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# The Importance of Realizing 'Other Rights' to Prevent Sex Trafficking

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# THE IMPORTANCE OF REALIZING “OTHER RIGHTS” TO PREVENT SEX TRAFFICKING

JONATHAN TODRES\*

## I. INTRODUCTION

International law, and international human rights law in particular, has long prohibited sex trafficking.<sup>1</sup> So grave are the human rights abuses associated with trafficking that the Statute of the International Criminal Court includes “enslavement” in its definition of “crimes against humanity” and defines enslavement as “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.”<sup>2</sup>

Today, the international legal framework on sex trafficking—articulated most explicitly in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention

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<sup>1</sup> See, e.g., ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No. 182), *adopted* June 17, 1999, arts. 1 & 3(a), 38 I.L.M. 1207 (*entered into force* Nov. 19, 2000) (obligating States Parties to “take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency” including “all forms of slavery or practices similar to slavery, such as the sale and trafficking of children”); Convention on the Rights of the Child (CRC), *adopted* Nov. 20, 1989, arts. 35 & 36, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/Res/44/25 (*entered into force* Sept. 2, 1990) (requiring States Parties to “prevent the abduction of, the sale of or traffic in children for any purpose or in any form” and obligating States Parties to “protect the child against all other forms of exploitation prejudicial to any aspects of the child’s welfare”); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), *adopted* Dec. 18, 1979, art. 6, G.A. Res. 34/180, 34 U.N. GAOR Supp. No. 46, U.N. Doc. A/34/46 (*entered into force* Sept. 3, 1981) (requiring States Parties to “suppress all forms of traffic in women”); African Charter on the Rights and Welfare of the Child, *adopted* July 11, 1990, art. 29, OAU Doc. CAB/LEG/24.9/49 (*entered into force* November 29, 1999) (prohibiting the sale, trafficking, and abduction of children). Earlier examples of anti-trafficking law include: the International Agreement for the Suppression of White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83; International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 211 Consol. T.S. 45, 103 B.F.S.P. 244; International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 416, 116 B.F.S.P. 547; and Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Mar. 21, 1950, 96 U.N.T.S. 271.

<sup>2</sup> Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, arts. 7(1)(c) & 7(2)(c), 2187 U.N.T.S. 3 (*entered into force* July 1, 2002).

Against Transnational Organized Crime<sup>3</sup> and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Pornography and Child Prostitution<sup>4</sup>—sets forth a three-pronged approach to anti-trafficking efforts: (1) criminalization of acts of trafficking,<sup>5</sup> (2) trafficking prevention programs, and (3) aid for victims of trafficking.<sup>6</sup> States parties to either protocol are required to pass legislation prohibiting all forms of trafficking, enforce such legislation, develop prevention measures, and provide assistance to victims of trafficking.

To date, efforts undertaken by various countries have focused primarily on the first component, with comparatively minimal resources being allocated to prevention or victim assistance programs.<sup>7</sup> Those countries that have initiated

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<sup>3</sup> 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, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (Nov. 15, 2000) (*entered into force* Sept. 9, 2003) [hereinafter Trafficking Protocol].

<sup>4</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, Annex II, 54 U.N. GAOR Supp. No. 49, at 6, U.N. Doc. A/54/49, Vol. III (2000) (*entered into force* Jan. 18, 2002) [hereinafter CRC Protocol on the Sale of Children].

<sup>5</sup> “Trafficking” is defined in the Trafficking Protocol as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, 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 labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

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

<sup>6</sup> For a more detailed discussion of the two instruments, see Jonathan Todres, *International Criminal Law: Combating Trafficking of Persons*, 39 INT’L. L. NEWS 1 (Summer 2005); LeRoy G. Potts, Jr., *Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons*, 35 GEO. WASH. INT’L L. REV. 227 (2003); Cris R. Revaz, *The Optional Protocols to the UN Convention on the Rights of the Child on Sex Trafficking and Child Soldiers*, 9 No. 1 HUM. RTS. BRIEF 13 (2001). On trafficking generally, see Mohamed Y. Mattar, *Trafficking in Persons: An Annotated Legal Bibliography*, 96 LAW LIBR. J. 669 (2004).

<sup>7</sup> See UNICEF, PROFITING FROM ABUSE: AN INVESTIGATION INTO THE SEXUAL EXPLOITATION OF OUR CHILDREN 14-16 (2001), available at [http://www.unicef.org/publications/files/pub\\_profiting\\_en.pdf](http://www.unicef.org/publications/files/pub_profiting_en.pdf). UNICEF explains:

While countries as diverse as Albania, Bangladesh, Costa Rica, Germany and the United States have adopted statutes to address trafficking, . . . most national legislation remains inadequate . . . . Even in countries where such legislation exists, law enforcement personnel and prosecutors often do not accord high priority to trafficking-related offences . . . . Anti-trafficking legislation with strong criminal sanctions for traffickers may not be enough unless it is coupled with an international effort to address demand . . . . [V]ery few anti-trafficking laws adequately address the primary root causes of sex trafficking—the demand that exists virtually everywhere for children and young women to sexually exploit, and the grinding poverty that generates the supply of children and women, desperate to survive. These may be the most difficult issues to address. Ultimately, however, only by addressing them can the scourge of trafficking in both children and women be ended.

*Id.* at 14-16. See also ILO, A GLOBAL ALLIANCE AGAINST FORCED LABOUR 6 (2005) (“At the present time the global momentum is apparently towards establishing the criminal offence of trafficking, making provision under such laws for identifying and prosecuting the offence of exacting forced labour, among

prevention measures tend to adopt a narrow view of “prevention programs”—focusing on activities such as public awareness campaigns warning of the penalties associated with such crimes or informing children and their families of the dangers of sex trafficking.

While these prevention efforts are welcome, an estimated 600,000 to 800,000 people, primarily women and children, continue to be trafficked internationally each year.<sup>8</sup> When intra-country trafficking victims are accounted for, the number of victims increases to between two and four million annually.<sup>9</sup> Although individuals are trafficked for other reasons, such as forced labor in sweatshops or agricultural settings and use in armed conflict, trafficking for commercial sexual exploitation accounts for a significant portion of all trafficking.<sup>10</sup> Accordingly, the sex trade continues to generate billions of dollars annually for criminal enterprises as well as legitimate businesses (such as hotels, travel agencies and other tourism related enterprises).<sup>11</sup> Ultimately, current prevention efforts fall short because they do little to address the systemic issues that permit sex trafficking to occur.

Thus, while international law correctly identifies “prevention” as one of the three essential components of a framework for combating sex trafficking, trafficking and commercial sexual exploitation will not be prevented unless systemic issues such as racism, sexism, poverty, and others are addressed. For these systemic problems help produce the conditions that permit sex trafficking networks to profit from exploiting poor and marginalized populations.

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others.”), available at [http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD\\_BLOB?Var\\_DocumentID=5059](http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=5059).

<sup>8</sup> See, e.g., U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 20 (June 2005) (“Of the estimated 600,000 to 800,000 people trafficked across international borders annually, 80 percent of victims are women and girls, and up to 50 percent are minors.”), available at <http://www.state.gov/documents/organization/47255.pdf> [hereinafter 2005 TRAFFICKING REPORT].

<sup>9</sup> See U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT (June 2004) (“Estimates that include global intra-country trafficking in persons range from two to four million.”), available at <http://www.state.gov/documents/organization/34158.pdf>; ILO, A GLOBAL ALLIANCE AGAINST FORCED LABOUR 14 (2005) (“The estimated minimum number of persons in forced labour at a given time as a result of trafficking is 2.45 million.”), available at [http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD\\_BLOB?Var\\_DocumentID=5059](http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=5059).

<sup>10</sup> See, e.g., U.N. OFFICE ON DRUGS AND CRIME, FACT SHEET ON HUMAN TRAFFICKING, available at [http://www.unodc.org/unodc/en/trafficking\\_victim\\_consent.html](http://www.unodc.org/unodc/en/trafficking_victim_consent.html) (visited Jan. 6, 2006); 2005 TRAFFICKING REPORT, *supra* note 8, at 6.

<sup>11</sup> See, e.g., 2005 TRAFFICKING REPORT, *supra* note 8, at 14 (“[a]ccording to the U.S. Federal Bureau of Investigation, human trafficking generates an estimated \$9.5 billion in annual revenue”), available at <http://www.state.gov/documents/organization/47255.pdf>; International Organization for Migration, *Trafficking in Migrants: IOM Policy and Activities* (Geneva, May 1997) (estimating that the trafficking trade produces a profit of \$7 billion annually). A 1998 International Labour Organization report calculated that 2-14% of the Gross Domestic Product of Indonesia, Malaysia, the Philippines, and Thailand derives from sex tourism. Lin Lean Lim, Preface, THE SEX SECTOR: THE ECONOMIC AND SOCIAL BASES OF PROSTITUTION IN SOUTHEAST ASIA 7 (Lin Lean Lim ed., 1998) [hereinafter ILO SEX SECTOR REPORT]. In Thailand, a Chulalongkorn University Political Economy Centre study on the illegal economy in Thailand calculated that “underground businesses” (including prostitution, drug trafficking, arms trading, contraband in diesel fuel, trafficking in human labor and gambling) generate at least \$33 billion to \$44 billion a year, and prostitution-related revenue accounts for two-thirds of that total. *Id.* at 10.

Consequently, a long-term solution requires a much broader conception of prevention programs.

Human rights law offers valuable guidance in developing more comprehensive strategies for preventing sex trafficking. Sustainable solutions require us to give greater attention to “other rights” embodied in human rights law, which can supplement the legal provisions covering trafficking and commercial sexual exploitation of persons. This Article examines selected other rights including those that cover gender-based violence, various forms of discrimination, birth registration, health, and education, with a view to addressing systemic issues that foster the current climate in which sex trafficking thrives. Ensuring these other rights will help states fulfill their obligations under international law to prevent sex trafficking. Moreover, these individual rights, when fully ensured, will strengthen communities by improving health and education standards and reducing discrimination and marginalization of certain populations. Such improvements will help promote sustainable economic development, which in turn will reinforce respect for human rights. In this regard, human rights and international development complement each other and together can improve the lives of marginalized persons around the world who are so often the targets for abuses such as sex trafficking.<sup>12</sup>

## II. FIVE “OTHER RIGHTS” RELEVANT TO COMBATING TRAFFICKING

In order to create sustainable, long-term solutions to sex trafficking, states must demonstrate a greater commitment to ensuring what I refer to in this Article as “other rights.” These rights include: (1) the right to be free from gender-based violence and discrimination; (2) the right to be free from other forms of discrimination; (3) the right to birth registration; (4) health rights; and (5) the right to education.<sup>13</sup> I focus on these rights because they go to the core issues underlying sex trafficking. The vast majority of victims of trafficking and commercial sexual exploitation are women and children, who have few resources, poor education, and limited or no access to health care. They are largely from marginalized populations, including minorities, the poor, refugees, displaced persons, and other vulnerable groups.

Ensuring these five “other rights” addresses issues vital to the well-being of marginalized populations and can help foster stronger communities, leading to sustainable development. In turn, sustainable development ultimately is one of the most important means of providing at-risk populations with meaningful alternative opportunities to commercial sex work and of frustrating traffickers’ exploitation of

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<sup>12</sup> On the interdependence of human rights and development, see, for example, PETER UVIN, *HUMAN RIGHTS AND DEVELOPMENT* (2004); *HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT* (Philip Alston & Mary Robinson eds., 2005).

<sup>13</sup> By referring to these rights as “other rights,” I do not intend to suggest that they are in any way less important than the core human rights law on sex trafficking. Rather, I refer to them as “other rights” because they are rights that generally are not the focus of discussions on combating sex trafficking, though, I submit, they are essential elements of any long-term solution.

these populations. In this section, I will discuss briefly each of these five rights and the potential benefit in the context of sex trafficking of ensuring their effective enforcement.<sup>14</sup>

*A. The right to be free from gender-based violence and discrimination*

Gender-based violence and discrimination have long been recognized as underlying causes of trafficking and commercial sexual exploitation of women and children (especially girls),<sup>15</sup> who constitute the vast majority of trafficking victims.<sup>16</sup> Gender-based discrimination and inequality leave women less able than men to exercise control over their bodies; because of gender inequalities, many young women and girls have difficulty exerting control with respect to sexual relations.<sup>17</sup> Women and girls often have little power to choose partners or decide whether and when to have sex. This power imbalance often also results in women being forced to have unprotected sex even when they know it is dangerous to their health. Young girls are particularly vulnerable in this context because they are not fully developed physically and have more limited verbal skills, leaving them less

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<sup>14</sup> In this article, I review the international human rights law applicable to these five rights to determine what international law requires and how its standards, if fully implemented, can be of benefit in combating sex trafficking. A discussion of which countries have ratified which treaties and with what reservations, if any, is beyond the scope of this short article but obviously merits attention when examining more closely whether a particular state is meeting its obligations under international law.

<sup>15</sup> See U.N. ESCOR Comm'n on H.R., 56th Sess., *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, Agenda Item 12(a) at 4, U.N. Doc. E/CN.4/2000/68 (Feb. 29, 2000) ("The lack of rights afforded to women serves as the primary causative factor at the root of both women's migrations and trafficking in women."), available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb/\\$FILE/G0011334.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb/$FILE/G0011334.pdf); United Nations Development Fund for Women, *Trafficking in Women and Children 2*, UNIFEM Gender Fact Sheet No. 2 (1996), available at <http://www.unifem-eseasia.org/resources/factsheets/UNIFEMSheet2.pdf> ("Women and children are the key target group, because of their marginalization, limited economic resources and predominance in the "invisible" formal sector."); Lisa Avery, *The Women and Children in Conflict Protection Act: An Urgent Call for Leadership and the Prevention of Intentional Victimization of Women and Children in War*, 51 LOY. L. REV. 103, 107-113 (2005); Ly Vichuta & Menh Navy, *Gender, Human Trafficking, and the Criminal Justice System in Cambodia*, Asia Regional Cooperation to Prevent People Trafficking (Mar. 2005), available at <http://www.arppt.org/docs/GenderCBA2005.pdf>.

<sup>16</sup> See, e.g., U.S. DEP'T OF STATE, THE LINK BETWEEN PROSTITUTION AND SEX TRAFFICKING 1 (Nov. 24, 2004) (reporting that of the 600,000 to 800,000 individuals trafficking internationally each year, over 80% are female and up to 50% are children), available at <http://www.state.gov/documents/organization/38901.pdf>. There are certain areas in which boys constitute a large percentage of victims. For example, in Sri Lanka, 90% of child prostitutes are boys. See Cynthia Price Cohen, *Children Sexual Exploitation in Developing Countries*, 44 INT'L COMM'N OF JURISTS REV. 42, 42 (1990); see also Willy Pedersen & Kristinn Hegna, *Children and Adolescents Who Sell Sex: A Community Study*, 56 SOC. SCI. & MED. 135 (2003) (reporting that in Norway three times as many adolescent boys sold sex as did girls).

<sup>17</sup> UNAIDS, UNFPA & UNIFEM, *Women and HIV/AIDS: Confronting the Crisis* 7 (2004), available at <http://www.unfpa.org/hiv/women/report/index.htm>. See also Human Rights Watch, *A Dose of Reality: Women's Rights in the Fight against HIV/AIDS*, (Mar. 2005), available at <http://hrw.org/english/docs/2005/03/21/africa10357.htm> (highlighting as examples the fact that marital rape is often not considered a crime, the lack of enforcement of laws prohibiting domestic violence against women, including sexual violence, and the customary practices of wife inheritance and ritual sexual cleanings).

capable of protecting themselves than adult women. As a result, many young girls are forced to trade sex for school fees and other basic items.<sup>18</sup>

The effects of gender discrimination are felt beyond sexual relations. Inequality in property rights and control over the family's financial resources make women more vulnerable to abuses of power.<sup>19</sup> In a number of countries, widows are prohibited by law or custom from inheriting property.<sup>20</sup> This leaves many women without a home or any financial resources following the death of their husbands. Divorced and separated women often suffer a similar fate.<sup>21</sup>

Even during marriage, local customs may leave women with little or no control over the marital property, regardless of whether they have brought some of those resources to the marriage.<sup>22</sup> Without access to the family's economic resources, women are at significant risk of ending up impoverished. In turn, poverty may push women into risky behavior, including engaging in sex work, in order to provide for their families and themselves.<sup>23</sup>

International human rights law clearly prohibits gender-based violence and discrimination. The major international human rights instruments contain non-discrimination clauses that prohibit discrimination, including sex discrimination, in the implementation of the rights enumerated in each such treaty.<sup>24</sup> Moreover, the prohibition on gender-based violence and discrimination is clearly articulated in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>25</sup> Despite the unequivocal stance of international law on gender-based

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<sup>18</sup> See, e.g., ILO, AN ILO CODE OF PRACTICE ON HIV/AIDS AND THE WORLD OF WORK 3, at 21 (2001), available at [http://www.ilo.org/public/english/protection/trav/aids/code/languages/hiv\\_a4\\_e.pdf](http://www.ilo.org/public/english/protection/trav/aids/code/languages/hiv_a4_e.pdf).

<sup>19</sup> UNAIDS et al., *supra* note 17.

<sup>20</sup> See, e.g., *A Dose of Reality*, *supra* note 17; Human Rights Watch, *Double Standards: Women's Property Rights Violations in Kenya*, 16-24 (March 2003).

<sup>21</sup> See *Double Standards*, *supra* note 20, at 25-29.

<sup>22</sup> See *id.* at 29.

<sup>23</sup> See ILO CODE OF PRACTICE ON HIV/AIDS AND THE WORLD OF WORK, *supra* note 18, at 21; Committee on the Elimination of Discrimination against Women, General Recommendation No. 19: Violence Against Women (11th Sess. 1992) ("Poverty and unemployment force many women, including young girls, into prostitution."). See also HUMAN RIGHTS WATCH, POLICY PARALYSIS: A CALL FOR ACTION ON HIV/AIDS-RELATED HUMAN RIGHTS ABUSES AGAINST WOMEN AND GIRLS IN AFRICA 12 (December 2003) (reporting that the subordinate status of women and girls in Africa and the intransigent poverty "often conspire to force girls into hazardous working situations that expose them to sexual abuse with attendant risk of HIV infection").

<sup>24</sup> See the non-discrimination clauses of the ICCPR, ICESCR, CRC, and other international instruments, all of which include a prohibition on discrimination on the basis of sex. See *supra* note 1 and *infra* note 52.

<sup>25</sup> CEDAW, *supra* note 1, Preamble (as the Preamble to CEDAW explains, "discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity"). See also Committee on the Elimination of Discrimination against Women, General Recommendation No. 19: Violence Against Women (11th Sess. 1992), at ¶¶ 6-7 (stating that "[g]ender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention," and that "[g]ender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence").

violence and discrimination, such violence and discrimination continue to adversely affect women and children and increase their vulnerability to sex trafficking.

Two important steps are needed in this context. First, states must do more to combat gender discrimination. There must be greater accountability among governments that encourage or even tolerate gender-based violence and discrimination. The law exists at the international level. Advocates must ensure that it is implemented and enforced at the national and local levels.

Second, there must be greater recognition of the symbiotic relationship between women’s rights and children’s rights.<sup>26</sup> Often the two rights regimes are treated as separate from, and unrelated to, each other.<sup>27</sup> In some respects, this distinction is understandable—women confront special issues and threats of human rights violations that children may not, and vice versa. In addition, some women’s rights advocates have expressed concern that to consider “women and children” as one group would risk relegating women to the roles of homemaker and caretaker and inhibiting full realization of women’s rights.<sup>28</sup> Similarly, child advocates want an agenda that gives full consideration to children. While acknowledging these concerns, it is important not to lose sight of the great benefit that each rights regime can provide for the other population. Women’s rights can do much to further the rights of children, and children’s rights can improve the lives of girls and enable them to be better positioned to exercise the full range of their rights as adult women.

As a threshold matter, women’s rights law, which requires equality among men and women, applies to the early stages of life and thus obligates states to ensure that girls and boys have equal opportunity.<sup>29</sup> At the same time, children’s rights law covers a broad range of civil, political, economic, social and cultural rights that can help ensure that young girls grow into adult women able to exercise all of their rights. Ensuring equality for girls from early childhood will help address a host of issues ranging from female infanticide to education preference for

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<sup>26</sup> See Jonathan Todres, *Women’s Rights and Children’s Rights: A Partnership with Benefits for Both*, 10 CARDOZO WOMEN’S L. J. 603 (2004).

<sup>27</sup> See *id.* at 603-604.

<sup>28</sup> See Cynthia Price Cohen, *The United Nations Convention on the Rights of the Child: A Feminist Landmark*, 3 WM. & MARY J. WOMEN & L. 29, 70-71 (1997) (reporting that in 1996, at meetings organized by the International League for Human Rights and UNICEF aimed at exploring common ground between women’s rights advocates and child rights advocates, the women’s NGOs expressed concern over the CRC that it may relegate women to a child-bearing role); see also Linda A. Malone, *Protecting the Least Respected: The Girl Child and the Gender Bias of the Vienna Convention’s Adoption and Reservation Regime*, 3 WM. & MARY J. WOMEN & L. 1, 6 (1997) (noting that “advocacy for the Children’s Convention by women’s rights advocates has been tempered by concern that linkage of children’s rights with women’s rights is a regression to a time in industrialized countries when the two groups were linked to control women in a patriarchal society”).

<sup>29</sup> See Todres, *supra* note 26, at 609.

boys.<sup>30</sup> As trafficking networks prey on girls and boys as young as five and six-years old, early intervention is vital.<sup>31</sup>

Education preference offers an important example of the need to address gender-based violence and discrimination early in life in order to promote both children's and women's rights. Education preference results in poor families electing to keep sons in school, rather than daughters.<sup>32</sup> As a result, girls obtain lower levels of education, enter the workforce at a younger age with more limited skills, and thus are physically and mentally more vulnerable to exploitation and at increased risk of being drawn into the sex trade. When these girls become women, they are likely to be disadvantaged and less able to exercise their rights.

Additionally, if women's rights are suppressed, it has an indirect adverse effect on all children. In the overwhelming majority of families around the world, women are the primary caretakers of children, and thus the welfare of children is linked to the status of women.<sup>33</sup> In addition to familial responsibilities, women in many parts of the world also do work more than men outside the home.<sup>34</sup> Impeding the rights of women (*e.g.*, through employment discrimination, denial of bank loans and other forms of credit, and other means) will have a negative impact on the well-being of children in their care.<sup>35</sup> Accordingly, ensuring the rights and welfare of children (both girls and boys) requires due regard for women's rights as well.

Successfully combating gender-based violence and discrimination is likely to have many positive outcomes. It will enable girls to have greater opportunities and develop into adult women positioned to exercise the full range of their rights. It will also make it possible for women and girls to exercise greater control over their bodies in sexual relations. And it will provide for more equitable property rights law and greater economic opportunity for women, so that women are not pushed into risky behavior to ensure their survival and that of their families. All of these

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<sup>30</sup> *Id.*

<sup>31</sup> See, *e.g.*, International Labor Organization, 39 WORLD OF WORK 6, 6 (June 2001), available at <http://www.ilo.org/public/english/bureau/inf/download/magazine/pdf/mag39.pdf>; Andrew Lam, *In the World of Human Trafficking, Vietnam Remains a "Supply Country"*, PACIFIC NEWS SERVICE, Jul. 19, 2005 ("Recent raids in Cambodian brothels came up with Vietnamese girls as young as 5 years old."), at <http://www.undp.org.vn/mlist/gender/072005/post22.htm>.

<sup>32</sup> See, *e.g.*, Erika George, *Instructions in Inequality: Development, Human Rights, Capabilities, and Gender Violence in Schools*, 26 MICH. J. INT'L L. 1139 (2005).

<sup>33</sup> UNITED NATIONS POPULATION FUND, STATE OF THE WORLD POPULATION 13 (2005) ("Women are the backbones of their families, pillars of community life, caregivers for the sick and elderly and primary caretakers of the next generation."), available at [http://www.unfpa.org/swp/2005/pdf/en\\_swp05.pdf](http://www.unfpa.org/swp/2005/pdf/en_swp05.pdf).

<sup>34</sup> *Id.* ("In addition to managing households and securing and preparing food, many [women] work in farms, factories, marketplaces, mines, sweatshops or offices. Women work more hours on average than men, and do so mostly in the absence of supportive policies, laws, institutions, services, family arrangements and time-saving technologies."); UNITED NATIONS DEVELOPMENT FUND FOR WOMEN, PROGRESS OF THE WORLD'S WOMEN 29 (2005) ("Time-use studies have shown that women spend more time in work overall, spend fewer hours in paid work and in general have less discretionary time than men do."), available at <http://www.un-ngls.org/women-2005.pdf>.

<sup>35</sup> See Todres, *supra* note 26, at 611-612.

steps are essential to creating environments in which trafficking networks cannot thrive. Ultimately, combating sex trafficking at its roots requires addressing gender-based discrimination and violence. Equality among girls and boys and women and men is essential for ensuring children’s rights and women’s rights and is vital to creating opportunities for women.

*B. The right to be free from other forms of discrimination*

It is not only gender-based discrimination that enables sex trafficking networks to persist. Other forms of discrimination, including discrimination based on race, ethnicity, religion, social origin, and class operate both to drive the demand for prostitution globally and to marginalize the poor and minorities, making them more vulnerable targets for trafficking and commercial sexual exploitation.<sup>36</sup>

Similar to gender-based discrimination, discrimination based on race, ethnicity and class serves to disadvantage poor and minority individuals. Discrimination occurs in a host of settings, including housing, employment, health care, education, and social services. The impact is to marginalize the poor and minority individuals, pressing them into more economically vulnerable, often desperate, situations. In these circumstances, traffickers are most successful at “recruiting” or forcing individuals into the sex trade. Not surprisingly, the vast majority of women and children targeted by traffickers are from minority or other marginalized populations. In India and Nepal, for example, caste discrimination underlies the sex trade. *Dalits*, or untouchables, constitute a sizeable portion of the women forced into prostitution in rural areas or sold into urban brothels.<sup>37</sup> One lower caste in particular, *badis*, is viewed by members of higher castes as a “prostitution caste.”<sup>38</sup> Racism is also a significant factor in the growing sex industry of the Dominican Republic. A report by ECPAT explains:

In terms of understanding the supply of sex workers in the Dominican Republic, it is necessary to consider the economic, gendered and ‘racialized’ oppressions that operate upon Dominicans. These factors cannot be clearly separated. Women bear the brunt of the economic

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<sup>36</sup> See, e.g., UNITED NATIONS, WORLD CONFERENCE AGAINST RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE, THE RACE DIMENSIONS OF TRAFFICKING IN PERSONS—ESPECIALLY WOMEN AND CHILDREN BACKGROUNDER (Aug. 31-Sept. 7, 2001), available at [http://www.un.org/WCAR/e-kit/trafficking\\_e.pdf](http://www.un.org/WCAR/e-kit/trafficking_e.pdf). See also Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, *supra* note 15, at 19 (“Gender-based discrimination intersects with discriminations based on other forms of “otherness,” such as race, ethnicity, religion and economic status, thus forcing the majority of the world’s women into situations of double or triple marginalization.”); Janie Chuang, *Redirecting the Debate Over Trafficking in Women: Definitions, Paradigms and Contexts*, 11 HARV. HUM. RTS. J. 65, 68 (1998) (stating that “[t]rafficking in women is fueled by poverty, sexism, and racism”); Johanna Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations*, 52 EMORY L.J. 71, 124-125 (2003) (noting that traffickers target women from particular racial or ethnic groups).

<sup>37</sup> HUMAN RIGHTS WATCH, CASTE DISCRIMINATION 18 (2001), available at <http://www.hrw.org/reports/2001/globalcaste/>.

<sup>38</sup> *Id.* at 18-19 (“[u]nder the devadasi system, thousands of Dalit girls in India’s southern states are ceremonially “dedicated” or married to a deity or to a temple. Once dedicated, they are forced to become prostitutes for upper-caste community members . . .”).

problems because this is a deeply sexist society; black and ‘mulatta’ women are still more vulnerable because their situation is affected not just by poverty and sexism but also by racism. The complexity of this web of oppression is also illustrated by the fact that poverty forces boy children as well as girls into prostitution and encourages black men as well as women to prostitute themselves.<sup>39</sup>

The experience of India, Nepal, and the Dominican Republic repeats itself in dozens of other countries, as racial, ethnic and class discrimination serve to isolate the poor and minorities, increasing their vulnerability to commercial sexual exploitation and trafficking.<sup>40</sup>

While these other forms of discrimination operate to make the poor and minorities more susceptible to trafficking, such discrimination also serves to fuel the demand for prostitution. The sex tourism industry in Australia, the United States and Western Europe plays on crude stereotypes of Asian women, by emphasizing the “submissiveness of Asian prostitutes and the [supposed] complicity of their families in their situation.”<sup>41</sup> Advertisements for sex tours “build on the patriarchal and racist fantasies of European, Japanese, American, and Australian men by touting the exotic, erotic subservience of Asian women.”<sup>42</sup> Racism clearly plays a role when white men from Western countries are willing to take advantage of women in Thailand, the Philippines or other developing countries, but would not treat white women in their own countries in the same manner.<sup>43</sup> These racist and ethnic stereotypes drive demand for sex tourism by simultaneously enticing Western men while easing any guilt they may have over exploiting poor women and children from developing countries.<sup>44</sup> Moreover, when states fail to crack down on these practices, choosing tourism revenue over the protection of marginalized populations and others vulnerable to commercial sexual exploitation, they enable such exploitation to persist.<sup>45</sup>

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<sup>39</sup> Julia O’Connell Davidson & Jacqueline Sanchez Taylor, ECPAT, *Child Prostitution and Sex Tourism: Dominican Republic* 3 (Dec. 1995), available at [http://www.ecpat.net/eng/Ecpat\\_inter/Publication/Other/English/Pdf\\_page/ecpat\\_sex\\_tourism\\_dom\\_republic.pdf](http://www.ecpat.net/eng/Ecpat_inter/Publication/Other/English/Pdf_page/ecpat_sex_tourism_dom_republic.pdf).

<sup>40</sup> Discrimination based on race, ethnicity and class plays out differently from country to country, very often in subtle ways that do not appear directly linked to sex trafficking. The countries discussed in this Article provide examples of some of the ways in which discrimination on these bases contributes to trafficking and commercial sexual exploitation of individuals.

<sup>41</sup> Harriet D. Lyons, *The Representation of Trafficking in Persons in Asia Orientalism and Other Perils*, RE/PRODUCTIONS, Issue 2 (Apr. 1999), available at <http://www.hsph.harvard.edu/grhf-asia/ejournals/ejournalsframe.html>.

<sup>42</sup> *Id.* (quoting Judith Mirkinson).

<sup>43</sup> In fact, the majority of sex tourists are not pedophiles, but rather “casual sex tourists” who live fairly ordinary lives in their home countries. See RON O’GRADY, *THE CHILD AND THE TOURIST* 81-82 (1992).

<sup>44</sup> See Lyons, *supra* note 41. Stereotypes of submissive young women and girls are used to entice Western men, while suggestions that these young girls are fulfilling their family obligations by engaging in the sex trade enable Western men to rationalize their actions so they can engage in sexual exploitation of “foreign” girls because “it is accepted there” when they would never do so in their home countries.

<sup>45</sup> Revenue from the sex trade can be significant for some governments. See ILO SEX SECTOR REPORT, *supra* note 11, at 7 (reporting that the sex trade accounts for 2-14% of GDP of select Southeast

Demand for prostitution in many poor areas of the world is not driven only by foreigners. The situation in Thailand offers one such example.<sup>46</sup> The media typically portrays the sex trade in Thailand as a product of demand created by Western men who travel to Thailand in order to engage in sex with local prostitutes. That is only part of the story; domestic demand also drives the market and must not be overlooked. In Thailand, 4.6 million Thai men routinely use prostituted women and children, whereas the number of foreign tourists visiting prostitutes in Thailand is roughly 500,000 each year.<sup>47</sup> Furthermore, in rural areas of Thailand where tourists generally do not travel, one still finds prostitution.

In these remote areas of Thailand, traditional values and customs still prevail. This includes the view that by the time men and women are of marrying age, men should be worldly and experienced (read: sexually experienced), but women should still be virgins.<sup>48</sup> In relatively closed communities, this dichotomy is only possible by having another group of women, considered unsuitable for marriage, with whom men can gain the requisite sexual experience,<sup>49</sup> and thus a market for prostitution is created. Without question, gender issues come into play here. However, there is more going on, as some women fall into the category of "good" marriageable women while others are relegated to the "other" category. Other forms of discrimination are at play here, reflected in part by the fact that poor and minority women and children are particularly at risk of ending up in prostitution.<sup>50</sup>

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Asian countries). In addition, the use and exploitation of prostitutes in Southeast Asia and other developing regions of the world by military personnel from industrialized countries is widespread, and some have suggested that discrimination and bias underlie the Western government tolerance of such practices. See, e.g., 2005 TRAFFICKING REPORT, *supra* note 8, at 11 ("[w]here military forces gather, there has been an historical risk of sexual exploitation, especially of local women"); Jane Margold, *Women, Violence, and the Reinvolverment of the U.S. Military in the Philippines*, HUMAN RIGHTS DIALOGUE 2.10 (Fall 2003), available at <http://www.carnegiecouncil.org/viewMedia.php/prmID/1071>. Moreover, the failure of "supply" countries to help crack down on trafficking networks permits travel agencies, airlines, and other businesses in those industrialized countries to profit indirectly from the sex trade.

<sup>46</sup> By selecting Thailand for this example, the author is in no way suggesting that discrimination is worse in Thailand than it is elsewhere. Rather, the selection reflects the author's experience from having worked on health care and human rights issues in Thailand.

<sup>47</sup> See Todres, *supra* note 26, at 618.

<sup>48</sup> See Chulandee Thianthai, *Gender and Class Differenced in Young People's Sexuality and HIV/AIDS Risk-taking Behaviours in Thailand*, 6 No. 3 CULTURE, HEALTH & SEXUALITY 189, 189-190 (May-June 2005).

<sup>49</sup> *Id.* at 190 ("The value of virginity is strongly related to the cultural dichotomy whereby Thai women are categorized as either good . . . or bad . . ."). Thai women who "have premarital sex, have more than one sexual partner or insist on using a condom are often stigmatized as impure, promiscuous, sexually skilled. Alternatively, they are viewed as prostitutes." *Id.*

<sup>50</sup> Alicia Burke & Stefania Ducci, United Nations Interregional Crime and Justice Research Institute, *Trafficking in Minors for Commercial Sexual Exploitation: Thailand*, available at [http://www.unicri.it/www/trafficking/minors/docs/dr\\_thailand.pdf](http://www.unicri.it/www/trafficking/minors/docs/dr_thailand.pdf) (last visited Jan. 2, 2006). The article notes:

Studies show that the majority of girls in prostitution are from Northern Thailand. This is particularly true of children from Northern Thailand's hill tribes. Most vulnerable are women and children from ethnic minority groups, such as the Akha, Lahu, Lisu, Thai Yai, Thai Leu and Luwa. These children are denied Thai citizenship and are viewed as having a lower cultural status than lowland Thais. Being underprivileged, having little education and little understanding of the dangers of leaving home, and with no alternative

Discrimination on the basis of race, ethnicity, and other characteristics conflicts with the rule of law, as international law contains an extensive body of anti-discrimination law. The International Convention on the Elimination of All Forms of Racial Discrimination is the most prominent international human rights treaty that mandates states parties prevent the various forms of discrimination.<sup>51</sup> Additionally, other major international human rights instruments contain a non-discrimination clause that requires countries to ensure the rights enumerated in such treaties to all individuals without discrimination of any kind.<sup>52</sup> These clauses prohibit discrimination on the basis of a broad range of characteristics, such as race, sex, ethnicity, and social status. As one example, the non-discrimination provision of the Convention on the Rights of the Child reads:

States shall respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.<sup>53</sup>

Two elements of non-discrimination clauses merit discussion. First, human rights conventions require states parties to “respect” *and* “ensure” the rights of each individual covered by each convention. The former obligates governments not to

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viable means of income, children from tribal groups often leave for or are lured to “work” in urban areas and fall victim to prostitution. The situation is so desperate for some living in hill tribes it has been reported in some cases that women and children from tribal groups succumb to the pressure of prostitution in an attempt to feel more “valuable” and become “accepted” by Thai society.

*Id.* at 20.

<sup>51</sup> International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969) [hereinafter CERD].

<sup>52</sup> *See, e.g.*, International Covenant on Civil and Political Rights, art. 2(1), G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, art. 2(2), G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (*entered into force* Jan. 3, 1976) [hereinafter ICESCR]; Universal Declaration of Human Rights, art. 2(1), U.N. G.A. Res. 217A(III) (Dec 10, 1948) [hereinafter UDHR]; African [Banjul] Charter on Human and Peoples' Rights, art. 2, *adopted* June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (*entered into force* Oct. 21, 1986) [hereinafter African Charter]; American Convention on Human Rights, art. 1(1), O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, (*entered into force* July 18, 1978); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14, (ETS 5), 213 U.N.T.S. 222 (*entered into force* Sept. 3, 1953, as amended by Protocols Nos. 3, 5, and 8 which *entered into force* on Sept. 21, 1970, Dec. 20, 1971, and Jan. 1 1990, respectively). Certain human rights conventions do not contain a non-discrimination clause, but only because such a provision is inapplicable or superfluous. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (*entered into force* Jan. 12, 1951) (as the prohibition on genocide and other crimes against humanity by definition apply to acts against “national, ethnical, racial or religious group,” a non-discrimination clause is unnecessary). Similarly, CERD does not need a separate non-discrimination clause as the subject of CERD itself is discrimination. *See* CERD, *supra* note 51.

<sup>53</sup> CRC, *supra* note 1, art 2(1). Compare the non-discrimination clause of the ICCPR, *supra* note 52, art. 2(1) (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

infringe upon the rights of individuals, whereas the latter obligates states to take affirmative steps to protect individuals from any threat of human rights violations.<sup>54</sup> Thus, a state *respects* the rights of an individual when the government does not interfere with his or her rights. Not engaging in, condoning, or participating in trafficking are examples of respecting an individual’s rights. However, the state must take affirmative steps to *ensure* the rights of individuals. For example, affirmative measures (such as cracking down on trafficking networks) are required by governments to ensure an individual’s right to be free from exploitation.

Second, states parties must respect and ensure the rights of all individuals “without discrimination of any kind.” In other words, the list of protected characteristics found in a convention’s non-discrimination provision (such as the CRC’s) is not a closed list; rather it is illustrative of the types of discrimination that are prohibited.<sup>55</sup> In fact, over time, human rights instruments have developed increasingly more extensive lists of protected characteristics. This is primarily a reflection of the development of international human rights law over the second half of the twentieth century and its growing recognition of the many forms of discrimination. However, in each instance, every human rights instrument continues to use the above language, which clearly indicates discrimination of *any kind* is prohibited under international law.

Discrimination, whether on the basis of race, ethnicity, class, gender, or any other protected trait, puts the poor and minorities at greater risk of exploitation. It also fosters an environment in which leaders at all levels of government tolerate exploitation, because it affects those individuals seen as less worthy of protection. In short, discrimination helps create the climate in which trafficking networks can prosper. Long-term solutions to sex trafficking require states to eliminate all forms of discrimination.

### C. *The right to birth registration*

Traffickers prey on easy targets, such as undocumented individuals. It is easier to falsify the age and identity of unregistered persons, making unregistered women and children more susceptible to trafficking and commercial sexual exploitation, as well as other abuses such as forced labor and use in armed conflict.<sup>56</sup> Consequently, the right to birth registration—the official recording of a

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<sup>54</sup> See Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in THE INTERNATIONAL BILL OF RIGHTS 72, 77 (Louis Henkin ed., 1981).

<sup>55</sup> See, e.g., ICCPR, *supra* note 52, art. 2(1); ICESCR, *supra* note 52, art. 2(2); UDHR, *supra* note 52, art. 2(1). The Restatement on Foreign Relations Law of the United States adopts a similar approach in determining customary international human rights law. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987) (Comment (a) reads, in part, “[t]he list [of customary international human rights norms] is not necessarily complete, and is not closed: human rights not listed in this section may have achieved the status of customary law, and some rights might achieve that status in the future.”).

<sup>56</sup> See Jonathan Todres, *Birth Registration: An Essential First Step Toward Ensuring the Rights of All Children*, 10 HUM. RTS. BRIEF 32, 33-34 (2003) [hereinafter *Birth Registration*].

child's birth by a government agency—is an integral step to ensuring the well-being of a child, as it establishes the existence of the child under law and provides the basis for many rights of the child.<sup>57</sup> It is essential to establishing a child's nationality and citizenship. It also helps prove a child's age, thereby allowing the child to avail herself of all of the legal protections available to children.<sup>58</sup>

Birth registration is such a basic step that most people in industrialized countries take it for granted. Yet, globally an estimated 50 million children go unregistered each year.<sup>59</sup> Without birth registration, a child does not exist in the government's records, and establishing his or her nationality or citizenship can be problematic. Failure to register a child's birth also means that health care extension workers may not know about a child who is missing essential immunizations, and schools may be unaware of a school-age child who is not enrolled.<sup>60</sup> Equally important, many children have been denied access to health care and education because their births are not registered and thus they do not have proper identification.<sup>61</sup> If children do not have access to health and education, they begin a downward spiral that increases their vulnerability to the worst forms of child labor and other abuses, including sex trafficking.

The child's right to birth registration is established in the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, and the African Charter on the Rights and Welfare of the Child.<sup>62</sup> Notably, the right to birth registration is considered a civil and political right. Unlike with economic and social rights law which makes concessions to states with limited resources, no allowances are made based on a country's available resources vis-à-vis states' obligations to ensure civil and political rights. Therefore, a state must ensure the right to birth registration to every child subject to its jurisdiction.

Birth registration alone will not guarantee children's subsequent rights; however failure to register their births will make it much more likely that they suffer violations of their rights.<sup>63</sup> States must be held accountable for shortcomings with respect to birth registration. It is a basic, low-cost step, requiring a relatively small investment. Yet, the dividends can be great. Taking this most basic right more seriously and pressing for greater compliance will help ensure greater

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<sup>57</sup> See *id.* at 32; UNICEF, BIRTH REGISTRATION: RIGHT FROM THE START (Mar. 2002), available at [www.unicef\\_icdc.org/publications/pdf/digest9e.pdf](http://www.unicef_icdc.org/publications/pdf/digest9e.pdf).

<sup>58</sup> See *Birth Registration*, *supra* note 56, at 33-34.

<sup>59</sup> See *id.* at 32 (citing UNICEF figures that 50 million children go unregistered each year).

<sup>60</sup> *Id.* at 33.

<sup>61</sup> *Id.*

<sup>62</sup> See CRC, *supra* note 1, art. 7(1) ("The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents."). In the CRC, the right to birth registration (in Article 7) immediately follows the child's most basic and fundamental right—the right to life—in Article 6. See also ICCPR, *supra* note 52, art. 24(2) ("Every child shall be registered immediately after birth and shall have a name."); African Charter on the Rights and Welfare of the Child, *supra* note 1, art. 6(2) ("Every child shall be registered immediately after birth.").

<sup>63</sup> See *Birth Registration*, *supra* note 56, at 33-34.

protections for marginalized children who risk going unregistered and being left more vulnerable to traffickers.

#### *D. Health rights*

Health rights are another essential building block in the foundation of rights that ensure every child has the opportunity for a fair start in life. They are equally important for adults. When health rights are jeopardized, the realization of additional rights—such as the right to education and labor rights—are put at risk, prompting a downward spiral that leaves the most vulnerable populations exposed to potential human rights violations, including sex trafficking.

At the most basic level, the survival of the individual is at stake when health rights are in doubt. Even when interference with health rights does not rise to the level of a life and death matter, the effects can be dramatic for both children and adults. In all instances, the poor and other vulnerable populations are at greatest risk.

For children, poor health hinders their performance in school. Malnourished and ill children miss more days of school, often under-perform when at school, and are at greater risk of falling behind their peers.<sup>64</sup> This leads to a greater likelihood that they will drop out of school earlier. When children leave school early, they enter the workforce earlier with fewer skills, where they are at greater risk of various forms of exploitation, including being drawn into the sex trade. For adults, the absence of good health means higher absenteeism at work, or possibly even the loss of their jobs.<sup>65</sup> This creates a financial strain on the family, placing the entire family at greater risk of poverty and exploitation.

Under international law, the right to health includes three important components: (1) the right to the highest attainable standard of health, including both physical and mental health; (2) the right to access health care services and treatment, including non-discrimination in the provision of health rights; and (3) state obligations to address particular health care issues relevant to women and children.<sup>66</sup>

First, the major human rights instruments that include economic and social rights each use a similar formulation related to health, requiring that states parties work to ensure each individual’s “right to the highest attainable standard of

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<sup>64</sup> United Nations Educational, Scientific and Cultural Organization, *Focusing Resources on Effective School Health* (“poor health and malnutrition lead to low school enrolment, high absenteeism, poor classroom performance and educational wastage”), at [http://portal.unesco.org/education/en/ev.php-URL\\_ID=36588&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/education/en/ev.php-URL_ID=36588&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited Dec. 28, 2005).

<sup>65</sup> World Health Organization, *WHO on Health and Economic Productivity*, 25 POPULATION & DEVELOPMENT REV. 396, 399 (1999) (“[b]etter adult health directly affects productivity by increasing work output and reducing absenteeism”).

<sup>66</sup> See, e.g., ICESCR, *supra* note 52, art. 12; CRC, *supra* note 1, art. 24; African Charter, *supra* note 52, art. 16; African Charter on the Rights and Welfare of the Child, *supra* note 1, art. 14.

health.”<sup>67</sup> In ensuring the right to the highest attainable standard of health, states must address all aspects of human health. The World Health Organization defines health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”<sup>68</sup> Therefore, by obligating states to ensure the highest attainable standard of health, international human rights law requires states to address both the physical and mental well-being of individuals.<sup>69</sup>

By affirming that every individual has the right to the “highest attainable standard of health,” international law acknowledges two important variables—differences among individuals and among countries.<sup>70</sup> First, not all individuals are able to enjoy the same level of good health. Human rights law recognizes that, at best, states can only ensure members of their populations that they will have the opportunity to enjoy the best health possible for each of them as individuals. Second, human rights law acknowledges that countries differ from each other in terms of available resources. Chad does not have the means to provide the level of health services that Canada can afford, and it would be unreasonable to expect the same from both.<sup>71</sup> Adopting a lowest common denominator approach, however, would render health rights meaningless in all but the poorest areas of the world. Therefore, the relevant international human rights instruments utilize language that requires states to implement health rights and other economic and social rights *to the maximum extent of their available resources and within the framework of international cooperation*.<sup>72</sup> This approach accounts for the fact that developing

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<sup>67</sup> See ICESCR, *supra* note 52, art. 12(1) (recognizing every individual’s right to the “highest standard of physical and mental health”); CRC, *supra* note 1, art. 24 (“States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health.”); African Charter, *supra* note 52, art. 16 (establishing the right to enjoy the “best attainable state of physical and mental health”); African Charter on the Rights and Welfare of the Child, *supra* note 1, art. 14 (recognizing children’s “right to enjoy the best attainable state of physical, mental and spiritual health[.]” and states parties’ obligation to “ensure the provision of necessary medical assistance and health care to all children.”).

<sup>68</sup> Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19-22 June, 1946 (*signed* on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, p. 100), *entered into force* on 7 April 1948).

<sup>69</sup> The ICESCR makes explicit reference to mental well-being. ICESCR, *supra* note 52, art. 12. *Cf.* CRC, *supra* note 1, art. 24, (“health” is not defined). However, the Committee on the Rights of the Child has commented on mental health services in various states parties. See RACHEL HODGKIN & PETER NEWELL, UNICEF, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD 364-368 (2002) [hereinafter UNICEF IMPLEMENTATION HANDBOOK].

<sup>70</sup> See, e.g., Committee on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health*, E/C.12/2000/4, ¶ 9 (Jul. 4, 2000) (stating that the ICESCR’s right to health “takes into account both the individual’s biological and socio-economic preconditions and the State’s available resources”).

<sup>71</sup> Canada’s GDP per capita is US\$29,480 and its health care expenditures per capita is US\$2,792, whereas Chad’s GDP per capita is only an estimated US\$1,020 and its per capita health care expenditure is US\$17. See UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2004, 139, 142, 156 and 159 (2004), available at <http://hdr.undp.org/reports/global/2004/>.

<sup>72</sup> See, e.g., CRC, *supra* note 1, art. 4 (“With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.”); ICESCR, *supra* note 52, art. 2(1)

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to

countries have more limited resources, while still obligating all states to work toward the progressive achievement of health for all.

The second legal requirement embedded in the right to health is that states ensure individuals’ access to health care treatment and facilities.<sup>73</sup> A fundamental component of this requirement is ensuring access for all without discrimination of any kind, as mandated by the international law on discrimination. In this regard, the Committee on Economic, Social and Cultural Rights—the body responsible for monitoring states parties’ compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR)—has emphasized that the ICESCR prohibits all forms of discrimination in the access to health care.<sup>74</sup> Similarly, the CRC’s requirement that “no child [be] deprived of his or her right of access to such health care services,” when combined with the prohibition on discrimination, obligates states parties to ensure that children in the most marginalized communities receive access to health care services as other children do.<sup>75</sup>

Third, international law requires states parties to take steps to address specific health issues, including infant and child mortality, pre- and post-natal care, and the provision of primary health care services.<sup>76</sup> The expectation is that states will demonstrate progressive improvement over time, providing better health care for the entire population in these important areas.

Given the requirements of international law and the health challenges faced by states, particularly developing countries with limited resources, several key steps are necessary to ensure health rights such that at-risk populations will be able to realize other rights and minimize their risk of exploitation. As an initial matter, the implementation of health rights requires a review of a state’s available resources, because of the resource qualifying language attached to economic and social rights in international law.<sup>77</sup>

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the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

*Id.* If drafters of the various human rights instruments had settled on an inflexible high standard, it is likely that many developing countries would not have ratified these treaties. Resource qualifiers in provisions on economic and social rights do *not* eliminate developing countries’ obligations to ensure these rights. Developing countries are required to do as much as possible with the resources they have, look to the international community to access additional resources, and build capacity so that they will have greater resources for ensuring children’s rights in the future.

<sup>73</sup> See, e.g., CRC, *supra* note 1, art. 24(1); ICESCR, *supra* note 52, art. 12(d).

<sup>74</sup> Committee on Economic, Social and Cultural Rights, *supra* note 70, at ¶ 18.

<sup>75</sup> CEDAW provides additional support for children’s health, as it contains several provisions requiring states parties to ensure women’s access to health care services, healthcare facilities and “educational information to help to ensure the health and well-being of families,” all of which have implications for the child’s ability to access needed healthcare. See CEDAW, *supra* note 1, arts. 10, 12 & 14. For more on the potential benefit of women’s rights to children (and children’s rights to women), see Todres, *supra* note 26. On the right to health, see also UDHR, *supra* note 52, art. 25.

<sup>76</sup> CRC, *supra* note 1, art. 24(2); CEDAW, *supra* note 1, art. 12(2).

<sup>77</sup> See *supra* note 72 and accompanying text.

Determining whether a state is adequately funding health rights within its available resources involves examining a state's budget expenditures.<sup>78</sup> If a country's national budget is sufficient, it should be able to fulfill any obligations qualified by available resources. In such cases, the state's obligation with respect to economic and social rights would be full implementation of such rights.

For countries with more limited resources, the obligation remains progressive implementation of those rights. A commitment to progressive implementation of health rights can be reflected, at least in part, in government spending trends.<sup>79</sup> For example, if the gross domestic product of a particular state that is obligated to provide health rights to its population is increasing each year, but the health care budget is not, or if a country's defense spending increases by a significantly greater percentage than its health care budget, one could argue that the state is not using its "maximum available resources" to achieve the progressive realization of these rights for its people and thus is failing to comply with international human rights law.<sup>80</sup> Budget analysis can help monitor states' practices, ensuring that they do not use the resource qualifying language as an excuse not to respect and ensure the economic and social rights of individuals subject to their jurisdiction.

Budget analysis can also suggest areas in which there may be discrimination in the provision of health care services. Additionally, it can highlight the areas where government has failed to spend allocated funds.<sup>81</sup> For example, Fundar's research on the Mexican Government's budget has raised a number of issues as to whether Mexico is meeting its international obligation to protect the health of its population using its maximum available resources.<sup>82</sup> It offers a model for determining what a country is required to do to secure health rights and other economic and social rights for its population.

It is important, however, to recognize that budget analysis has limitations. It does not reveal whether resources are used effectively or efficiently.<sup>83</sup> However, it can provide useful information that is a starting point to determining whether a country is using its "maximum available resources." Combining budget analysis with the content of specific provisions, such as the right to health, can enable human rights scholars and advocates to determine, with greater precision, the content of specific economic and social rights and to better assess states' compliance with human rights law.

In addition to monitoring states' compliance with the requirement to ensure the right to the highest attainable standard of health, human rights advocates must also press governments to combat discrimination in the provision of health care, so

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<sup>78</sup> See generally International Budget Project, *Applied Budget Analysis and Economic Social and Cultural Rights*, available at <http://www.internationalbudget.org/themes/ESC/index.htm>.

<sup>79</sup> Fundar, International Human Rights Internship Program, and International Budget Project, *in* DIGNITY COUNTS: A GUIDE TO USING BUDGET ANALYSIS TO ADVANCE HUMAN RIGHTS 30 (2004).

<sup>80</sup> *Id.* at 29.

<sup>81</sup> *Id.* at 37.

<sup>82</sup> *Id.* at 68-69.

<sup>83</sup> *Id.* at 36.

that all individuals have access to care. As discussed above, it is minorities, the poor, refugees, and other marginalized populations that are victims of discrimination in health care. States must ensure that national health care measures do not discriminate against vulnerable populations and that implementation of such measures at local and regional levels is done without discrimination. Recall that prohibitions on discrimination are not subject to resource qualifying language. Consequently, states must eliminate discrimination in the provision of health care. Finally, budget analysis and other forms of monitoring state practice can help ensure that governments meet their obligations under international law to address specific health issues, including infant and child mortality, pre- and post-natal care, and the provision of primary health care services.

Holding states more accountable for ensuring economic and social rights will lead to greater implementation of health rights. In turn, if states implement and enforce health rights, it will help guarantee better health for at-risk populations. With better health, children can pursue their education more successfully, leading to greater opportunities in the future, and adults can pursue employment opportunities that hopefully will keep them and their families out of poverty and away from the dangers of trafficking and the sex trade.

#### *E. The right to education*

Despite the importance of education in ensuring that children have economic opportunities in adulthood, over 120 million children of primary school age are not in school.<sup>84</sup> Education provides value not only in the long-term, it is also crucial to helping keep children out of exploitative work environments, including sex trafficking. Today, an estimated 250 million children between the ages of five and fourteen work for a living, almost half work full-time.<sup>85</sup> Children are pressed to work in a variety of settings, including as domestic servants, agricultural workers, prostitutes, and factory workers. The less education a child receives, the earlier she enters the workforce and the more limited her skills are, making her a prime target for sex traffickers.

International law recognizes the right of each individual to education.<sup>86</sup> There are three essential elements of states' obligations with respect to the right to education under international law. States must (1) ensure access to education for all; (2) comply with the different requirements for each of the three levels of

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<sup>84</sup> UNICEF, *UNICEF to Pick Up Pace on Girls' Education* (Dec. 2, 2002) (reporting that “[o]f the 120 million children who never go to school, the majority are girls.”), available at [http://www.unicef.org/media/media\\_19242.html](http://www.unicef.org/media/media_19242.html); UNICEF USA, Education, at [http://www.unicefusa.org/site/c.eiJRK3PFJpH/b.1126999/k.F3DD/Education\\_\\_What\\_We\\_Do\\_\\_US\\_Fund\\_for\\_UNICEF.htm](http://www.unicefusa.org/site/c.eiJRK3PFJpH/b.1126999/k.F3DD/Education__What_We_Do__US_Fund_for_UNICEF.htm) (last visited Dec. 28, 2005).

<sup>85</sup> See UNICEF IMPLEMENTATION HANDBOOK, *supra* note 69, at 477 (citing ILO statistics).

<sup>86</sup> CRC, *supra* note 1, art. 28(1); ICESCR, *supra* note 52, art. 13(1); African Charter, *supra* note 52, art. 17; African Charter on the Rights and Welfare of the Child, *supra* note 1, art. 11; UDHR, *supra* note 52, art. 26(1).

education (primary, secondary, and higher education); and (3) progressively provide more with respect to the higher levels of education.

Of fundamental importance in the area of education is that it be truly accessible for all. One notable obstacle to children's education is discrimination. Marginalized populations suffer most, resulting in poor children being out of school and thus being more likely targets for sex traffickers. Discrimination in the education setting reinforces the need to consider different rights in conjunction with each other. Successful implementation of the right to education requires combating discrimination. As this Article suggests in the Introduction, the full realization of one right cannot be done independently of others. Consequently, eliminating sex trafficking requires not only implementation of the law on trafficking but enforcement of anti-discrimination law, the right to birth registration, health rights, and the right to education.

The non-discrimination clauses of the CRC, ICESCR and other international instruments guard against discriminatory practices in education.<sup>87</sup> In addition, under the African Charter on the Rights and Welfare of the Child, states parties are required to "ensure equal access to education for *all sections* of the community," including the most marginalized.<sup>88</sup> Provisions such as these, as well as the prohibition on discrimination under international law, must be taken into account in the context of education.

Even in situations where children are not prevented from attending school because of discrimination, they may still be forced to drop out of school for financial reasons. States, therefore, must eliminate economic obstacles which force children to leave school, in order to make education truly "accessible" and to comply with their obligations under international law. As a practical matter, this may impose obligations on states that may not initially appear to fall under the rubric of providing education for all. However, for children of poor families who are forced to miss school because they must earn money to support themselves and their siblings, "free" schools are meaningless if there is no provision for financial and other support from the state that will enable these children to attend school.<sup>89</sup>

Second, international law imposes different levels of obligation on states parties for primary, secondary, and higher education. States are required to make primary education "compulsory and available free to all."<sup>90</sup> Compliance with this provision requires ensuring that every child attends and completes primary school free of charge.

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<sup>87</sup> See *supra* notes 52 and 53 and accompanying text.

<sup>88</sup> African Charter on the Rights and Welfare of the Child, *supra* note 1, art. 11 (emphasis added).

<sup>89</sup> States must be attentive to "hidden" obstacles that prevent children from attending school (such as the cost of books and school uniforms). These seemingly incidental costs can be enough to keep the poorest, and most marginalized, children from attending school. To make education available to all, states must meet these costs for students in need. Budget analysis may help determine whether sufficient resources are being allocated to assist these children.

<sup>90</sup> CRC, *supra* note 1, art. 28(1)(a). See also ICESCR, *supra* note 52, art. 13(2); African Charter on the Rights and Welfare of the Child, *supra* note 1, art. 11(3)(a); UDHR, *supra* note 52, art. 26(1).

In addition, each state must make secondary schooling “available and accessible” to every child.<sup>91</sup> There are variations among the relevant international instruments in the wording of provisions on secondary education. The ICESCR imposes an additional obligation on states parties to work toward making secondary education available to all *for free*; whereas the CRC only suggests free secondary education as an appropriate step to take. In each case, however, international law emphasizes the state’s obligation to work toward providing secondary education to all by making it truly accessible.<sup>92</sup>

With respect to higher education, states are generally required to make it “accessible to all on the basis of capacity by every appropriate means.”<sup>93</sup> Understandably, for many poorer countries with large numbers of younger children out of school, this step is a lower priority than more basic levels of education, and the less stringent obligation under international law is an acknowledgment of that situation.

Third, states must fulfill the critical requirement of progressive realization of the right to education.<sup>94</sup> In other words, although the strongest obligation resides at the primary education level, states cannot stop after providing the minimum. There must be a concerted effort to enable children to achieve higher levels of education. It is essential that this occurs for communities to break the cycle of poverty and enjoy lives beyond mere subsistence and survival.

Full implementation of the right to education is of paramount importance as education is a foundation on which other rights are built. If children do not receive an education, they will be less equipped to exercise other civil, political, economic, social, and cultural rights. Conversely, when children drop out of school early, they are at greater risk of various forms of exploitation, including prostitution, forced labor, and use in armed conflict.<sup>95</sup> Moreover, education is an important component of development, and its implementation strengthens communities.

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<sup>91</sup> CRC, *supra* note 1, art. 28(1)(b) (states must make education “available and accessible to every child and take appropriate measures such as the introduction of free education and offering financial assistance in case of need”). *See also* ICESCR, *supra* note 52, art. 13(2) (“Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.”); African Charter on the Rights and Welfare of the Child, *supra* note 1, art. 11(3) (requiring states parties “to progressively make [secondary education] free and accessible to all”).

<sup>92</sup> While making secondary education free for all is the most comprehensive approach, countries with limited resources may find it more effective to allocate available resources to the poorest as a means of eliminating their obstacles to education and ensuring secondary education is truly accessible for all.

<sup>93</sup> CRC, *supra* note 1, art. 28(1)(c); African Charter on the Rights and Welfare of the Child, *supra* note 1, art. 11(3)(c) (“Make higher education accessible to all on the basis of capacity and ability by every appropriate means.”); ICESCR, *supra* note 52, art. 13(2)(c) (make higher education “equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education”).

<sup>94</sup> As with other economic and social rights, the right to education requires states to progressively achieve full implementation.

<sup>95</sup> *Birth Registration*, *supra* note 56, at 34.

As with health rights and other economic and social rights, education rights are subject to resource qualifiers to their progressive realization. Therefore, as discussed above, budget analysis can prove to be a useful tool in determining what a country is able to provide and accordingly what a country must provide.

Education can be a vehicle for breaking the cycle of poverty and reducing the incidence of trafficking and commercial sexual exploitation. If governments see their mission only as ensuring basic literacy and providing primary school education to all, it will be more difficult for children to break the cycle of poverty. Children must have opportunities beyond primary education; it is essential for their development and the development of their communities and countries. And human rights law requires no less.

### III. NEXT STEPS

Sex trafficking is among the most grave human rights abuses. As mentioned at the outset of this Article, it is recognized as equivalent to a “crime against humanity.”<sup>96</sup> To combat such horrible violations of individual rights, a comprehensive, multi-sector approach is essential.

States must redouble their efforts to combat sex trafficking and to comply fully with the requirements of the international law on trafficking and commercial sexual exploitation of persons. The three components of anti-trafficking law must be implemented: (1) laws must be strengthened and effectively enforced; (2) prevention programs must receive greater priority; (3) and meaningful assistance must be made available to victims of sex trafficking, to help in the rehabilitation and reintegration of these individuals into their communities. Nonetheless, when taken alone, these three steps are insufficient.

To effectively combat sex trafficking, greater attention must be given to the other rights described above. Realization of these other rights will: enable children to have access to health care and education; provide girls with the same opportunities as boys, so they grow into adult women with full power to exercise all of their rights; ensure that adults have access to health care facilities and remain healthy enough to provide for their families; and end toleration of and support for discriminatory practices that lead to exploitation of minorities and the poor. All of these steps will help communities grow stronger, creating an environment in which development can flourish. These steps will not guarantee socio-economic development, but they will help lay the groundwork for development that is truly sustainable and will have the best hope of improving quality of life for the long-term.

Along with the enforcement of human rights, sustainable development is a vital component of any plan that will provide viable opportunities for families to support themselves, without being pushed into at-risk activities. In designing development programs, it is important that they be participatory. That is, local

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<sup>96</sup> See *supra* note 2 and accompanying text.

communities must be involved in the “creation, conduct and content of a[ny] program or policy designed to change their lives.”<sup>97</sup> Enforcing the “other rights” described above will ensure that the poor and the marginalized are better positioned to affect development in their communities.<sup>98</sup> As such, human rights and development must go hand in hand.

The task is not easy. In the multi-billion dollar industry of sex trafficking, the incentives for perpetrators of these abuses are great. The challenge for governments and human rights advocates is enormous. That said, the vast majority of states have assumed the responsibility to combat sex trafficking by ratifying some, or all, of the human rights instruments prohibiting sex trafficking. Moreover, the overwhelming majority of states are obligated to provide these “other rights” that, if fully implemented, can strengthen communities and help foster development. As such, implementation of the right to freedom from all forms of discrimination including gender-based discrimination and related violence, the right to birth registration, health rights, and the right to education must be a part of any solution to the problem of sex trafficking. Ultimately, ensuring the full range of individual rights and fostering sustainable development programs that are inclusive of all individuals, including the most marginalized, is the best way of reducing and hopefully one day eliminating trafficking and commercial sexual exploitation of persons.

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<sup>97</sup> RAY JENNINGS, PARTICIPATORY DEVELOPMENT AS NEW PARADIGM: THE TRANSITION OF DEVELOPMENT PROFESSIONALISM, 1 (Oct. 2000), available at [http://www.usaid.gov/our\\_work/cross-cutting\\_programs/transition\\_initiatives/pubs/ptdv1000.pdf](http://www.usaid.gov/our_work/cross-cutting_programs/transition_initiatives/pubs/ptdv1000.pdf).

<sup>98</sup> An in-depth discussion of the best practices in the field of development and various approaches to sustainable development is beyond the scope of this article. For further discussion, see, e.g., John C. Dernbach, *Sustainable Development as a Framework for National Governance*, 49 CASE W. RES. L. REV. 1 (1998) (explaining basic governing principles for sustainable development); Aljaji B.M. Marong, *From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development*, 16 GEO. INT’L ENVTL. L. REV. 21 (2003) (arguing that norms such as the precautionary principle, the principle of environmental impact assessment, and public participation in decision-making could play an important role in the realization of sustainable development); U.N. Dep’t of Econ. & Soc. Affairs, *Guidance in Preparing a National Sustainable Development Strategy: Managing Sustainable Development in the New Millennium*, Background Paper No. 13 (Jan. 28-Feb. 8, 2002) (discussing different sustainable development practices including economic growth, social equity and protection of the environment), available at [http://www.un.org/esa/sustdev/publications/nsds\\_guidance.pdf](http://www.un.org/esa/sustdev/publications/nsds_guidance.pdf). See generally UN-Habitat, *Best Practices & Local Leadership Programme*, Best Practices Database, available at <http://www.bestpractices.org/> (compiling best practices worldwide).