

Non-consensual Submission in Trafficking in Women: Legal Implications in the Philippine Context

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I. INTRODUCTION

I believe the trafficking of persons, particularly women and children, for forced and exploitative labor, including for sexual exploitation, is one of the most egregious violations of human rights which the United Nations now confronts. It is widespread and growing. It is rooted in social and economic conditions in the countries from which the victims come, facilitated by practices which discriminate against women, and driven by cruel indifference to human suffering on the part of those who exploit the services that the victims are forced to provide. The fate of these most vulnerable people in our world is an affront to human dignity and a challenge to every state, every people, and every community.

Kofi Annan, UN Secretary-General,
Palermo Convention (2000)¹

Elizabeth Cady Stanton in *Declaration of Sentiments for Women's Rights*, once said, "The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her."² Nothing exemplifies such absolute tyranny more than the peddling of women into the sex trade, often by force, fraud, or coercion, as if they were mere commodities or articles of commerce that can be dealt, exchanged, marketed or traded.³

Violence against women has presently reached appalling proportions; and the numbers as well as statistics are simply too reprehensible to remain unnoticed. The United Nations (UN) estimates that four million women have been trafficked transnationally, i.e. from one country to another, and

1. UNDCP, *UN Secretary-General Calls Signing of Palermo Convention "A Watershed Event" in Fight against Organized Crime*, at <http://www.undcp.org/palermo/convmain.html> (last visited Dec. 12, 2000).
2. Elizabeth Cady Stanton et al., *Declaration of Sentiments, Woman's Rights Convention*, in *HISTORY OF WOMAN SUFFRAGE* 70 (1881).
3. It would seem that articles of commerce and commodities are in a situation far better than trafficked women. Unlike those who are trafficked, articles of commerce are not abused, exploited, maltreated, nor violated.

domestically, *i.e.* within a country's borders itself. Notably, of those trafficked, adult women constitute an overwhelming majority.⁴

Although researchers differ as to the actual number of women trafficked and that such estimates are generally preliminary, the reported revenue allegedly collected from trafficking reveals what the demography of trafficked women cannot tell us with precision: *trafficking is a five to seven billion U.S. dollar annual operation.*⁵ In fact, trafficking is currently the third largest source of profits for organized crime, behind that of trade in drugs and guns.⁶ In many countries, however, the penalty imposed for trafficking in persons is usually lower than those imposed for firearms and drug trafficking,⁷ thereby creating a low-risk environment for trafficking in persons to thrive.

Trafficking affects virtually every country in the world. Countries can either be a sending country (origin), a transit country or a receiving country (destination place). The largest number of victims comes from Asia, with over 225,000 victims annually from Southeast Asia, and over 150,000 from South Asia. The former Soviet Union is now believed to be the largest new source of trafficking for prostitution and the related sex industry, with over 100,000 women and children trafficked each year from that region.⁸ Over 250,000 victims also come from Eastern Europe, Latin America, Africa, and the Caribbean. Most of the victims are sent to Asia, the Middle East, Western Europe and North America.⁹

Indeed, trafficking is nothing new. It has been in existence since ancient civilization when large numbers of women and children were traded in the marketplace as plantation or domestic slaves and sex slaves to their masters.¹⁰

4. JANICE G. RAYMOND ET AL., A COMPARATIVE STUDY OF WOMEN TRAFFICKED IN THE MIGRATION PROCESS-PATTERNS, PROFILES AND HEALTH CONSEQUENCES OF SEXUAL EXPLOITATION IN FIVE COUNTRIES (INDONESIA, THE PHILIPPINES, THAILAND, VENEZUELA AND THE UNITED STATES) I (2001) [hereinafter COMPARATIVE STUDY].
5. JANICE G. RAYMOND, GUIDE TO THE NEW UN TRAFFICKING PROTOCOL I (2001) [hereinafter GUIDE].
6. Francis T. Miko, *Trafficking in Women and Children: The U.S. and International Response*, Congressional Research Service Report 98-649 C (2000), at <http://usinfo.state.gov/topical/global/traffic/crs0510.htm> (last visited Apr. 7, 2002) [hereinafter CRS Report].
7. COMPARATIVE STUDY; *supra* note 4.
8. CRS Report, *supra* note 6.
9. *Id.*
10. Stop Sex Trafficking of Filipino Women and Children: A Primer on Sex Trafficking, at http://members.tripod.com/~gabriela_p/8-articles/990601_prose.html (last visited March 3, 2004) [hereinafter Primer].

Although trafficking is historically one of the oldest issues that drew international attention and concern, it has remained one of the most persistent and disturbing problems of the twenty-first century.¹¹ Unfortunately, the issue on trafficking, especially in women, has never received any priority, whether in the agenda of local legislators or international conferences. It was only in the last five years that a heightened awareness of the issue on trafficking in women began. Such transnational awareness culminated in the signing of the new UN Convention Against Transnational Organized Crime (UN Convention) by 141 countries gathered in Palermo, Italy in December 2000. Most importantly, over 105 countries signed one of its supplementary protocols – the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Protocol).¹² The new Convention and its supplementary protocol on trafficking in persons have to be ratified by 40 countries before they enter into force and become instruments of international law.¹³ As of present time, neither the Convention nor the Protocol have entered into force, with only 18 states ratifying the Convention and 12 states ratifying the Protocol.

11. Aurora Javate de Dios, *Trafficking in Women: New Trends, Approaches and Action*, at <http://www.catw-ap.org/Trafficking.htm> (last visited Apr. 10, 2002).
 12. GUIDE, *supra* note 5. There are three supplementary protocols to the Convention Against Transnational Organized Crime: (1) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; (2) Protocol Against the Smuggling of Migrants by Land, Sea and Air; and (3) Protocol on the Illicit Manufacturing of and Trafficking in Firearms. The Philippines is a signatory of this Convention and its supplementary protocols.
 13. *Id.* As of this writing, the UN Convention and its protocols have not yet entered into force. Art. 38 (1) of the UN Convention provides: "This Convention shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization." UN Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex I, 55 U.N. GAOR Supp. (No.49) at 44, U.N. Doc. A/45/49 (Vol. I) (2001).
- Under Article 11 of the 1969 Vienna Convention on the Law of Treaties, signature and ratification are the most frequent means of expressing consent to be bound by a treaty. However, it is possible that the diplomats negotiating a treaty have limited authority to bind their states by signing the treaty; in such a case, the treaty does not become binding until it is ratified or approved by the head of state or the legislature or a part thereof. Strictly speaking, ratification occurs when instruments of ratification are deposited with the depositary. See PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 131-32 (1997).

Significantly, the Philippines is one of those countries which ratified the Convention and the Protocol in 28 May 2002.¹⁴

The Convention and the Protocol are the first legally binding international instruments in the field of trafficking in persons. The Protocol, albeit optional, is an express measure mandated to combat the evil of trafficking in persons. Impliedly, trafficking in persons is now recognized as an act of transnational organized crime. Trafficking in persons is considered as grave as money laundering, drug trafficking, smuggling of migrants, and trafficking in firearms. Incidentally, trafficking in persons is now considered a crime against humanity, being a form of enslavement, pursuant to the newly ratified Rome Statute of International Criminal Court.¹⁵

Although a lot of issues on trafficking were threshed out during the 12 sessions of the *Ad Hoc* Committee Established for the Drafting of the Convention and the Protocol, the most controversial aspect was the definition of trafficking in persons, specifically as regards the issue on consent. Contentious debates likewise revolved on the issues as to whether the focus of the Protocol should only be women rather than children; whether trafficking can take place within or across national borders; whether the trafficked women should be seen as criminals rather than victims; and whether all victims of trafficking in persons should be protected and not just those who can prove force, coercion, abduction, fraud, or deception.

Clearly, the judicious attitude towards the crafting of the definition was understandable. The definition will be the first ever international definition of trafficking in persons. The Protocol seeks to create a global language in defining trafficking in persons. The Protocol likewise anticipates accomplishing what national legislation cannot do on its own. The foremost intention is to jumpstart national legislation on trafficking in persons.¹⁶

14. See http://www.undcp.org/crime_cicp_signatures_convention.htm and http://www.undcp.org/crime_cicp_signatures_trafficking.htm (last visited Jul. 14, 2002).

15. Rome Statute of International Criminal Court, U.N. Doc. UN Doc. A/CONF.183/9 (1998), art. 7 (2)(c) [hereinafter Rome Statute]. The Statute was adopted on July 17, 1998 by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and entered into force last July 2, 2002. The Philippines expressed its consent to be bound by signing the Statute on Dec. 28, 2000 but it did not subsequently ratify said Statute.

Enslavement means the exercise of 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 particular, women and children. Rome Statute, art. 7 (2)(c).

16. GUIDE, *supra* note 5.

Stated otherwise, Member Countries to the Protocol are now expected to introduce national legislation against trafficking, having in mind how trafficking is defined in the Protocol.

Steps taken by the Philippine Congress towards creating national legislation on trafficking in persons commenced with Senate Bill No. 867, An Act to Institute Policies to Eliminate the Trafficking in Persons Especially Women and Children, Establishing the Necessary Institutional Mechanisms for the Protection and Support of Trafficked Persons, Providing Penalties for its Violations, and For Other Purposes, otherwise known as the Anti-Trafficking Act of 2001 (SB No. 867); and House Bill No. 4432, which is similarly titled, otherwise known as the Anti-Trafficking in Persons Act of 2002 (HB No. 4432).¹⁷ HB No. 4432 adopted almost *en toto* the definition of trafficking used under the Protocol.

Pursuant to these two bills, Republic Act No. 9208, the Anti-Trafficking in Persons Act of 2003 (RA 9208), was promulgated on 26 May 2003, incorporating substantially the same definition. True, legislators adopted the notion that trafficking can take place "with or without the victim's consent," even if the victim is over 18 years of age or an adult. Nevertheless, it is still pertinent to analyze whether the definition of trafficking in persons is broad and inclusive enough to represent the plight of trafficked Filipino women and whether it is consistent with prevailing Philippine law and jurisprudence. It is after all material that a discussion on trafficking in persons should not only encompass the level of international law but more importantly, it should embody a national framework effective and comprehensive enough to solve the problem of trafficking in persons, especially in women.

In light of all these, the article focuses on adult trafficked women used for purposes of prostitution and other forms of sexual exploitation. There is no question that consent is irrelevant in children since they are essentially incapable of giving any valid and binding consent. The case of the trafficked Filipinas, however, is not the same. Several queries herein arise. First, can consent be validly given in a trafficking situation or is it merely the woman's submission to the trafficking done towards her? Second, assuming *arguendo* that the woman's submission can be equated to consent, is such consent material as to the determination of the commission of the crime? Third, does

17. On one hand, S.B. No. 867 was introduced by Sen. Teresa Aquino-Oreta during the first regular session of the Twelfth Congress. The bill was read on First Reading and referred to the Committee on Youth, Women and Family Relations and Finance. On the other hand, H.B. No. 4432 was introduced by Hon. Bellaflor J. Angara-Castillo. H.B. No. 4432 incorporates H. B. Nos. 140, 189, 1012, 1118, 2844, 2991, 3298 and 3366. These bills were subsequently consolidated and enacted into law as RA 9208.

the presence of consent on the part of the trafficked woman serve as an exempting or mitigating circumstance on the part of the traffickers? Finally, should the trafficked woman be held criminally liable for giving her consent to the trafficking?

II. THE TRUTH ABOUT TRAFFICKING IN WOMEN

"They told us that we were going to Germany. We were brought to Nigeria, and not as waitresses. The salary promised us, US\$350, became \$50."

- A trafficked Filipino woman¹⁸

A. Factors that Give Rise to Trafficking

We all live in a world of human civilization. Accumulated centuries of learning have formed the foundation for an individual's development, improvement and progress. However, there are certain aspects of this so-called civilized society that has remained uncivil and utterly despicable. Traffickers and those who benefit from such acts lucidly corrode the civility of human beings, making these individuals the antithesis of all that is regarded as civil.¹⁹

Trafficking is essentially rooted in social and economic factors. Generally, such socio-economic factors are termed as "push and pull factors," for they "push" the women to migrate and "pull" the women to life abroad. The operation of these factors is highly evident in the phenomenon of feminization of international labor migration which has emerged in the late twentieth century and has become more markedly evident in the Asian Region.²⁰

The "push and pull factors" are necessarily true with Filipino women since majority of them are faced with the harsh consequences of poverty and lack of employment opportunities. In 1999, for instance, the number of unemployed in the Philippines reached 3.9 billion, 40% of whom were

women.²¹ In Indonesia, the Philippines, Thailand, and Venezuela, the number of women as compared to men who migrate for economic reasons has steadily increased over the last quarter of the 20th century. The most dramatic indication of the feminization of international labor migration from the Philippines is shown by the proportion of women among the first-time migrant workers as compared to the rehires. In 1992, about half of the newly hired workers were women. Such percentage swelled to 60% in 1994.²² An average of 2,748 Filipino women leave the country every day as overseas Filipino workers.²³

There is actually an intimate nexus between migration and trafficking. Common factors of migration render migrant women highly vulnerable to sexual exploitation, whether they are documented or undocumented migrants.²⁴ On one hand, several women who go overseas for non-existent jobs are forced into prostitution.²⁵ On the other hand, various studies have shown that Filipino women migrants, especially the domestic helpers and entertainers, are subjected to abuse. These women are particularly vulnerable because of the nature of their work situation – the labor laws and social security provisions of the receiving countries generally do not cover them.²⁶ Hence, an examination of female migration patterns is very instructive in learning about trafficking for sexual exploitation. Studies have shown that factors promoting female migration facilitate women's entrance into the sex industry and there are points where migration and trafficking intersect.²⁷

Trafficking in women operates within the continuum of the migration cycle. It occurs within the processes of regular migration. In the process of going abroad, a woman may be exploited by a recruiter or employer for financial or personal gain. Women who migrate without proper documents or work abroad without employment papers are generally more prone to trafficking. However, women with proper papers such as those who migrate as spouses or fiancées are likewise prone to trafficking. Hence, it becomes unnecessary

21. Primer, *supra* note 10.

22. *Id.* Japan remains the highest taker of Filipino women "entertainers," oftentimes a euphemism for prostitution.

23. Sandy Araneta, *Filipino Diaspora Continues*, PHILIPPINE STAR, Apr. 22, 2002, at 1.

24. Aida F. Santos & Janice Raymond, *Sex Trafficking and Reproductive Health: Links to Migration*, Coalition Asia-Pacific Report 6 (Mar. 2002) [hereinafter Santos & Raymond].

25. Fel V. Maragay, *RP to Zero in on Women Traffic*, MANILA STANDARD, Aug. 29, 1995.

26. Go, *supra* note 20.

27. Santos & Raymond, *supra* note 24.

18. COMPARATIVE STUDY, *supra* note 4, at 100.

19. Kofi Annan, *A New Tool to Fight Crime: The United Nations Convention Against Transnational Organized Crime*, Speech rendered during the Palermo Conference at Italy, available at <http://www.undcp.org/palermo/convmain.html> (Dec. 12, 2000).

20. Stella P. Go, *Filipino Women and Migration: Trends, Issues, and Policy Response*, Paper presented at the International Symposium on Globalization of Labor Mobility and Settlement of Migrants (Nov. 20 and 21, 1999) [hereinafter Go].

to distinguish whether the trafficked victims are regular or irregular migrants.²⁸

Legally or illegally, trafficking will flourish as long as there is a demand. Since the Philippines is known to be a primary origin or sending country of migrant workers as an economic option, it is highly important to examine the factors that induce women to migrate.

1. Dearth of Economic Opportunities

What propels Filipino women to migrate? According to the Philippine-Belgian Pilot Project Against Trafficking in Women (Pilot Project), the economic component of the "push and pull factors" is basically the dream of finding better jobs and earning higher income, whether within or outside the country. This is, in fact, the primary "push" factor behind migration. Differences in economic conditions push people to move from low-wage, high employment countries to high-wage labor shortage countries. Having an educational background does not secure a good paying job either. As posited in the Pilot Project:

These economic conditions stem from demographic and structural factors in the economy. Rapid population growth creates an expanding labor force but combined with slow economic growth, it generates surplus labor in the sending country. On the other hand, the slow population growth in the receiving country which cannot keep pace with its rapid economic growth leads to a higher demand for labor and consequently, higher wages. Rising incomes may make some occupations inferior for indigenous workers, creating a gap for foreign workers to fill. The demand for labor in certain sectors, specifically domestic work or "sex services," creates the "pull" factor for workers from poorer areas.

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For example, the chances for a low-skilled Filipino woman finding a job in Belgium is enhanced by the presence of a large diplomatic community (embassies, EC, NATO, among others) which can afford and are allowed by law to hire domestic servants. The Philippines, on the other hand, is known for its efficient, English-speaking workforce, especially in domestic service. Aside from domestic work, a number of Filipino women also end up as prostitutes in Belgium or neighboring countries.²⁹

28. ATENEO HUMAN RIGHTS CENTER, THE PHILIPPINE-BELGIAN PILOT PROJECT AGAINST TRAFFICKING IN WOMEN, SUMMARY OF RESEARCH REPORT BY THE ATENEO DE MANILA UNIVERSITY RESEARCH TEAM 5 (1999) (emphasis supplied) [hereinafter PILOT PROJECT].

29. *Id.* at 11.

The dearth of economic opportunities also causes migration from the rural to the urban areas in the Philippines.

In addition, Philippine society is highly unequal, characterized by big socio-political and economic gaps between the rich and the poor. Respectability and social acceptance of the self and the family are hinged on material things and stature. Hence, working abroad and sending dollar remittances and gifts is one of the most effective ways for the family to acquire desired material goods, and in the process, gain respect and social acceptance.³⁰ In fact, most of the women profiled to be vulnerable to trafficking are said to come from large families who have low-income farming or working class backgrounds. They are usually the eldest or the second eldest in the family whose parents are unemployed, retired, widowed, or separated. Understandably, the burden of supporting the family falls on these women whose income from overseas work will always be much higher than the salary they would earn in the Philippines. It is admitted that such expectation to support their families influences their decision to seek work opportunities abroad.³¹

Most of the women who leave the country expect to be employed as service workers, particularly as domestic helpers. Other expected occupations are salespersons, entertainers, nannies or *au pairs*, waitresses and the like.³² What further compels the women to migrate are cases of cash advances given to their families which serves as a "push" factor for the women to agree to the recruitment, whether local or international.³³

Incidentally, restrictive policies of receiving countries on foreign migrant workers lead to trafficking as well. Many destination countries regard trafficked women as undesirable and criminal aliens, crossing borders illegally to take advantage of greener pastures elsewhere. This perspective is reflected in the immigration laws of receiving countries that make immigration restrictive, thus obstructing the flow of migrants seeking to enter countries legally. Border controls are also tightened and often used to harass vulnerable migrants, but have little effect on the traffickers.³⁴ As immigration policies become more restrictive and discriminatory, and border controls in destination countries remain ineffective, traffickers become the major international players who facilitate international migration because the legitimate channels are very inhibitive. Many would-be immigrants turn to

30. *Id.* at 4.

31. *Id.* at 6.

32. *Id.* at 8.

33. COMPARATIVE STUDY, *supra* note 4, at 100.

34. Santos & Raymond, *supra* note 24.

smugglers, who are often the traffickers. The result is the channeling of numbers of women into global trafficking networks that supply local sex industries and cheap labor markets in countries of destination.³⁵

2. Marriage and Mail-Order Brides

Other than seeking employment opportunities, another motivation for migration is marriage. The numbers are just astounding. In 2000 alone, the Commission on Filipinos Overseas (CFO) counseled 15,162 Filipinos proceeding to USA, Japan, Australia, Germany, Canada, United Kingdom, and other countries as fiancées or spouses.³⁶

The motivations for inter-marriage are several. For the poor Filipina, being married to a foreigner is usually equated with opportunity and social advancement – her ticket to a better life. Aside from economic considerations, adventurism, desire to heighten social status, and other personal reasons are inducing factors. Increasing combination and amalgamation of cultures due to globalization is also a contributing cause.³⁷ Most, if not all of the Filipinas, who agree to such method of “matchmaking” seek a husband who is sincere, understanding and responsible.³⁸

The usual reason why Filipinas are highly favored by foreigners is because of certain highly-valued characteristics that prevail as stereotypes regarding Filipinas. Such beliefs leave the women vulnerable to abuse or exploitation:

According to the women, employers abroad or their husbands value their industry and hard work (*masipag*), efficient work habits (*masinop*), willingness to put in extra hours, and tolerance for difficult working conditions. The husbands value them for being kind, loving and helpful to their aging in-laws and children from previous marriages.

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The characteristics valued by employers and spouses seem to put the women in a position where they are vulnerable to abuse and exploitation. Moreover, these valued characteristics further define Filipinas as commodities. Women are not just regarded as a natural resource but as a specifically created/gendered/ordered object. “Specifically created” refers

35. GUIDE, *supra* note 5.

36. Study of Commission on Filipinos Overseas, Mar. 2001.

37. Elena L. Samonte, Challenges and Concerns for Cross-Cultural Marriages in the New Millennium (1999) (transcript available at Ateneo Human Rights Center [hereinafter Samonte]).

38. *Id.*

to how market demands shape the lives of women, the most “valuable” being those who are young, single, adequately educated, subservient, and willing to work and suffer.³⁹

At first, the medium for introducing a foreign man and a Filipina was through newspaper advertisements, correspondence through mail, or meetings arranged by commercial agencies.⁴⁰ Recently however, the most common mode for marriage match-making is through the Internet. The reason is that the Internet phenomenon is about fantasies and dreams, of illusions coupled with a make-believe world created by the very same medium.⁴¹ Marriage agencies that use the Internet generally do not screen their male clients, some of whom have histories of domestic violence or criminal records. Further, most of the matchmaking companies or brokers have links to organized crime groups and use such companies as fronts for prostitution.⁴² It must be stressed that cross-cultural marriages *per se* are not illegal but it is a fact that numerous syndicates use matchmaking bureaus, agencies and websites to recruit women into prostitution.⁴³

Other personal, non-economic reasons which prod the women to work abroad are the lure of travel to a foreign land, the desire for change, seeing the world, and living a different experience. For others, it is the desire to be independent, or simply to escape from sibling control or an unhappy marriage.⁴⁴

3. Gender Socialization and Patriarchal Values

Gender socialization and the erosion of family values also contribute to the supply and demand factors in trafficking.⁴⁵ In a patriarchal society, men oppress women to the extent that they can because it is in their interest and to their advantage to do so. Women along with their wants and needs are conceived as completely constructed by patriarchal power. Women’s

39. PILOT PROJECT, *supra* note 28, at 9.

40. *Racist Poison*, MANILA STANDARD, Nov. 5, 1996.

41. Samonte, *supra* note 37.

42. CSI Report: International Trafficking in Women to the United States-Related Industries, at <http://usinfo.state.gov/topical/global/traffic/report/chapter10.htm> (last visited Apr. 7, 2002).

43. Primer, *supra* note 10.

44. Go, *supra* note 20, at 6.

45. Amparita S. Sta. Maria, *Using Legal and Other International Instruments to Combat the Trafficking in Women and Children Within the Asia-Pacific Region*, 46 ATENEO L.J. 684, 687 (2001).

differences from men are thus the result of male power since men desire them to be different and subordinate them to produce this effect.⁴⁶

The overwhelmingly patriarchal societies in Asia guarantee the dominant role of men as heads of the family, breadwinners, leaders, and decision makers.⁴⁷ Women are thus perceived as the weaker sex, relegated to lower status, and deemed simply as caretakers of the household. Since there is a large demand for domestic or care-giving work and sexual services, women are naturally targeted to supply these demands both for local and international markets.⁴⁸ It should be noted that the overwhelming majority of the persons trafficked to work in sweatshops and brothels are women and girls due to their inferior and vulnerable status in most societies.⁴⁹

Additionally, low regard for women persists as perpetuated by the church, the home, the school, and the mass media. Not only women's labor power but also women's bodies have become a commodity.⁵⁰ Women were in fact once understood as all too "economic in nature," as a species of property, a bundle of goods and services.⁵¹ A double standard of morality thus exists. Men are sexually free while women should be chaste and well behaved. Vulnerable to social censure, single women with sexual experience are viewed by men as "used goods" with "loose morals."⁵² Given this socialization, Filipinas are not likely to call attention to or publicly reveal experiences that are deemed to have made her less of an ideal Filipina. This partly explains why Filipinas do not complain to authorities when they find themselves in trouble while working overseas.⁵³ Traffickers then will never be prosecuted, thus continuing the profitable nature of trafficking.

46. Maxine Eichner, *On Postmodern Feminist Legal Theory*, 36 HARV. C. R. -C.L. L. REV. 1, 9-10 (2001).

47. Sta. Maria, *supra* note 45.

48. *Id.*

49. Global Alliance Against Traffic in Women (GAATW), Human Rights Standards for the Treatment of Trafficked Persons, Jan. 1999, at <http://www.inet.co.th/org/gaatw/SolidarityAction/SMR99.htm> (Apr. 9, 2002) [hereinafter GAATW-Human Rights Standard].

50. Primer, *supra* note 10.

51. Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 631 (Dec. 2001).

52. PILOT PROJECT, *supra* note 28, at 4.

53. *Id.*

4. Globalization, Tourism and Macro-Economic Policies of the Government

The globalization of economic systems and developments in transportation and communications technology have created enormous opportunities for human communication and economic advancement; these developments have, however, likewise created significant new opportunities for organized crime to prosper. New forms of transnational cooperation between organized crime groups emerged in the closing decades of the 20th century.⁵⁴ International organized crime has taken advantage of the freer flow of people, money, goods, and services to extend its own international reach.⁵⁵ Opening of borders between countries provided more opportunities for traffickers to move people without much scrutiny. Hence, trafficking, within or without the country, continues to grow and develop into a low-risk, high-profit business, especially in Asia.⁵⁶

According to an International Labor Organization (ILO) publication entitled *The Sex Sector: The Economic and Social Bases of Prostitution in Southeast Asia*:

The growth of prostitution is probably linked, albeit inadvertently, to the macro-economic policies of governments which have a tendency to spawn rapid urbanization at the expense of rural development, to promote cheap labor for industrialization, to facilitate the export of female labor for overseas employment and to promote tourism as a foreign exchange earner. All these features of modern, export-oriented economies, combined with the pervasive lack of social safety nets and deep-rooted gender discrimination against females, probably contribute to the growth of the sex sector.⁵⁷

Tourism has likewise contributed to the growth of trafficking in persons. Tourism has always been one of the top dollar earners for the Philippines. In fact, during the 60s and 70s, tourism became one of the big industries for developing nations. The International Monetary Fund, the World Bank and agencies like U.S. Aid, have urged countries to exploit their natural resources by developing resorts and hotels to attract foreign capital.

54. Summary of the United Nations Convention against Transnational Organized Crime and Protocols thereto, at <http://www.undcp.org/palermo/convsummm.htm> (Apr. 8, 2002).

55. CRS Report, *supra* note 6, at 3.

56. Sta. Maria, *supra* note 45, at 688.

57. ILO, Press Release (ILO/98/36), at <http://www.ilo.org/public/english/bureau/inf/pr/1998/36.htm> (Apr. 10, 2002).

Unfortunately, part and parcel of the tourist attraction was sex.⁵⁸ Tourism has likewise created and expanded permanent structures, which makes prostitution an enticing option for women oppressed by extreme poverty. The use of women's bodies as a commodity for profit, for pleasure and sexual satisfaction happens in beerhouses, clubs, massage parlors and karaoke bars which flourish in places intended for tourism. Sex tours in Angeles City have long been a fad.⁵⁹ Promoting sex tourism ultimately leads to trafficking since women recruited or sold into domestic prostitution are often trafficked into brothels overseas.

5. Inadequacy of Laws and Unresponsiveness of Law Enforcers

Furthermore, the inadequacy of laws and law enforcement in most origin, transit and destination countries hampers efforts to fight trafficking and makes traffickers more aggressive in their illegal activities. Several years ago, cases of illegal recruitment were actually filed against two traffickers of Filipinas to Nigeria. To date, the cases are still pending and the traffickers remain at large.⁶⁰

Although prostitution is penalized in the Philippines, it is already legal or tolerated in many countries, and widespread in most. Further, prostitutes are the ones who are usually apprehended and not the traffickers. Oftentimes, penalties for trafficking humans for sexual exploitation are relatively lighter compared with those for other criminal activities like illegal drugs or firearms trafficking.⁶¹

The indifference, and in some cases, complicity of governments is another big factor. Many law-enforcement agencies and governments do not prioritize the plight of trafficking victims and downplay the seriousness of the trafficking problem. In some cases, police and other governmental authorities accept bribes and collude with traffickers by selling fake documentation, employment papers and travel authorizations.⁶² It has also been reported by Filipino women trafficked to Nigeria that local immigration officials allied with traffickers and recruiters since eight of them passed through immigration without question or examination of travel

58. Judith Mirkinson, *Red Light, Green Light: The Global Trafficking of Women*, at <http://www.selenasol.com/selena/struggle/prostitution.html> (last visited Apr. 7, 2002).

59. Primer, *supra* note 10 at 5.

60. COMPARATIVE STUDY, *supra* note 4, at 92.

61. CRS Report, *supra* note 6, at 4.

62. *Id.*

documents.⁶³ The aforesaid situations serve to embolden the traffickers in becoming more aggressive in their recruitment.⁶⁴

B. How Traffickers Operate

Trafficking can involve an individual or a chain of individuals starting with the recruiter and ending with the last person who buys or receives the victim, e.g. the owner of the sweatshop or the brothel owner.⁶⁵ Dr. Adam Graycar, Director of the Australian Institute of Criminology enumerates the different kinds of traffickers as follows:

Arranger/investor: is the person who invests money in the trafficking operation and oversees the whole criminal organization and its activities. This person is rarely, if ever, known to the lower levels of employees and to the migrants being trafficked. An organizational pyramid structure insulates the arranger, who stands back and is not easily connected with the commission of specific criminal offences.

Recruiter: is a person who works as a middleman between the arranger and the customers of the criminal enterprise. Recruiters are responsible for finding and mobilizing potential migrants and collecting their payments. The recruiters that work in the country of departure are usually not informed about the precise trafficking passage. They get paid for casual jobs only and not on a permanent basis. Investigations show that in many cases the recruiters come from the same region as the migrants and frequently they are members of the same culture and well respected people within the local community.

Transporter: A transporter is the person in charge of assisting the migrants in leaving the country of origin by whatever means (land, air or sea). Transporters in the destination country bring undocumented immigrants from an airport, seaport or coast to the big cities. The transport-providers and operators have to be technically sophisticated to change their operations in reaction to law enforcement and coastal surveillance activities. Transporters usually do not get inside information on the criminal organizations and their structures. They stay in touch with the organization through intermediaries who contract them casually.

Corrupt public officials ("bribeable"), protectors: The traffickers have to pay government officials to obtain travel documents for their customers. Law enforcement authorities in many transit countries have been found to accept

63. COMPARATIVE STUDY, *supra* note 4, at 54.

64. Sta. Maria, *supra* note 45, at 688.

65. GAATW-Human Rights Standard, *supra* note 49, at 5.

brides to enable migrants to enter and exit countries illegally. The corruptees individually or collectively protect the criminal organization through abuses of their position, status, privileges and other violations of the law.

Informers: For the trafficking operations it is necessary to have systems of information-gathering on border surveillance, immigration and transit procedures and regulations, asylum systems, law enforcement activities, etc. The accumulated knowledge is then used to the best advantage of the criminal organization. In some cases it was found that information-gathering resided in a core group of informers who managed the information flow and had access to well-organized and centralized communications systems through sophisticated technology.

Guides and crew members: Guides are responsible for moving illegal migrants from one transit point to the other or helping the migrants to enter another country by sea or air. Crew members are people employed by the traffickers to charter trafficking vessels and accompany migrants throughout the illegal passages.

Enforcers: often themselves illegal migrants, are primarily responsible for policing staff and migrants and for maintaining order, often involving the use of violence.

Supporting personnel and specialists: This category features mostly local people in transit points who support the organization by providing accommodation and other assistance to illegal migrants. Traffickers also depend on skilled individuals who provide specialized products and services to the criminal organization. These individuals are usually paid for casual duties only and do not share a continuing commitment to the group.

Debt-collector: A person based in the destination country who is responsible for collecting the trafficking fees.

Money-mover: A person who is expert at laundering the proceeds of crime, disguising their origin through a string of transactions or investing them in legitimate businesses.⁶⁶

Women are trafficked into a multitude of exploitative or abusive situations, such as in the garment, agricultural, or fishery industries, and even mendicancy. They are also trafficked into domestic labor as servants or into forced marriages where such women are continually raped by their husbands

and often forced to become pregnant for the purpose of providing their husbands with children.⁶⁷

Crime groups such as the Italian *Camorra*, the Chinese Triads, the Russian *Mafia* and the Japanese *Yakuza* are among the major traffickers of people. Such crime groups interact with local networks to provide transportation, safe houses, local contacts, and documentation.⁶⁸ Nevertheless, it is erroneous to conclude that transnational organized traffickers always operate in large syndicates. Research studies have shown that husbands and boyfriends of trafficked women often recruit, traffic and pimp their female partners into prostitution. It is possible that they engage a small group of friends or others to assist in the crime.⁶⁹ Although agents, agencies, and impresarios have recruited a considerable number of women, those recruited by friends and family members are rapidly increasing. There is actually an overt shift from formal recruitment practices seen in the 1970s and 1980s. Further, getting information from personal sources was considered more powerful in influencing the women to migrate, rather than advertisements and agencies.⁷⁰

According to the U.S. Congressional Research Service Report on Trafficking in Women (Congressional Report), traffickers acquire their victims in the following ways:

Sometimes women are kidnapped outright in one country and taken forcibly to another. In other cases, victims are lured with job offers. Traffickers entice victims to migrate voluntarily with false promises of good paying jobs in foreign countries as *au pairs*, models, dancers, domestic workers, etc. Traffickers advertise these phony jobs, as well as marriage opportunities abroad in local newspapers. Russian crime gangs reportedly use marriage agency databases and matchmaking parties to find victims. In some cases, traffickers approach women or their families directly with offers of well-paying jobs elsewhere. After providing transportation and false documents to get victims to their destination, they subsequently charge exorbitant fees for those services, creating lifetime debt bondage.⁷¹

C. Profile of Victims and Risks Involved

The largest number of victims comes from Asia, with majority from Southeast Asia and from South Asia. The former Soviet Union is now

67. *Id.*

68. CRS Report, *supra* note 6.

69. GUIDE, *supra* note 5.

70. PILOT PROJECT, *supra* note 28, at 7.

71. CRS Report, *supra* note 6, at 5.

66. Adam Graycar, *Trafficking in Human Beings*, at http://www.aic.gov.au/conferences/other/graycar_adam/1999-07-trafficking.html (last visited Jul. 30, 2002).

believed to be the largest new source of trafficking for prostitution. Women from Eastern Europe, Latin America, Caribbean, Africa are also major sources of trafficked women. Most of the victims are sent to Asia, the Middle East, Western Europe, and North America. They usually end up in large cities, vacation and tourist areas, or near military bases, where the demand is highest.

While there is no specific victim stereotype, trafficked women in general are poor, come from both urban and rural areas, have little or no education at all, and are mostly single mothers. A substantial number have backgrounds of abuse, have gone through unsuccessful or abusive marriages, or failed relationships. Most of them are runaways or come from families who expect support from their daughters.⁷² A majority of trafficked women are under the age of 25, with many in their mid to late teens.⁷³ They are preferred because of a false perception among customers that there is a lesser risk of HIV/AIDS infection since the woman or girl child would be too young to have been infected.

Trafficked women have to endure sub-human conditions of work; they are often ill-treated and subjected to violence in prison-like environments. Cruel mental and physical abuse is normally used to keep the women in servitude, including beating, rape, starvation, forced drug use, confinement, and seclusion. Passports are often confiscated while earnings are kept away and withheld by the traffickers and employers. Victims in sex trafficking are usually forced to have unprotected sex with large numbers of partners and work unsustainably for long hours. Moreover, access to health and medical facilities are almost non-existent.⁷⁴

Due to exposure to such miserable living conditions, trafficked women are prone to drug addiction, mental breakdowns and the risk of getting pregnant and contracting sexually transmitted diseases, including HIV/AIDS. Death is also forthcoming because of denial of access to medical facilities. There is also the fear for their safety and reprisals from the traffickers in case they escape from the safe houses. There is likewise the danger of being apprehended, detained, prosecuted, and deported by the immigration authorities of the receiving countries that treat the trafficked women as migration criminals.⁷⁵

72. NCRFW, *Press Release: Stop Sale of Filipino Women*, at http://www.ncrfw.gov.ph/whats_new/whats.htm (last visited Apr. 25, 2002).

73. CRS Report, *supra* note 6, at 5.

74. Sta. Maria, *supra* note 45, at 688; CRS Report, *supra* note 6, at 5.

75. Sta. Maria, *supra* note 45, at 689.

III. LEGAL DEVELOPMENTS ON THE PROBLEM OF TRAFFICKING IN WOMEN

There are actually certain prevailing laws and legal measures that seek to address the sad plight of Filipino women, whether as migrants, mail order brides or victims of white slavery. Despite the fact that a trafficked Filipina may resort to such laws and claim some protection or redress, it can be easily noticed that unless an all-encompassing law on trafficking *per se* is enacted which defines trafficking in persons, the magnitude and immensity of the problem will never be addressed and curbed. Internationally, however, trafficking in women has already been recognized as an issue of grave international concern even before the UN came into existence.⁷⁶

A. International Instruments on Trafficking in Women

1. 1910 Convention for Suppression of White Slave Traffic

The first ever treaty on trafficking is the 1910 Convention for the Suppression of White Slave Traffic. This treaty addressed the problem of procuring women and girls for immoral purposes and engaged State-Parties to enact legislation to make "white slave traffic" a crime. The treaty also allowed white slave traffic to be treated as an extraditable offense between States having an extradition treaty.⁷⁷ An improvement from the 1910 Convention was the International Convention for the Suppression of the Traffic in Women and Children of 1922, which was the first treaty which contained the phrase "traffic in women and children" in its title.⁷⁸

2. The International Bill of Human Rights

Principally, international law accords considerable weight to the notion of gender equality. The Universal Declaration of Human Rights (UDHR), adopted in 1948, was considered to possess two primary doctrines where international human rights began – *first*, human rights are universal and applicable without distinction of any kind and *second*, that individual rights are inseparable from and interdependent with rights of equality between women and men.⁷⁹ Article 4 thereof even prohibits slavery, servitude and slave trade.

76. *Id.*

77. *Id.* at 690.

78. *Id.*

79. *Universal Declaration of Human Rights*, G.A. Res. 217A (III) (1948), art. 1 and 2, at <http://www.universalrights.net/main/declarat.htm> (last visited Dec. 7, 2001).

The UDHR was a resolution passed by the UN General Assembly centering on two main categories: civil and political rights, on the one hand, and economic, social and cultural rights, on the other. Most of the States, which voted in favor of the UDHR, regarded it as a mere statement of a relatively distant ideal, which involved little or nothing in the way of legal obligations.⁸⁰ At most, the UDHR for them is simply a list of the human rights which Member States "pledge" themselves to promote. Nonetheless, some parts of UDHR have subsequently become binding as a matter of customary international law.⁸¹

From the passage of UDHR, two overarching treaties were subsequently adopted in 1976: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). The drafting of the two treaties was designed to transform the principles of the UDHR into binding, detailed rules of law.⁸² More importantly, the ICCPR contained provisions against slavery, servitude and compulsory or forced labor.⁸³ Together with the UDHR, these three international instruments are known as the International Bill of Human Rights.

3. 1949 Convention for the Suppression of Traffic in Persons

In 1949, the UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949 Convention) was approved by the General Assembly. Such Convention consolidated the earlier treaties on trafficking and declared prostitution and traffic of persons as incompatible with the dignity and worth of the human person. Article 1 of the Convention provides:

The Parties to the present Convention agree to punish any person who, to gratify the passions of another:

- (1) Procures, entices or leads away, for purposes of prostitution, another person, *even with the consent of that person*;

80. PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 212-213 (1997) [hereinafter MALANCZUK].

81. *Id.*

82. *Id.* at 215.

83. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, G.A. Res. 2200A (XXI), U.N. GAOR, U.N. Doc. A/RES/2200A (1966), Art 8.

- (2) Exploits the prostitution of another person, *even with the consent of that person*.⁸⁴

Article 2 further provides:

The Parties to the present Convention further agree to punish any person who:

- (1) Keeps or manages or knowingly finances or takes part in the financing of a brothel;
- (2) Knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others.⁸⁵

The 1949 Convention addresses both prostitution and trafficking. Its important features are that it does not penalize the trafficked women who are rather treated as victims, and that it disregards the defense of consent to being trafficked.⁸⁶

4. Convention on the Elimination of All Forms of Discrimination Against Women

A salient treaty for the human rights of women is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Adopted in 1979 and entered into force in 1981, CEDAW imposes an obligation on a State to refrain from any act or practice which is discriminatory against women.⁸⁷ States are also mandated to adopt legislation to suppress trafficking and exploitation of prostitution of women⁸⁸ and modify social and cultural patterns of conduct of people to eliminate practice based on inferiority of women.⁸⁹

84. 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, G.A. Res. 317 (IV) (1949), art. 1, available at <http://www.unhcr.ch/html/menu3/b/33.htm> (last visited Apr. 16, 2002) [hereinafter 1949 Convention].

85. *Id.* art. 2.

86. *COMPARATIVE STUDY*, *supra* note 4, at 117, 218.

87. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, U.N. Doc. A/RES/34/180 (1979), art. 2(d) [hereinafter CEDAW].

88. *Id.* art 6.

89. *Id.* art 5(a).

5. Declaration on the Elimination of Violence Against Women

Subsequently, the General Assembly adopted the Declaration on the Elimination of Violence against Women (DEVAW) in 1993. DEVAW represented a significant step in the legitimization of the importance of violence against women as a human rights issue. It states:

Violence against women shall be understood to encompass, but not be limited to, the following:

xxx

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, *trafficking in women* and forced prostitution;⁹⁰

Significantly, DEVAW is the foremost international instrument which recognizes that trafficking in women is a form of violence against women. Women are trafficked because they are women. Acknowledging trafficking in women as violence against women meant that the personhood of trafficked women are severely violated and abused. Although CEDAW mandated the suppression of trafficking and prostitution of women, there was no pronouncement that violence against women includes trafficking in women. The only imperfection in DEVAW, however, is that in general, UN declarations are not signed and upheld by nations and they have no legally binding authority. States therefore are under no obligation to conform to the terms of DEVAW. Nonetheless, DEVAW may still serve as a tool in advancing women's interests in the eradication of gender-based violence.⁹¹

In 1994, the United Nations General Assembly attempted to define trafficking as:

[t]he illicit and clandestine movements of persons across national borders, largely from developing countries and some countries with economies in transition, with the end goal of forcing women and girl children into sexually or economically oppressive and exploitative situations for profits of recruiters, traffickers and crime syndicates, as well as other illegal activities

90. Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, 48 U.N. GAOR Supp. (No. 49) at 217, U.N. Doc. A/48/49(1993), art. 2(b), at http://www.dfait-maeci.gc.ca/genderandpeacekeeping/resources/5_DEVAW.pdf (emphasis supplied) (last visited Aug. 9, 2002).

91. Jennifer L. Ulrich, *Confronting Gender-Based Violence with International Instruments: Is a Solution to the Pandemic Within Reach?*, 7 IND. J. GLOBAL LEGAL STUD. (2000), at http://ijgls.indiana.edu/archive/07/02/ulr:ch.shtml#* (last visited May 9, 2002).

related to trafficking, such as forced domestic labor, false marriages, clandestine employment and false adoption.⁹²

6. UN Convention Against Transnational Organized Crime

Six years after, the UN Convention Against Transnational Organized Crime was adopted by the General Assembly at its millennium meeting in November 2000. It was opened for signature at a high-level conference in Palermo, Italy in December 2000.⁹³

The Convention was the first legally binding UN instrument in the field of organized crime. State-Parties to the Convention were required to establish in their domestic laws, four criminal offenses, namely, participation in an organized criminal group, money laundering, corruption, and obstruction of justice. Also adopted by the Assembly are three optional protocols by which countries would undertake in-depth measures to combat smuggling of migrants, the buying and selling of women and children for sexual exploitation or sweat shop labor and the illicit manufacturing of and trafficking in firearms.⁹⁴

7. Protocol to Suppress, Prevent and Punish Trafficking in Persons, Especially on Women and Children

As trafficking in persons, especially women and children for forced labor or sex slavery, becomes increasingly linked to transnational organized crime, different States have decided that a separate legal instrument on trafficking is peculiarly necessary. The international community decided to include trafficking in all persons as the subject matter of the Protocol,⁹⁵ while at the

92. Sta. Maria, *supra* note 45, at 685.

93. As of July 31, 2002, 141 States have signed the Convention while the Trafficking Protocol has 105 signatures. Forty countries must ratify the Convention before it comes in force and before they can be a party to any of the Protocols. This means that each Protocol must be read and applied in conjunction with the main Convention: countries may be party to the Convention only, but not to a Protocol only. Presently, eighteen and twelve countries have ratified the Convention and the Protocol respectively, including the Philippines. See *supra* note 12.

94. UNDCP, *UN Convention against Transnational Organized Crime: Welcome Address*, available at <http://www.undcp.org/palermo/theconvention.html> (last visited Apr. 8, 2002).

95. *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, G.A. Res. 55/25, annex II, 55 U.N. GAOR Supp. No. 49,

same time noting the increased vulnerability of women and children and their specific needs for protection and support. The Protocol sets forth three purposes:

- a. To prevent and combat trafficking in persons, paying particular attention to women and children;
- b. To protect and assist victims of trafficking, with full respect for their human rights; and
- c. To promote cooperation among States in order to meet these objectives.⁹⁶

Likewise, the Protocol brought forth an accepted international definition of trafficking and an agreed-upon set of prosecution, protection and prevention mechanisms on which to base national legislation against trafficking, and which can serve as a basis for harmonizing various State laws. But the most contentious aspect of the Protocol, albeit most important, is the definition of trafficking.

The Protocol defines trafficking in persons as:

the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.

*The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.*⁹⁷

Thus, the definition provides a comprehensive coverage of criminal means by which trafficking takes place, including force, coercion, abduction, fraud, deception, as well as less explicit and non-coercive means, such as

U.N. Doc. A/45/49 (Vol. I) (2001), available at http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_20traff_eng.pdf (last visited Apr. 16, 2002) [hereinafter *Protocol to Prevent, Suppress and Punish Trafficking in Persons*].

96. *Protocol to Prevent, Suppress and Punish Trafficking in Persons*, art. 2.

97. *Protocol to Prevent, Suppress and Punish Trafficking in Persons*, art. 3 (a) (emphasis supplied).

abuse of power or of a victim's vulnerability, or giving or receiving of payments to achieve the consent of the person having control over the person trafficked. "Abuse of a victim's vulnerability" is interpreted to mean, "any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved."⁹⁸ Further, the *travaux préparatoires* of the Protocol indicates that the terms "exploitation of the prostitution of others" or "other forms of sexual exploitation" are not defined in the Protocol purposely, so that State Parties can address prostitution in their respective domestic laws without prejudice.⁹⁹

All victims of trafficking in persons are thus interpreted to be protected and not just those who can prove force. It has been prescribed that the consent of a victim of trafficking is irrelevant, albeit of full age. Moreover, trafficked persons, especially women in prostitution, are no longer viewed as criminals but as victims of a crime.

Despite the fact that the Protocol has not defined "exploitation," it is again the prescribed view that the exploitation or prostitution of others and trafficking cannot be separated. Hence, the key element in the trafficking process is the exploitative purpose, rather than the transnational movement. Conclusively, it is not necessary for a victim to cross a border. Hence, women who are domestically trafficked for prostitution and forced labor within their own countries are also subject to the provisions of the Convention and the Protocol.¹⁰⁰

Aside from the definition, the Protocol also offers tools for law enforcement and border control; strengthens the response of the judiciary; expands the scope of protection and support to victims and witnesses; and establishes prevention policies. Member States have the obligation to criminalize trafficking, create penalties that take into account the grave nature of these offenses and establish procedures to investigate, prosecute and convict traffickers.¹⁰¹

98. UNCJIN, *Interpretative Notes for the Official Records (travaux préparatoires) of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*, Interpretative Note No. 63, available at http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents/383_21c.pdf (April 17, 2002) (emphasis supplied) [hereinafter Interpretative Note].

99. *Id.* at no. 64.

100. GUIDE, *supra* note 5, at 4-5.

101. UNDCP, *Background on Trafficking in Persons: The New Protocol 2*, available at http://www.undcp.org/trafficking_protocol_background.html (last visited Apr. 17, 2002).

B. Legal Developments in the Philippines

1. The 1987 Constitution

The 1987 Philippine Constitution contains certain provisions that manifest the political will of the State to ensure the essential preservation of the woman's entitlement to human dignity and rights; the valuable role that women play in our nation building and of the fundamental equality of both sexes before the law. The Declaration of State Policies and Principles provides:

Sec. 11. The State values the dignity of every human person and guarantees full respect for human rights.¹⁰²

Sec. 14. The State recognizes the role of women in nation-building, and shall ensure the fundamental equality before the law of women and men.¹⁰³

The Article on Social Justice and Human Rights also has a provision on women:

Sec. 14. The State shall protect working women by providing safe and healthful working conditions, taking into account their maternal functions, and such facilities and opportunities that will enhance their welfare and enable them to realize their full potential in the service of the nation.¹⁰⁴

None of these provisions, however, precisely address the issue of trafficking in women. It would seem that curbing trafficking in women, as a matter of extrapolation, would be a matter of statutory legislation.

2. Anti-Mail Order Bride Act

In 1990, former President Corazon Aquino signed into law Republic Act No. 6955, otherwise known as the Anti-Mail Order Bride Act (RA 6955). Section 1 of said law provides that "the State shall take measures to protect Filipino women from being exploited in utter disregard of human dignity in their pursuit of economic upliftment."¹⁰⁵ RA 6955 explicitly prohibits the matching of Filipino women for marriage to foreign nationals through the

102. PHIL. CONST., art. II, § 11.

103. PHIL. CONST., art II, § 14.

104. PHIL. CONST., art XIII, § 14.

105. Republic No. 6955, An Act to Declare Unlawful the Practice of Matching Filipino Women for Marriage to Foreign Nationals on a Mail Order Basis and Other Similar Practices Including the Advertisements, Publication, Printing or Distribution of Brochures, Fliers and Other Propaganda Materials in Furtherance Thereof and Providing Penalty Therefore, § 1 (1990).

mail-order basis or personal introduction. The law was expected to address the increasing number of Filipino women who migrate to a foreign country for purposes of marriage.

The law is now being attacked for suffering from the following weaknesses: it does not cover transactions through the Internet; it has relatively light penalties and it does not have extraterritorial application. It was understandable that the Internet was not popular when the law was enacted in 1989. Be that as it may, the pervasive and uncontrollable nature of the Internet as a medium of transaction for the sale of Filipino women has reached alarming proportions.¹⁰⁶ A person convicted under said law would only face six to eight years of imprisonment and a fine of ₱ 8,000 to ₱ 20,000. As for the third weakness, more often than not, the trafficker, buyer or would-be husband is outside the jurisdiction of the local courts. Moreover, the law was only an attempt to address the mail order bride phenomenon and not the entirety of the trafficking problem.

Although the Commission for Filipinos Overseas prepares women who are leaving as petitioned fiancées or spouses of foreign nationals through its pre-departure orientation seminars, it has been reported that women are still allowed to leave notwithstanding illiteracy and ignorance of the effects and risks of migration.¹⁰⁷

3. Migrant Workers and Overseas Filipinos Act of 1995

Through the years, the Philippines has developed a culture of immigration born out of a long history of out migration which fosters, if not highly values, working and living abroad. Consequently, families with a long history of migration are more likely to have norms and values that encourage migration.¹⁰⁸

Even though the Philippines is in fact a primary sending country of migrant workers, the welfare and human rights issues related to international labor migration only received belated attention with the enactment of Republic Act No. 8042, otherwise known as the Migrant Workers and Overseas Filipinos Act of 1995 (RA 8042) in 1995. RA 8042 provides that "the State shall, at all times, uphold the dignity of its citizens whether in the

106. Cynthia D. Balana, *Blacklist of Traffickers in Filipino Women Sought*, PHILIPPINE DAILY INQUIRER, at http://www.inq7.net/inf/2002/jan/29/text/inf_3-1-p.htm (last visited Apr. 25, 2002).

107. PILOT PROJECT, *supra* note 28, at 17.

108. Go, *supra* note 20, at 4.

country or overseas, in general, and Filipino migrant workers, in particular."¹⁰⁹ More importantly, Section 2(d) provides:

The State affirms the fundamental equality before the law of women and men and the significant role of women in nation-building. Recognizing the contribution of overseas migrant women workers and their particular vulnerabilities, the State shall apply gender sensitive criteria in the formulation and implementation of policies and programs affecting migrant workers and the composition of bodies tasked for the welfare of migrant workers.¹¹⁰

Clearly, the aforementioned provision recognizes the vulnerability of women migrant workers to abuse. The State also gives assurance that these women migrant workers will be given full protection, and that their rights, freedom and dignity will not be compromised.¹¹¹ Undoubtedly, the government seeks to ensure the welfare and protection of its workers, both documented and undocumented, by institutionalizing mechanisms to do so. However, how effective these mechanisms are in protecting the workers, particularly women, remains to be seen.

There is a provision in RA 8042, which addresses the problem of illegal recruitment. In fact, it is said that trafficked women can resort to RA 8042 for some sort of protection in the absence of a law on trafficking in women. Illegal recruitment, under the law, is defined as:

[A]ny act of canvassing, enlisting, contracting, transporting, utilizing, hiring, or procuring workers and includes referring, contract services, promising or advertising for employment abroad, whether for profit or not, when undertaken by a non-licensee or non-holder of authority contemplated under Article 13(f) of Presidential Decree No. 442, as amended, otherwise known as the Labor Code of the Philippines: *Provided*, That any such non-licensee or non-holder who, in any manner, offers or promises for a fee employment abroad to two or more persons shall be deemed so engaged.¹¹²

Illegal recruitment is deemed committed by a syndicate if carried out by a group of three or more persons conspiring or confederating with one another. It is deemed committed in large scale if committed against three or more persons individually or as a group.¹¹³ A higher penalty and fine is

109. Republic Act No. 8042, Migrant Workers and Overseas Filipinos Act, § 2(a) (1995).

110. *Id.* § 2(d).

111. PILOT PROJECT, *supra* note 28, at 14.

112. RA 8042, § 6.

113. *Id.* § 6 (3).

imposed under this situation since it is considered an offense involving economic sabotage.

A migrant worker who decides to sue the illegal recruiter may file three cases: an administrative case for the revocation/suspension of the recruiter's license with the Philippine Overseas Employment Agency; a money claim and suit for damages with the Labor Arbiter and a criminal action against the recruiter before the Regional Trial Court. It is to be noted, however, that the expenses and time consumed becomes three-fold and impractical.¹¹⁴

A reality check on the implementation of RA 8042 reveals that illegal recruitment has been committed largely by agencies which are registered with the POEA. This goes to show that non-registered agencies are most likely escape prosecution. The trouble with RA 8042 in terms of addressing the trafficking problem is that with the strict restrictions and requirements imposed by the law, a lot of women migrant workers resort to illegal migration channels and leave as tourists while working abroad as undocumented migrants.¹¹⁵ Likewise, RA 8042 lacks the all-encompassing nature that a law on trafficking should possess. Most importantly, the nature of illegal recruitment is mere movement of the workers for purposes of employment. It is a labor migration issue and does not deal with the exploitation of women for purposes of prostitution.

4. Law on Vagrancy

The only existing legislation that involves prostitution is Article 202 (3) and (5) of the Revised Penal Code (RPC). Said article provides that the following are considered vagrants:

- 1.) An idle or dissolute person who lodges in houses of ill-fame;
- 2.) Ruffian or pimp; or
- 3.) One who habitually associates with prostitutes; and
- 4.) Prostitutes.¹¹⁶

The same article defines prostitutes as "women who, for money or profit, habitually indulge in sexual intercourse or lascivious conduct."¹¹⁷ Any person found to be a vagrant is penalized, including the prostitute herself.

114. PILOT PROJECT, *supra* note 28, at 15.

115. *Id.* at 16.

116. Act No. 3815, An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], art. 202(3) (1930).

A maintainer of a house of prostitution may be considered a vagrant while a pimp is one who provides gratification for the lust of others.¹¹⁸ For a woman to be considered a prostitute, it is required that she habitually indulges in sexual intercourse or lascivious conduct and for money or profit. Hence, there must be the element of habituality and pecuniary gain. Further, sexual intercourse is not absolutely necessary.

Article 202 has been known as a crime which is hard to prove. A woman can only be charged on the fourth or fifth offense because of the element of habituality. Likewise, no client will be willing to testify that sexual intercourse took place between him and a prostitute. Because it is already quite difficult for a woman to be found guilty of the crime, some legal advocates are of the view that the law is already compassionate and humanitarian even if the prostitute can be held liable under the law.¹¹⁹

5. Slavery for Immoral Traffic

Art. 272 of the RPC provides:

Slavery – The penalty of *prision mayor* and a fine of not exceeding 10, 000 pesos shall be imposed upon anyone who shall purchase, sell, kidnap, or detain a human being for the purpose of enslaving him.

If the crime be committed for the purpose of assigning the offended party to some *immoral traffic*, the penalty shall be imposed in its maximum period.¹²⁰

Classified as a crime against liberty, slavery is aggravated when it is committed for the purpose of assigning the offended party to some immoral traffic. There is no qualification as to what constitutes immoral traffic. However, it has been opined that “immoral traffic” should nevertheless be equated with prostitution as defined in Art. 202 (5) of the RPC.¹²¹

6. White Slave Trade

Article 341 of the RPC, as amended by *Batas Pambansa Blg. 186* provides:

117. *Id.* art. 202 (5),(6).

118. 2 LUIS B. REYES, *THE REVISED PENAL CODE: CRIMINAL LAW 353* (1998) [hereinafter 2 REYES].

119. Jose C. Sison, *A Controversy More Apparent than Real, A Law Each Day (Keeps Trouble Away)*, *PHILIPPINE STAR*, Mar. 15, 2002, at 13.

120. *REVISED PENAL CODE*, art. 272 (emphasis supplied).

121. 2 REYES, *supra* note 118, at 559.

White Slave Trade – The penalty of *prision correccional* in its medium and maximum periods shall be imposed upon any person who, in any manner, or under any pretext, shall engage in the business or shall profit by prostitution or shall enlist the services of women for the purpose of prostitution.

Any of the above-mentioned acts is sufficient to constitute the offense. Habituality is not even a necessary element of the crime. Likewise, the crime can be committed under any pretext, hence, one who engages the services of a woman ostensibly as a maid but in reality for purposes of prostitution and for profit is guilty of such crime.¹²² Nevertheless, prostitutes are not held liable under this provision. Rather, the law applies only to women traded for purposes of prostitution. With the alarming proportion of trafficked women for various forms of sexual exploitation not necessarily involving acts of prostitution, the law is clearly inadequate.

7. Current Developments on Trafficking in Persons and Prostitution: S.B. No. 867 and H.B. No. 443; R.A. 9208

Prior to the enactment of RA 9208, the Anti-Trafficking in Persons Act of 2003, there had already been a long line of bills on trafficking in women that has been filed by numerous lawmakers.¹²³ The most notable among these bills are S.B. No. 867 introduced by Senator Teresa Aquino-Oreta and H.B. No. 4432 authored by Congresswoman Bellaflor J. Angara-Castillo which were eventually consolidated and passed as law on 26 May 2003 as RA 9208.

Aimed at strengthening RA 6955, both anti-trafficking bills contained an integrated and holistic approach in the protection and rehabilitation of victims of trafficking in persons, especially women and minors. Both bills further institutionalized the role of local government units in addressing trafficking in persons in their area of jurisdiction and intend to eliminate all forms of exploitation, sexual servitude, commercialized transnational marriages, and abuse against persons.

On one hand, S.B. No. 867 defines trafficking in persons as follows:

Section 3. *Definition of Terms* –

Trafficking in Persons – shall refer to the recruitment, transfer, or deployment of a person, done legally or illegally *with or without victims' consent or knowledge, through fraud, deceit, violence, coercion, intimidation, abuse of position*

122. *Id.* at 873-74.

123. Based on the Committee Report No. 234 of the Committee on Women and Appropriations, H.B. No. 4432 was submitted in substitution of H.B. Nos. 140, 189, 1012, 1118, 2844, 2991, 3298, and 3366.

or authority, within or across national borders for purposes of prostitution, work or services, marriage or other similar arrangements, or adoption, characterized by forced labor, slavery or slavery-like practices, sexual exploitation, physical and other forms of abuse of other similar acts.¹²⁴

On the other hand, H.B. No. 4432 proposes the following definition of trafficking in persons:

Sec. 3. *Definition of Terms* -

Trafficking in Persons - refers to the recruitment, transportation, transfer or harboring or receipt of persons *with or without the victim's consent* or knowledge through legal or illegal means, within or across national borders by means of threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of position, taking advantage of the vulnerability of the person, or, the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation which includes at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal or sale of organs.¹²⁵

At this point, it can be observed that the definition adopted by the H.B. No. 4432 is more in consonance with the Protocol.

The definition finally adopted into law is found in what is now RA 9208, as follows:

SEC. 3. *Definition of Terms*. - As used in this Act:

(a) *Trafficking in Persons* - refers to the recruitment, transportation, transfer or harboring, or receipt of persons *with or without the victim's consent* or knowledge, within or across national borders by means of threat or use of force, or other forms of coercion, abduction, fraud, deception, abuse of power or of position, taking advantage of the vulnerability of the person, or, the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation which includes at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery, servitude or the removal or sale of organs.

The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall also be considered as "trafficking in persons" even if it does not involve any of the means set forth in the preceding paragraph.¹²⁶

124. S.B. No. 867, 12TH Cong. § 3(a) (2001) (emphasis supplied).

125. H.B. No. 4432, 12TH Cong. § 3 (2002) (emphasis supplied).

126. R.A. 9208, An Act to Institute Policies to Eliminate the Trafficking in Persons Especially Women and Children, Establishing the Necessary Institutional

The law likewise defines prostitution, forced labor, slavery-like practices, and mail-order bride schemes. It must be stressed that victims of trafficking are not limited to women only, although the law acknowledges that the victims are predominantly women and children.

Essentially, the law enumerates several acts that would constitute trafficking in persons. Among these are to recruit a person for purposes of prostitution or forced labor under any pretext of lawful domestic or overseas employment; to offer or contract marriage with women and minors for purposes of offering, selling, or trading him or her to engage in prostitution;¹²⁷ to maintain or hire a person to engage in prostitution under the pretext of tours and travel plans to the Philippines¹²⁸ and to recruit persons especially women and minors to engage in prostitution with military forces.¹²⁹ Imposition of stiffer penalties for the violators of the law, including imprisonment ranging from six years to life imprisonment and fines not less than two million pesos are likewise imposed.¹³⁰ Certain acts are also classified as qualified trafficking, with the corresponding penalty imposing penalties of life imprisonment and fines up to five million pesos.¹³¹

Other salient features of the law is the creation of an Inter-Agency Council Against Trafficking to primarily monitor compliance with the law;¹³² initiation of bilateral and/or multilateral agreements to eliminate international trafficking in persons¹³³ and preferential entitlement of the victims of trafficking under the Witness Protection Program.¹³⁴ Moreover, victims of trafficking will not be imprisoned or detained for crimes committed directly related to the acts of trafficking enumerated above or in obedience to the order made by the trafficker in relation thereto.¹³⁵

The law did not expressly repeal the related provisions on Law on Vagrancy, White Slave Trade and Slavery for Immoral Traffic. There are only general repealing clauses. It is possible then, even with RA 9208,

Mechanisms for the Protection and Support of Trafficked Persons, Providing Penalties for its Violations, and For Other Purposes [Anti-Trafficking Act], § 3(a) (2003) (emphasis supplied).

127. *Id.* § 4(a).

128. *Id.* § 3(e).

129. *Id.* § 4(d).

130. *Id.* § 10.

131. *Id.*

132. *Id.* §§ 3(i), 20-22.

133. *Id.* § 21(1)

134. *Id.* § 18.

135. *Id.* § 17.

trafficked women might be prosecuted under the Law on Vagrancy as prostitutes while the traffickers will simply be held liable under White Slave Trade and Slavery for Immoral Traffic with penalties as low as *prisión correccional* or imprisonment ranging from 6 months and one day to six years.¹³⁶

IV. FORMATION OF THE PROTOCOL'S DEFINITION OF TRAFFICKING IN PERSONS

There are two things that contribute to the Protocol's potential significance. *First*, there had been no universal instrument dealing with trafficking in persons before the Protocol. In fact, the most recent international instrument dealing with trafficking and its related issues is now more than half a century old. *Second*, "trafficking" has never been precisely defined in International Law. Hence, the *Ad Hoc* Committee for the Purpose of Drafting a Comprehensive International Convention Against Transnational Organized Crime and the Three Supplementary Protocols made sure that the Protocol contained a clear-cut, well-defined concept of trafficking.

Nevertheless, the task has not been easy. There were a total of seven revisions of the definition of trafficking considered in 11 sessions for a span of two years. Primitive and inexact at the beginning, the definition underwent a lot of changes and was the subject of contentious deliberations. The final version of the definition is now found in the Protocol. Be that as it may, the definition remains controversial and needs to be satisfactorily addressed.

To determine the intention behind the Protocol, the study should not be limited to the treaty itself. The *travaux préparatoires* (preparatory work) and the records of the negotiations themselves are likewise helpful for these reflect the historical context in which the treaty was negotiated.¹³⁷ Hence, it is necessary to discuss the evolution of the definition of trafficking in persons, using the records of the deliberations as guideposts. However, the scope will be limited to two aspects of the definition only: the means for committing trafficking and the relevance/irrelevance of consent.

¹³⁶ REVISED PENAL CODE, arts. 272 and 341.

¹³⁷ MALANCZUK, *supra* note 80, at 366.

A. Means for Committing Trafficking

The first draft of the definition was contained in Article 2, under "Scope of Application." As proposed by the US delegation, "trafficking in persons" was defined as:

...[t]he recruitment, transportation, transfer, harboring or receipt of persons:

(a) *By the threat or use of kidnapping, force, fraud, deception or coercion; or*

(b) *By the giving or receiving of unlawful payments or benefits to achieve the consent of a person having control over another person, for the purpose of prostitution or other sexual exploitation or forced labor.* xxx¹³⁸

Noticeably, the means enumerated are much more limited as compared to the final version. The abuse of a person's vulnerability is not considered as one of the means. The definition is also silent as to the relevance of consent of trafficked adult women.

Subsequently, two definitions were proposed, one for trafficking in children and another, for trafficking in women. The latter was worded as follows:

(c) "*Trafficking in women*" shall mean any act carried out or to be carried out for an illicit purpose or aim by a criminal organization, jointly or through any of its members, whether or not on behalf of another, whether or not for profit and whether occasionally or repeatedly, that involves:

(i) *Promoting, facilitating or coordinating the kidnapping, holding or hiding of a woman, with or without her consent, for illicit purposes or in order to force her to perform, not perform or tolerate an act or to subject her unlawfully to the power of another person;*

(ii) *Transporting a woman to or facilitating her entry into another State;*¹³⁹

The new version did not expressly enumerate the means through which the woman is trafficked although it expressly states that there is trafficking for purposes of prostitution or other form of sexual exploitation, regardless of the presence of consent.

¹³⁸ Protocol to Combat International Trafficking in Women and Children Supplementary to the United Nations Convention on Transnational Organized Crime A/AC.254/4/Add.3, 2, at <http://www.uncjin.org/Documents/Conventions/dcatoc/1session/43e.pdf> (last visited May 7, 2002) (emphasis supplied).

¹³⁹ Draft Protocol, A/AC.254/4/Add.3/Rev.1, 4, at <http://www.uncjin.org/Documents/Conventions/dcatoc/2session/4a3r1e.pdf> (last visited May 7, 2002).

Subsequently, a more extensive enumeration of the means was proposed:

For the purposes of this Protocol, "trafficking in persons" means the recruitment, transportation, transfer, harboring or receipt of persons, either by the threat or use of kidnapping, force, fraud, deception or coercion, or by the giving or receiving of unlawful payments or benefits to achieve the consent of a person having control over another person, for the purpose of sexual exploitation or forced labor.¹⁴⁰

During the deliberations of the *Ad Hoc* Committee, one delegation expressed concern that it would be difficult to prove "coercion" in practice.¹⁴¹

Major changes were seen when the sixth revised draft was proposed during the ninth session of the *Ad Hoc* Committee. Three options for the definition of trafficking in persons were proposed and all of them were placed in the Article on Definitions. One of the options defined Trafficking in Persons as follows:

"Trafficking in persons" shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by the threat or use of force, by abduction, fraud, deception, coercion or the abuse of power or by the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of [at a minimum] slavery, forced labor or servitude, including through sexual exploitation.¹⁴²

It can be observed that abuse of power was finally inserted as one of the means, although abuse of a position of vulnerability was not. Subsequently, "abuse of authority" was used rather than "abuse of power". The word "authority" should be understood to include the power that male family members might have over female family members in some legal systems and the power that parents might have over their children.¹⁴³ Further, the words "at a minimum" will allow State Parties to go beyond the offenses listed in this definition.¹⁴⁴

Things were made a lot simpler when the seventh draft was made since the 11th session was to be the last session before the Convention and its

140. *Id.* (emphasis supplied).

141. Informal Note by the United Nations High Commissioner for Human Rights, 3, at <http://www.uncjin.org/Documents/Conventions/dcatoc/4session/16e.pdf> (last visited May 7, 2002).

142. Draft Protocol, A/AC.254/4/Add.3/Rev. 6, 5, at <http://www.uncjin.org/Documents/Conventions/dcatoc/7session/4a3r6e.pdf> (last visited May 7, 2002) [hereinafter Draft Protocol Rev. 6].

143. *Id.*

144. *Id.*

supplementary protocols were offered for signing by the State Parties. The seventh draft was actually a product of the ninth session of the *Ad Hoc* Committee where an informal working group agreed that a consolidated version of the definition would be adopted. It was worded as follows:

"Trafficking in persons" shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by the threat or use of force, by abduction, fraud, deception, [inducement,] coercion or the abuse of power or by the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation, [irrespective of the consent of the person]; exploitation shall include, at a minimum, [the exploitation of the prostitution of others or other forms of] sexual exploitation, forced labor or services, slavery or practices similar to slavery, [the removal of organs for illicit purposes] [or servitude] ...¹⁴⁵

Compared to the final version of the definition, the words "inducement" and "irrespective of the consent of the person" were deleted. Meanwhile, the words "of a position of vulnerability" were added to the final version after the phrase "abuse of power". Hence, it is accurate to say that the *Ad Hoc* Committee did not intend to limit the means of committing trafficking through force, coercion, abduction, fraud, or deception but it is also possible that a woman can be trafficked, *although no force, coercion, abduction, fraud, or deception is present*, when there is an abuse of power or abuse of a position of vulnerability, or the giving or receiving of payments to achieve the consent of a person having control over another person. Again, "abuse of a victim's vulnerability" is interpreted to mean, "any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved."¹⁴⁶

B. Relevance/Irrelevance of Consent

At the informal consultations held during the fifth session of the *Ad Hoc* Committee, a consensus was reached on recommending to the plenary the addition of a new article on definitions. The Article on Definitions defined two concepts: sexual exploitation and forced labor. Interestingly, sexual exploitation was defined as:

145. Draft Protocol, A/AC.254/4/Add.3/Rev.7, 3-4, at <http://www.uncjin.org/Documents/Conventions/dcatoc/8session/4a3r7e.pdf> (last visited May 7, 2002) (emphasis supplied). At the informal consultations held during the seventh and ninth session of the *Ad Hoc* Committee, there was a general agreement to defer discussion of the words in brackets pending finalization of the corresponding provisions in the draft Convention.

146. Interpretative Note, *supra* note 98, at no. 63.

(i) Of an adult, [forced] prostitution, sexual servitude or participation in the production of pornographic materials, for which the person does not offer herself or himself with free and informed consent;

(ii) Of a child, prostitution, sexual servitude or use of a child in pornography;¹⁴⁷

During the discussions on the definition of "sexual exploitation", several delegations expressed reservations regarding the proposal. The Netherlands suggested replacing the definition of the term "sexual exploitation" with a definition of the term "slavery" that reads as follows:

Slavery shall mean the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including forced prostitution and servitude and other practices similar to slavery as defined in article 1 of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.¹⁴⁸

Other than that, majority of the delegations suggested deleting the word "forced" in the proposed definition of sexual exploitation. It was recognized that it might be difficult for victims of prostitution to prove that they had been "forced." However, several delegations expressed the view that it was essential to distinguish the victims of prostitution from those who had chosen to engage in prostitution. Moreover, consensus was reached on recommending the replacement of the word "voluntarily" with the words "with free and informed consent."¹⁴⁹ The proposal by the United States to use the phrase "for which the person does not offer herself or himself voluntarily" was rejected. At this point, it is quite clear that the intention is to avoid making distinctions between forced and voluntary trafficking.

During the ninth session of the *Ad Hoc* Committee, there was extensive discussion of whether a reference to the consent of the victims should be made in the definition of "trafficking in persons" and if so, how it should be worded. The discussions were very enlightening:

Most delegations agreed that the consent of the victim should not, as a question of fact, be relevant to whether the victim had been "trafficked." However, many delegations expressed legal concerns about the effect of expressly excluding consent from a provision in which many of the means listed, by their nature, precluded the consent of the victim. Several expressed concern that an express reference to consent might actually imply that in some

147. Draft Protocol, A/AC.254/4/Add.3/Rev.4, 8, at <http://www.uncjin.org/Documents/Convention/dcatoc/session/4a314e.pdf> (last visited May 7, 2002) (emphasis supplied) [hereinafter Eighth Draft Protocol].

148. *Id.* at 7 (emphasis supplied).

149. *Id.* at 8.

circumstances, it would be possible to consent to such things as the use or threat of force, or fraud. Several delegations pointed out that proving lack of consent was difficult because the victim's consent or ability to consent often changed while the offence was ongoing. In trafficking cases, the initial consent of the victim was often withdrawn or vitiated by subsequent changes in circumstance and in some cases, a victim abducted without consent might subsequently consent to other elements of the trafficking. There was agreement that both the Protocol and legislation implementing it should reduce this problem for prosecutors and victims as much as possible.¹⁵⁰

Notwithstanding the deliberations, no consensus was reached on the words "irrespective of the consent of the person" being included in the definition. The Chairperson then asked the delegations to consider the following options:

(a) The deletion of the words "irrespective of the consent of the person;" their replacement with a new subparagraph proposed by the Chairperson (worded as follows: "The existence of any of the means set forth in subparagraph (a) of this article shall be considered as vitiating any alleged consent of a victim of trafficking"); and inserting in subparagraph (a) the words "by means of the threat or use of force" to clarify which "means" were referred to in new subparagraph (a);

(b) A proposal by Spain to amend the bracketed text to read "irrespective of the initial consent of the victim;"

xxx

(d) A proposal by Argentina to replace the article with the following text (originally submitted in Spanish):

"(...) For the purpose of this Protocol, 'trafficking in persons' shall mean their transfer under any circumstances, with or without their consent, for purposes of exploitation;

"(...) 'Exploitation' shall mean reduction to servitude, subjection to prostitution, slavery, forced labor or child pornography;

"(...) States Parties may take into account other forms of 'exploitation', in accordance with their domestic legal systems."¹⁵¹

For the final version, the treatment of consent is now found in Article 3(b) of the Protocol.

Although Article 3(b) of the Protocol, which states that consent shall be irrelevant as long as the means in subparagraph (a) are present, Article 3(b) should not be interpreted as imposing any restriction on the right of accused persons to a full defense and to the presumption of innocence. However, it

150. *Id.* (emphasis supplied).

151. *Id.*

should also not be interpreted as imposing on the victim the burden of proof. As in any criminal case, the burden of proof is on the State or public prosecutor, in accordance with domestic law.¹⁵²

V. DIVERGENT VIEWS ON CONSENT IN TRAFFICKING IN WOMEN

As aforementioned, the General Assembly established an intergovernmental *Ad Hoc* Committee for the Purpose of Drafting a Comprehensive International Convention Against Transnational Organized Crime and Its Corresponding Supplementary Protocols. The *Ad Hoc* Committee held 11 sessions in Vienna from January 1999 until October 2000, with over 120 countries in attendance at various meetings, along with a number of international non-governmental organizations (NGOs) which played a key role in the consultation process, especially in the deliberations over the Protocol.¹⁵³ Since the Protocol will establish the international parameters and standards for a State's obligation and commitment in combating trafficking in women, governments and NGOs have been intensely debating every word and legal concept contained in the Protocol to reflect their respective priorities and agenda.

After two years, the Protocol has been adopted by more than 100 States containing the first ever international definition of trafficking in persons. Continuing controversial debates between different bodies and NGOs nevertheless exist as to the relevance of consent based on the definition in the Protocol. It appears that the definition did not fully eliminate the question of consent. Their main issue is whether lack of consent from the trafficked woman is an essential element of the crime of trafficking in persons. Stated otherwise, are adult women capable of exercising their right to consent to being trafficked, if that consent is free? Notwithstanding the risk of oversimplifying a complicated issue, it is very apparent that the word "consent" has drawn more discussions and arguments than any other word during the 11 Vienna Sessions for the drafting of the Protocol.

In order to furnish a better understanding of the issue involved, it is pertinent to note the varying views and interpretations from different international bodies and NGOs regarding consent as regards trafficking. Basically, there are two prevailing divergent views. The first is that consent is relevant in trafficking because women should be allowed to be sex workers by choice, and thus be trafficked by choice. Further, their interpretation of the definition is that the Protocol draws a distinction between voluntary prostitution and forced prostitution. The second view is that consent is

¹⁵² Interpretative Notes, *supra* note 98, at no. 68.

¹⁵³ GUIDE, *supra* note 5, at 3.

immaterial to trafficking since a woman who has consented to be trafficked should not be considered less exploited than someone who was forced. Further, their interpretation of the definition in the Protocol is that the Protocol protects all victims of trafficking, not just those who could prove they had been forced, coerced, abducted, deceived, or victimized by fraudulent inducements.

A. Relevancy of Consent in Trafficking in Women [*GAATW, Special Rapporteur on Violence Against Women and ILO Position*]

Exponents of this view are the Global Alliance Against Traffic in Women (GAATW), the UN Special *Rapporteur* on Violence against Women (Special *Rapporteur*) and the International Labor Organization (ILO). Their option, which was proposed during the drafting of the Protocol, draws a distinction between consensual and forced prostitution.

Advocates of this approach consider consensual prostitution as far better since it leaves open the possibility that a woman may choose prostitution of her own free will. Many women see prostitution as a chosen way to make a living. Although it might not be their first choice in a perfect world, but faced with the alternatives, it is a logical one that they freely make.

Proposing a broad, inclusive and all-encompassing definition of trafficking in persons drives prostitutes, already among the most marginalized women in the world, further underground into the clutches of criminals since their only means of survival is outlawed as well.¹⁵⁴ In effect, their right to self-determination, right to make autonomous choices and decisions as well as right to work are violated. Women should therefore be allowed to be sex workers by choice, and thus be trafficked by choice.

1. GAATW Position

GAATW was formed at the International Workshop on Migration and Traffic in Women held in Thailand in 1994. GAATW is a movement of organizations and individuals worldwide, which has facilitated work on issues related to trafficking in persons and women's labor migration. Their aim is to ensure that the human rights of trafficked persons are respected and protected by authorities and agencies and that women are empowered rather than treated as mere victims.¹⁵⁵

¹⁵⁴ *Id.* at 2.

¹⁵⁵ GAATW, *About GAATW*, at <http://www.inet.co.th/org/gaatw/about.html> (last visited May 7, 2002).

GAATW believes the definition under the Protocol took a different approach to trafficking from that contained in the 1949 Convention, which focused only on prostitution and considered all prostitution, voluntary and forced, to be trafficking. The Protocol actually recognizes the existence of voluntary and forced prostitution. There is no express mention that trafficking takes place irrespective of the consent of the trafficked person at all times and by any other means. The definition is limited to a selective enumeration of means which seemed to have a common element: its vitiating factor.

Initially, it was proposed that the definition need not include the phrases "exploitation of the prostitution of others" or "other forms of sexual exploitation" since the terms "forced labor or services, slavery or practices similar to slavery, servitude" already cover every situation in the sex industry. GAATW stresses that despite the inclusion of the two former phrases on sexual exploitation in the final version of the definition, they are still not defined in the Protocol which was meant to be without prejudice as to how State Parties address prostitution in their respective domestic laws.¹⁵⁶

Impliedly, a justification for the distinction can be derived from the fact that government delegates to the sessions could not agree on a common meaning. While all delegates agreed that involuntary forced participation in trafficking should be penalized, majority of governments rejected the idea that voluntary, non-coercive participation by adults in trafficking should be sanctioned as well.¹⁵⁷ As long as sexual exploitation remains undefined under International Law, it can mean anything; it can mean only forced, coercive prostitution and it can mean all kinds of prostitution.¹⁵⁸ Furthermore, GAATW defines "sexual exploitation" as including the use of force or coercion only:

"Sexual exploitation" means the participation by a person in prostitution, sexual servitude, or the production of pornographic materials as a result of being subjected to a threat, deception, coercion, abduction, force, abuse of authority, debt bondage or fraud.¹⁵⁹

Note that the proposed definition of sexual exploitation does not include abuse of power or being in a position of vulnerability as one of the means of

156. GAATW, *A New Convention Has Been Adopted*, 2, at <http://www.inet.co.th/org/gaatw/SolidarityAction/HRSLetter.htm> (last visited Apr. 9, 2002).

157. *Id.*

158. Ann Jordan, *Stop-Traffic Urgent Action UN Trafficking Protocol 2-3*, at <http://fpmail.friends-partners.org/pipermail/stop-traffic/2000-August/095400.html> (last visited May 2, 2002).

159. *Id.* at 3.

sexually exploiting the woman. Neither did it include the giving or receiving of payments to achieve the consent of a person having control over another person. Besides, including voluntary prostitution within the coverage of trafficking transforms the Protocol into an anti-prostitution instrument, akin to the 1949 Convention. Consensus would be impossible if this occurs. The best proof is the 1949 Convention itself which has been signed by fewer than half of the world's governments for this same reason. Ann Jordan, Director of Initiative against Trafficking in Persons and a member of the International Human Rights Law Group (IHLG) posits:

Regardless of one's personal views on prostitution, delegates must be willing to compromise because countries that tolerate prostitution or have decriminalized or legalized prostitution would be unable to sign an anti-prostitution Protocol. Other countries have already expressed their objections to the proposal because they understand the negative consequences of including voluntary migrant sex work in the Trafficking Protocol. *Trafficking is a transnational crime and it requires an international coordinated response. If ratification is not universal, traffickers will be free to move their operations to countries that have not signed and be able to operate with impunity.*¹⁶⁰

In the 1999 GAATW publication, *Human Rights Standards for the Treatment of Trafficked Persons*, the GAATW took the position that adults who freely agree to travel within or across borders and who are fully informed about the type and conditions of work or services they are expected to perform and adults who do not consent at all or whose apparent, implied or express consent is vitiated by the use of deception, coercion or debt bondage should not be treated alike. There is a need to respect the right of adults, men and women, to make decisions about their lives, including the decision that working under abusive or exploitative conditions is preferable to other available options. Further, a trafficking law should not be overly protective and prevent women from making the same type of decisions that adult men are able to make.¹⁶¹

GAATW also disagrees with the view that consent should be irrelevant since an adherence to the all-encompassing notion of trafficking will lead to the prosecution of anyone connected with the sex worker and deprive him or her of using consent as a defense. Successful prosecutions are built upon strong evidence. The issue of consent is a matter of evidence, not definition, because once the prosecution presents evidence proving the existence of forced prostitution, forced labor, slavery or servitude, consent is

160. *Id.* (emphasis supplied).

161. GAATW, *Human Rights Standard for the Treatment of Trafficked Persons* 6, 13, at <http://www.inet.co.th/org/gaatw/SolidarityAction/SMR99.htm> (last visited Jan. 1999).

understandably irrelevant. However, when the prosecution fails to present adequate evidence proving force, consent will then be relevant.¹⁶²

2. ILO Position

The ILO is the first UN specialized agency which seeks the promotion of social justice and internationally recognized human and labor rights. It was founded in 1919. The ILO formulates international labor standards in the form of conventions and recommendations setting minimum standards of basic labor rights, one of which is the abolition of forced labor.¹⁶³

In 1998, the ILO published a book-length study entitled *The Sex Sector: The Economic and Social Bases of Prostitution in Southeast Asia* (Sex Sector) which was edited by economist Lin Lean Lim. The study examined the social and economic forces driving the growth of the sex industry in four Southeast Asian countries: Indonesia, Malaysia, Philippines, and Thailand. Further, the study considered the provision of sexual services assuming the dimensions of a full-blown commercial sector, one that provides direct and indirect employment to millions of workers, which substantially contributes to national incomes throughout the region.¹⁶⁴

Significantly, *Sex Sector* regards prostitutes as sex workers. For adult sex workers, their situation ranges from freely chosen to exploitative conditions. In fact, child prostitution should be considered as a much more serious problem than adult prostitution. While adults can choose to become prostitutes or to work in pornography, children cannot. Hence, the study draws a distinction between voluntary and involuntary prostitution.

Also, the study emphasized the presence of strong economic incentives that drive women to enter the sector, despite the social stigma and danger attached to the work. Sex work is understood to often pay better than most of the options available to young, often uneducated women. All in all, prostitution is mainly economic in nature. However, the study noted that "recognition of prostitution as an economic sector does not mean that the ILO is calling for the legalization of prostitution. It is for the countries themselves to decide on the legal stance to adopt."¹⁶⁵

162. *Id.*

163. ILO, *About the ILO, Who We Are: ILO Mandate*, at <http://www.ilo.org/public/english/about/mandate.htm> (last visited May 7, 2002).

164. ILO Press Release, *supra* note 57.

165. *Id.* at 2.

Lim further contends that the study takes no position on consent, but merely conveys competing views. She denied that *Sex Sector* encourages governments to "get in on the gravy train" by taxing prostitution, but suggests that recognition of prostitution as an economic sector in official statistics, development plans and government budgets is important for sound policy.

IHRL, another NGO which shares the same view as the GAATW, argues that there are important policy reasons why there is a need to recognize that some women freely choose prostitution. An example cited was the 40,000 prostitutes in Calcutta, who formed a union. The implication of eliminating the stigmatization of those in prostitution in describing them as "sex workers" is that the human rights of prostituted women are better protected, as they are given a decree of legal legitimacy. For instance, in giving them the right to organize, the sex workers can keep more of the money they earn.¹⁶⁶ Prostituted women, as sex workers, can now choose their own working conditions, their clients and, if working for an employer, would have industry health and safety standards in place. The end result would be empowerment of the women, rather than continual victimization.

3. Position of the UN Special Rapporteur on Violence Against Women

Radhika Coomaraswamy, the Special *Rapporteur* on Violence Against Women, Its Causes and Consequences, in Accordance with a Resolution of the Commission on Human Rights, made a mission report on the issue of trafficking in women and girls in Bangladesh, Nepal and India. The report contained a chapter on the definition of trafficking which the Special *Rapporteur* noted the need for conceptual clarity and that it should be along the lines of the language of the Protocol. Interestingly, the following definition was used for the mission report:

Trafficking in persons means:

- (1) The recruitment, transportation, purchase, sale, transfer, harboring or receipt of persons, by threat or use of violence, abduction, force, fraud, deception or coercion (including the abuse of authority), or debt bondage

For the purpose of:

166. Eric Goldscheider, *Prostitutes Work – But Do They Consent?*, BOSTON GLOBE *Cor* (Jan. 2, 2000), at <http://departments.bloomu.edu/crimjust/SexTourism.htm> (last visited May 2, 2002).

(2) Placing or holding such person, whether for pay or not, in *forced* labor or slavery-like practices, in a community other than the one in which such persons lived at the time of the original act described in (1).¹⁶⁷

It is to be noted that the definition did not contain abuse of power or a position of vulnerability and giving or receiving of payments to achieve the consent of a person having control over another person as means to commit trafficking.

Although the Mission Report concentrated on South Asia and the South Asia Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children in Prostitution, the Special *Rapporteur* made certain comments in her General Findings on the issue of consent. The Special *Rapporteur* stressed the importance of recognizing the conceptual difference between trafficking and prostitution and in segregating the regimes that operate for women from children:

Trafficking of people across boundaries is for a variety of purposes and not only for prostitution. The Special *Rapporteur* is aware of women, boys and girls being trafficked for *forced* labor, *forced* marriage and to work as camel jockeys to various parts of South Asia as well as to other regions. In addition, it is important to maintain conceptual clarity in separating the regimes that operate for women and those that operate for children. Women are adults and should be treated as such in laws, policies and programmes. Children may need additional special measures to prevent them from being victims of trafficking.

xxx

Conceptual clarity with regard to trafficking is the only way we can prevent the enactment of laws and programmes to prevent trafficking that violate other human rights of women. While the Special *Rapporteur* welcomed the enthusiasm to fight trafficking she found in South Asia, she was disturbed by the fact that many of the laws and policies appeared draconian and seemed to violate other human rights of women.... Many of the victims interviewed by the Special *Rapporteur* were very clear – they had left home because of poverty and discrimination. *To force these women to remain against their will in communities where they are unhappy is violation of their basic rights.*

xxx

167. UN Economic and Social Council, Report of the Special *Rapporteur* on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, in Accordance with Commission on Human Rights Resolution 2000/45 Addendum-Mission to Bangladesh, Nepal and India on the Issue of Trafficking of Women and Girls (October 28 - November 15, 2000) E/CN.4/2001/73/Add.2, 7 (last visited Feb. 6, 2001) (emphasis supplied).

The discrimination against women that is prevalent in South Asia runs parallel to an ideology that asserts that women are vulnerable, like children, and need protection.¹⁶⁸

With such a distinction between women and children, impliedly, the Special *Rapporteur* contends that there can be consensual and coerced trafficking for purposes of prostitution in women:

The SAARC convention does not distinguish between women and children. The legal regime surrounding women should be based on a framework of rights and the concept of coercion when it comes to trafficking. The legal regime with regard to children must be completely different.... In addition, the convention does not distinguish between movements and migrations that are legitimate and consensual and those that are coerced. This will result in a great deal of abuse and the violation of women's freedom of movement in a context of constant movement of people across national and local borders.¹⁶⁹

Finally, the Special *Rapporteur* cites an example where certain "sex workers" are happy with their "trade:"

In an industrial suburb near Bombay, NGO activists took the Special *Rapporteur* to meet some sex workers during the day when they had the time to speak to her. Many of these women were from traditional *devadasi* families. Their families had given them to the village temple for sex work but after a while they left the temple and went to work in the city. A group of women met with the Special *Rapporteur* at her request. She spoke to them of the possibility of setting up a rehabilitation center near the suburb so that the women could get medical check-ups and learn another trade and find alternative avenues of employment. The women were visibly upset by the Special *Rapporteur's* suggestion. They informed the Special *Rapporteur* that *they were very happy in their work and that they earned and saved enough money to keep their children and their parents back in the village. They had no intention of changing their trade. ... [t]hey felt that they were not in need of rehabilitation.*¹⁷⁰

To summarize, trafficking in persons, as defined in the Protocol, should be interpreted as covering forced or coerced trafficking only; hence, trafficking for purposes of prostitution due to the voluntary consent on the part of the woman should be treated as legitimate migration for sex work and not trafficking in persons. Further, trafficking and prostitution are not similar since trafficking can be for purposes other than prostitution. Thus, recognizing prostitution as an economic and labor sector empowers the

168. *Id.* at 10 (emphasis supplied).

169. *Id.* at 11.

170. *Id.* at 7 (emphasis supplied).

prostituted women or "sex workers" and enable them to better protect themselves from abuse or exploitation.

B. Irrelevancy of Consent in Trafficking in Women [CATW Position]

The main advocate of the theory of irrelevancy of consent in trafficking in women is the Coalition Against Trafficking in Women (CATW), an international network of feminist groups, organizations and individuals fighting the sexual exploitation of women globally.¹⁷¹ For the CATW, the definition in the Protocol protects all victims of trafficking, not just those who could prove they had been forced or coerced. Likewise, trafficking exists irrespective of the consent of the victim.

Although the definition does not contain phrases "with or without consent" or "irrespective of the consent of the victim," subparagraph (b) of the definition explicitly states that the consent of a victim of trafficking is irrelevant "where any of the means set forth in subparagraph (a) have been used." The means enumerated are "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."¹⁷² Thus, the phrase "abuse of a victim's vulnerability" clearly shows that trafficking does not only occur under conditions of force or coercion.¹⁷³ Therefore, even without force or coercion, as long as there is "abuse of power or position of vulnerability," the victim who freely gives her consent is still considered a trafficked woman.

Since "abuse of power or position of vulnerability," is understood to refer to "any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved,"¹⁷⁴ it is evident that the activity of being involved in trafficking for purposes of prostitution and sexual exploitation is so abhorrent and so unnatural that no one would freely choose it and whatever consent given in such a situation is irrelevant. According to CATW, it must be underscored that victims of trafficking are mostly from developing and least developed countries and from the lowest

171. CATW-AP, *Introduction*, at <http://www.catwinternational.org> (last visited July 31, 2002).

172. *Protocol to Prevent, Suppress and Punish Trafficking in Persons*, art. 3 (a) (emphasis supplied).

173. *Id.* at 7.

174. Interpretative Note, *supra* note 98, at no. 63.

economic and social strata of their societies.¹⁷⁵ Hence, voluntary, initial consent does not necessarily mean free choice or informed consent. In fact, other NGOs supporting this theory take the position that there should be an irrefutable presumption that women found in trafficking could not have given their consent to such a practice.¹⁷⁶ Trafficking with consent is literally a contradiction in terms.¹⁷⁷

Further, supporters for this theory disagree that prostitution, sex trafficking and other forms of commercial sexual exploitation are not human rights concerns when adults enter these situations consensually and voluntarily. There is no such thing as informed consent in trafficking; neither can there be voluntary migrant sex work.

Despite the fact that there are many women and girls who enter prostitution voluntarily, as to whether their consent is meaningful or of any significance is questionable when the powerful social conditions which mediate this process, are examined.¹⁷⁸ Moreover, the definition unequivocally reflects the reality that trafficking in women occurs in a continuum where initially, victims might consent to migrate, for instance for work that might in fact be a deception or falsehood. They may be tempted by enticing inducements such as attractive salaries and work conditions, only to end up in conditions of prostitution and sex slavery.¹⁷⁹

Initial consent is definitely irrelevant where trafficking is concerned. It is important to realize that whether or not a woman agrees to illegally work in a foreign country does not make her any less a victim of a crime. Most trafficked women do not even understand that what they agree to is criminal. In addition, many women are aware that they will work in some form of

175. International Human Rights Law Institute, *Investigating International Trafficking in Women and Children for Commercial Sexual Exploitation* 5 (2001), at http://www.depaul.edu/IHRLI/Americas_Project.pdf (last visited May 2, 2002).

176. *Id.*

177. WCAR, *Trafficked Persons as Victims of Racism, Racial Discrimination, Xenophobia and Related Tolerance* (2001), at <http://www.hurights.or.jp/wcar/E/tehran/traffickingintvntn.htm> (last visited May 2, 2002).

178. Dorchon Leidholdt, *Presentation to UN Special Seminar on Trafficking, Prostitution and the Global Sex Industry - Position Paper for CATW Part One* (1999), at <http://action.web.ca/home/catw/readingroom.shtml#sh> (last visited Apr. 17, 2002) [hereinafter Leidholdt].

179. Aurora De Dios, *Not A Matter of Consent, Asia-Pacific Coalition Report Online* (1999), at <http://www.catw-ap.org/editorial.htm> (last visited May 2, 2002) [hereinafter De Dios].

prostitution and initially consent to it but they are not aware that they will have little control over their "work," salary and that they might enter into a situation of debt bondage to their pimp.¹⁸⁰ No matter how one looks at it, it is still trafficking.

It is important to note that the 1949 Convention served as an influential precedent for the Protocol. Since the 1949 Convention regarded prostitution as "incompatible with the dignity and worth of the human person with or without the consent of the prostituted person,"¹⁸¹ the CATW worked to insure that nothing in the Protocol would contradict the 1949 Convention. The 1949 Convention is also understood to equate sex trafficking with the exploitation of the prostitution of others.

Likewise, making consent relevant ignores the fact that the core element of trafficking is exploitation. It is essentially a form of violence against women (VAW). Violence against women refers to all forms of violence inflicted upon women on account of her gender. Trafficking for purposes of prostitution and sexual exploitation is the cornerstone of patriarchal control and sexual subjugation of women that impacts negatively not just on the women and girls in prostitution but on all women as a group because prostitution continually affirms and reinforces patriarchal definitions of women as having a primary function to serve men sexually.¹⁸² Prostitution is possible because men's power as a dominating class over women exists. All activities in the sex industry constitute sexual exploitation. There is no need to qualify "sex work" as being under exploitative, forced or slavery-like conditions before they can be considered as sexual exploitation. Thus, women who are deemed to have agreed to exploitative contracts are no less exploited than those who are coerced at every stage. What the law will eventually punish is the element of exploitation done by the traffickers on the trafficking women.

Including consent as a necessary element of the crime of trafficking will also allow the presence of consent as a defense on the part of the trafficker(s). By allowing consent as a defense, it puts into question the state of mind of the victim. The victim in this manner shoulders the burden of proving that she was indeed forced.

180. Trafficking in Women, at <http://free.ngo.pl/lastrada/page2.html> (last visited May 2, 2002).

181. 1949 Convention, whereas clause (1).

182. CATW-AP, *Sex: From Intimacy to "Sexual Labor" or Is It A Human Right to Prostitute?* 2 (1998), at <http://action.web.ca/home/catw/readingroom.shtml?sh> (last visited Apr. 17, 2002).

Meanwhile, by making consent of the victim immaterial to a definition of trafficking, the point of focus would actually be on the culpability of the trafficker and not the victim anymore. The definition is meant to be broad, inclusive and directs the *onus* of guilt and penalties on the traffickers and pimps.¹⁸³ In fact, CATW stressed that there should be no definitional loopholes for traffickers whereby they could claim in their own defense that women had consented to their exploitation.¹⁸⁴

The argument that the right to prostitute oneself flows from the right to self-determination of an individual suffers from a failure to acknowledge the social, economic and political structural imbalances as well as the sexual relations of power between women and men which constitute the context within which these choices and decisions are made.¹⁸⁵ The issue of choice and consent as an analytical tool is worthless to understand prostitution as an institution. Prostitution pre-exists, as a system that requires a supply of female bodies and therefore, the question as to how women get into prostitution is irrelevant to the functioning of the prostitution system. As to the query on whether a person may "fully and freely consent to his/her own exploitation," CATW provides the following response:

*The issue of consent, of "personal choice politics" rests on a western liberal understanding of human rights that elevates individual will and choice above all other human values and above notions of common good. At the same time, it must be noted that as a result of advances in bio-technology, the concept of personal choice has been questioned and ethical issues have been raised regarding the integrity of the human body and person, for example, in connection with the sale of human organs, surrogate motherhood or human cloning. Individual choice is also generally not accepted as an argument for drug use. In defense of a conception of the human and of social good, human community has often seen the necessity to mark the boundaries of personal liberty. But perhaps because mainstream concepts of social good have never included the good of the class of women, the traditionally "socially subjugated;" it is tolerated that prostitution, a practice that integrally contributes to the maintenance of an underclass, be accepted on the basis that some few women are freely choosing it.*¹⁸⁶

There are also arguments that prostitution and other related forms of sexual exploitation should be treated as legitimate "sex work" and be legalized. For CATW, the "sex work" model is a misguided attempt to bestow dignity on a stigmatized and marginalized population and confer

183. De Dios, *supra* note 179.

184. CATW *Definition on Trafficking Wins in UN Vienna Conference*, ASIA-PACIFIC COALITION REPORT 8 (Mar. 2001).

185. De Dios, *supra* note 179.

186. *Id.* at 3 (emphasis supplied).

legitimacy on the systems of sexual exploitation that devastate the lives of prostituted women.

The reason behind legitimization of sexual exploitation is that it makes billions of dollars that lines the pockets of pimps, traffickers, brothel owners, legitimate businessmen, and, sometimes, government officials. The sex industry is estimated to reap 52 billion dollars a year. But the pecuniary advantage is done at the expense of women treated as prime commodities. Consequently, viewing sexual exploitation as work rather than abuse shields the industry from a powerful critique that could lead to legislative and policy changes that would impinge on the industry's profits. Thus, the appropriate model for understanding and addressing commercial sexual exploitation should not be the labor model but the violence against women model.

[E]ven as a labor practice, "sex work" is destructive to "sex workers." What other form of labor requires that the workers be physically invaded by those who view him or her with contempt, subjects the workers to tremendous risk of fatal disease, destroys the worker's reproductive health, systematically subjects the worker to "on the job" violence, leaves the workers psychologically traumatized, renders the worker employable for only a short period of his/her life span, and offers the worker no job skills with which to survive after she is no longer employable in the trade. When evaluated this way, it becomes clear that "sex work" is akin to other forms of gross exploitation never dignified by the term "work"—exploitation as a "mule" in drug trafficking; exploitation by organ traffickers; and, for women, reproductive exploitation for the benefit of traffickers in infants.¹⁸⁷

Further, in response to the ILO report officially recognizing the "sex sector" which would entail legal acceptance of the industry, CATW published a study commenting on the ILO's discussion of consent:

Those who defend prostitution and call for legalization often say that it is consensual and women "choose" this "work." What does this "consent" consist of? Many women engage in two forms of work to make enough money to survive. One third of prostituted women working in brothels in Victoria earned less than 500 Australian dollars, with only one in five earning more than \$1,000 per week. Thus, a woman who waits tables in the daytime, protected perhaps by a sexual harassment policy, against men grabbing her breasts, will be considered to have "consented" at 5 p.m. to much more violating acts in the licensed brothel. In fact, the "consent" is likely to take the form simply of *dissociation*.¹⁸⁸

187. Leidholdt, *supra* note 178, at 3-4.

188. MARY SULLIVAN & SHEILA JEFFREYS, LEGALISING PROSTITUTION IS NOT THE ANSWER: THE EXAMPLE OF VICTORIA, AUSTRALIA 11 (2000) (emphasis supplied).

Lastly, CATW believes that trafficking in women clearly violates the human right not to be prostituted. It also violates the right to physical and moral integrity by the alienation of women's sexuality that is appropriated, debased, and turned into a commodity. Besides, there is the violation of the right to liberty and security and the right to enjoy the highest standard of physical and mental health because violence, disease, unwanted pregnancies, abortions, and AIDS present grave risks for women in trafficking for purposes of prostitution.

The human rights of women include their right to have control over, and to decide freely and responsibly, on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.¹⁸⁹ Ultimately, trafficking is a human rights issue and the presence or absence of consent does not make a difference. The act of consenting to a certain treatment is not an event that extinguishes a human rights claim.¹⁹⁰

To reiterate, CATW advocates the view that although women may enter into prostitution voluntarily and consensually, it is most likely the result of powerful social inequities, like poverty, discrimination, and violence. Making consent relevant and an essential element of the crime of trafficking would, in effect, shield the pimps, traffickers and procurers from prosecution and accountability while the victims would be denied protection and relief. Moreover, allowing consent as a defense would lead to a situation where the victim, who was forced or coerced, must bear the burden of proving that force and deceit was actually exerted upon him.

Basing legal definitions on distinctions between trafficked women who are forced and those who volunteer simply reinforces deeply rooted misogynistic stereotypes of "good girls and bad girls," "victims and whores."¹⁹¹ Such contrasting treatment perpetuates a double standard that is clearly not acceptable. A society that allows some women to be degraded for the gratification of men inevitably demeans all women.¹⁹²

VI. TREATMENT OF CONSENT IN PHILIPPINE LAW AND JURISPRUDENCE

Consent has invariably been an essential factor in various Philippine statutes, whether the statutes are criminal or civil in nature. The presence or absence of consent determines the existence or non-existence of a crime as well as the perfection of a contract. Consent can likewise be a legal defense on the

189. *Id.* at 6-7.

190. Leidholdt, *supra* note 178, at 2.

191. *Id.* at 1.

192. Goldscheider, *supra* note 166.

part of the accused; if not, it can even serve as a justifying, exempting or mitigating circumstance. Since the main thrust of this study is to examine and decipher the relevance of consent in trafficking in women along with its legal ramifications, a survey of how consent is viewed in different aspects of Philippine law and jurisprudence will certainly be necessary and pertinent.

A. Consent in Philippine Criminal Law and Jurisprudence

I. Vagrants and Prostitutes

Article 202(3) and (5) of the RPC provides:

Vagrants and prostitutes; penalty – The following are vagrants:

xxx

3. Any idle or dissolute person who lodges in houses of ill-fame; ruffians or pimps and those who habitually associate with prostitutes;

xxx

1. Prostitutes.

For the purposes of this article, women who, for money or profit, habitually indulge in sexual intercourse or lascivious conduct, are deemed to be prostitutes.¹⁹³

Aside from singling out women for the offense, the Law on Vagrancy makes no qualification as to consent. The law simply requires the element of habitual gratification and pecuniary profit. Meanwhile, there is no enumeration of the means of procuring a woman for prostitution under said provision. Whether by force, deception or fraud, the woman can still be considered a "prostitute."¹⁹⁴

Aside from the "prostitutes," the law punishes as vagrants individuals who are either:

- a. an idle or dissolute person who lodges in houses of ill-fame;
- b. ruffian or pimp; or
- c. one who habitually associates with prostitutes.¹⁹⁵

A pimp is one who provides gratification for the lust of others; a procurer, a panderer.¹⁹⁶ Compared to the situation of trafficking in women

193. REVISED PENAL CODE, art. 202 (3) and (5).

194. For other features of the crime, refer to Chapter II under the sub-heading "Legal Developments in the Philippines."

195. REVISED PENAL CODE, art. 202 (3).

for purposes of prostitution, the pimp or procurer is quite comparable to the traffickers. Again, the law does not qualify pimping with the presence or absence of consent on the part of the "prostitutes."

For the past decades, advocates for the decriminalization of prostitutes argue that it is time for prostitutes not to be treated as offenders but as victims. However, Article 202 has not yet been repealed.¹⁹⁷ Hence, a foreseeable problematic situation is where the Protocol and the Anti-Trafficking Law recommend implied decriminalization of the trafficked woman while that woman can still be prosecuted under Article 202(5) as "prostitutes."

2. Giving Assistance to Suicide

Art. 253 of the RPC provides:

Giving Assistance to Suicide – Any person who shall assist another to commit suicide shall suffer the penalty of *prision mayor*, if such person lends his assistance to another to the extent of doing the killing himself, he shall suffer the penalty of *reclusion temporal*. However, if the suicide is not consummated, the penalty of *arresto mayor* in its medium and maximum periods shall be imposed.¹⁹⁸

Art. 253 of the RPC penalize any person who shall assist another to commit suicide or lend assistance to another to the extent of doing the killing himself.¹⁹⁹ Committing suicide is not a crime and the person who attempted suicide is not liable for the act or its consequences.

In legal acceptance, as well as in a popular sense, the term "suicide" is employed to characterize the act of self-destruction. Suicide was once regarded by common law as exclusively a felonious act; of late, however, it has been often treated as the result of insanity, to be followed by all the legal consequences of that disease, so far as it is practicable.

That suicide may be committed by a person in the full enjoyment of his reason, there can be no doubt; nor can there be any doubt that it is often the result of unquestionable insanity. In such cases, the instinct of self-

196. U.S. v. Giner Cruz, 38 Phil. 677 (1918).

197. According to Ms. Jean Enriquez, Deputy Executive Director of Coalition Against Trafficking in Women-Asia Pacific (CATW-AP) whose organization has been lobbying the passage of the Anti-Prostitution Bill and Anti-Trafficking Bill, it can be predicted that the Anti-Prostitution Bill will face more challenges before it becomes part of our local legislation than the Anti-Trafficking Bill.

198. *Id.* art. 253.

199. REVISED PENAL CODE, art. 253.

preservation is not so strong as to prevent persons entirely from being tired of life and seeking their own destruction.²⁰⁰

The person committing the suicide is not punished even if he does not succeed in killing himself for, as *Pacheco*, a well known commentator of the Spanish Penal Code, observes: "How can the State punish a person who is not afraid of taking his own life when death is the greatest evil to which men may condemn him?"²⁰¹ Hence, only the person assisting another to commit suicide will be imposed a penalty despite the willingness of the person assisted to end his or her life. The rationale behind this is that the society is reluctant to give one person absolute and irrevocable power over the life of another, whether there is consent or not.²⁰²

3. Intentional Abortion

Art. 256 of the RPC provides:

Intentional Abortion – Any person who shall intentionally cause an abortion shall suffer:

1. The penalty of *reclusion temporal*, if he shall use any violence upon the person of the pregnant woman.
2. The penalty of *prison mayor*, if without using violence, he shall act without the consent of the woman.
3. The penalty of *prison correccional* in its medium and maximum periods, if the woman shall have consented.²⁰³

The term "abortion" has been defined as the unlawful destruction, or the bringing forth prematurely, of the human fetus before the natural time of birth.²⁰⁴ Abortion may be either criminal or justifiable, the latter when done for therapeutic reasons. As for criminal or intentional abortion, there are three ways of committing it: It can be done using any violence upon the person of the pregnant woman, by acting without violence and consent of the pregnant woman and by acting without violence but with the consent of the pregnant woman.

200. 3 VICENTE J. FRANCISCO, *THE REVISED PENAL CODE 652 (1961)* [hereinafter FRANCISCO].

201. *Id.* (emphasis supplied).

202. DAVID L. BENDER & BRUNO LEONE, *SUICIDE: OPPOSING VIEWPOINTS 72 (1992)* [hereinafter BENDER & LEONE].

203. REVISED PENAL CODE, art. 256 (emphasis supplied).

204. FRANCISCO, *supra* note 200, at 678.

"Without violence" means that drugs or beverages are administered upon the pregnant woman.²⁰⁵ If the woman consented, the person causing the abortion is imposed the least penalty among the three ways of committing intentional abortion. However, it is required that it is done without violence. There is mitigation of liability. Hence, if the act of abortion was done with violence despite the consent of the pregnant woman, the person will still be imposed with the heaviest penalty under Article 256. As for the woman herself, if she consented to the abortion, she will be liable under Article 258, which is abortion practiced by the woman herself or by her parents. Also, if the woman consents that any other person should do so, she will be held liable aside from the other person.²⁰⁶

4. Rape

Article 266-A of the RPC defines rape by providing how it is committed. The following are the means:

Rape, When and How Committed – Rape is committed:

1. By a man who shall have carnal knowledge of a woman under any of the following circumstances:

- a. Through force, threat or intimidation;
- b. When the offended party is deprived of reason or is otherwise unconscious;

By means of fraudulent machination or grave abuse of authority;

When the offended party is under twelve (12) years of age or is demented, even though none of the circumstances mentioned above be present;²⁰⁷

Rape was originally penalized as a crime against chastity under Art. 335 of the Revised Penal Code. Subsequently, RA 8353, otherwise known as the Anti-Rape Law of 1997, was enacted and the law reclassified rape as a crime against persons.²⁰⁸ Notwithstanding the major changes brought forth by RA 8353, the lack of consent of the offended woman persisted as an essential element of the crime. As a result, jurisprudential doctrines on lack of consent have incessantly remained applicable.

205. 2 REYES, *supra* note 118, at 498.

206. REVISED PENAL CODE, art. 258.

207. *Id.* art. 266-A (1).

208. The definition of the crime of rape was expanded and the same was reclassified as a crime against persons and incorporated into Title Eight under Chapter Three as Arts. 266-A, 266-B, 266-C and 266-D of the Revised Penal Code.

Foremost, authorities are uniform that the sexual act must be committed against the will of the woman and without her consent. The absence of consent must not be technical but actual in fact, or else, it will not be rape. If ever, the yielding to overpowering force should be construed as mere *submission*, and not consent.

An examination of the different circumstances where carnal knowledge of the woman was had would actually reveal that the law implies the very absence of consent of the woman to the sexual act.²⁰⁹ According to *Pacheco* and *Viada*, both learned commentators of the Spanish Penal Code:

The crime of rape is not to be presumed; consent and not physical force is the common origin of acts between man and woman. Strong evidence and indications of great weight will alone support such a presumption. The moral conviction that may serve as basis of a finding of guilt in criminal cases is that which is the logical and inevitable result of the evidence on record, exclusive of any consideration. Short of this, it is not only the right of the accused to be freed, it is even more our constitutional duty to acquit him.²¹⁰

Further, *Viada* posits: "Should the records disclose that some hesitation was shown by the woman or that she had contributed in some way to the realization of the act, this will perhaps constitute an offense very different from rape."²¹¹ Force and violence in rape must be proven by clear and conclusive evidence, otherwise there is reason to suspect that the act was committed by consent.²¹²

For the accused, however, being mere sweethearts does not prove consent by the offended party to the sexual act. A love relationship, even if true, will not necessarily rule out force. Convincing proof of consent is still required.²¹³ The usual proofs of consensual sex are love letters,²¹⁴ momentos or pictures²¹⁵ and testimonies of witnesses.²¹⁶

Later jurisprudence, however, has quantified force or intimidation as not to be so great or of such character as could not be resisted. It is only

209. FRANCISCO, *supra* note 200, at 1314.

210. *Babanto v. Zosa*, 120 SCRA 834 (1983); *People v. Bihasa*, 130 SCRA 62, 74 (1984); *People v. Agripa*, 130 SCRA 185, 187 (1984).

211. *People v. Lopez*, 131 SCRA 548, 555 (1984).

212. *US v. Florez*, 26 Phil 262, 268-69 (1913).

213. *People v. Monfero*, 308 SCRA 396, 414 (1999).

214. *People v. Barcelona*, 325 SCRA 168, 178 (2000).

215. *Monfero*, 308 SCRA 396, at 414.

216. *People v. Tianson*, 344 SCRA 291, 199 (2000).

necessary that the force or intimidation be sufficient to consummate the purpose which the accused had in mind.²¹⁷

Nonetheless, in cases where the offended party has allegedly given her consent but was mentally retarded or demented, the Supreme Court has continually stressed that there is rape since a mental retard cannot give rational consent to the sexual intercourse.²¹⁸ When the consent came from an offended party who is mentally deprived of reason, the crime of rape is still existent as if there was active resistance but it was overcome by force and threat, which is the essence of the crime of rape.²¹⁹ The Court has enunciated:

In this species of rape neither force upon the part of the man nor resistance upon the part of the woman forms an element of the crime. If, by reason of any mental weakness, she is incapable of legally consenting, resistance is not expected any more than it is in the case of one who has been drugged to unconsciousness, or robbed of judgment by intoxicants. Nor will an apparent consent in such a case avail any more than in the case of child who may actually consent, but who by law is conclusively held incapable of legal consent. *Whether the woman possesses mental capacity sufficient to give legal consent must, saving in exceptional cases, remain a question of fact . . . It need but be said that a legal consent pre-supposes an intelligence capable of understanding the act, its nature, and possible consequences. This degree of intelligence may exist with an impaired and weakened intellect, or it may not. . . .*²²⁰

Likewise, in *People v. Estrella*, the Court ruled:

Sexual intercourse with a woman who is deprived of reason or one who is weak in intellect to the extent that she is incapable of giving rational consent to the carnal intercourse constitute rape. . . . [r]esistance on the part of the woman is not essential. In the instant case the fact that complainant did not offer any resistance did not mean that she consented, for clearly she could not comprehend the full implications of the libidinous act. Surely, she deserves the protection of the law.²²¹

Another instance when consent is irrelevant in rape is when the offended party is below twelve years of age.²²² As long as the element of sexual intercourse has been proven, the crime is already statutory rape since in law, such offended party cannot give valid consent thereto.

217. *People v. Grefiel*, 215 SCRA 596, 608 (1992).

218. *People v. Mariano*, 124 SCRA 802, 806 (1983).

219. *People v. Gallano*, 108 SCRA 405, 413 (1981).

220. *Gallano*, 108 SCRA 405, at 410; *People v. Race*, 212 SCRA 90, 103 (1992).

221. *People v. Estrella*, 164 SCRA 114, 119 (1988).

222. REVISED PENAL CODE, art 266-A(d).

Nevertheless, it is not always necessary that the rape victim should be mentally retarded or below twelve years of age before the alleged consent given will be disregarded and seen as irrelevant. This can be seen in the cases of *People v. Peña*²²³ and *People v. Cruz*.²²⁴

In *Peña*, the rape victim was 18 years of age, a third year nursing student at a reputable university and a consistent honor student. The Court held:

Young, innocent and decent as she is, she was cowed by fear and shock because of the outrageous act of appellant on her person and honor. Consent obtained by fear of personal violence is no consent at all. Though a man puts no hand on a woman, yet if, by the use of mental and moral coercion the accused so overpowers her mind out of fear that as a result she dare not resist the dastardly act inflicted on her person, accused is guilty of the crime imputed on him.²²⁵

In *Cruz*, the Court emphasized:

The working of human mind when placed under such emotional stress is unpredictable. Fear of further injuries simply pinned her mind, overpowering and stifling any attempt to resist the sexual assault. Ana may have failed to successfully resist the accused's advances at the actual time of the sexual assault itself but such is not a manifestation of consent, but rather an indication of *involuntary submission*. Anyway, force or intimidation itself is sufficient for a woman not to put up any resistance. Not only a frearm can produce intimidation. Intimidation is addressed to the mind.²²⁶

Hence, it is inaccurate to generalize that consent is perpetually available as a legal defense to the accused in rape cases as long as the victim is above twelve years of age and not demented. Strictly speaking, consent is only available as a legal defense when it is alleged that the means used to consummate the bastardly act are force, threat or intimidation. Meanwhile, when the victim has been deprived of reason or otherwise unconscious, consent is basically irrelevant. Such distinction was stressed in *People v. Bugtong*, where the Court posited:

Having been charged with Rape allegedly committed thru force or intimidation, it is to be expected that appellant should focus his defense on showing that the sexual intercourse complained of was the result of mutual consent, rather than of force or intimidation. This defense, however, has been rendered futile and ineffective by the appellant's further conviction under par. (2) of Art. 335, for even if he should succeed in convincing us that the sexual act under consideration was born out of mutual consent, he

*nonetheless remains liable under par. (2) of Art. 335, wherein consent of the offended party is not a defense, the latter being considered to be legally incapable of giving her consent.*²²⁷

Another enlightening case is *People v. Salarza*.²²⁸ In *Salarza*, the victim was raped while she was half asleep and admittedly possessed some degree of awareness. The Court held that there was still rape since "from both physiological and neurological considerations, a person who is half asleep and therefore, in a stupor of drowsiness or semi-consciousness, is not capable of giving full, informed, intelligent and voluntary. Clearly, it is only when a woman is fully informed that consent may be intelligently given."²²⁹

An examination of the foregoing doctrines clearly shows that the absence of consent as an element of rape implies absence of *rational and intelligent* consent. Stated otherwise, consent means a choice made that is free from any mental and moral coercion by one who is fully aware of the consequences of the deed. *Consent should never be equated with involuntary submission. Besides, consent might be given voluntarily but not necessarily informed.* As a matter of fact, the non-resistance by an 18-year old third year college honor student in *Peña* was not even construed as rational consent due to the overpowering presence of mental and moral coercion. Submission to sexual intercourse for fear of one's life should not be equated with consent.²³⁰ However, in ordinary cases, when the woman is awake, of mature years, of sound mind, and not in fear, a failure to oppose the carnal act is consent and the act is not rape in the man.²³¹

5. Qualified Seduction

Art. 337 defines qualified seduction. Said article provides:

Qualified Seduction – The seduction of a virgin over twelve years and under eighteen years of age, committed by any person in public authority, priest, homeservant, domestic, guardian, teacher, or any person who, in any capacity, shall be entrusted with the education or custody of the woman seduced, shall be punished by *prision correccional* in its minimum and medium periods.²³²

227. *People v. Bugtong*, 169 SCRA 797, 806 (1984) (emphasis supplied). Art. 335 (2) is now Art. 266-A(1b).

228. 277 SCRA 578 (1997).

229. *Id.* at 594.

230. *People v. Peñero*, 276 SCRA 564, 569 (1997)

231. FRANCISCO, *supra* note 200, at 1319.

232. REVISED PENAL CODE, art. 337.

223. 151 SCRA 638 (1987).

224. 203 SCRA 682 (1991).

225. *Peña*, 151 SCRA 638, at 651.

226. *Cruz*, 203 SCRA 682, at 695-96.

For the crime of qualified seduction to exist, there must be abuse of: (a) authority, by a person in public authority, a guardian, a teacher, or a person entrusted with the education or custody of the victim; (b) confidence, by a priest, a house-servant or a domestic; and (c) relationship, by a brother or ascendant, whether legitimate or illegitimate.²³³ The other requisites are legal virginity, that is, the victim has no other voluntary carnal relations with another man; the offended party is twelve years of age or over but less than eighteen years of age and the offender have had sexual intercourse with the woman.²³⁴ Simple seduction does not require the victim to be a virgin.

More importantly, the doctrine of mutual desire, or the defense that the woman yielded due to her own desire, is not applicable to qualified seduction. It is only applicable to simple seduction. Stated otherwise, consent is not a legal defense in qualified seduction since the essence of the crime is abuse of authority, confidence, or relationship.²³⁵ Such element does not exclude the presence of consent since the law takes for granted the existence of deceit as an integral element of the said crime.²³⁶

6. Acts of Lasciviousness with the Consent of the Offended Party

Art. 339 of the Revised Penal Code punish lascivious acts with consent. Said article provides:

Acts of Lasciviousness with the Consent of the Offended Party – The penalty of *arresto mayor* shall be imposed to punish any other acts of lasciviousness committed by the same persons and under the same circumstances as those provided in Articles 337 and 338.²³⁷

This crime is committed by the same persons and under the same circumstances in Articles 337 and 338, that is, of qualified or simple seduction wherein the consent of the victim was obtained by abuse of authority, confidence, relationship, or deceit, but without sexual intercourse. The victim should likewise be a woman, with her being a virgin, or single, or a widow of good reputation, and 12 years of age or over but less than 18 years of age. If the victim is 18 years old or over, there can be no crime of acts of lasciviousness with consent, unless the offender is a brother or an ascendant wherein, as in qualified seduction, the virginity or age of the victim is immaterial.²³⁸ In this crime, the offended woman may have

233. FLORENZ D. REGALADO, *CRIMINAL LAW CONSPECTUS* 615 (2000).

234. *Perez v. CA*, 168 SCRA 236, 246 (1988).

235. *US v. Sarmiento*, 27 Phil. 121, 123-24 (1914).

236. FRANCISCO, *supra* note 200, at 1377.

237. REVISED PENAL CODE, art. 339.

238. REGALADO, *supra* note 229, at 612-13.

consented to the acts of lasciviousness being performed by the offender on her person, but the consent is obtained by abuse of authority, confidence or relationship or by means of deceit. Hence, consent is considered immaterial and the offender will still be penalized.

6. White Slave Trade and Slavery for Immoral Traffic

Art. 341 of the RPC define White Slave Trade as a crime against chastity. Said article provides:

White Slave Trade – The penalty of *prison correccional* in its medium and maximum periods shall be imposed upon any persons who, in any manner, or under any pretext, shall engage in the business or shall profit by prostitution or shall enlist the services of any other for the purpose of prostitution.²³⁹

On the other hand, Slavery for Immoral Traffic is classified as a crime against liberty by the RPC. Art. 272 provides:

Slavery – The penalty of *prison mayor* and a fine of not exceeding 10,000 pesos shall be imposed upon anyone who shall purchase, sell, kidnap, or detain a human being for the purpose of enslaving him.

If the crime be committed for the purpose of assigning the offended party to some *immoral traffic*, the penalty shall be imposed in its maximum period.²⁴⁰

As discussed earlier, any person who (a) engages in the business of prostitution, (b) profits therefrom, and (c) enlists the services of prostitutes, commits the crime of White Slave Trade under Article 341 of the RPC. It must be stressed that three distinct and separate acts of prostitution are penalized under said article.

Meanwhile, Article 272 of the RPC penalizes Slavery for Immoral Traffic. The article penalizes the purchase, sale, kidnapping, or detaining of a person for slavery that is considered aggravated if the purpose is to assign the offended party to immoral traffic. Although the law uses the words "human being" and "offended party," it is opined that qualified crime of slavery pertains to women since "immoral traffic" as used in the provision pertains to prostitution under Article 202 (5) of the RPC.²⁴¹

The rationale behind the provision of slavery is constitutional since it is an implementation of the prohibition against involuntary servitude. The Constitution expressly guarantees the fundamental right against involuntary

239. REVISED PENAL CODE, art. 341.

240. *Id.* art. 272 (emphasis supplied).

241. 2 REYES, *supra* note 122, at 559.

servitude except as a punishment for a crime whereof the party shall have been duly convicted.²⁴²

It is not clear whether consent is relevant for the prosecution of both crimes. Both crimes of White Slave Trade and Slavery for Immoral Traffic do not explicitly require lack of consent on the part of the offended party as an element of the offense. Hence, a conclusion can be made that whether the offended party "agreed" to be assigned for immoral traffic or be used for the business of prostitution by the offender is completely irrelevant under both crimes.

The difference between White Slave Trade and the Law on Vagrancy are actually more apparent than real. Both crimes punish the same act: prostitution. They only differ as to who is held liable. Under Article 202 or the Law on Vagrancy, it is the women themselves and the pimp or procurers who are penalized. Under Article 341, any person who commits any of the three acts comes within the purview of said article. The basis for the divergent treatment is that the purpose of the law is to do away with prostitution. The law thus recognizes that one of the most effective measures to get rid of prostitution is to go against those who promote the same.²⁴³ The commission of the three acts is analogous to what the pimp under the Law on Vagrancy is penalized for, which is essentially pandering the services of women for sexual purposes.

Another similarity between the two crimes is the element of profitability. Under the Law on Vagrancy, profit only qualifies the crime with regard to the prostitutes. It does not require the sharing of profit on the part of the pimp. In the same way, the offender under White Slave Trade can be prosecuted as long as he commits any of the three acts enumerated under Article 341. Hence, once it is proved that the accused had enlisted the services of women for the purpose of prostitution, he can be held criminally liable even if there was no proof that he had shared in the profit and vice-versa. Further, habituality is not a necessary element in White Slave Trade.²⁴⁴ Stated otherwise, it is not a requirement that the offender should be habitually engaged in the business of prostitution.

7. Consented Abduction

Art. 343 of the RPC provides:

242. PHIL. CONST, art. 3, § 18(2).

243. AMBROSIO PADILLA, CRIMINAL LAW: REVISED PENAL CODE ANNOTATED 637 (1989).

244. *People v. Bueno*, 6 CAR(2s) 678 (1964).

Consented Abduction – The abduction of a virgin over twelve and under eighteen years of age, carried out with her consent and with lewd designs, shall be punished by the penalty of *prision correccional* in its minimum and medium periods.²⁴⁵

Consented abduction has two common elements with qualified seduction, namely: (a) that the offended party is a virgin and (b) that she must be 12 years of age or over and under 18 years of age. But two other elements differentiate consented abduction from qualified seduction. Consented abduction, in addition to the two common elements, requires that the taking away of the offended party must be with her consent, after solicitation or cajolery from the offender and the presence of lewd designs.²⁴⁶

There is no need for deceit in consented abduction. In fact, it is even required that the victim's consent is intelligently and freely given, considering that she is already a person of sufficient discretion.²⁴⁷ This is because the gravamen of the offense of the abduction of a woman with her own consent, who is still under the control of her parents or guardians is "the alarm and perturbation to the parents and family" of the abducted person, and the infringement of the rights of the parent or guardian.²⁴⁸ It is not required that the abducted woman be personally removed from the house of her parents or guardians; it is sufficient that she leave it and be withdrawn from their control and vigilance, yielding to the cajolery and promises of her seducer. Succinctly put, the law does not punish the violence done to the person abducted, when it is assumed that she has her consent, but the disgrace to her family.²⁴⁹

B. Consent in the Field of Civil Law

1. Law on Contracts

Consent is essential for the existence of a contract, and where it is wanting, the contract is non-existent. The essence of consent is the conformity of the parties on the terms of the contract, the acceptance by one of the offer made by the other; it is the concurrence of the minds of the parties on the object and the cause which shall constitute the contract.²⁵⁰ Consent presupposes the

245. REVISED PENAL CODE, art. 343.

246. *Perez v. CA*, 168 SCRA 236, 246 (1988).

247. REGALADO, *supra* note 229, at 620.

248. *Percz*, 168 SCRA 236, at 246.

249. *US v. Reyes*, 28 Phil. 352, 357 (1914).

250. 4 ARTURO M. TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 447 (1991) [hereinafter 4 TOLENTINO].

following requisites: (1) plurality of subjects; (2) capacity; (3) intelligent and free will; (4) express or tacit manifestation of the will; and (5) conformity of the internal will and its manifestation. As to its manifestation, consent is exemplified by the concurrence of offer and acceptance with respect to the object and the cause of the contract.²⁵¹

Manresa, a known commentator on Civil Law, opined that consent should be intelligent or with an exact notion of the matter to which it refers; it should be free and it should be spontaneous.²⁵² More specifically, intelligence in consent is vitiated by error, freedom by violence, intimidation, or undue influence, and spontaneity by fraud.²⁵³ Full, clear and convincing evidence is necessary to prove defect or lack of valid consent, and not just mere preponderance of evidence.²⁵⁴

Consent, although vitiated in voidable contracts, does not cover a situation where there is complete absence of consent.²⁵⁵ A voidable contract is a valid and subsisting contract until annulled or set aside by a competent court.²⁵⁶ In *MWSS v. CA*,²⁵⁷ the Court held that a voidable contract has all three elements of a contract. Despite the alleged vitiation of the consent of MWSS because of the undue influence of President Ferdinand Marcos, the contract is not null and void *ab initio*. The Court further provides:

Voidable or annulable contracts are existent, valid and binding, although they can be annulled because of want of capacity or vitiated consent of one of the parties, but before annulment, they are effective and obligatory between parties. Hence, it is valid until it is set aside and its validity may be assailed only in an action for that purpose. They can be confirmed or ratified.²⁵⁸

a. Unemancipated Minors, Insane or Demented Persons, Deaf Mutes

Under Contract Law, unemancipated minors and insane or demented persons and deaf-mutes who do not know how to write are incapacitated to give consent.²⁵⁹ Legally, if both parties are incapacitated, the contract is

²⁵¹. *Id.* at 448.

²⁵². *Id.* at 475 (citing 8 *Manresa* 663).

²⁵³. *Id.*

²⁵⁴. *Id.*

²⁵⁵. *Hermes v. CA*, 316 SCRA 347, 368 (1999).

²⁵⁶. *Abando v. Lozada*, 178 SCRA 509, 514 (1989).

²⁵⁷. *MWSS v. CA*, 297 SCRA 287, 300 (1998).

²⁵⁸. *Id.* at 300.

²⁵⁹. Republic Act No. 386, An Act To Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], art. 1327 (1949).

unenforceable while if only one is incapacitated, the contract is voidable. In addition, contracts agreed to in a state of drunkenness or during a hypnotic spell are also voidable.²⁶⁰ The same effect applies to contracts given through mistake, violence, intimidation, undue influence, or fraud.²⁶¹

b. Violence and Intimidation

Violence is present when serious or irresistible force is employed to wrest consent. Intimidation meanwhile exists when one of the contracting parties is compelled by a reasonable and well-grounded fear of an imminent and grave evil upon his person or property, or upon the person or property of his spouse, descendants or ascendants to give his consent.²⁶² Succinctly put, violence refers to physical force or compulsion, while intimidation refers to moral force and compulsion. The latter influences the expression of the will, inhibiting the true intent and making it manifest something apparently as that of the person who consents.²⁶³ Further, the intimidation that will annul a contract has to do with evil or harm arising from an unlawful act. The threat must be unjust, contrary to law or morals. There must be some evil intent.²⁶⁴ Also, if a third person who was not a party to the contract has employed violence or intimidation, the agreement is still voidable.²⁶⁵

Intimidation should never be equated with miserable judgment. In the case of *Vales v. Villa*,²⁶⁶ the Court made a distinction between consent given against good sense and judgment *vis-à-vis* consent given against the will of a person:

There must, then, be a distinction to be made between a case where a person gives his consent reluctantly and even against his good sense and judgment, and where he, in reality, gives no consent at all, as where he executes a contract or performs an act against his will under a pressure which he cannot resist. *It is clear that one acts as voluntarily and independently in the eye of the law when he acts reluctantly and with hesitation as when he acts spontaneously and joyously.* Legally speaking he acts as voluntarily and freely when he acts wholly against his better sense and judgment as when he acts in conformity with them. *Between the two acts there is no difference in law.* But when his sense, judgment, and his will rebel and he refuses absolutely to act as requested, but is nevertheless overcome by force or intimidation to such an extent that he becomes a mere automaton and acts mechanically only, a

²⁶⁰. *Id.* art. 1328.

²⁶¹. *Id.* art. 1330.

²⁶². *Id.* art. 1335.

²⁶³. 4 TOLENTINO, *supra* note 250, at 489.

²⁶⁴. *Id.* at 491.

²⁶⁵. CIVIL CODE, art. 1336.

²⁶⁶. 35 Phil. 769 (1916).

new element enters, namely, a disappearance of the personality of the actor. He ceases to exist as an independent entity with faculties and judgment, and in his place is substituted another — the one exercising the force or making use of the intimidation. While his hand signs, the will which moves it is another's. While a contract is made, it has, in reality and in law, only one party to it; and, there being only one party, the one using the force or the intimidation, it is unenforceable for lack of a second party.²⁶⁷

To reiterate, violence or intimidation must have been the determining, not incidental, factor in giving the consent. If the party would have consented, even without the intimidation, the mere presence of the intimidation does not annul the contract.²⁶⁸

c. Undue Influence

As for undue influence, Art. 1337 of the Civil Code provides:

Art. 1337. There is undue influence when a person takes improper advantage of his power over the will of another, depriving the latter of a reasonable freedom of choice. The following circumstances shall be considered: the confidential, family, spiritual and other relations between the parties, or the fact that the person alleged to have been unduly influenced was suffering from mental weakness, or was ignorant or in financial distress.²⁶⁹

Undue influence pertains to any means employed upon a party which, under the circumstances, he could not well resist, and which controlled his volition and induced him to give his consent to the contract, that otherwise he would not have entered into.²⁷⁰ When a person takes improper advantage of his power over the will of another, depriving the latter of a reasonable freedom of choice, undue influence exists. Undue influence thereby destroys the free agency of a party and interferes with the exercise of that independent discretion which is necessary for determining the advantage or disadvantages of a proposed contract. Undue influence is different from intimidation since in the former, there need not be an unjust or unlawful act. Notwithstanding the difference, both cases have the element of moral coercion.²⁷¹

In determining undue influence, it is essential to ascertain, as far as practicable, the power of coercion on the part of one party, and the susceptibility to its influence on the part of the other. Further, the provision on undue influence enumerated several circumstances to ascertain the

267. *Id.* at 787-90 (emphasis supplied).

268. 4 TOLENTINO, *supra* note 250, at 500.

269. CIVIL CODE, art. 1337 (emphasis supplied).

270. *Id.* at 501.

271. *Id.*

employment of said means. Among the circumstances are mental weakness, ignorance and financial distress.²⁷²

Corollary to the aforementioned discussion, it is helpful to note that Article 24 of the Civil Code mandates that "in all contractual, property or other relations, when one of the parties is at a disadvantage on account of his moral dependence, *ignorance, indigence*, mental weakness, tender age or other handicap, the courts must be vigilant for his protection."²⁷³ It is opined that the provision on undue influence is a concrete manifestation of the principle embodied in Article 24.²⁷⁴

d. Fraud

Another vitiating circumstance is fraud. Fraud is every kind of deception, whether in the form of insidious machinations, manipulations, concealments or misrepresentations, for the purpose of leading another party into error and thus executes a particular act. Fraud, to be a vitiating factor, must have a determining influence on the consent of the victim.²⁷⁵

Inherent in insidious words or machinations, which is essentially fraud, is deceit. False promises, exaggeration of hopes or benefits, abuse of confidence, fictitious names, qualifications or authority, or all the thousand and one forms of deception which may influence the consent of a contracting party are fundamentally included in such category.²⁷⁶ Similarly, the misrepresentation constituting fraud must be alleged and proved, otherwise the contract cannot be annulled on this ground.

The Civil Code further mandates that fraud should be serious and should not have been employed by both contracting parties.²⁷⁷

2. Law on Marriages

Art. 2 of the Family Code provides:

No marriage shall be valid, unless these essential requisites are present:

- (1) Legal capacity of the contracting parties who must be a male and a female; and

272. CIVIL CODE, art. 1337.

273. *Id.* art. 24 (emphasis supplied).

274. 1 ARTURO M. TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 88 (1991) [hereinafter 1 TOLENTINO].

275. 4 TOLENTINO, *supra* note 250, at 505.

276. *Id.*

277. CIVIL CODE, art. 1344.

(2) *Consent freely given* in the presence of the solemnizing officer.²⁷⁸

The law requires mutual consent from the man and woman who will become husband and wife. Such consent must be real, in the sense that it is not vitiated by mistake, duress, or fraud. It must also be conscious or intelligent, in that insanity, intoxication, drugs, or hypnotism does not affect the understanding of the party.²⁷⁹ In case a party has not consented to a real marriage, such as when he or she is under hypnosis, or drugs when apparently agreeing to be husband or wife, the supposed marriage is non-existent or void from the beginning.²⁸⁰ Further, Article 35 (5) of the Family Code provides that marriages contracted through mistake of one contracting party as to the identity of the other are rendered void for lack of consent.²⁸¹

However, if the party does not give his or her consent to be husband or wife, not knowingly and voluntarily or freely, or is misled, there is merely a defect in the essential requisite of consent. The consent, although present, is vitiated or defective and the marriage is not void *ab initio*, only voidable or annulable.²⁸²

Article 36 of the Family Code speak about psychological incapacity, which renders marriages null and void. Marriages contracted by parties who, at the time of the celebration, were psychologically incapacitated to comply with the essential marital obligations of marriage, are void from the very beginning. It is required, however, that the incapacity becomes manifest only after its solemnization.²⁸³ If a husband believes that he does not have to work to support his family because that is the duty of his in-laws, or a wife thinks that sexual relation is sinful and dirty and dislikes children, the marriage would be void under this ground.²⁸⁴

C. The Significant Role of Consent

The survey of the different criminal offenses in this chapter establishes the following conclusions:

- 1.) In crimes where force, intimidation, coercion or other vitiating factors are allegedly used as the means to commit the crime, the

278. Executive Order No. 209, Family Code of the Philippines [FAMILY CODE], art. 2 (1987)(emphasis supplied).

279. I TOLENTINO, *supra* note 274, at 231.

280. *Id.* at 236.

281. FAMILY CODE, art. 35(5).

282. *Id.*

283. FAMILY CODE, art. 36.

284. I TOLENTINO, *supra* note 274, at 274.

offender can prove that there was consent on the part of the offended party and this negates the presence of the alleged vitiating factors if lack of consent is an element in the crime, *e.g.* rape.

- 2.) However, lack of consent is not always included as an essential element of the crime. In such a situation, proof that there was consent given on the part of the offended party will not be available as an affirmative defense on the part of the offender, *e.g.* giving assistance to suicide, white slave trade. Moreover, consent should never be equated with submission.
- 3.) Offenders can still be held criminally liable for certain crimes, despite the free and voluntary consent of the offended party. When this happens, it is clear that the law punishes the offender, not for the violation caused to the offended party, but because of some greater public policy that it seeks to enforce, *e.g.* giving assistance to suicide. An act which is contrary to public policy will not be condoned just because the offended party consented to the unlawful act done towards him or her.
- 4.) Even in crimes where consent is available as a legal defense, it is possible that the law will allow certain circumstances within that same crime where consent cannot be used as a defense, *e.g.* statutory rape.
- 5.) The presence of consent with respect to certain crimes can also be considered as a mitigating circumstance of the liability, *e.g.* intentional abortion, consented abduction. The law concludes that the offender possesses lesser depravity when the victim actually consents to the crime done towards him.

Another important thing that must be stressed is that all the crimes including or pertaining to prostitution under the RPC make no mention of consent. In the Law on Vagrancy, White Slave Traffic and Slavery for Immoral Traffic, no qualification as to consent on the part of the woman was ever made. However, the law still makes a distinction between these crimes. In the Law on Vagrancy, the law somehow presupposes that such women enter into prostitution knowing freely and rationally what they are entering into. Hence, the prostitute themselves are penalized. The law in effect prosecutes the pimp, procurer or panderer and the pimped, procured or pandered. The law, however, does not penalize the women under provisions of White Slave Trade or Slavery for Immoral Traffic.

Civil Law meanwhile reinforces the kind of consent acceptable in the Philippine legal system to be able to enter into legal relations. Unlike in Criminal Law, the Civil Code contains certain express provisions discussing and providing what kind of consent is valid and binding. The rationale is that a contract, to be valid and binding, must have the element of consent

present. Not only that, but such consent is required to be intelligent, free and spontaneous. Even in marriages, the Family Code contemplates the kind of consent that is real and not impaired by any vitiating circumstance. As seen in cases of psychological incapacity, the consent allegedly given towards marriage can even be nullified since such a situation presupposes that there is complete absence of consent in the first place, although the manifestations are revealed in the latter part of the marriage relations.

Can the concept of consent under Civil Law be interpreted as the same concept of consent required under Criminal Law whenever it is in issue? It can. As seen in the crime of rape, the Supreme Court continually uses the same words in describing the consent of the woman that should be given for the offender to be exculpated from the crime. Consent must be rational, intelligent, spontaneous, voluntary, and informed. Absence of any of the attributes constitutes a vitiation of the consent. Only such kind of consent can bind a person to a contract or exculpate a criminal offender when lack of consent is an essential element of the crime.

VII. CONSENT IN TRAFFICKING IN WOMEN: AN ANALYSIS

And finally, the protocols will bring about a change in the way we see and treat those working as ... prostitutes. No longer will they be viewed as accomplices. Now we will know them for what they are - victims of a new form of slavery. They must not be criminalized. Instead, they need help and protection.

*Pino Arlacchi, UN Under Secretary General, Palermo Convention (2000)*²⁸⁵

A. Refocusing the Problem

A lot of misconceptions surround trafficking in women. One of the common misconceptions is the adult-child divide: women are not entitled to the same degree of protection as children. It is easy for lawmakers and law enforcers to see that children are victims and that those who harm and exploit them should be held liable. However, when the profile of the victims is adult women, society is reluctant to provide such women the same treatment and compassion given to children. They are not considered free and autonomous persons who are capable of entering into situations knowledgeably and give free and informed consent despite the exploitative conditions that might soon depict their way of life.

As long as adult women give consent, society should respect that because that is their way of invoking right to life, self-determination, work, and free

285. Pino Arlacchi, Statement to the Opening Session of the Plenary, Palermo Conference at <http://www.undcp.org/palermo/arlacchi.html> (last visited Jul. 15, 2002).

choice. Society assumes that adult women know what they are entering into since they are no longer "children." It is also argued that a contrary treatment will further propagate the stigmatization of women as the weaker sex, that they should be treated as helpless as children are.

Furthermore, only women who can prove that they were forced, coerced, abducted, or deceived into trafficking for sexual exploitation are seen as victims. In such cases, their alleged "consent" is vitiated. Women who do not fit the profile of a victim should incur criminal liability. Accordingly, if the trafficked women "freely consented" to the trafficking, it negates the presence of force or coercion. Thus, there is no trafficking. The women should then be held liable for "consenting" to join the trafficking chain. The burden is almost always on the adult women.

Notably, certain indispensable actors of the trafficking cycle are often overlooked: the traffickers. Everyone pins the blame on the women while the limelight never focuses on the recruiters, transporters, customers, and corrupt public officials who act as protectors. To add more insult to the injury, an alleged "consent" from the woman is supposed to serve as an exculpatory or mitigating factor for the traffickers.

Undoubtedly, there is a need to refocus the problem. The limelight must be on the offense itself, which is trafficking in persons, especially in women, and the perpetrators of the offense, who are the traffickers. It must be stressed that the participation of the trafficked women is an end result of non-consensual submission, which should never be equated with consent. The danger sought to be prevented is that any future Philippine legislation on trafficking may limit trafficking committed only through force, coercion, abduction, fraud or deception, which is not an accurate definition. Such definition will not effectively deter or punish the offenders. Worse, the law may even prescribe criminal liability on the part of the trafficked woman.

What is significant in trafficking in women is that any law dealing with it must protect women as victims from various forms of trafficking. Only then can the law shift the focus from criminalizing the behavior of the trafficked woman to protecting such a woman as a victim of trafficking, in addition to providing for a more effective punishment of the trafficker.

Since the definition of trafficking in persons under the Protocol serves as the analytical framework for this study, it will be practical to commence the discussion with the definition:

(a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

(b) Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.

(c) *The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.*²⁸⁶

Based on the aforementioned definition, trafficking in persons has three essential elements:

- a. Recruitment, transportation, transfer, harboring or receipt of persons;
- b. 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;
- c. For the purpose of exploitation.

Additionally, the Protocol explicitly provides that consent of the victim is irrelevant where any of the means enumerated in the definition have been used. Logically whatever consent given by the trafficked woman under such means is vitiated, thus, immaterial. However, this same definition under the Protocol has merited the following interpretation:

Moreover, *not every instance of trafficking constitutes an offense under the Protocol. First, for the "recruitment, transportation, transfer, harboring or receipt of persons" to be considered trafficking in persons, the protocol requires first that such acts be committed "by means of the threat or use of force or other forms of coercion, of abduction, or fraud and deception, of the abuse of power or of a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person" Existence of any of these means, renders consent either lacking altogether or defective. In either case, it becomes "irrelevant." The Protocol, thus, draws a distinction between voluntary prostitution and forced prostitution, although it adopts a broad definition of what constitutes forced prostitution to include all cases of vulnerability where the person "has no real and acceptable alternative but (to) submit to the abuse involved." One may argue that economic hardship constitutes a form of coercion and a source of exploitation under this broad definition.*²⁸⁷

286. Protocol to Prevent, Suppress and Punish Trafficking in Persons, art. 3 (a) (emphasis supplied).

287. Mohamed Mattar, *Towards a Comprehensive International Legal Approach to Combat Trafficking*.

This is where the confusion lies. Some strong advocates against trafficking in women actually adopt this interpretation, that there is actually *voluntary* and *forced* trafficking as mandated by the Protocol. Further, it has been asserted repeatedly that all the means enumerated in the definition connote force and coercion. What is more disturbing is that there is recognition that not every instance of trafficking constitutes an offense under the Protocol. From here, it can be observed that the definition under the Protocol has not clarified all issues regarding trafficking, especially as to consent. In fact, it has brought forward more conflicting views and interpretations. Such conflicting views impede the elimination of trafficking in persons, especially in women, as a form of exploitation and violence against women. It must be stressed that the Philippines has ratified the Protocol, which signifies its assent to the definition. There is also the possibility that the definition under the Protocol will be adopted verbatim into our national legislation. It is imperative then to go beyond the Protocol with its respective interpretations and answer the issues with our own legal framework consistent with the Philippine context.

B. Non-Consensual Submission is Not Consent

In trafficking, what is actually given by the trafficked women is non-consensual submission. Non-consensual submission is not consent. Consent implies not just mere voluntariness and spontaneity but it must be a product of a rational and intelligent mind. This can never exist in a trafficking situation.

It must be remembered that exploitation, not migration, is the core element of trafficking in women. Trafficking is not a migration problem nor is it a mere labor issue. Exploitation, as defined in the Philippine-Belgian Pilot Project against Trafficking in Women, refers to "any means of taking advantage of the vulnerable situation the women is in for financial or other personal gain."²⁸⁸ Most often that not, women who may "agree" to work as prostitutes for a trafficking syndicate are not aware of the exploitative working conditions they are entering. Such findings negate the presence of informed and intelligent consent since inherent in trafficking itself are the criminal means used to procure the alleged "consent" of the women for purposes of exploitation.

The 2000 United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, at <http://www.protectionproject.org/main1.htm> (last visited Jul. 31, 2002) (emphasis supplied).

288. PILOT PROJECT, *supra* note 28, at 19.

The reason why a distinction should be made is because it is easy to jumble up the concepts and conclude that the submission given by the woman should be construed as consent, that there can be consent in trafficking, and that there should be a distinction between voluntary and forced trafficking. Those who claim that there is voluntary trafficking equate it with consensual trafficking. That is completely erroneous. The word "consent" entails something more than being voluntary.

As discussed in the preceding chapters, the usual profile of a trafficked woman is an individual, who freely chooses to work overseas, having no means of livelihood in the country, albeit entering the destination country illegally without the necessary documents. From there, two possibilities can occur: either the woman migrant simply works illegally which is a labor migration issue or the vulnerable migrant will eventually be forced into prostitution or exploited by a recruiter or employer for other forms of sexual exploitation. In such a situation, the woman did "agree" to become a migrant worker but that initial submission does not necessarily last until the time the migrant worker is trafficked. It is also possible that the woman, even with proper papers, will be susceptible to trafficking eventually. Then it is also possible that she was given misleading or unclear information about job prospects, only to realize that when she arrives at her destination country that the job is non-existent.

This is what happens in trafficking. Not only is there force, coercion, abduction, fraud or deception, but there is also abuse of power or a position of vulnerability or giving or receiving of payments to achieve the consent of a person having control over another person. In many instances, trafficked women are lured by false promises, misled by misinformation concerning employment opportunities abroad or driven by economic despair. Such desperation on the part of the women to seek job opportunities abroad because of poverty makes them highly vulnerable to trafficking.

It is indeed ludicrous to contend that a woman can actually foresee the exploitative conditions she will be eventually exposed to. It is also ludicrous to contend that a trafficker will actually inform and explain to the woman what she will be expecting from a trafficking syndicate. In the foregoing situations, it is impossible to say that the "agreement" conveyed by the woman was in fact consent. Such "agreement" is mere dissociation, compliance or pure naiveté, which is more tantamount to non-consensual submission rather than consent.

Moreover, it must be clear that the criminal means to commit trafficking are not limited to those of a coercive nature. It is unequivocal that when there is allegedly force, coercion, abduction, fraud or deception, there is really no consent to speak of. But what happens to those situations when a woman, because of economic and financial desperation, has no choice but to migrate and allow herself to be recruited? What about those situations where

the parents sell their adult daughters to a recruiter? There is no force, coercion, abduction, fraud or deception in these situations. The daughter might even submit to her parent's wishes. Nonetheless, these situations are still part and parcel of trafficking. Regardless of whether the volition came from the trafficked woman herself or her parents, it must not be forgotten that there are recruiters who find ways to convince the trafficked woman or her parents to migrate to the city or abroad and have well-paying jobs. The exploitative content is still very much present. Again, whatever act of agreement conveyed by the trafficked woman or her parents should still be viewed as mere submission but not consent.

The Protocol actually supports the proposition. This can be seen in the two enumerated means peculiar to trafficking which are not of the same nature as force, coercion, abduction, fraud, or deception: abuse of power or of a position of vulnerability and the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.

1. Abuse of Power or a Position of Vulnerability as a Means

It is clear that when force, coercion, abduction, fraud or deception are alleged and proved to be present in the commission of a crime, consent on the part of the offended party is really immaterial. It is irrelevant because such consent is vitiated. However, there is some contention as to abuse of power or a position of vulnerability as a means. Abuse of a position of vulnerability is defined in the *travaux préparatoires* of the Protocol to "refer to any situation in which the person involved has no real and acceptable alternative but to submit²⁸⁹ to the abuse involved."²⁹⁰

Meanwhile, the records of the deliberations of the *Ad Hoc* Committee considered abuse of power as akin to abuse of authority. Authority should be understood to include the power that male family members might have over female family members and the power that parents might have over their children.²⁹¹

Based on the foregoing, it is then possible to commit the crime of trafficking even if no force, coercion, abduction, fraud or deception was actually exerted upon the trafficked woman. Abuse of a position of vulnerability essentially pertains to a situation where the trafficked woman, in her own volition, submits herself to the abuse and exploitation because she has no real and acceptable alternative. Since it was in her own volition, then

289. Note that the word used was "submit" and not "consent."

290. Interpretative Note, *supra* note 98, at no. 63 (emphasis supplied).

291. Draft Protocol Rev. 6, *supra* note 142.

such act would normally be considered "voluntary." However, the inclusion of such means in the definition under the Protocol clearly shows that even if there was submission on the part of the trafficked woman to expose herself to abuse and exploitation, there is still the crime of trafficking.

The same argument applies for abuse of power. The trafficked woman might decide to be an obedient wife or adult daughter and simply follow the order of her husband or parents, not minding the dangers that she will be eventually exposed to.

This argument is sufficient to negate the contention that the definition under the Protocol distinguishes voluntary from forced trafficking. Abuse of a position of vulnerability is actually akin to undue influence under Article 1337 of the Civil Code. Said article defines undue influence as follows:

Art. 1337. There is undue influence when a person takes improper advantage of his power over the will of another, depriving the latter of a reasonable freedom of choice. The following circumstances shall be considered: the confidential, family, spiritual and other relations between the parties, or the fact that the person alleged to have been unduly influenced was suffering from mental weakness, or was ignorant or in financial distress.²⁹²

If Article 1337 is read together with the definition of abuse of a position of vulnerability, it can be concluded that some individuals can indeed be deprived of a reasonable freedom of choice and will have to resort to unconventional means to earn her means of livelihood. Stated otherwise, even if a person, with no real and acceptable alternative, submits to sexual exploitation, it should not be considered as consenting to one's sexual exploitation. This is so, despite the absence of force, coercion, abduction, fraud, or deception.

2. Giving or Receiving of Payments or Benefits to Achieve the Consent of a Person

As for the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, it is a clear case of absence of consent and not only vitiation. The one who gives the consent is the person having control over the trafficked women.

One of the common ways to commence a trafficking situation is the giving of cash advance to the families of trafficked women which served as a "push" factor for the women to agree to the recruitment. Definitely, the trafficked women cannot be held liable for the consent given by another person on their behalf. Again, an analogy can be made with Civil Law. Under Article 1346, an absolutely simulated or fictitious contract is void.²⁹³

292. CIVIL CODE, art. 1337 (emphasis supplied).

293. *Id.* art. 1346.

Under the Law on Marriage, a proxy marriage is considered void since there was no consent freely and personally given by the contracting parties. The law does not permit a non-contracting party to give his or her consent in the place of the supposed contracting party.

To reiterate, there is only non-consensual submission in trafficking which should not be equated with consent. However, it is important to further discuss the legal implications assuming *arguendo* that the woman's submission to the trafficking can be equated with consent. First, in case the woman's submission can be equated with consent, such consent should be irrelevant and immaterial to the determination of the commission of the crime of trafficking. The consent given should not serve as a legal defense on the part of the traffickers. Second, notwithstanding the presence of consent, the liability of the traffickers should remain full and unmitigated. Third, the trafficked woman, being a victim of trafficking, should not incur any criminal liability despite the presence of such consent.

C. Consent Should Be Irrelevant in Trafficking

1. The General Rule, Not the Exception

A criminal offense is defined as an offense against the public, pursued by the State. A criminal act is a wrong affecting more than the victim, since it affects the whole of the society. The general rule has always been that even though the party directly injured by the offense consents to the criminal act, such approval will not ordinarily operate as a defense in a criminal prosecution involving that act. It is beyond the power of the individual who is harmed to license the criminal act.²⁹⁴ The underlying rationale is that the principal injury resulting from the commission of a crime is not to the victim involved but to society in general.

The exception to the general rule, however, is when the lack of consent is, itself, an element of the crime. In such a situation, the victim's consent would now provide a lawful defense. The usual example is the crime of rape. The woman's consent to sexual intercourse bars a conviction for rape, because the lack of consent is an element of the offense.²⁹⁵ However, if the victim is threatened with bodily harm if she refuses to engage in sexual intercourse, and fearing for her safety, she accepts or acquiesces to the sexual act, such submission is not legally recognized as consent. The force or fear which generates a genuine belief that failure to submit to the criminal act will result in great bodily injury or other heinous acts on the part of the

294. VERNON RICH, LAW AND THE ADMINISTRATION OF JUSTICE 210 (1979).

295. *Id.*

victim will disallow the use of consent as a lawful defense to a charge of rape.²⁹⁶

Again, it is not unusual to provide that consent should be irrelevant in the consummation of a certain crime. In fact, it is the general principle that private persons cannot license crime, and it is no excuse that the evildoer has anyone's consent thereto.²⁹⁷ It is a matter of common knowledge that a normal person in full possession of his or her mental faculties does not freely consent to the use, upon himself or herself, of force likely to produce great bodily injury.²⁹⁸

There are also a number of crimes that are explicitly penalized by the Revised Penal Code even if it was done with the express consent of the victim. Crimes such as Giving Assistance to Suicide, Acts of Lasciviousness with the Consent of the Offended Party, Intentional Abortion, Consented Abduction, and Qualified Seduction all involve offended parties giving their consent to the consummation of the criminal act. Nevertheless, the law still punishes the offender. The determining factor is essentially the character of the particular crime which the State seeks to deplore and punish. As seen in the crime of Consented Abduction, the gravamen of the offense is the alarm and perturbation to the parents and family of the woman abducted with her consent and not the violence done to the woman herself. Another example would be statutory rape cases, where the law seeks to protect the victim from herself despite the victim's consent to the sexual intercourse. Thus, all acts of sexual intercourse with a woman below the age of 12 years are rape.

Evidently, the character of trafficking as a form of violation of women's rights and as a variant of modern enslavement mandates a treatment consonant to the general rule that consent from the offended party will not operate as a defense in the criminal prosecution of the trafficker. The gravamen of the offense is not only when a previously innocent woman is enticed into being trafficked for sexual exploitation but that trafficking is discrimination against women and a manifestation of cruel indifference to human suffering on the part of those who exploit the services that the victims are forced to provide. The exploitation of the vulnerability of the trafficked women is undoubtedly an affront to human dignity and this is what the law seeks to deplore. What the State condemns is the corrupt and criminal state of mind or *mens rea* of the traffickers and consent on the part of the trafficked women does not amount to disproving such state of mind of the traffickers.

296. *Id.*

297. 21 AM. JUR 2D *Criminal Law* § 141 (1965).

298. *People v. Samuels*, 250 Cal. App.2d 501, 58 Cal. Rptr. 439, cert. denied, 390 U.S. 1024, 88 S.Ct. 1404 (1967).

2. Evidentiary Considerations

Another reason why lack of consent should not be considered an element of trafficking is that such inclusion will ultimately impose on the prosecution, more specifically, the woman, the burden of proving that there was indeed lack of consent on her part. Burden of proof is a two-part concept in the Law on Evidence: *first*, the burden of producing evidence or the burden of production, and *second*, the burden of persuasion.

In criminal cases, the State bears both burdens with respect to the issue of guilt. The defendant is not required to offer any evidence and the State must offer evidence sufficient to justify a finding of guilt beyond reasonable doubt.²⁹⁹ Nevertheless, it is possible for the defendant to bear the burden with respect to some defenses, e.g. insanity defense or self-defense. Where the burden of persuasion is put on the defendant the defense is commonly termed an "affirmative defense." However, if such shifting of the burden of persuasion of an affirmative defense is tantamount to shifting to the defendant the burden of persuasion on an essential element of the crime, it is invalid since the prosecution must prove each and every element of the crime beyond reasonable doubt.³⁰⁰ Therefore, including lack of consent as an element of trafficking virtually imposes on the trafficked women the burden of proving beyond reasonable doubt that there was no consent on her part. This is difficult and cumbersome on the part of the trafficked women since, as explained in the foregoing paragraphs, it is highly possible the trafficked women gave some sort of submission to the trafficking process, although it was in a nature of a non-consensual submission. It is highly detrimental for the trafficked women to shoulder such burden.

Notably, concerns were raised during the deliberations of the *Ad Hoc* Committee for the Drafting of the Protocol as to whether the consent of the trafficked woman should be relevant to whether the victim has been trafficked. This was due to the recognition by majority of the delegations that it is difficult to prove lack of consent. The end result is that those who pimp, traffic, procure, and profit from the exploitation, are shielded from prosecution and accountability while their victims are denied protection and relief.

It must be understood that it is difficult to meet the proof requirement as traffickers and pimps control the evidence as well as the trafficked women themselves. Evidence on consent can actually be manipulated easily.

299. GEORGE E. DIX & M. MICHAEL SHARLOT, *BASIC CRIMINAL LAW: CASES & MATERIALS* 10 (1974).

300. *In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Patterson v. New York*, 432 U.S. 197 (1977); *Sandstrom v. Montana*, 442 U.S. 510 (1979).

Traffickers can simply conceal evidence of coercion or deception while they manufacture evidence of consent e.g. making the women pose smilingly for pornography.³⁰¹

The *Ad Hoc* Committee that drafted the Protocol acknowledged the necessity of reducing this problem for prosecutors and victims as much as possible.³⁰² Besides, the definition under the Protocol is a legal definition, not an empirical one. A legal definition establishes legal requirements that must be proved by the prosecution. Hence, when lack of consent is considered an element, the focus of the inquiry shifts from the traffickers to the ability of the trafficked women to prove that there was indeed lack of consent.³⁰³

It is, however, erroneous to suggest that non-inclusion of lack of consent as an element of trafficking prejudices the rights of the traffickers. The constitutional presumption of innocence of the accused is always present. The traffickers' guilt must still be proven beyond reasonable doubt. The *travaux préparatoires* of the definition of trafficking in the Protocol indicates that the definition should not be construed as imposing any restriction on the right of accused persons to a full defense and to the presumption of innocence.³⁰⁴ But it was also indicated that the victim should not be imposed the burden of proof. The burden of proof is on the State or public prosecutor in accordance with domestic law.³⁰⁵ The traffickers are still entitled to deny the factual allegations raised by the prosecution or introduce new factual allegations that, if true, constitute an affirmative defense.

D. Liability of the Parties

A decisive implication of the issue of consent is the liability of the traffickers and the trafficked women. Supposing there was non-consensual submission on the part of the women to participate in trafficking for purposes of prostitution, should the liability of the traffickers be mitigated? In the same line, should the woman be held liable as an accomplice or abettor of the exploitation done to her?

301. Leidholdt, *supra* note 178, at 1.

302. Eighth Draft Protocol, *supra* note 147.

303. IMADR, *Towards the Elimination of Trafficking in Women and the Rights of Migrant Women: Recommendations to the International Community*, at <http://www.imadr.org/beijing5/sympo.html> (last visited May 2, 2002).

304. Interpretative Notes, *supra* note 98, at no. 68.

305. *Id.*

1. Traffickers

There is no question that traffickers should be held liable for the commission of acts of trafficking as long as their guilt is proven beyond reasonable doubt. Such liability should likewise remain full and unmitigated despite the non-consensual submission on the part of the trafficked women.

Significantly, the exemplification of the crime of Giving Assistance to Suicide is enlightening at this point. Both crimes involve the offended party giving his or her consent to an actual harm to be performed by the offender. In Giving Assistance to Suicide, the law penalizes the person who assists in the suicide while it does not penalize the person assisted. As mentioned in the preceding chapter, the law will not punish someone who is not afraid of taking his own life when death is the greatest evil to which men may condemn him. Further, it is argued that "a person has the right to end his own life, since no right is more sacred, or is more carefully guarded ... than the right of the individual to the possession and control of his own person."³⁰⁶ However, public policy dictates that even if there was consent on the person assisted, the person who assisted the suicide will still be held liable.

Public policy is public order and weal. It mandates that there should not be any act, which is inconsistent with sound policy and good morals, or tends clearly to undermine the security of individual rights. Public policy cannot be ignored simply because of the consent of the offended party. In the same way, the non-consensual submission of the woman to trafficking should never exculpate or mitigate the liability of the traffickers. Neither should the woman be penalized for her own exploitation. Most importantly, the non-consensual submission of the trafficked woman is not inconsistent with the crime of trafficking. There is still trafficking despite the non-consensual submission.

A finding of non-consensual submission does not mitigate the liability of the offender. Under the RPC, the basis for mitigating circumstances enumerated in Article 13³⁰⁷ of the said Code is the "diminution of either

306. BENDER & LEONE, *supra* note 202, at 70.

307. Art. 13. *Mitigating Circumstances* - The following are mitigating circumstances:

1. Those mentioned in the preceding chapter, when all the requisites necessary to justify the act or to exempt from criminal liability in the respective cases are not attendant.
2. That the offender is under eighteen years of age or over seventy years. In the case of the minor, he shall be proceeded against in accordance with the provisions of Article 80.

freedom of action, intelligence, or intent, or on the lesser perversity of the offender."³⁰⁸ Stated otherwise, the voluntariness on the part of the offender to commit the crime is considered by law to have decreased when the mitigating circumstances are found to be existent. Lack of intention to commit so grave a wrong is considered a mitigating circumstance since *intent*, an element of voluntariness in intentional felony, is diminished.³⁰⁹ Sufficient provocation or threat on the part of the offended party, which immediately preceded the act, is likewise mitigating since the law considers the *diminution of intelligence* of the offender in such situation.³¹⁰ A voluntary surrender and confession of guilt on the part of the offender is also mitigating since the offender is seen to possess *lesser perversity*.³¹¹

However, non-consensual submission on the part of the offended party cannot be considered as any other circumstance of a similar nature and

3. That the offender has no intention to commit so grave a wrong as that committed.
4. That sufficient provocation or threat on the part of the offended party immediately preceded the act.
5. That the act was committed in the immediate vindication of a grave offense to the one committing the felony, his spouse, ascendants, descendants, legitimate, natural or adopted brothers or sisters, or relatives by affinity within the same degrees.
6. That of having acted upon an impulse so powerful as naturally to have produced passion or obfuscation.
7. That the offender had voluntarily surrendered himself to a person in authority or his agents, or that he had voluntarily confessed his guilt before the court prior to the presentation of the evidence for the prosecution.
8. That the offender is deaf and dumb, blind or otherwise suffering some physical defect which thus restricts his means of action, defense, or communication with his fellow beings.
9. Such illness of the offender as would diminish the exercise of the will-power of the offender without however depriving him of consciousness of his acts.
10. And finally, any other circumstances of a similar nature and analogous to those above mentioned.

308. I LUIS B. REYES, REVISED PENAL CODE: CRIMINAL LAW 236 (1998).

309. *Id.* at 260.

310. *Id.* at 265.

311. *Id.* at 303.

analogous to the specified mitigating circumstances in Article 13. All mitigating circumstances are considered personal to the offender which arises from the moral attributes of the offender, or from his private relations with the offended party, or from any other personal cause.³¹² Evidently, non-consensual submission of the trafficked women is not something personal to the traffickers. It cannot be argued then that the liability of the offenders should be mitigated or lessened for the fact that the trafficked women submitted themselves to the exploitation.

Nonetheless, the traffickers can clearly avail of the mitigating circumstances provided by Article 13 of the RPC, which if proven to be present, will serve to reduce their liability. The general rule is that mitigating circumstances under the Code is not available to offenses punishable under special laws since penalties under special laws are usually indeterminate and does not contain three periods. Special laws usually provide their own specific penalties for the offenses punished thereunder, and which penalties were not taken from or with reference to those in the RPC. Thus, the suppletory effect of the Code to special laws, as provided in Article 10 of the former, cannot be invoked where there is a legal or physical impossibility or a prohibition in the special law against, such supplementary application.³¹³

The exception is when the penalty for the special offense is actually taken from the RPC in its technical nomenclature and, necessarily, with its duration, correlation and legal effects under the system of penalties native to said Code.³¹⁴ Referring to the Anti-trafficking legislation, the penalties imposed by the legislature are clearly penalties taken from the Code:

Any person found guilty of committing any of the acts enumerated in Section 4 [Acts of Trafficking in Persons] hereof shall suffer the penalty of *prison mayor in its maximum period to reclusion temporal to reclusion perpetua*.³¹⁵

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Any person found guilty of committing any of the acts enumerated in Section 8 [Acts of Trafficking in Persons] hereof shall suffer the *penalty of reclusion temporal in its medium period to reclusion perpetua* and a fine of not less than One Million Pesos (P1,000,000.00) nor more than Two Million Pesos (P2,000,000.00).³¹⁶

312. *Id.* at 310.

313. *People v. Simon*, 234 SCRA 555, 573-74 (1994).

314. *Id.*

315. S.B. No. 867, 12TH Cong. § 10 (a) (2001).

316. H.B. 4432, 12TH Cong. § 13(a) (2002) (emphasis supplied).

Hence, if the anti-trafficking bills eventually become law and the penalties are still those taken from the Code, then clearly, the offenders can avail of the mitigating circumstances under Art. 13 as long as they prove their entitlement to it.

Incidentally, H.B. No. 471 contains a clear-cut provision regarding the consent of the victim *vis-à-vis* the liability of the offenders:

Sec. 7. Consent of Victim Immaterial – The consent of the person exploited in prostitution to the commission of any of the acts defined in Section of this Act shall not in any way exempt the offender from, or mitigate his/her criminal liability.³¹⁷

2. Trafficked Women

When it comes to determining whether trafficked women should ultimately be held liable for being involved in trafficking, it is a common misunderstanding that the trafficked women should be seen as conscious actors possessing a criminal state of mind which results in a commission of a crime. Hence, they should somehow be held liable in some ways. The misconception lies in the failure to see that trafficked women are really victims of trafficking.

Foremost, trafficking in persons is a crime. It is recognized as such by the Protocol. Further, trafficking is now a form of enslavement which is one of the crimes against humanity under the jurisdiction of the International Criminal Court which statute recently entered into force.³¹⁸

Second, the trafficked women are definitely the victims of the crime of trafficking and not the criminals. It is true that the Protocol does not define who is a victim of trafficking, regardless of its extensive use of the term in the Protocol. Nonetheless, the U.N. Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power is enlightening in this aspect:

“Victims” mean persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.³¹⁹

317. H.B. 471, 12TH Cong. § 7 (2001) (emph. asis supplied).

318. Rome Statute, *supra* note 15.

319. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Nov. 29, 1985 at

Undoubtedly, the degree of harm suffered by the trafficked women fully entitles them to be treated as victims. There is no merit that trafficking should be treated as a victimless crime or a willing exchange among adults in private of strongly demanded, but legally proscribed goods or services.³²⁰ Trafficking for sexual exploitation should not be seen as the mere transfer of goods or sexual services between consenting adults. Accepting such an argument condones the illegal trafficking of women as if they are mere commodities or articles of trade.

Illustrative of the non-liability of trafficked women are jurisprudence decided under the federal White Slave Traffic Act (Mann Act) of the United States.³²¹ The Mann Act penalizes the “act of any person who knowingly transports any woman or girl in interstate or foreign commerce ... for the purpose of prostitution or debauchery or for any immoral purpose, or with the intent and purpose to induce, entice or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice... with or without her consent.”³²²

It has been held by the U.S. Supreme Court that a woman who is transported in violation of the Mann Act is not subject to federal charges because the woman is considered the victim rather than an accomplice under the law. This is despite the voluntary participation in the journey by the woman.³²³ More than that, it has been stated that the circumstances may be such that the woman may be guilty of a conspiracy to violate the Mann Act.³²⁴ But such argument has been refuted and clarified in the subsequent case of *Gebardi v. United States*.³²⁵

In *Gebardi*, petitioners, a man and a woman, not then husband and wife, were indicted in the District Court for Northern Illinois, for conspiring together, and with others not named, to transport the woman from one state to another for the purpose of engaging in sexual intercourse with the man.³²⁶ The Supreme Court held that there must be something more on the part of the woman than mere agreement or “consent” to the transportation and its immoral purpose in order for her to fall within the ban of the Act.

http://www.unhchr.ch/html/menu3/b/h_comp49.htm (last visited Jul. 15, 2002).

320. RICH, *supra* note 287, at 234-35.

321. The law remains in use.

322. 18 USCS § 2421 (1917).

323. *Hays v. United States*, 242 US 470 (1917).

324. *U.S. v. Holte*, 236 U.S. 140 (1915).

325. 287 U.S. 112 (1932).

326. *Id.* at 116.

Transportation of a woman or girl whether with or without her consent, or causing or aiding it, or furthering it in any of the specified ways, are the acts punished, when done with a purpose which is immoral within the meaning of the law.³²⁷ The Court further posits:

The act does not punish the woman for transporting herself; it contemplates two persons - one to transport and the woman or girl to be transported. For the woman to fall within the ban of the statute she must, at the least, "aid or assist" some one else in transporting or in procuring transportation for herself. But such aid and assistance must, as in the case supposed in *United States v. Holte*, be more active than mere agreement on her part to the transportation and its immoral purpose. For the statute is drawn to include those cases in which the woman consents to her own transportation. Yet it does not specifically impose any penalty upon her, although it deals in detail with the person by whom she is transported. In applying this criminal statute we cannot infer that the mere acquiescence of the woman transported was intended to be condemned by the general language punishing those who aid and assist the transporter, any more than it has been inferred that the purchaser of liquor was to be regarded as an abettor of the illegal sale. The penalties of the statute are too clearly directed against the acts of the transporter as distinguished from the consent of the subject of the transportation. So it was intimated in *United States v. Holte* and this conclusion is not disputed by the government here, which contends only that the conspiracy charge will lie though the woman could not commit the substantive offense.³²⁸

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We place it rather upon the ground that we perceive in the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent, evidence of an affirmative legislative policy to leave her acquiescence unpunished.³²⁹

It can be observed from *Gebardi* that it is actually valid for the Legislature to clearly leave the acquiescence of the trafficked women, if any, unpunished. It can be argued that such trafficked women are "willing" victims but still nevertheless, victims. To hold otherwise would make trafficking laws a source of punishment against those whom the law seeks to protect in the first place. A practical consideration will also show that making women liable for their own trafficking will only hinder women from coming forward to testify against the wrongdoers. Trafficked women do not cease to be an object of trafficking by making them possible subjects of their own trafficking.

327. *Id.* at 118.

328. *Id.* at 119 (citations omitted) (emphasis supplied).

329. *Id.* at 123.

Laws against trafficking should be clearly directed against the acts of the trafficker. Trafficked women can only be penalized when they themselves perform acts of trafficking. However, it must be stressed that if ever they are penalized for the performance of such acts, they are penalized as traffickers and not as trafficked women. Additionally, the penalty that will be imposed on the trafficked women for performing the acts of trafficking should likewise be lower than the penalty that will be imposed on the traffickers themselves if it can be proven that the trafficked women are suffering from the effects of their previous or continuous victimization of the trafficking. The rationale behind the mitigation of the penalty of the women is that one cannot discount the fact that the subsequent infiltration and performance of the women of acts of trafficking can be reasonably attributable to the degree of physical brutality, torture and deprivation of liberty that trafficked women experience which eventually leads to their demoralization. It must be stressed that there have been findings that women in situations of sexual exploitation suffer from psychological illnesses - suicidal feelings, clinical depression, post-traumatic stress disorders, and drug or alcohol abuse. Hence, their situation can be considered analogous to the mitigating circumstances laid down in the RPC which are based on diminution of intelligence, intent and lesser perversity on the part of the offender.

To reiterate, trafficked women should be viewed and treated as victims of trafficking and exculpated from whatever criminal or civil liability imposed by law. The trafficked women should instead be subjected to rehabilitation programs, which will protect and prevent them from being vulnerable once more to traffickers. If ever they should be held liable as traffickers, their liability should furthermore be mitigated if acts of abuse performed upon them are due to the effects of her previous or continuing victimization of the trafficking. Prescribing appropriate punishment is obviously the mandate of the law and in the interest of the State but trafficked women as victims of trafficking warrant protection rather than punishment. Unfortunately, they are repeatedly punished more harshly than the traffickers themselves.

Trafficking in persons which is perpetrated by organized, sophisticated criminal enterprises somehow escapes prosecution because the State fails to see the gravity of the offense. The recognition that trafficking is a grave violation of women's rights and a matter of pressing international concern is very much wanting. The trafficked women are always the ones prosecuted because they are the most vulnerable and defenseless participants in the trafficking chain. It is time for the State to focus on the offense itself and to direct its prosecutorial powers on the traffickers themselves. The traffickers should clearly be held liable and such liability should neither be negated nor lessened with the non-consensual submission on the part of the trafficked women.

This is clear also from the fact that the law itself provides for the legal protection to trafficked persons:

Sec. 17. Legal Protection to Trafficked Persons. – Trafficked persons shall be recognized as victims of the act or acts of trafficking and as such shall not be penalized for crimes directly related to the acts of trafficking enumerated in this Act or in obedience to the order made by the trafficker in relation thereto. In this regard, the consent of a trafficked person to the intended exploitation set forth in this Act shall be irrelevant.³³⁰

E. Summary

In sum, RA 9208, the Anti-Trafficking Law, should be amended to contain the following pertinent features:

1. The enumeration of the means used to commit the crime of trafficking which should not be limited to force, coercion, abduction, fraud or deception but should likewise include abuse of power or of a position of vulnerability or of the giving or receiving of payments of benefits to achieve the consent of a person having control over another person.

2. The definition should not distinguish between voluntary and forced trafficking for purposes of prostitution and other forms of sexual exploitation.

3. Non-consensual submission should never be equated to consent. Non-consensual submission refers to the trafficked person's act of yielding or surrendering to an exploitative situation despite the absence of force, coercion, abduction, fraud or deception. This is due to the inherent impossibility of consent being given by the trafficked woman in a trafficking situation.

4. Should the woman's submission to the trafficking be equated with consent, such consent is entirely immaterial and insignificant in the crime of trafficking. This is consistent with the general rule in criminal law, that consent by the offended party to the infliction of injury towards him or her will not operate as a defense in a criminal prosecution involving the act.

5. The criminal liability of the traffickers remains full and unmitigated despite the presence of non-consensual submission on the part of the trafficked women. If ever, the traffickers can avail of the mitigating circumstances provided in Article 13 of the RPC.

6. No criminal liability shall be imposed on the trafficked women since they should be considered victims of trafficking. Further, such women shall undergo rehabilitation programs. The only circumstance when the trafficked

³³⁰ Anti-Trafficking Act, §17.

women will be criminally liable is when they perform acts of trafficking as traffickers. However, the criminal liability should be lower than the penalty imposed on the traffickers themselves if it can be proven that the trafficked woman is suffering from the effects of her previous or continuing victimization of the trafficking.

7. There should be an express provision mandating that victims of trafficking for purposes of prostitution should not be penalized under Article 202 (5) of the RPC as prostitutes. This serves as a transitory provision in view of the proposals to review the Law on Vagrancy and until such time the law is finally amended or repealed by Congress.

8. There should be an express provision repealing Articles 272 and 341 of the RPC, which penalizes Slavery for Immoral Traffic and White Slave Trade respectively.

VIII. RECOMMENDATIONS

Based on the foregoing, the following recommendations are hereby appropriate:

1. The Protocol gave a good definition of trafficking in persons. However, the present wording of the definition is highly susceptible of opposing interpretations as to the legal question of consent. There should be a more precise definition of trafficking in persons and the following amendments to the present Philippine legislation on trafficking are hereby proposed:³³¹

Sec. 3(a) *Trafficking in Persons*. – refers to the recruitment, transportation, transfer, harboring or receipt of persons, within or across national borders, by means of the threat or use of force, or other forms of coercion, abduction, fraud, deception, abuse of power or of position, taking advantage of the vulnerability of the person, or, the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation which includes at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery, servitude or the removal or sale of organs.

The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall also be considered as "trafficking in

³³¹ Although this essay has been devoted exclusively to trafficking in adult women, the recommended definition recognizes that not only women can be trafficked but also men and children.

persons" even if it does not involve any of the means set forth in the preceding paragraph.³³²

In cases of 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 trafficked, the non-consensual submission of the person recruited, transported, transferred, harboured or received shall not be a legal defense on the part of the offender/s.

Non-consensual submission refers to the trafficked person's act of yielding or surrendering to an exploitative situation despite the absence of the threat or use of force, coercion, abduction, fraud or deception.

Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.³³³

2. The inclusion of the following provision in the penalties and sanctions for the offenders is likewise recommended:

The non-consensual submission of the victim of trafficking in persons to the commission of any of the acts of trafficking hereof shall not in any way exempt the offender from, or mitigate his/her criminal liability.

3. The trafficked woman should not be held criminally liable unless she performs acts of trafficking herself. However, such liability shall be mitigated if it is proven that the acts of trafficking performed are effects of her previous or continuing victimization of the trafficking.

Victims of trafficking in persons shall not suffer any criminal or civil liability under this Act. *Provided that*, a victim of trafficking in persons who shall commit any of the acts of trafficking shall suffer a penalty lower in degree than those imposed on the traffickers and no fine shall be imposed on him or her. *Provided further*, that the lower penalty will be imposed if the acts of trafficking performed are proven to be effects of his or her continuous victimization of the trafficking.

4. To avoid inconsistencies between existing laws and any future Philippine legislation on trafficking, the following provisions are proposed:

Suppletory Application – The provisions of the Revised Penal Code shall have suppletory application to this Act. *However, victims of trafficking in*

332. *Id.* §3 (a).

333. Although this thesis concentrated on trafficking for purposes of prostitution and other forms of sexual exploitation, the proponent recognizes that trafficking can be for other purposes e.g. removal of organs.

*persons shall not be considered as prostitutes defined under Art. 202 of the Revised Penal Code.*³³⁴

Repealing Clause – Articles 272³³⁵ and 341³³⁶ of the Revised Penal Code are hereby repealed. All other laws, presidential decrees, executive orders, and rules and regulations, or parts thereof, inconsistent with the provisions of this Act, are hereby modified or repealed accordingly.

IX. CONCLUSION

Every year, hundreds of thousands of women are trafficked illegally all over the world. The low status of women in many countries has contributed to a burgeoning of the trafficking industry. The Philippines is no exception. The assumption is that these women are "willing" participants in a criminal transaction and that they are simply looking for an escape from poverty. However, there is no question that these women are physically, economically, and emotionally exploited in trafficking. Should the women then still be considered victims when they submit themselves to the trafficking? Should such submission be equated with consent? These issues have finally been answered by proposing and defining a new term: *non-consensual submission*. Consent and non-consensual submission may seem to be two sides of the same coin, but they are not. Their distinction has been discussed and explained in the preceding chapter and such distinction hopefully resolves the pending issue as to consent in trafficking.

By invoking that only non-consensual submission exists in trafficking, one should not be mistaken in viewing such position as an attempt to throw back the women to the level of mentally challenged individuals or children. Neither is there an attempt to hinder the ongoing movement of women empowerment by not respecting their choices and rendering them incapable to chart their own destiny. Conceptualizing non-consensual submission as the accurate term in describing the act of surrendering oneself to the exploitative conditions is not a product of hasty assumptions and inferences from scattered facts gathered through the wide range of materials. On the contrary, non-consensual submission is amply supported by general rules in criminal law and jurisprudence. It is likewise consistent with the women's basic right to freedom from slavery and other forms of exploitation and right to human dignity. Those who invoke that women can be "empowered" by

334. There is a possibility that the Law on Vagrancy will be amended in a future time. Arguments raised in this thesis are actually applicable to Prostitution and may justify an amendment of Article 202 (5) of the Revised Penal Code.

335. Article 272 penalize Slavery for Immoral Traffic.

336. Article 341 penalize White Slave Trade.

allowing them to submit themselves to exploitation are simply contradictions of what real empowerment entails.

Succinctly put, trafficking in women is a gross violation of women's rights. It is plain and simple exploitation. Fortunately, the advent of the Convention and the Protocol carries a loud and distinct message: *trafficking in persons, especially in women, is now a transnational crime with international implications*. Not only should there be suppression of trafficking in persons but the trafficked persons, especially the women should be treated as victims and entitled to protection. The Protocol, by far, has gone beyond its predecessor, the 1949 Convention, by containing the first international definition of trafficking in persons. The definition shall be treated as the framework for the Member States' national legislation on trafficking. This is particularly relevant to countries like the Philippines, which suffers from antiquated penal laws dealing with trafficking which are not in tune with the current times. Although this essay recommends a further refined definition of trafficking in persons by incorporating non-consensual submission, the Protocol remains laudable. Commendable provisions on the aspect of prevention, suppression of trafficking as well as the protection of the women as victims of trafficking are definitely a milestone for the continuing movement to eradicate trafficking, not only as a crime but as a blatant manifestation of the discrimination against women worldwide.

It is likewise vital and more far-reaching if trafficking is finally recognized as a form of gender-based violence against women. Although the recommended definition of this study still pertains to trafficking in persons, trafficking predominantly involves only women and children. Key government institutions that will enforce and implement the law must recognize this. It will be a futile task and effort if the Protocol will suffer the same fate as its predecessor, the 1949 Convention.

It must be noted that the Protocol has not yet entered into force. It is unfortunate that a lot of State Parties have reservations to the immense and urgent need in dealing with trafficking. Hopefully, the introduction of non-consensual submission in the definition of trafficking in persons will divest the definition of its controversial nature and finally solicit the required number of ratification for its entry into force. Further, non-consensual submission might actually facilitate the prosecution of the traffickers.

The widespread increase of trafficking in women for the past decades is a specific example that issues involving women still do not command any priority. It shows that there has been no acceptance that women's rights are indeed human rights. With the numerous developments in International Law and domestic legislation, women's rights should finally find concrete implementation, not only in Philippine legislation but in the legislation of other countries as well. A continuing refusal to place women's rights at par with human rights will simply allow the latter to remain *droits de l'homme* to

the true sense of the word – available only to men. As for the Philippines, it is fervently anticipated that with the advent of the Protocol and the amendment of RA 9208, trafficked Filipino women will no longer part of the reprehensible trade and peddling of women for prostitution and other forms of sexual exploitation.