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_105023.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_105023.pdf); U.N. OFF. ON DRUGS AND CRIME, MODEL LAW AGAINST TRAFFICKING IN PERSONS, at 9-10, U.N. Sales No. E.09.V.11 (2009).

<sup>51</sup> GALLAGHER, *supra* note 23, at 32.

<sup>52</sup> Palermo Protocol, *supra* note 21, 2237 U.N.T.S. at 344.

does not define but provides an open-ended list, further allowing for State interpretation.<sup>53</sup>

Following introduction of the Palermo Protocol, regional treaties began to adopt the newly accepted definition of trafficking in persons.<sup>54</sup> Others simply used it as guidance.<sup>55</sup> Now, over twenty years after opening for signature, 178 parties have signed on to the Palermo Protocol, reaching almost universal ratification.<sup>56</sup> Additionally, over ninety percent of UN Member States have enacted specific legislation criminalizing trafficking, of which the Palermo Protocol definition is almost universal.<sup>57</sup> However, the Protocol and its definition have failed to keep pace with the expansion of the internet, leaving a significant gap for the medium where trafficking is now most likely to take place.<sup>58</sup>

## II. TECHNOLOGY AS A TOOL FOR TRAFFICKING<sup>59</sup>

For many today, the internet is essential. However, over the past twenty years, the internet has given rise to new means of human trafficking and fostered a new modus operandi for traffickers. A study in eight major United States cities noted:

The widespread availability and rapid expansion of the Internet has redefined spatial and social limitations of the sex market by introducing new markets of recruitment and advertisement . . . . Offenders report new marking

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<sup>53</sup> *Id.*

<sup>54</sup> See Council of Europe Convention on Action against Trafficking in Human Beings, May 16, 2005, C.E.T.S. No. 197.

<sup>55</sup> See South Asian Association for Regional Cooperation, Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, Jan. 5, 2002, <https://evaw-global-database.unwomen.org/-/media/files/un%20women/vaw/full%20text/asia/south%20asian%20association%20for%20regional%20cooperation/saarc%20convention%20on%20preventing%20and%20combating%20trafficking%20in%20women%20and%20children%20for%20prostitution.pdf?vs=3229> (limiting the definition of trafficking to women and children moved or sold specifically for prostitution purposes); see also Council Framework Decision 2002/629, art. 1, 2002 O.J. (L 203/3) (EU) (differing substantially only on the purpose element of the Palermo Protocol definition).

<sup>56</sup> 2020 TRAFFICKING REPORT, *supra* note 12, at 23.

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

<sup>58</sup> See Erin I. Kunze, *Sex Trafficking via the Internet: How International Agreements Address the Problem and Fail to Go Far Enough*, 10 J. HIGH TECH. L. 241, 271-72 (2010).

<sup>59</sup> Part II explores to what extent the internet changed the practice of human trafficking. It describes new ways in which trafficking is being conducted online and how technology platforms complicate the issue on an international level.

opportunities for pimps [traffickers] to connect with both recruits and clientele, including online classifieds, social media, and networking websites.<sup>60</sup>

While there is potential for the internet to be used as a tool to combat trafficking,<sup>61</sup> several exacerbating factors continue to make internet-related trafficking a difficult problem to handle.

#### A. *New Ways to Engage in Trafficking*

Widespread use of the internet brought about new methods for traffickers to advertise, recruit, and exploit victims, as well as new systems of control. Traffickers first used standalone websites that advertised mostly adult victims.<sup>62</sup> They then shifted to use online classified sites like Craigslist, Backpage, and AdultSearch.com to advertise their victim's "services"—predominantly to sex buyers.<sup>63</sup> In 2009, a Chicago County Sherriff brought a federal suit<sup>64</sup> against Craigslist's owners to enjoin the site's hosting of "erotic" services and for over \$100,000 in damages to recompense the county's additional costs in officers responding to prostitution and trafficking-related calls stemming from Craigslist.<sup>65</sup> While the suit was ruled in favor of Craigslist,<sup>66</sup> the website ultimately closed its Adult Services sections worldwide by December 2010.<sup>67</sup> Some traffickers have thus resorted to

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<sup>60</sup> MEREDITH DANK ET AL., URB. INST., ESTIMATING THE SIZE AND STRUCTURE OF THE UNDERGROUND COMMERCIAL SEX ECONOMY IN EIGHT MAJOR US CITIES 3 (2014) [https://www.urban.org/sites/default/files/publication/22376/413047-estimating-the-size-and-structure-of-the-underground-commercial-sex-economy-in-eight-major-us-cities\\_0\\_1.pdf](https://www.urban.org/sites/default/files/publication/22376/413047-estimating-the-size-and-structure-of-the-underground-commercial-sex-economy-in-eight-major-us-cities_0_1.pdf).

<sup>61</sup> See *infra* Part IV.

<sup>62</sup> 2020 TRAFFICKING REPORT, *supra* note 12, at 15, 123.

<sup>63</sup> *Id.* at 15, 120. See also DEP'T OF JUST., JUSTICE DEPARTMENT LEADS EFFORT TO SEIZE BACKPAGE.COM, THE INTERNET'S LEADING FORUM FOR PROSTITUTION ADS, AND OBTAINS 93-COUNT FEDERAL INDICTMENT (2018), <https://www.justice.gov/opa/pr/justice-department-leads-effort-seize-backpagecom-internet-s-leading-forum-prostitution-ads>. The U.S. Federal Bureau of Investigation seized [www.backpage.com](http://www.backpage.com) in April 2018. *Id.*

<sup>64</sup> See generally *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009) (holding that Craigslist did not induce users to post illegal content; therefore, the court granted the Motion to Dismiss).

<sup>65</sup> Complaint for Petitioner at 26, *Dart*, 665 F. Supp. 2d 961 (No. 09-CV-1385).

<sup>66</sup> *Dart*, 665 F. Supp. 2d at 970.

<sup>67</sup> MARK LATONERO ET AL., UNIV. S. CAL. ANNENBERG CTR. ON COMM'C'N LEADERSHIP & POL'Y, THE RISE OF MOBILE AND THE DIFFUSION OF TECHNOLOGY-FACILITATED TRAFFICKING 19 (2012). Craigslist's Adult Services closure came after pressure from government officials, activist groups, and a Change.org petition with over 10,000 signatures. *Id.*; see also *Domestic Minor*

using a combination of pictures and coded language to avoid detection by law enforcement.<sup>68</sup>

The most recent trend is to use mainstream social media such as Facebook, Snapchat, WhatsApp, and Xbox Live for advertising.<sup>69</sup> These same social media applications are additionally used to recruit victims, largely children,<sup>70</sup> through either direct messaging or more deceptive contact known as “catfishing.”<sup>71</sup> Fake job advertisements, typically on classified websites, are another mode of recruiting victims, usually for sexual exploitation or forced labor.<sup>72</sup> The internet also created new forms of internet-based exploitation such as cybersex dens where sexual performances are livestreamed via webcam.<sup>73</sup>

Traffickers carry out their activities on both the surface web and the so-called “Dark Web.” The surface web hosts the online classifieds that were popular in the mid-2000s and social media platforms that are the predominant space for online trafficking today.<sup>74</sup> Though there appears to be no reported cases of trafficking on the “Dark Web,”<sup>75</sup> traffickers do use this portion of the internet to communicate anonymously.<sup>76</sup> The internet has also provided traffickers with new

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*Sex Trafficking: Hearings on H.R. 5575, Before the Subcomm. on Crime, Terrorism, and Homeland Sec., 111th Cong. 169 (2010) (testimony of William Clinton Powell, Dir., Customer Serv. and L. Enf't Relations, Craigslist, Inc.).*

<sup>68</sup> 2020 TRAFFICKING REPORT, *supra* note 12, at 120-21.

<sup>69</sup> *Id.* at 15; Kristine Hickle, *Victims of Sex Trafficking and Online Sexual Exploitation*, in CYBERCRIME AND ITS VICTIMS 99 (Elena Martellozzo & Emma A. Jane eds., 2017).

<sup>70</sup> 2020 TRAFFICKING REPORT, *supra* note 12, at 122. The National Center for Missing and Exploited Children reported an “846% increase from 2010 to 2015 in reports of suspected child sex trafficking—an increase the organization has found to be ‘directly correlated to the increased use of the Internet to sell children for sex.’” STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 114TH CONG., BACKPAGE.COM’S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING 4 (2015).

<sup>71</sup> 2020 TRAFFICKING REPORT, *supra* note 12, at 121; Armida Derzakarian, *The Dark Side of Social Media Romance: Civil Recourse for Catfish Victims*, 50 LOY. L.A. L. REV. 741, 741 (2017) (“The term ‘catfish’ has been popularly used to refer to those who use the cloak of technology to fabricate online personas and lure victims into romantic relationships.”).

<sup>72</sup> Derzakarian, *supra* note 71, at 741; *see also* U.N. Glob. Initiative to Fight Human Trafficking, *The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper*, UNODC.ORG (Feb. 13-15, 2008), <https://www.unodc.org/documents/human-trafficking/2008/BP017TechnologyandHumanTrafficking.pdf>.

<sup>73</sup> 2020 TRAFFICKING REPORT, *supra* note 12, at 122.

<sup>74</sup> *Id.* at 122-23.

<sup>75</sup> *Id.* at 124.

<sup>76</sup> INTER-AGENCY COORDINATION GRP. AGAINST TRAFFICKING IN PERS., HUMAN TRAFFICKING AND TECHNOLOGY: TRENDS, CHALLENGES AND OPPORTUNITIES 1 (2019) [hereinafter ICAT Brief 7]. From the information collected for the 2020 Trafficking Report, the “Dark Web” while not

means of control over their victims such as GPS tracking, video surveillance, and threats to share explicit images.<sup>77</sup>

### *B. A New Modus for Recruiting*

Traffickers learned to adapt to the online environment to recruit through two manners—hunting and fishing.<sup>78</sup> Hunting, as in nature, demonstrates the online pursuit of a specific victim.<sup>79</sup> Online hunters can make use of fake profiles to lure their victims, such as one profile to cyberbully the victim and another profile to offer compassion and build trust.<sup>80</sup> Young victims, who are more likely to succumb to trafficking on social media, are more likely to form relationships with the “compassionate” trafficker in this scenario relatively quickly.<sup>81</sup> Fishing is the other mode of recruiting where traffickers wait for victims to come to them by responding to an ad.<sup>82</sup> This method is more common with adults responding to ads for fake jobs.<sup>83</sup> Victims are then exploited either online via blackmail,<sup>84</sup> or after meeting with the trafficker in-person.<sup>85</sup>

### *C. How the Internet Exacerbates the Problem of Trafficking*

The emergence of online human trafficking poses a conundrum to governments and law enforcement officials working to curb the

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used specifically for trafficking purposes, was used for the distribution of child sex abuse materials by criminal organizations. The report found this material was “very often the result of trafficking children for sexual exploitation.” 2020 TRAFFICKING REPORT, *supra* note 12, at 124.

<sup>77</sup> *Id.* at 2.

<sup>78</sup> 2020 TRAFFICKING REPORT, *supra* note 12, at 15.

<sup>79</sup> *Id.* Of 233 court cases, 176 victims fell prey to hunting practices. *Id.* at 128.

<sup>80</sup> See Sarah Devaney, *Justice for All? Impeding the Villainization of Human Trafficking Victims Via the Expansion of Vacatur Laws*, 49 PEPP. L. REV. 241, 252-54 (2022) (“Traffickers might use violence, manipulation, false promises of well-paying jobs, or romantic relationships to lure victims into trafficking situations. In the age of social media, traffickers essentially have a menu of victims to choose from. Force is then used to ensure that the victims are trapped and unable to visualize a conceivable way of escaping.”).

<sup>81</sup> Hickle, *supra* note 69, at 99.

<sup>82</sup> 2020 TRAFFICKING REPORT, *supra* note 12, at 15. Of 233 court cases, 296 victims fell prey to fishing practices. *Id.* at 128.

<sup>83</sup> *Id.* at 52-53.

<sup>84</sup> *Id.* at 15. Around 100 women were required to submit sexually explicit images in response to an overseas modelling ad. The images were then used as blackmail if the women did not comply with the chosen exploitation. *Id.*

<sup>85</sup> Herbert B. Dixon Jr., *Human Trafficking and the Internet (and Other Technologies, Too)*, 52 JUDGES’ J. 36, 36 (2013).

practice on the international stage. First, the transnational nature of online trafficking imposes several new challenges compared to traditional trafficking.<sup>86</sup> Now, a trafficker has the potential to recruit, meet, and exploit multiple victims simultaneously and can do so without ever leaving their home in a completely different country.<sup>87</sup> Though cyber flows like this do not constitute a substantial portion of online trafficking, they enable the exploitation of a single victim through coerced livestream performances to much larger audiences than traditional trafficking practices offer.<sup>88</sup> International flows make up the largest portion of online trafficking, where traffickers coordinate the physical movement of their victims between countries.<sup>89</sup>

Due to the transnational nature of trafficking involving multiple jurisdictions, the international legal framework is a critical component in combatting online trafficking. However, these agreements sadly fall short when internet-enabled trafficking is involved, making it harder to prosecute these cases.<sup>90</sup> Outside of formal international agreements, governments often rely on norms and cooperation to hold one another accountable in combatting online human trafficking.<sup>91</sup> Unfortunately, these informal arrangements between nations are relatively weak.<sup>92</sup>

Briefly on the technical aspect of combating internet-facilitated crimes, there is a lack of sufficient tools and coordination to detect and uncover trafficking efficiently.<sup>93</sup> Prior to the closing of Craigslist's Adult Services sections, the website predominantly relied on users' flagging of classified ads to know which posts violated then existing community guidelines.<sup>94</sup> Governments have the onus of combatting human trafficking but only account for ownership of around nine percent of the online tools created to combat online human trafficking

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<sup>86</sup> Kunze, *supra* note 58, at 241.

<sup>87</sup> 2020 TRAFFICKING REPORT, *supra* note 12, at 124.

<sup>88</sup> *Id.* at 125.

<sup>89</sup> *Id.* The 2020 Trafficking Report examined 79 court cases of which 57% of victims were moved between two or more countries. *Id.*

<sup>90</sup> *See infra* Part III.

<sup>91</sup> INTER-AGENCY COORDINATION GRP. AGAINST TRAFFICKING IN PERS., 20TH ANNIVERSARY OF THE TRAFFICKING IN PERSONS PROTOCOL: AN ANALYTICAL REVIEW 12-13 (2020).

<sup>92</sup> ICAT Brief 7, *supra* note 76, at 2.

<sup>93</sup> *Id.*

<sup>94</sup> MARK LATONERO ET AL., UNIV. S. CAL. ANNENBERG CTR. ON COMM'N LEADERSHIP & POL'Y, HUMAN TRAFFICKING ONLINE: THE ROLE OF SOCIAL NETWORKING SITES AND ONLINE CLASSIFIEDS 33 (2011).

as of 2020.<sup>95</sup> Further, the use of tools currently available across all sectors does not meet the scale of the problem.<sup>96</sup>

### III. THE INTERNATIONAL LEGAL FRAMEWORK<sup>97</sup>

The legal framework applicable to international human trafficking consists of several instruments, namely the Palermo Protocol<sup>98</sup> and the domestic measures<sup>99</sup> put in place by the Protocol's ratifying States. Legal instruments for human trafficking in the Internet Age, however, fail to keep up with the pace of technology. The Budapest Convention, which is the only binding international Convention on cybercrime, mostly focuses on computer-facilitated crimes and fails to apply to most crimes that could previously be conducted without a computer—including human trafficking.<sup>100</sup> This lack of an international commitment resulted in a patchwork of State-led efforts to combat online trafficking activity to varying degrees of success.<sup>101</sup>

#### A. *The Palermo Protocol*

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol) was adopted and opened for ratification on November 15, 2000.<sup>102</sup> As discussed above, the Palermo Protocol signifies the first clear internationally agreed upon definition for human trafficking which forms the basis for the rest of the Protocol's provisions.<sup>103</sup> The driving force behind the Palermo Protocol and the formation of an internationally accepted definition was certainly the recognized need for

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<sup>95</sup> OSCE OFF. OF THE SPECIAL REPRESENTATIVE AND CO-ORDINATOR FOR COMBATING TRAFFICKING IN HUM. BEINGS & TECH AGAINST TRAFFICKING, LEVERAGING INNOVATION TO FIGHT TRAFFICKING IN HUMAN BEINGS: A COMPREHENSIVE ANALYSIS OF TECHNOLOGY TOOLS 27 (2020). The private sector accounts for development of roughly 40% of technology tools and NGOs account for around 33%. *Id.*

<sup>96</sup> *Id.* at 7.

<sup>97</sup> Part III looks at the current international legal instruments that apply to human trafficking. The section notes the strengths and shortcomings of these instruments and the need for their amendment in the internet era to combat content-based cybercrime offenses.

<sup>98</sup> See *infra* Section III.A.

<sup>99</sup> See *infra* Section III.A.

<sup>100</sup> See *infra* Section III.B.

<sup>101</sup> See *infra* Section III.B.ii; see also Sona Movsisyan, *Human Trafficking in a Digital Age: Who Should Be Held Accountable?*, 27 MICH. ST. INT'L L. REV. 539 (2019).

<sup>102</sup> Palermo Protocol, *supra* note 21.

<sup>103</sup> See *supra* Section I.B.

standardization in an increasingly globalized world.<sup>104</sup> The drafters of the Protocol hoped that having similarly structured domestic offenses for human trafficking would lead to more efficient investigation and prosecution at the international level.<sup>105</sup> One of the biggest obstacles in combatting human trafficking historically was the lack of reliable data<sup>106</sup> and compatible sources.<sup>107</sup> Additionally, a standardized definition would potentially produce the added benefit of improving research, thereby leading to State and regional comparisons and a more accurate understanding of trafficking activity on a global scale.<sup>108</sup>

*i. Criminalizing Trafficking*

The central provision among the Protocol's requirements is for States to establish criminal offenses for conduct outlined in the new definition of trafficking in persons.<sup>109</sup> This is unsurprising as the Palermo Protocol is housed under a broader framework on transnational organized crime.<sup>110</sup> This minimum requirement for establishing criminal offenses only applies to conduct within the new definition, but States are encouraged to go beyond this threshold, and many have done so.<sup>111</sup> Additionally, States are further obligated to adopt criminal offenses for attempting to commit a trafficking offense, participating as an accomplice, and the organizing or directing others to commit an offense outlined within the Protocol's definition.<sup>112</sup> These offenses apply to both natural and legal persons.<sup>113</sup>

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<sup>104</sup> U.N. OFF. ON DRUGS AND CRIME, LEGISLATIVE GUIDE FOR THE IMPLEMENTATION OF THE PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME 269 (2004) [hereinafter "Legislative Guide"].

<sup>105</sup> *Id.*

<sup>106</sup> Frank Laczko & Marco A. Gramegna, *Developing Better Indicators of Human Trafficking*, 10 BROWN J. WORLD AFF. 179, 179-81 (2003) ("[D]ata on the number of persons being trafficked are often only estimates and usually concern only the trafficking of women and children for sexual exploitation . . .").

<sup>107</sup> *Id.* at 184. ("No single agency acts as a focal point for the collection, collation, or harmonization of statistics on trafficking either at the national or regional levels . . . . Another problem is that existing data are frequently program-specific.")

<sup>108</sup> Legislative Guide, *supra* note 104, at 269.

<sup>109</sup> Palermo Protocol, *supra* note 21, 2237 U.N.T.S. at 344-45.

<sup>110</sup> Convention Against Transnational Organized Crime, Nov. 15, 2000, S. TREATY DOC. NO. 108-16, 2225 U.N.T.S. 209 [hereinafter "Organized Crime Convention"].

<sup>111</sup> See Legislative Guide, *supra* note 104, at 267 n.12.

<sup>112</sup> Palermo Protocol, *supra* note 21, 2237 U.N.T.S. at 344-45.

<sup>113</sup> Organized Crime Convention, *supra* note 110, 2225 U.N.T.S. at 279-80. For legal persons, liability may be criminal, civil, or administrative. *Id.*

Article 5 of the Palermo Protocol, which enumerates the criminalization obligations for States, interestingly makes no mention of any required penalties in the prosecution of these crimes.<sup>114</sup> Despite the language for penalties being in all of the drafts prior to adoption,<sup>115</sup> drafters of the protocol removed this line from the final product.<sup>116</sup> The *mutatis mutandis* requirement, however, may be the reason for this omission as provisions of the Organized Crime Convention apply to the Palermo Protocol except where otherwise specified.<sup>117</sup> This would invoke Article 11 of the Organized Crime Convention for States to make any offenses under the Palermo Protocol “liable to sanctions that take into account the gravity of that offense.”<sup>118</sup> States are also imposed with additional obligations to take further measures related to trafficking offenses such as taking steps to ensure that the offender’s release does not inhibit securing their presence at later proceedings,<sup>119</sup> criminalizing the laundering of any proceeds from trafficking,<sup>120</sup> establishing a statute of limitations for trafficking offenses,<sup>121</sup> and providing additional aid to other States,<sup>122</sup> along with other obligations under the *mutatis mutandis* requirement.<sup>123</sup>

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<sup>114</sup> Palermo Protocol, *supra* note 21, 2237 U.N.T.S. at 344-45.

<sup>115</sup> GALLAGHER, *supra* note 23, at 80 n.179.

<sup>116</sup> U.N. OFF. ON DRUGS AND CRIME, TRAVAUX PRÉPARATOIRES OF THE NEGOTIATIONS FOR THE ELABORATION OF THE U.N. CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO, at 363, U.N. Sales No. E.06.V.5 (2006) [Hereinafter “Travaux Préparatoires”].

<sup>117</sup> Palermo Protocol, *supra* note 21, 2237 U.N.T.S. at 343-44. As indicated above, the Palermo Protocol is an additional protocol to the Organized Crime Convention, supplementing a key area of organized crime that was of concern to the Convention’s drafters. The Protocol and the Convention were therefore intended to be interpreted together with provisions of the Convention applying with equal force to the Protocol unless otherwise provided for in the Protocol. *Id.*

<sup>118</sup> Organized Crime Convention, *supra* note 110, 2225 U.N.T.S. at 280.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 277-78.

<sup>121</sup> *Id.* at 280.

<sup>122</sup> *Id.* at 281-83, 286-91. States are required to provide mutual legal assistance in investigating, prosecuting, and in the judicial proceedings of trafficking offenses, as well as provide—to the extent possible—for tracing, freezing, and confiscating of trafficking proceeds in cases with other State Parties as well as domestically. *Id.*

<sup>123</sup> *Id.* at 292-94. States are further required to criminalize the offender’s obstruction of justice. *Id.* This includes protecting trafficking victims and witnesses who give testimony from retaliation, intimidation, and harm. *Id.* In addition, States must ensure their safety in testifying, such as by allowing video testimony, encouraging individuals involved in trafficking to assist—or at least cooperate with—national authorities, and providing communication channels between law enforcement for investigations. *Id.*

Also set out in the Organized Crime Convention, and not the Palermo Protocol itself, is the establishment of jurisdiction.<sup>124</sup> States are required to establish jurisdiction over offenses committed within their territories, as well as on board a vessel or aircraft that is flying that State's flag or registered under their laws.<sup>125</sup> States are also encouraged to establish jurisdiction over offenses committed against nationals of their State, or offenses committed by a national of their State, or a stateless person who habitually resides within their State.<sup>126</sup> Essentially, in combination with the Extradition requirements,<sup>127</sup> States are required to either prosecute trafficking offenses committed by their nationals overseas, make trafficking offenses extraditable, or both.

*ii. Supporting the Victims*

Another key provision of the Palermo Protocol calls for the protection of trafficking victims.<sup>128</sup> These requirements for victim assistance and protection are argued to “have had a considerable impact on the infiltration of a human rights approach into the international anti-trafficking regime.”<sup>129</sup> While this may have some bearing, the requirements pertaining to victim protections arguably fall short when compared to the strict obligations imposed on States in the criminalization and prosecution of traffickers.<sup>130</sup> Where States are *required* to adopt measures to go after traffickers,<sup>131</sup> they are given discretion when it comes to implementing victim assistance and support.<sup>132</sup> The Protocol's obligation to provide physical security to victims is only to “endeavor to provide,”<sup>133</sup> limiting the Organized Crime Convention's obligation to take any appropriate measures within the State's means.<sup>134</sup> Implementing additional safety measures for a victim's physical, psychological, or social recovery need only be “consider[ed]” by a State.<sup>135</sup>

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<sup>124</sup> *Id.* at 283-84.

<sup>125</sup> *Id.*

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

<sup>127</sup> *Id.* at 284-86.

<sup>128</sup> Palermo Protocol, *supra* note 21, 2237 U.N.T.S. at 345-46.

<sup>129</sup> Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76, 98 (2012).

<sup>130</sup> *See supra* Section III.B.ii.

<sup>131</sup> Palermo Protocol, *supra* note 21, 2237 U.N.T.S. at 344-45; *see also* Legislative Guide, *supra* note 104, at 267-69.

<sup>132</sup> Legislative Guide, *supra* note 104, at 283-85.

<sup>133</sup> Palermo Protocol, *supra* note 21, 2237 U.N.T.S. at 345.

<sup>134</sup> Organized Crime Convention, *supra* note 110, 2225 U.N.T.S. at 292.

<sup>135</sup> Palermo Protocol, *supra* note 21, 2237 U.N.T.S. at 345.

The provision does oblige States to protect both the privacy and identity of victims to the extent possible under domestic law but limits this requirement to “appropriate cases” allowing for some discretion.<sup>136</sup> Finally, domestic law must allow victims the ability to obtain compensation.<sup>137</sup> However, States are not required to use any confiscated proceeds from trafficking to fund a victim’s compensation for an agreement for *mutatis mutandis* to apply here.<sup>138</sup> This unfortunate compromise mostly limits victims to the court system for recompense,<sup>139</sup> prolonging their recovery as they will likely face years of litigation. Further, there is no provision for the protection of child trafficking victims who are more likely to have special needs compared to adult victims.<sup>140</sup> This is unfortunate seeing that a group of agencies submitted the recommendation that “[I]n dealing with child victims of trafficking, the best interests of the child (including the specific right to physical and psychological recovery and social integration) are to be at all times paramount.”<sup>141</sup>

### iii. *Combating International Trafficking*

Many of the prevention goals of the Palermo Protocol are established in the Organized Crime Convention and apply *mutatis mutandis*.<sup>142</sup> Party obligations include developing prevention policies and best practices, reducing future opportunities for trafficking such as strengthening bonds with law enforcement, and promoting public

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<sup>136</sup> *Id.*; see also Organized Crime Convention, *supra* note 110, 2225 U.N.T.S. at 292 (indicating that witness testimony should be given in a manner that ensures the safety of the witness).

<sup>137</sup> Palermo Protocol, *supra* note 21, 2237 U.N.T.S. at 345.

<sup>138</sup> Travaux Préparatoires, *supra* note 116, at 443-44. The original provision of the Ad Hoc Working Group provided, “[t]he proceeds from such seizure and confiscation shall be allocated towards defraying the costs of providing due assistance to the victim, where deemed appropriate by States Parties and as agreed by them, in conformity with individual guarantees enshrined in domestic legislation.” *Id.* at 344.

<sup>139</sup> Legislative Guide, *supra* note 104, at 286. As the Protocol does not specify the source of compensation, victims can look to civil damages from common law torts, compensation or restitution from criminal courts, or schemes where the victim can claim compensation from the State. *Id.*

<sup>140</sup> See generally Palermo Protocol, *supra* note 21, 2237 U.N.T.S. at 345 (indicating that there is no provision for the protection of child trafficking victims).

<sup>141</sup> Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, Note by the Office of the United Nations High Commissioner for Human Rights, the United Nations Children’s Fund and the International Organization for Migration on the Draft Protocols Concerning Migrant Smuggling and Trafficking in Persons, at 6, U.N. Doc. A/AC.254/27 (Feb. 8, 2000).

<sup>142</sup> Organized Crime Convention, *supra* note 110, 2225 U.N.T.S. at 297-98.

awareness of the issue of human trafficking.<sup>143</sup> These requirements are regrettably, like the requirements (or recommendations) for victim support, made under a “shall endeavor” obligation,<sup>144</sup> making it difficult to ascertain any standard or specific level of obligation. However, the Convention does fully require States to provide the UN Secretary-General with contact information for authorities that can assist other States in their development of anti-trafficking measures.<sup>145</sup> States are also required to collaborate with one another and applicable regional and international organizations in developing and promoting these measures.<sup>146</sup>

The Palermo Protocol builds on the Organized Crime Convention standards by requiring that States *shall* establish comprehensive measures and work through bilateral or multilateral cooperation to strengthen these measures.<sup>147</sup> It also includes that States must work with NGOs and other relevant organizations where appropriate.<sup>148</sup> The Protocol further makes it more difficult for traffickers to use traditional means of transportation by requiring the exchange of information between law enforcement and immigration authorities regarding travel documentation, routes used, and measures for detecting traffickers.<sup>149</sup> States must also provide or improve immigration and law enforcement training that focuses on trafficking methods.<sup>150</sup>

*iv. Varying Implementation Measures Lead to Different Results*

The Palermo Protocol has garnered many critiques during its twenty years in operation—from competing interests with immigration control and prostitution reform,<sup>151</sup> to the incorporation of human

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> Palermo Protocol, *supra* note 21, 2237 U.N.T.S. at 346-47.

<sup>148</sup> *Id.* at 347.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> See Jennifer M. Chacon, *Tensions and Trade-offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1634 (2010); Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1657 (2010).

rights.<sup>152</sup> These are all expected with an issue as complex as international human trafficking. However, a core critique of the Protocol should be that individual State approaches to implementing domestic anti-trafficking policies have led to different outcomes around the world. These individual approaches result in a patchwork of laws that skew trafficking regulation, arguably based on each State's agenda and interests.<sup>153</sup> This patchwork is exacerbated when it comes to online trafficking policy due to the large disparity in State attitudes towards online regulation.<sup>154</sup>

With 178 signatories, the international community claims near-universal status for a global anti-trafficking commitment under the Palermo Protocol.<sup>155</sup> While this may look like universal combatting of human trafficking, it still leads to a patchwork of laws that operate based on the individual country's needs and not the collective goal at ending trafficking practices. The overall strategy to combat trafficking consists of the four Ps: “*prevent* and combat trafficking in persons, *protect* and assist victims of trafficking in persons, *prosecute* crimes of trafficking in persons and *promote partnerships* to strengthen coordination and cooperation.”<sup>156</sup>

The United States' legislation appears, on its face, to take the perfect approach, but misses the mark in several ways. The Victims of Trafficking and Violence Protection Act (TVPA) was passed by the U.S. Congress in 2000.<sup>157</sup> The first iteration of the TVPA was the country's first federal law on human trafficking;<sup>158</sup> it developed an Interagency Task Force to research domestic and international trafficking, evaluate progress domestically and abroad, and to cooperate with other nations in an effort to end trafficking.<sup>159</sup> One of the notable results of the TVPA was the creation of the T Visa, which assigns

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<sup>152</sup> See Jonathan Todres, *Widening Our Lens: Incorporating Essential Perspectives in the Fight against Human Trafficking*, 33 MICH. J. INT'L L. 53, 67-70 (2011).

<sup>153</sup> See Marija Jovanovic, *International Law and Regional Norm Smuggling: How the EU and ASEAN Redefined the Global Regime on Human Trafficking*, 68 AM. J. COMP. L. 801, 807-810 (2020).

<sup>154</sup> See Kristen E. Eichensehr, *The Cyber-Law of Nations*, 103 GEO. L.J. 317, 330 (2015).

<sup>155</sup> 2020 TRAFFICKING REPORT, *supra* note 12, at 23.

<sup>156</sup> G.A. Res. 64/293, U.N. Global Plan of Action to Combat Trafficking in Persons, at 5 (July 30, 2010) (emphasis added).

<sup>157</sup> 22 U.S.C. § 7101 (2000).

<sup>158</sup> U.S. DEP'T HEALTH & HUM. RES., TRAFFICKING VICTIMS PROTECTION ACT OF 2000: FACT SHEET, [https://rhyclearinghouse.acf.hhs.gov/sites/default/files/docs/16114-Trafficking\\_Victims\\_Protection\\_Act\\_of\\_2000.pdf](https://rhyclearinghouse.acf.hhs.gov/sites/default/files/docs/16114-Trafficking_Victims_Protection_Act_of_2000.pdf) (last visited Mar. 16, 2022).

<sup>159</sup> See Victims of Trafficking and Violence Protection Act of 2000, H.R. 3244, 106th Cong. § 105(d) (2000) (outlining the duties of the Interagency Task Force).

nonimmigrant status to foreign victims of human trafficking and allows them to remain in the United States for up to four years.<sup>160</sup>

The 2003 reauthorization of the TVPA took on a more victim-centered approach by providing victims with more aid, including a private right of action to bring civil suits for punitive damages.<sup>161</sup> It also added over \$200 million to the fight against human trafficking, including assistance to victims of labor and sex trafficking.<sup>162</sup> The TVPA was reauthorized again in 2006 and 2008, expanding protections to vulnerable populations.<sup>163</sup> The 2006 iteration acknowledged the susceptibility of women and girls succumbing to trafficking due to “[their] low status . . . in many parts of the world” because women and girls are more “disproportionately affected by poverty, . . . lack of access to education, chronic unemployment, discrimination, and . . . lack of economic opportunities in countries of origin.”<sup>164</sup> The 2008 reauthorization further requires “to the greatest extent possible” to provide access to counsel to unaccompanied minors.<sup>165</sup>

After a lapse in 2011,<sup>166</sup> the Trafficking Victims Protection Reauthorization Act of 2013 TVPRA (TVPRA) was reauthorized into law.<sup>167</sup> This time, the bill smartly took issue with new forms of trafficking by utilizing the expanding technology sector.<sup>168</sup> In describing the state of affairs, President Obama noted:

Just as they are now using technology and the Internet to exploit their victims, we’re going to harness technology to stop them. We’re encouraging tech companies and

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<sup>160</sup> 22 U.S.C. § 7105 (2000); *see also* U.S. Dep’t Health & Hum. Res., *Fact Sheet: Victim Assistance*, ADM. FOR CHILD. & FAMS., <https://www.acf.hhs.gov/orr/fact-sheet/fact-sheet-victim-assistance-english> (last visited Mar. 16, 2022).

<sup>161</sup> 22 U.S.C. § 7101 (2003).

<sup>162</sup> U.S. DEP’T HEALTH & HUM. RES., *supra* note 158.

<sup>163</sup> Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. 109-164, 119 Stat. 3558 (codified at 22 U.S.C. § 7101); Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, 122 Stat. 5044 (codified at 22 U.S.C. § 7101).

<sup>164</sup> 22 U.S.C. §§ 7101(b)(2)-(b)(4) (2006).

<sup>165</sup> 8 U.S.C. § 1232(c)(5) (2008).

<sup>166</sup> Ali Vitali, *If Everyone Opposes Slavery, Why Has the Trafficking Victims Protection Act Died?*, NBC NEWS (Jan. 11, 2013, 6:49 PM), <https://www.nbcnews.com/id/wbna50438002>. The TVPA was allowed to expire due to a combination of “election year politics, pushbacks on spending, and lack of awareness.” *Id.*

<sup>167</sup> Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, §§ 1201-02, 127 Stat. 54, 136 (codified at 22 U.S.C. § 7101) (reauthorizing the TVPA).

<sup>168</sup> *See* President Barack Obama, Remarks by the President to the Clinton Global Initiative (Sept. 25, 2012) (transcript available at <https://obamawhitehouse.archives.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative>).

advocates and law enforcement—and we’re also challenging college students—to develop tools that our young people can use to stay safe online and on their smart phones.<sup>169</sup>

In addition to this new approach under the TVPRA, the United States also passed the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) in 2018,<sup>170</sup> which carved out immunity previously offered to online platforms for online trafficking.<sup>171</sup> While a bold step towards combatting online trafficking, the FOSTA has received much criticism during its short enactment.<sup>172</sup> The criticism questions whether it presents a model for other countries moving forward.<sup>173</sup> While the United States has at least made efforts to combat online trafficking, regrettably the same does not hold true on the international stage.

### B. *The Budapest Convention*

The Budapest Convention on Cybercrime (Budapest Convention) was adopted and opened for ratification on November 23, 2001.<sup>174</sup> To date, it is the only binding international convention on the

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<sup>169</sup> *Id.*

<sup>170</sup> See Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. 115-164, 132 Stat. 1253 (codified at 18 U.S.C. §§ 1591, 1595, 2421A, 47 U.S.C. § 230) (adopting that providers and users of interactive computer services who knowingly promote or facilitate online sex trafficking will be subject to Federal and State criminal and civil law).

<sup>171</sup> *Id.*; Danielle Citron & Quinta Jurecic, *FOSTA: The New Anti-Sex-Trafficking Legislation May Not End the Internet, But It’s Not Good Law Either*, LAWFARE (Mar. 28, 2018), <https://www.lawfareblog.com/fosta-new-anti-sex-trafficking-legislation-may-not-end-internet-its-not-good-law-either> (“The idea is that online platforms should face the same liability for enabling illegal sex-trafficking, as offline outlets do.”).

<sup>172</sup> See Heidi Tripp, *All Sex Workers Deserve Protection: How FOSTA/SESTA Overlooks Consensual Sex Workers in an Attempt to Protect Sex Trafficking Victims*, 124 PENN ST. L. REV. 219 (2019) (generally recommending that Section 230 immunity be reinstated for consensual sex workers so they may receive protection under the FOSTA); Lura Chamberlain, *FOSTA: A Hostile Law with a Human Cost*, 87 FORDHAM L. REV. 2171 (2019) (advocating for the repeal of the FOSTA and for decriminalization of consensual sex work as well as for new legislation that more acutely incriminates traffickers and mitigates trafficking practices); Eric Goldman, *The Complicated Story of FOSTA and Section 230*, 17 FIRST AMEND. L. REV. 279 (2018) (arguing that the FOSTA does not meet Congress’ goals of protecting sex trafficking victims and reducing their victimization).

<sup>173</sup> See *infra* Part IV.

<sup>174</sup> Convention on Cybercrime, Nov. 23, 2001, S. TREATY DOC. NO. 108-11, E.T.S. 185 [hereinafter “Budapest Convention”].

topic of cybercrime.<sup>175</sup> The Convention is organized into four sections. The second section is of the greatest pertinence to this Comment, as it outlines the substantive criminal consequences that are to be implemented at the national level for cybercrime-related offenses.<sup>176</sup> While a progressive and monumental achievement, the Budapest Convention fails in regard to curbing online content-related offenses.<sup>177</sup>

*i. Intent of the Convention*

The Budapest Convention was drafted in response to the technological revolution.<sup>178</sup> With the convenience new internet technologies brought about, so too did technology foster the emergence of a dark side of the internet with “new types of crime as well as the commission of traditional crimes by means of new technologies” with consequences more far-reaching than ever before.<sup>179</sup> Computers can now be the target of a crime, a tool of a crime—including the facilitation of “traditional” offenses—or merely incidental to the commission of a crime.<sup>180</sup> The final draft of the Convention shied away from these “traditional” criminal offenses except for those relating to child pornography,<sup>181</sup> and was largely designed to protect computer system and data integrity.<sup>182</sup>

*ii. Child Pornography*

As mentioned above, child pornography offenses are the only content-related crime covered under the Budapest Convention.<sup>183</sup> While not a trafficking prohibition on its face, this criminalization of child pornography-related activity on the internet should have some impact in efforts against human trafficking.<sup>184</sup> Children account for an estimated

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<sup>175</sup> *Budapest Convention on Cybercrime Key Facts*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/cybercrime/key-facts> (last visited Feb. 9, 2022).

<sup>176</sup> Budapest Convention, *supra* note 174, at 3-12.

<sup>177</sup> See *infra* Section III.B.ii & Section III.B.iii.

<sup>178</sup> Explanatory Report to the Convention on Cybercrime, 1 Nov. 23, 2001, E.T.S. 185 [hereinafter “Explanatory Report”].

<sup>179</sup> *Id.*

<sup>180</sup> Scott Charney & Kent Alexander, *Computer Crime*, 45 EMORY L.J. 931, 934 (1996).

<sup>181</sup> Budapest Convention, *supra* note 174, at 5-6.

<sup>182</sup> *Id.* at 1-2.

<sup>183</sup> *Id.* 5-6.

<sup>184</sup> Explanatory Report, *supra* note 178, at 15.

one out of every three trafficking victims around the world.<sup>185</sup> Of that, between 36% and 68% of detected child victims are trafficked for sexual exploitation purposes, depending on their country of origin.<sup>186</sup> While it misses the recruitment or transportive features of trafficking, Article 9 of the Convention set out to curb the same exploitive conduct that trafficking perpetuates—only this time applying to conduct online.<sup>187</sup> In drafting the Convention, delegations “strongly felt that specific provisions in an international legal instrument were essential to combat this new form of sexual exploitation and endangerment of children,” despite most States already criminalizing “traditional” production and distribution of child pornography.<sup>188</sup> They likely believed this would have a dismantling effect on the child porn industry as the delegations believed online exchanges of advice and fantasies among pedophiles were a key piece in the continued encouragement and facilitation of these offenses.<sup>189</sup>

Like the Palermo Protocol criminalizes trafficking efforts at all points throughout the offense, Article 9 of the Convention appears to do the same for child pornography, only reduced to what would be considered exploitive conduct under a trafficking definition.<sup>190</sup> The Convention dictates mandatory criminalization at the national level of the production, offering or making available, and the distribution or transmission of a “minor engaged in sexually exploitative conduct” on a computer system.<sup>191</sup> Unfortunately, the Convention does not mandate criminalization through to the end of the offense in the transaction of child pornography. States are permitted to opt out of criminalizing the procurement or possession of child pornography as well as criminalizing realistic images representing or a person appearing to be a minor engaged in sexually explicit conduct.<sup>192</sup>

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<sup>185</sup> 2020 TRAFFICKING REPORT, *supra* note 12, at 81. “Children” in this report are defined as under the age of 18. *Id.* at 31, n.13.

<sup>186</sup> *Id.* at 82-87. Children from higher income countries account for a larger share of sexual exploitation victims. *Id.* at 85. Additionally, girls specifically between the ages of 14 and 17 account for a substantially greater share than boys for children trafficked for sexual exploitation. *Id.*

<sup>187</sup> Explanatory Report, *supra* note 178, at 15.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 16.

<sup>190</sup> Budapest Convention, *supra* note 174, at 5-6.

<sup>191</sup> *Id.* at 5. Paragraph 3 defines a ‘minor’ to be under the age of 18 for child pornography purposes under the Convention. Exceptions are made for countries where the national lower age-limit is 16. *Id.* at 6.

<sup>192</sup> *Id.*

iii. *Other Shortcomings of the Convention*

The failure to criminalize additional content-related offenses under the Convention is surely one of its biggest shortcomings. It also perfectly demonstrates one of the more difficult aspects of crafting international legal agreements, especially in a cyber context: coming to a consensus.<sup>193</sup> Negotiating delegations were encouraged to draft the Convention with an eye towards getting the largest number of signatories possible.<sup>194</sup>

Though a fair mission for encouraging cooperation and participation among States, this aim caused a number of content-related offenses to be left out of the Convention.<sup>195</sup> The drafting committee summarily delegated the issue to the European Committee on Crime Problems to draft an additional Protocol to the Convention.<sup>196</sup> One of these content-related offenses recommended to the committee was the addition of using the internet for human trafficking purposes.<sup>197</sup> This recommendation was then made again to drafters of the Convention to “immediately draw up a protocol to the [Budapest] Convention.”<sup>198</sup> Eventually, this recommendation largely came to fruition as the Protocol on Xenophobia and Racism.<sup>199</sup> Unfortunately, this additional protocol did not make the recommended change to include human trafficking as an offense.<sup>200</sup>

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<sup>193</sup> Explanatory Report, *supra* note 178, at 7.

<sup>194</sup> *Id.* at 15.

<sup>195</sup> *Id.* at 7. The committee failed to reach a consensus on whether to include the distribution of racist propaganda online because some delegations—including the United States—cited freedom of expression concerns. *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> Eur. Parl. Ass., *Report of Committee on Legal Affairs and Human Rights*, 11th Sitting, Doc. No. 9031 (2001).

<sup>198</sup> Eur. Parl. Ass., *Draft Convention on Cyber-crime*, 11th Sitting., Op. 226 (2001).

<sup>199</sup> Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems, Jan. 28, 2003, C.E.T.S. No. 189.

<sup>200</sup> During the process of writing this Comment, the Second Additional Protocol to the Budapest Convention was adopted on November 17, 2021. The protocol will be opened for signature on May 12, 2022. *The Second Additional Protocol*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/cybercrime/opening-for-signature-of-the-second-additional-protocol-to-the-cybercrime-convention> (last visited Apr. 19, 2022). This additional protocol may provide some assistance in combatting online human trafficking as one aim of the protocol is “to further enhance co-operation on cybercrime and the collection of evidence in electronic form of *any* criminal offence” (emphasis added). Second Additional Protocol to the Convention on Cybercrime on Enhanced Co-Operation and Disclosure of Electronic Evidence, May 12, 2022, C.E.T.S. No. 224.

It should be noted that one ingenious aspect of the Convention is its forward-thinking use of technology-neutral language to render current *and* future technologies subject to criminal offenses under the Convention.<sup>201</sup>

#### IV. THE FOSTA: A BLUEPRINT SOLUTION?<sup>202</sup>

As indicated above, the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA)<sup>203</sup> has garnered a fair share of critiques during the few years that it has been signed into law, from free speech concerns to harming the consensual sex industry.<sup>204</sup> The United States law was passed in response to the proliferation of online sexual exploitation and sex trafficking.<sup>205</sup> Aimed at the Internet Service Providers (ISP) that host this content, the 2018 law increased the ISP's liability while lowering the requisite mens rea, thus allowing victims and prosecutors to more easily pursue claims.<sup>206</sup> While the FOSTA is not entirely devoid of redeeming qualities, it is unclear whether the legislation has any lasting value worth saving, let alone serving as a model for similar legislation in other countries.

A major critique of the FOSTA is that it impedes on freedom of speech rights guaranteed under the First Amendment.<sup>207</sup> While these rights are unique to the United States, this claim of the FOSTA's impingement on speech would likely extend to speech laws in other

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<sup>201</sup> Explanatory Report, *supra* note 178, at 9.

<sup>202</sup> Part IV evaluates the United States' efforts to curb trafficking through passage of the FOSTA. This section notes criticisms of the legislation and recommends against use of the FOSTA as a template for anti-trafficking legislation to be used in other countries.

<sup>203</sup> The FOSTA is the combination of two separate bills: FOSTA and SESTA (The Stop Enabling Sex Trafficking Act of 2017) which were passed as a package. *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. 115-164. Thus, the FOSTA is sometimes referred to as the SESTA-FOSTA. Throughout this Comment, this package of laws will be referenced to using FOSTA.

<sup>204</sup> Abigail W. Balfour, *Where One Marketplace Closes, (Hopefully) Another Won't Open: In Defense of FOSTA*, 60 B.C. L. Rev. 2475, 2494-502 (2019).

<sup>205</sup> Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA), Pub. L. No. 115-164, 132 Stat. 1253 (codified as amended 18 U.S.C. §§ 1, 2421, 2421A, 47 U.S.C. § 230) (2018); 164 CONG. REC. H1290-91 (daily ed. Feb. 27, 2018) (statement of Rep. Martha Roby) (arguing that the legislation "will finally hold bad actor websites accountable . . . [by] provid[ing] increased criminal liability and, thus, deter[ing] websites and individuals from selling human beings online. Websites will no longer be able to turn a blind eye . . .").

<sup>206</sup> Balfour, *supra* note 204, at 2489-90.

<sup>207</sup> *See* Chamberlain, *supra* note 172, at 2192-200.

countries as well.<sup>208</sup> A vast number of critiques concerning the FOSTA further focus on consensual workers in the sex work industry.<sup>209</sup> These critiques come from advocates as well as workers in the industry who have felt a negative impact from the FOSTA's enactment.<sup>210</sup>

An example of the FOSTA's claimed overbreadth in this area is that the law unwittingly restricts and harms consensual sex workers, both in terms of speech but also sex workers' health and safety.<sup>211</sup> Shortly after the FOSTA's enactment, online companies began removing content and taking down sex-related webpages.<sup>212</sup> This included sex industry forums where workers could share information about dangerous clients.<sup>213</sup> In addition to the removal of these online "tip" forums, many sex workers no longer have access to cheap advertising and no alternative but to revert to street work.<sup>214</sup> The removal of content from free online platforms has had the biggest impact on marginalized sex workers, such as Black, Brown, and indigenous workers, as well as trans sex workers and those with low socio-economic status.<sup>215</sup>

In addition to harming sex workers' ability to make a living and putting their safety at risk, the FOSTA's deterrent effect on trafficking has yet to be seen.<sup>216</sup> In July of 2018, three months after being signed into law, the House Judiciary Committee released a video commenting on the successes of the FOSTA.<sup>217</sup> In the video, Representative Ann Wagner, a key sponsor of the bill, claimed: "We have shut down nearly

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<sup>208</sup> To succeed on a First Amendment claim in a U.S. court, a statute must be "narrowly tailored to only proscribe unprotected speech from which illegal activity will directly follow." *Id.* at 2194.

<sup>209</sup> See Tripp, *supra* note 172, at 230, 239.

<sup>210</sup> Danielle Blunt and Ariel Wolf, *Erased: The Impact of FOSTA-SESTA & the Removal of Backpage* (Hacking Hustling, ed., 2020), <https://hackinghustling.org/erased-the-impact-of-fosta-sesta-2020>.

<sup>211</sup> See Tripp, *supra* note 172, at 230, 239.

<sup>212</sup> *Id.* at 223, 237.

<sup>213</sup> Kendra Albert, et al., *FOSTA in Legal Context*, 52 COLUM. HUM. RTS. L. REV. 1084, 1089-91 (2021).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 1090.

<sup>216</sup> Glenn Kessler, *Has the Sex-Trafficking Law Eliminated 90 Percent of Sex-Trafficking Ads?*, Wash. Post: Fact Checker (Aug. 20, 2018), <https://www.washingtonpost.com/politics/2018/08/20/has-sex-trafficking-law-eliminated-percent-sex-trafficking-ads/>.

<sup>217</sup> House Judiciary GOP, *Putting an End to Online Sex Trafficking through FOSTA: The Fighting Online Sex Trafficking Act*, YOUTUBE (July 20, 2018), <https://www.youtube.com/watch?v=Nfygwxz-IZs>.

90 percent of the online sex-trafficking business and ads.”<sup>218</sup> This comment earned Representative Wagner “Three Pinocchio’s” from the Washington Post, as this sharp decline in trafficking advertisements was directly related to the Justice Department’s shutdown of Backpage.com.<sup>219</sup> The problem is that Backpage’s shutdown happened *before* the FOSTA’s enactment.<sup>220</sup> However, within a month of the video’s release, sex-trade ads were at nearly 75% of the pre-FOSTA count.<sup>221</sup> Additionally, fluctuations in sex-trade ads cannot be equated to changes in the actual rates of trafficking. Indeed, trafficking for sexual exploitation accounts for roughly 70% of all trafficking victims in North America, which is the highest rate globally.<sup>222</sup>

Implementation of the Palermo Protocol, and international law enforcement in general, is bolstered by some focus on the development of uniformity among national laws. This is especially pertinent if the goal includes combatting cross-border trafficking. When laws are implemented with different motives, a patchwork of legislation results.<sup>223</sup> Having guidelines or implementing model legislation that is proven to be effective can therefore be an helpful tool.<sup>224</sup> However, the FOSTA falls into a class of recent legislation that attempts to curb trafficking while “replicat[ing] many of the flaws of earlier approaches, namely, a focus on victimization, a fruitless cycle of debate on the role of prostitution, problematic definitional questions, and a process of decisionmaking that excludes critical voices.”<sup>225</sup> If nations are interested in a collaborative effort solely focused on combatting online trafficking, they should look elsewhere than the FOSTA for guidance.

## CONCLUSION

Human trafficking has gained the attention of governments around the world over the past twenty years culminating in the near-universal Palermo Protocol. However, human trafficking has arguably become an even more glaring problem around the world thanks to the rise of internet connectivity giving traffickers the perfect medium

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<sup>218</sup> *Id.*

<sup>219</sup> Kessler, *supra* note 216.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> 2020 TRAFFICKING REPORT, *supra* note 12, at 156.

<sup>223</sup> Jovanovic, *supra* note 153.

<sup>224</sup> See Elizabeth M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 STAN. J. INT’L L. 1, 17 n.77 (2004).

<sup>225</sup> *Id.* at 3.

through which to operate. Despite the growing reach and impact of online trafficking, legal frameworks around the world have failed to keep stride after ratification of the Palermo Protocol, and do not address the problem sufficiently in the online era. As indicated, online human trafficking is a problem that needs to be addressed on the international stage. Traffickers can now more easily operate across borders and have access to a larger pool of potential victims around the world. An additional protocol to the Budapest Convention is surely the best tool to combat cyber human trafficking. However, since this particular instrument is not likely to come to fruition any time soon, nations seeking to collaboratively combat online human trafficking will need to look elsewhere. Though recycling model legislation may have potential, these nations and drafters of a new instrument or interim agreement should be wary of looking to the United States' FOSTA as the ideal blueprint to solve the problem of human trafficking on the internet.