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Legal Recourse and Accountability for Sex Trafficking

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Introduction

As the 59th meeting of the Commission on the Status of Women commences, it is a time to reflect on previous initiatives, revise old objectives and develop new strategies for the future. At the heart of this will be the examination of the Beijing Declaration and Platform for Action (Beijing Platform) and evaluating the progress in achieving the Millennium Development Goals (MDGs), by the end of 2015. However, in addition to reviewing previous goals and objectives, the time has come to cultivate a plan that ensures the preservation of past successes and while developing new objectives for women and girls across the globe.

The Beijing Platform and the MDGs, continue to ensure the forward momentum on issues that impact women and young girls. The forms of progress mentioned in the Beijing Platform and the MDGs include a woman's right to equality,¹ access to economic and educational mobility,² and the preservation of women and girls right to safety, dignity and enjoyment of the fundamental freedoms entitled to all citizens of the global community.³ Nevertheless, in order for these goals to further advance, factors that pose a threat to the advancement of women and girls must be addressed.

One major derailment in the forward progress of women around the world has and continues to be the role of trafficking, more specifically, the sex trafficking of women and children around the world. The crime is widespread and countries all across the world have worked to combat this plague on society through legislation,⁴ initiatives,⁵ and

¹ UN Women, *Progress towards meeting MDGs for women and girls, Goal 3: Promote Gender Equality and empower women* (last visited Feb. 15, 2015), <http://www.unwomen.org/en/news/in-focus/mdg-momentum>.

² United Nations, Beijing Declaration and Platform of Action, Chap. IV (B) section 69, adopted at the Fourth World Conference on Women, 27 October 1995.

³ *Id.* at IV (D) section 112.

⁴ Victims of Trafficking and Violence Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

⁵ U.N. Inter-Agency Protocol on Human Trafficking, The Coordinated Mekong Ministerial Initiative against Trafficking COMMIT, <http://www.no-trafficking.org/commit.html> (last visited January 21, 2015).

working-groups⁶. Despite the many angles that have been taken to address this problem, victims of sex trafficking with 152 different citizenships in over 124 countries across the world, were identified between 2010 and 2012 alone, according to the 2014 Global Report on Trafficking in Persons by the United Nations Office on Drugs and Crime.⁷ As defined under Convention against Transnational Organized Crime, the techniques include the use of force, fraud and coercion and are continuously recruited, harbored and transported for the purpose of commercial sex.⁸ Of these victims, composed of women, men and children, research has detected an increase in child trafficking, especially amongst young girls.⁹ As this report suggests, sex trafficking remains a persistent problem affecting the global community and touches every border of the world.

Consequently, when thinking about the next steps after the Beijing Platform and the MDGs, the discussion must remain focused on promoting women and girl's equality, economic and educational mobility and the preservation of their fundamental freedoms. However, to do this, an aggressive global collective effort to eliminate trafficking must be taken. Three ways this can occur are: 1) for all nation states within their domestic legislation to be in full compliance with the UN Trafficking in Persons Protocol;¹⁰ 2) the utilization of universal jurisdiction by all nations, as done in war crimes, to prosecute trafficking perpetrators; and 3) when domestic remedies have been exhausted or insufficient, prosecution of individuals responsible for controlling the trafficking rings in the International Criminal Court (ICC).

⁶ U.N. Office on Drugs and Crime, Working Group on Trafficking Persons, <http://www.unodc.org/unodc/human-trafficking/publications.html> (last visited February 12, 2015).

⁷ U.N. Office on Drugs and Crime, *Global Report on Trafficking in Persons*, p.7 (November, 2014).

⁸ United Nations Convention against Transnational Organized Crime, 32, Nov. 15, 2000, U.N. Doc. A/RES/55/25 at 25 (2000); Annex II: UN Trafficking in Persons Protocol, 4, Jan. 8, 2001, UN Doc. A/RES/55/25 at 4 (2001).

⁹ *Supra* note 7 at 11.

¹⁰ *Supra* note 8

By implementing these three strategies, greater protections will be provided to victims of trafficking, which are predominantly women and children. With women and children safer, their ability to access proper education and employment can commence without the fear of trafficking. This affirmative step forward by all nations will provide traction for woman and children alike to further fulfill the goals of the Beijing Platform, the MGDs and beyond. This report will examine the legal mechanisms under domestic legislation, the principle of universal jurisdiction, and the utilization of the ICC. It will assess the ability of these mechanisms to help provide continued progress beyond the Beijing Platform and MGDs goals, while simultaneously addressing the issue of sex trafficking globally.

I. Domestic Compliance with UN Trafficking in Persons Protocol

The United Nations has developed multiple strategies to combat sex trafficking, some of those have included: The United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949);¹¹ The International Covenants on Civil and Political Rights (1966);¹² The Convention on the Elimination of all Forms of Discrimination Against Women (1979);¹³ and The United Nations Protocol against the Smuggling of Migrants by Land, Sea, and Air, which entered into force in 2004.¹⁴ These major treaties and covenants helped identify, classify and criminalize the act of trafficking and provided a platform for sex trafficking to be addressed within the international community.

¹¹ United Nations Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, Dec. 12, 1949, U.N. Doc. A/RES/317, 96 UNTS 271.

¹² International Covenant on Civil and Political Rights, Dec. 16, 1966, GA res. 2200A(XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316; 999 UNTS.

¹³ The Convention on the Elimination of all Forms of Discrimination Against Women, Dec. 18, 1979, GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46; 1249 UNTS 13.

¹⁴ Protocol against the Smuggling of Migrants by Land, Sea, and Air Supplementing the United Nations Convention Against Transnational Crime, Dec. 15, 2000, GA Res. 55/25, annex III, U.N. GAOR, 55th Sess., Supp. No. 49, at 65, UN Doc. A/45/49 (Vol. I) (2001).

One of the most notable resolutions passed by the United Nations General Assembly occurred on January 8, 2001, when it supplemented the UN Convention against Transnational Organized Crime with the UN Trafficking in Persons Protocol,¹⁵ which is focused on prevention, suppression and punishing the act of trafficking people, especially women and children. This action was crucial in providing a platform to effectively address the problem of sex trafficking, due to the Convention's stated purpose to promote international cooperation as well as to prevent and combat transnational organized crime.¹⁶ Prior to the protocol going into effect in 2003, almost two-thirds of the countries in the world did not have specific offences that criminalized trafficking.¹⁷ As of 2015, approximately 95% of the world's countries either partially or fully criminalize all forms of trafficking.

However, this number can be deceiving. Of those 95%, ten-percent totaling about 18 countries and territories, have only partial legislation, which means that although they do prosecute trafficking, their legislation may only cover specific types of crimes and victims, such as just women, or sex-trafficking only.¹⁸ These types of partial legislation lead to an inconsistent approach to addressing all forms of trafficking. Furthermore, where these types of legislation exist in South America, Southeast Asia and Sub-Saharan Africa, trafficking of all types against women, men and children continue to be substantial.¹⁹ To further exacerbate the problem, the five-percent of the world's countries, which still remain without any form of domestic legislation, to prosecute any form of trafficking, reside predominately in Sub-Saharan Africa and Southeast Asia, where sex

¹⁵ *Supra* note 8

¹⁶ *Id.*

¹⁷ *Supra* note 7 at 51.

¹⁸ *Id.* at 12.

¹⁹ *Id.*

trafficking retains a major strong-hold.²⁰ Given the density and size of the population of these areas, effectively over 2 billion people live in regions where any form of trafficking will not be prosecuted to its full extent.²¹ Thus, as illustrated, although 95% of the global community has moved toward domestic legislation to prosecute trafficking perpetrators, the countries and territories in which most of the victims of trafficking are coming from remain with little to no form of domestic protection.²²

Given the current understanding of areas most susceptible to predators of sex trafficking, domestic and regional legislation of these areas need to come into compliance with the UN Trafficking in Persons Protocol. By remaining either partially or completely in non-compliance with the protocol, these regions remain a safe haven for sex-traffickers who prey on their citizens and utilize their lack of domestic legislation to evade prosecution. The role of prosecution is not only for victims of the crime, it sets a precedent within a nation for its people that their government will protect them for those who wish to prey on its citizens. Furthermore, the program goals set-forth in the Beijing Platform and MDGs can be far more successful if women and children are able to focus on their education and becoming economically competitive within their country and not be preoccupied with maintaining their personal safety. Overall, in order to ensure equality for women and combat the many challenges set-forth in the MDGs, all nations need to be in compliance with the UN Trafficking in Persons Protocol to combat sex trafficking and to destruct any safe-haven perpetrators may have within their regions.

II. Prosecutorial Practices through Universal Jurisdiction

²⁰ *Supra* note 7 at 51.

²¹ *Id.* at 52.

²² *Id.* at 7.

The principle of universal jurisdiction allows national authorities of any state to investigate and prosecute serious international crimes even if they were committed in another country.²³ This principle rests on an idea that some crimes are so heinous, such as genocide, crimes against humanity, torture and war crimes, that they affect the interest of the entire international community.²⁴ In comparison, many crimes under a State's criminal law system have a number of reasons for an application of extraterritorial jurisdiction, which include: actions committed by person having the nationality of the State; actions committed against nationals of the state or; affecting the security of the State.²⁵ However, unlike extraterritorial jurisdiction, universal jurisdiction is applicable over offenses regardless of where they occurred and the nationality of the perpetrator or victim.²⁶ Many of the crimes that require an assertion of universal jurisdiction, are based on the desire to prevent impunity and not allow criminals from finding a protection from prosecution in another State.²⁷

One example of the application of universal jurisdiction can be seen in the prosecution of Chilean dictator Augusto Pinochet. On October 16, 1998, Judge Baltasar Garzon of Spain issued an international arrest warrant is for Pinochet for the torture and murder of Spanish citizens.²⁸ A week later, based on this international arrest warrant, the British authorities arrested Pinochet in London for human rights violations, which

²³ U.N. General Assembly, *The Scope and Application of the Principle of Universal Jurisdiction, Comments of Kenya* U.N. Doc. A/64/452-Res 64/117, http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Kenya.pdf (December 2009).

²⁴ *Id.*

²⁵ International Committee of the Red Cross, *Advisory Service on International Humanitarian Law*, <https://www.icrc.org/eng/resources/documents/misc/57jnxn.htm> (June 2002).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *In re Pinochet*. Spanish National Court, Criminal Division (Plenary Session) Case 19/97; Case 1/98 (November 4, 1998).

included torture, murder and the taking of hostages, during his dictatorship of Chile.²⁹ Throughout the Pinochet regime, thousands of citizens were tortured and killed by the Chilean government and under the direction of Pinochet.³⁰ Under the highest courts of the United Kingdom, Pinochet was forced to face the consequences of his actions committed in his home state on foreign soil.³¹ What made this prosecution unique was that the United Kingdom had no direct interest in the prosecution of General Pinochet, he was neither their citizen nor were any of the victims Pinochet was responsible for torturing or killing.³² The actions of the British government were done as global citizens identifying a need to prosecute an injustice.³³ The United Nations High Commissioner of Human Rights, further supported these actions by identifying acts such as torture as an international crime subject to universal jurisdiction.³⁴ This act by the British government would mark one of the first times the use of universal jurisdiction would be applied as a way to address an issue that was considered an international crime, which allowed for a domestic application of justice.³⁵

In general, the crimes that fall under the principle of universal jurisdiction include: war crimes, torture and crimes against humanity, these crimes signify actions by an individual and/or government who show a complete disregard for human life and inevitably affected not only individuals but also their community.³⁶ The effects caused by these types of crimes are pervasive; they last through generations and leave deep-rooted

²⁹ *In re an Application for Writ of Habeas Corpus as Subjiciendum re: Augusto Pinochet Ugarte*, 38 I.L.M. 68 (Q.B. Divl. Ct. 1998)

³⁰ *Supra* note 28 at 4.

³¹ *Id.*

³² *Supra* note 29 at 5.

³³ *Id.*

³⁴ *World Straw considers Pinochet case*, bbc.com, <http://news.bbc.co.uk/2/hi/302487.stm> (last visited February 17, 2015).

³⁵ *Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet, R v.* [1998] UKHL 41; [2000] 1 AC 61; [1998] 4 All ER 897; [1998] 3 WLR 1456 (November 1998).

³⁶ Rome Statute of the International Criminal Court art. 1, July 17, 1998.

scars not only within the region in which it occurred but also the international community.³⁷

Much like torture and war crimes, the trafficking of people is neither isolated nor insular. Its impact is widespread, starting from the countries in which women, men and children are preyed on and sold into labor,³⁸ commercial sex work³⁹ and/or for organ transplantation.⁴⁰ Ending in countries in which they arrive and they become subject to deportation,⁴¹ criminal prosecution,⁴² or further trafficking and violence.⁴³ The violence and predatory behavior is cyclical. As mentioned earlier, although much is being done to combat this, there is an increase in young children, specifically girls, being trafficked all around world.⁴⁴ If not intercepted, these young women will face a life of violence, abuse and fear, and sometimes an untimely death. When this occurs, there is irreparable harm to the individual, their family and the global community. It is not hard to draw the parallels that arise between crimes that fall under universal jurisdiction and trafficking amongst women, men and children. All of these crimes require a deft hand through the use of the justice system to address the crime and to provide a remedy to its victims.

With this in mind, it is not only necessary for regions to prosecute their own citizens who are perpetrators of sex trafficking, it is also a necessary practice for those countries who are able to identify and capture sex-traffickers, who are not their citizens, to prosecute them to the fullest extent of the law under the principle of universal jurisdiction. By enforcing the principle across the globe in every country and territory,

³⁷ *Supra* note 28 at 9.

³⁸ *Supra* note 7 at 5.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ U.N. Office on Drugs and Crime, *The Role of 'Consent' in The Trafficking of Persons Protocol*, p.11 (2014).

⁴² *Id.*

⁴³ U.N. Office on Drugs and Crime, *Corruption and the Smuggling of Migrants*, p.15 (2013).

⁴⁴ *Supra* note 7 at 5.

there will be no place in which sex traffickers will be able to seek a safe haven from the law.

III. The Role of the International Criminal Court in Sex Trafficking

The International Criminal Court (ICC) was created in order to prosecute the most serious criminal acts that were committed within the international community.⁴⁵ More specifically the ICC has the jurisdiction to prosecute individuals for international crimes that fall under the definition of genocide, crimes against humanity, war crimes and the crime of aggression.⁴⁶ As an intergovernmental and international tribunal it remains one of the few arenas in which victims may receive justice on an international scale when their domestic options have been exhausted.⁴⁷ The Rome Statute, a multilateral treaty, is the foundational and governing document from which the ICC was formed as a court system.⁴⁸ Although this court has often been used to prosecute war crimes, the ICC has within its governing power to have an effect on the prosecution of trafficking, especially sex trafficking within its court system.

As mentioned earlier, one of the crimes the ICC has universal jurisdiction and power to prosecute are crimes against humanity. Under Article 7 of the Rome Statute, crimes against humanity include, enslavement,⁴⁹ sexual slavery, enforced prostitution and any other form of sexual violence of comparable gravity.⁵⁰ Article 7, defines enslavement as, “any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in

⁴⁵ Rome Statute of the International Criminal Court art. 1, U.N. Doc. A/CONF.183/9 (1998).

⁴⁶ *Id.* at art. 5.

⁴⁷ *Id.* at art. 4.

⁴⁸ *Id.*

⁴⁹ *Id.* at art. 7(1)(c).

⁵⁰ *Id.* at art. 7(1)(g).

particular women and children.”⁵¹ With this in mind, under the definition of enslavement, sexual slavery and enforced prostitution, the act of trafficking falls under the ICC’s jurisdiction and protection.

Thus, if and when domestic remedies are exhausted, traffickers may be subjected to the jurisdiction of the ICC. However, there are hurdles that arise when attempting to prosecute individuals under the ICC, which make this option more challenging.

One of the major hurdles that arise when pursuing a prosecution through the ICC is a lack of jurisdiction. Under Article 12(2) of the Rome Statute, before the ICC can act, its jurisdiction must be accepted either by the territorial state⁵² or the State of Nationality of the accused.⁵³ Without this pre-established acceptance of the ICC’s jurisdiction, the State in question would have to approve the ICC jurisdictions independently,⁵⁴ which is unlikely if under investigation of crimes within their territory.

This is relevant when discussing the prosecution of sex trafficking due to the locations where these acts are most pervasive such as, Sub-Saharan Africa and Southeast Asia. Within Sub-Saharan Africa 25 countries have ratified the Rome Statute, however, in Southeast Asia only 2 countries within the entire region have ratified it: Cambodia and Thailand. Without proper jurisdiction, the use of ICC as an international tool to prosecute individuals within a region is significantly limited if not non-existent.

Furthermore, although 25 countries within Sub-Saharan African have ratified the treaty, as of late, many African countries have raised the issue around whether the International Criminal Court is targeting Africa inappropriately in its prosecution of

⁵¹ *Id.* at art. 7(2)(c).

⁵² *Id.* at art. 12 (2)(a).

⁵³ *Id.* at art. 12 (2)(b).

⁵⁴ *Id.* at art. 12 (3).

crimes and its leaders.⁵⁵ As a result, the African Union and African leaders such as President Museveni of Kenya have discussed removing Africa from the ICC.⁵⁶ Given this, the role of the ICC in prosecuting individuals leaders within this region may be difficult.

Another hurdle that arises when attempting to prosecute an individual through the ICC is the initiation of investigations and satisfying the admissibility standard set-forth by the ICC. As established under Article 13, in order for investigation to be initiated, it must be referred by a state party,⁵⁷ the Security Council,⁵⁸ or the prosecutor.⁵⁹ Therefore, in order for a claim to be heard by the ICC, there would need to be an excessive amount of evidence on a specific area for investigation to be requested.⁶⁰

Furthermore, if and when this occurs, the ICC still can not proceed forward under Article 17 which provides the standard of admissibility if: 1) it is being investigated or prosecuted by a State which has jurisdiction;⁶¹ 2) it has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned;⁶² 3) the person has already been tried for the same conduct;⁶³ 4) the case is not of sufficient gravity to justify further action by the Court.⁶⁴ Given these requirements, it becomes quite arduous for many cases of sex-trafficking to meet these standards and if they are able to, to have a swift resolution and remedy for victims.

⁵⁵ International Human Rights International Criminal Law, *ICC Forum*, iccforum.com, <http://iccforum.com/africa> (last visited Feb. 12, 2015).

⁵⁶ Steve Herrmann, *Will Africa pull out of the ICC*, BBC.com, <http://www.bbc.com/news/world-africa-24452288> (last visited Feb. 12, 2015).

⁵⁷ *Supra* note 44 at art.13 (a).

⁵⁸ *Id.* at art. 13(b).

⁵⁹ *Id.* at art. 13 (c).

⁶⁰ *Id.*

⁶¹ *Supra* note 44 at art.17 (1)(a).

⁶² *Id.* at art. 17(1)(b).

⁶³ *Id.* at art. 17 (1)(c).

⁶⁴ *Id.* at art. 17 (1)(d).

Alas, in order for the ICC to be a viable option for States to prosecute sex trafficking on an international level three things would need to occur. First, all States that are located within Southeast Asia and Sub-Saharan Africa would need to ratify the Rome Statute in order to allow the ICC to have jurisdiction within their region. Second, the ICC would need to re-establish confidence in its criminal justice system, especially within African nations, to reestablish a belief in impartiality and fairness. Finally, there would need to be massive investigations of these regions, which would include documentation of the problem, its impact, the names and locations of leaders of sex trafficking rings and detailed accounts of their transgression. Given the magnitude of this process, the immediate impact the ICC can have on prosecuting sex trafficking remains limited. Therefore, the prosecution of individuals through domestic courts and through the use of universal jurisdiction within all States becomes even more critical to solving this problem.

However, despite the difficulties that arise when attempting to prosecute individuals under the ICC, those individuals who are caught within trafficking rings need to be made aware of their options and be reassured that their capturers will be prosecuted. If this faith can be affirmed, there is a chance more victims will be encouraged to come forward and begin to disrupt these trafficking rings. However, this can only occur if all forms of legal systems from the domestic to the international can uphold their end of the system and prosecute these predators.

IV. Conclusion

There can be no doubt that trafficking is and will continue to be a pervasive factor within the global community unless a more direct and collaborative approach is not taken. There are three ways in which this collaboration can and needs to be done from domestic legislation to international prosecution.

On a domestic level, those regions that have partial to no domestic legislation on trafficking need to be in compliance with the UN Trafficking in Persons Protocol. This is even more essential given the current and consistent problem of trafficking within their region and territories.

For those countries that are in full compliance, there needs to be a more pro-active utilization of universal jurisdiction when it comes to prosecuting sex traffickers within their regions regardless of their national origins. By reasserting the importance of combatting sex trafficking in their domestic legislation, these countries have taken the first step, but this problem cannot remain insular, it must be attacked from all angles by all those committed to its abolition.

Finally, on an international level, when domestic remedies are exhausted or do not exist, the International Criminal Court, must and is well within its power to help prosecute those individuals who continue to prey on women, men and children for their own financial gain. However, in order to do this, actions need to be taken that will ensure an expedited process to effectively address sex trafficking in a direct way. These include: 1) persuading countries who have not allowed the ICC to have jurisdiction within their country to do so; 2) building confidence amongst those States that have agreed to allow the ICC to have jurisdiction with their state; and 3) encouraging more thorough

investigations within these regions to provide the necessary information to those who can initiate prosecution.

Most importantly, this issue must be fought on every front if some form of a resolution is going to come. In prosecuting the perpetrators, victims will have access to courts in a way that have been previously closed off to them before. The more prosecutions and convictions, the more likely victims will be able to speak out against their captors. Building faith with victims can only come when the global community can show their intent to protect their citizens and begin to dismantle the organized crime of sex trafficking. These prosecutions ensure that no State can be a safe haven for these criminals and every place is a safe haven for their victims.

In order for the visions of the Beijing Declaration and Platform for Action and the Millennium Development Goals to come full circle, the progress of a woman's right to equality, access to economic and educational mobility must continue. But in an attempt to bring those realities to life, issues of violence and trauma caused by trafficking must be addressed simultaneously in order for these goals to come to fruition. By creating safer communities, the ability to create healthier and sustainable opportunities for women and children remains possible.

Recommendations

Human Rights Advocates urges:

1. The CSW to include the following recommendations for States when developing the resolutions beyond the Beijing Platform and MGDs. In addition, we ask the CSW to consider these proposals when developing their recommendations to ECOSOC and the General Assembly.

2. States:

a. To be in compliance with the UN Trafficking in Persons Protocol of the United Nations Convention against Transnational Organized Crime. This would include the development of domestic legislation that prosecutes all forms of trafficking crimes and protecting all types of trafficking victims within the State to the full extent of the law. As result, destructing any safe-haven perpetrators may have within their regions.

b. That encounter victims and perpetrators of trafficking within their States borders need to prosecute these traffickers. Under the principle universal jurisdiction, regardless of whether the criminal or victim is a citizen States need to prosecute these traffickers to the full extent of the their domestic laws. That have not ratified the Rome Statute within high trafficking areas to ratify the treaty to allow the International Criminal Court to be an option for prosecuting traffickers when domestic remedies have been exhausted.