

INTERROGATING THE STATE'S ROLE IN HUMAN TRAFFICKING

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*The state maketh and un-maketh;
It giveth and it taketh away
It makes members and non-members,
Exploiter, exploited, and exploitable
In accordance with law.
And is, itself, exploiter, exploited, and exploitable.
In accordance with law.*

This Essay identifies some examples of and interrogates the state's role in human trafficking. The state is not a blameless onlooker with respect to trafficking in human beings; nor is it a whole-heartedly committed crusader against this profitable illicit trade. Instead, States create the preconditions for and profit from human trafficking.

Through the state's power to legislate, it defines and re-defines reality – it is the creator and enforcer of paradigms of subordination and exploitation that normalize the exploitation of the individuals and groups it makes vulnerable.

The state's roles in this area arise from (i) *foundational concepts*, such as doctrines supporting and protecting the sovereignty of state actors; (ii) *organizational principles*, such as the implementation and policing of the concepts of belonging and non-belonging; and (iii) *economic and political policies*, such as the tension arising from the state's simultaneously conflicted flirtation with and resistance to globalization.

Anti-human trafficking campaigns, while emotionally gratifying and optically pleasing, do not address the structural foundations of state-created and state-implemented systems of exploitation.

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I. INTRODUCTION

This Essay captures and expands on my comments at the February 2014 Symposium “*Moving to Opportunity: Examining the Risks and Rewards of Economic Migration*” organized by the Indiana International and Comparative Law Review. Human trafficking was prominent among the risks attendant to economic migration that were explored by my fellow speakers. My contribution calls for a structural understanding of human trafficking. Human trafficking is very “*au courant*.” School groups learn about and are appalled by its existence.¹ Police officers, hotel workers, social workers, and taxi drivers are trained to recognize it on street corners, in restaurants, nail salons, and hospitals, and to report it to law enforcement officials.² Committed and dedicated activists and non-governmental organizations rescue and rehabilitate its victims, and lobby their legislators for the adoption and implementation of anti-human trafficking campaigns.³

States⁴ and intergovernmental organizations are no slackers in the fight against this modern form of exploitation. Dubbed “modern day slavery,” human trafficking is denounced in the halls of the United States Congress,⁵ the great rooms of the European Union,⁶ and the General Assembly of the United Nations.⁷

¹ See, e.g., *Comprehensive List of Human Trafficking Curricula*, MBABOLITIONISTS (2014), <http://www.mbabolitionists.org/resources/curricula> (giving samples of middle and high school curricula on human trafficking).

² See, e.g., Abigail Lawlis Kuzma, *Game Plan to Fight Human Trafficking: Lessons from Super Bowl XLVI*, 2 DEPAUL J. WOMEN, GENDER & L. 129, 154-67 (2012) (describing public outreach efforts of Indiana’s anti-trafficking task force in anticipation of and during Super Bowl XLVI).

³ See *A Web Resource for Combating Human Trafficking*, Humantrafficking.org (April 10, 2012), <http://www.humantrafficking.org> (providing facts about and a list of NGOs active in more than 20 countries).

⁴ “States,” as used in this essay, refers to nation states, the paradigmatic actors in international law. These entities, bearing the attributes of defined borders, fixed populations, a government in control, and the capacity to enter into foreign relations with other states, have the power to enter into treaties, legislate, and use legally sanctioned violence, among other attributes. See *Montevideo Convention on the Rights and Duties of States*, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

⁵ See *Hearings of the U.S. Senate Committee on Homeland Security and Governmental Affairs, Combatting Human Trafficking: Federal, State, and Local Perspectives* (Sept. 23, 2013), available at <http://www.hsgac.senate.gov/hearings/combating-human-trafficking-federal-state-and-local-perspectives>.

⁶ See Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report, in Council of Europe Treaty Series – No. 197, http://www.coe.int/t/dghl/monitoring/trafficking/Source/PDF_Conv_197_Trafficking_Erev.pdf [hereinafter, Council of Europe Convention].

⁷ For example, in a speech to the United Nations General Assembly on September 23, 2003, President George W. Bush declared:

We must show new energy in fighting back an old evil. Nearly two centuries

Multinational corporations, as well, have participated in the anti-human trafficking crusades. Through funding mechanisms, public relations campaigns, and corporate best practice guidelines and policy papers, these entities have made known their firm stance against this modern form of exploitation.⁸

And yet . . .

While we are encouraged to think that human trafficking is an aberration, it is not. Instead, human trafficking and similar forms of exploitation are embedded in and play an integral role in our contemporary existence. The structural, conceptual, and organizational principles of our lives today facilitate – perhaps even *demand* – that historic slavery and forms of exploitation mutate to forms of human suffering, subordination, and exploitation that we call “human trafficking.” Further, on multiple levels, States set the preconditions of and profit from human trafficking. At the same time, States themselves are exploited in order to facilitate human trafficking.

Part II describes some forms of contemporary exploitation labeled as “human trafficking,” and acknowledges and summarizes the expected and public anti-human trafficking roles of modern states. Part III of the Essay outlines the nature and scope of state power. Part IV introduces the states’ facilitator roles in the mutation and maintenance of human trafficking. Part V identifies the ways in which states, themselves, are exploited and exploitable, and the contribution of those roles to human trafficking and similar forms of exploitation. Part VI calls for a contextual understanding of and approach to human trafficking that expressly includes a reckoning with the structural role of the state.

after the abolition of the transatlantic slave trade and more than a century after slavery was officially ended in its last strongholds, the trade in human beings for any purpose must not be allowed to thrive in our time.

President George W. Bush, Address to the United Nations General Assembly in New York City (Sept. 23, 2003), *available at* <http://www.un.org/webcast/ga/58/statements/usaeng030923.htm>.

⁸ See, e.g., The Athens Ethical Principles (2006), *available at* http://www.ungift.org/docs/ungift/pdf/Athens_principles.pdf; Luxor Implementation Guidelines to the Athens Ethical Principles: Comprehensive Compliance Programme for Businesses (2010), *available at* http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/Luxor_Implementation_Guidelines_Ethical_Principles.pdf (anti-trafficking code of conduct and implementation principles produced by the business community). More than 8,000 businesses in 145 countries have joined the Global Compact. See *Participants and Stakeholders*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html>. See also American Bar Association, *Majority of Fortune 100 Companies Have Policies on Human Trafficking and Forced Labor*, ABA (June 2, 2014), http://www.americanbar.org/news/abanews/aba-news-archives/2014/05/majority_of_fortune.html (reporting on a study jointly released by the ABA and a number of higher education institutions); see *Global Business Coalition Against Human Trafficking*, GBCAT, www.gbcat.org (detailing anti-human trafficking efforts of multinationals such as Microsoft, LexisNexis, and Ford).

II. HUMAN TRAFFICKING

Whether it comes in the form of a young girl trapped in a brothel, a woman enslaved as a domestic worker, a boy forced to sell himself on the street, or a man abused on a fishing boat, the victims of [human trafficking] have been robbed of the right to lead the lives they choose for themselves, and trafficking and its consequences have a spill-over effect that touches every element of a society.⁹

This Part introduces some of the contemporary forms of exploitation that are described in popular media, scholarly literature, and legislative history as “human trafficking,” and examines and compares the legal definitions introduced to identify and combat the exploitation. The Part concludes with a summary of state efforts to combat human trafficking.

A. “*Human Trafficking*”

As illustrated by the quote above from U.S. Secretary of State John Kerry, a sample list of modern forms of human-to-human exploitation which have been described as human trafficking includes: commercial sexual exploitation (of minors and adults of all genders); indentured servitude; agricultural, construction and factory labor coerced through debt bondage or other forms of coercion; exploitative guest worker arrangements; child labor; recruitment and deployment of child soldiers; and other scenarios where individuals are held in positions of total control and exploitation.¹⁰

Human trafficking involves exploitation and the exercise of control through fraud, misrepresentation, coercion, and violence and/or psychological manipulation.¹¹ The levers of control may be provided by the legal and/or social system (through employment contracts, for example).¹²

B. *Definitions*

Following decades of concern about child sex tourism in Southeast Asia and the trade of women for sex work, the sharp increase in the trade of post-Soviet era Eastern European women sparked grave concern in Western

⁹ Letter from U.S. Secretary of State John Kerry to 2014 Trafficking in Persons Report, (June 2014).

¹⁰ See, e.g., U.S. State Department, 2014 Trafficking in Persons Report 1, 29-40 (2014), available at <http://www.state.gov/j/tip/rls/tiprpt/2014/index.htm> (describing some of these forms of exploitation).

¹¹ See *id.*, at 29-35; see also next section for notable, codified definitions.

¹² See *id.*, at 23, 25-39.

capitals and among rights organizations.¹³ In 2000, the groundbreaking UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (hereinafter, the UN Trafficking Protocol)¹⁴ opened for signature. That instrument, and the international and domestic anti-human trafficking instruments that followed, have brought the existence of human trafficking to the attention of civil society worldwide and have spurred it to passionate action.

Among the groundbreaking aspects of the UN Trafficking Protocol is its formulation of the first international definition of human trafficking. That definition, and the others excerpted below, include a tripartite definitional structure – act, means, and purpose – in their attempt to identify and name the forms of exploitation that fall within the auspices of the instruments. Both the United Nations Trafficking Protocol and the Council of Europe Convention on Action Against Trafficking in Human Beings¹⁵ follow the tripartite structure.

The U.N. Trafficking Protocol defines human trafficking as:

[Act] [T]he recruitment, transportation, transfer, harbouring or receipt of persons, *[Means]* 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, *[Purpose]* 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.¹⁶

The Council of Europe's definition of trafficking in human beings is virtually identical:

¹³ See Karen E. Bravo, *Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INT'L L.J. 207, 219-23 (2007).

¹⁴ 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. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/45/49 (Vol. I), at 60 (2001) [hereinafter, UN Trafficking Protocol].

¹⁵ See Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings*, (May 16, 2005), available at <http://conventions.coe.int/Treaty/en/Treaties/Html/197.htm>.

¹⁶ UN Trafficking Protocol Art. 3(a), *supra* note 14, at 42.

"Trafficking in human beings" shall mean *[Act]* the recruitment, transportation, transfer, harbouring or receipt of persons, *[Means]* 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, *[Purpose]* 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.¹⁷

In contrast, the South Asian Association for Regional Cooperation (SAARC) Convention Preventing and Combatting Trafficking in Women and Children for Prostitution adopts a definition that is much narrower in scope:

"Trafficking" means the moving, selling or buying of women and children . . . victimized or forced into prostitution by the traffickers by deception, threat, coercion, kidnapping, sale, fraudulent marriage, child marriage, or any other unlawful means.¹⁸

While the larger regional grouping, the Association of South East Asian Nations (ASEAN) countries have issued a declaration against human trafficking,¹⁹ the regional bloc has not yet entered into a regional anti-trafficking treaty.²⁰

The United States' Trafficking Victims Protection Act,²¹ adopted the same year as the UN Trafficking Protocol, also reflects the tripartite structure. However, the U.S. federal instrument distinguishes between severe forms of trafficking and mere sex trafficking. The definition reads as follows:

¹⁷ Council of Europe Convention, *supra* note 6, at 8.

¹⁸ SAARC Convention Preventing and Combatting Trafficking in Women and Children for Prostitution, Art. 1, §§ 3 and 5, saarc-sec.org/userfiles/conv-trafficking.pdf.

¹⁹ See *ASEAN Declaration Against Trafficking in Persons Particularly Women and Children*, ASEAN (2014), <http://www.asean.org/communities/asean-political-security-community/item/asean-declaration-against-trafficking-in-persons-particularly-women-and-children-3>.

²⁰ See *ASEAN Convention on Human Trafficking Sought*, ATUC (July 11, 2011), <http://aseantuc.org/2011/07/asean-convention-on-human-trafficking-sought/>; see Office to Combat and Monitor Trafficking in Persons, *Trafficking in Persons Report 2014*, 420, 428-29, available at <http://www.state.gov/j/tip/rls/tiprpt/2014/210759.htm> (giving a list of international and regional anti-human trafficking instruments).

²¹ See Trafficking Victims Protection Act, 22 U.S.C. § 7101 (2000) (hereinafter, TVPA).

'severe forms of trafficking in persons' means—

[*Act*] sex trafficking in which a commercial sex act is induced by [*means*] force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or . . . [*Act*] the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, [*means*] through the use of force, fraud, or coercion [*purpose*] for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery...

'Sex trafficking' means [*Act*] the recruitment, harboring, transportation, provision, or obtaining of a person [*Purpose*] for the purpose of a commercial sex act.²²

Subsequent reauthorizations and amendments to the TVPA clarified the types of activities that fall within the definition, and introduced additional mechanisms to combat it.²³

Although ostensibly a domestically directed statute, it is difficult to overstate the global impact of the U.S. TVPA.²⁴ The legislation's impact stems from the intent of the drafters that the statute's provisions be extraterritorial. In particular, the statute created a sustained mechanism for exporting the United States anti-trafficking initiatives, backed by the economic and political power of the United States.²⁵ The mechanisms, in the form of the annual Trafficking in Persons Report, together with the Report's tier system used to rank other countries' anti-trafficking activities pursuant to U.S. standards, and threats of the withholding of U.S. assistance from non-compliant countries, has been effective in persuading many states to sign and ratify the U.N. Trafficking Protocol and to adopt their own domestic legislation that transpose into their domestic regimes the provisions of the Protocol.²⁶

Further, all fifty U.S. states have adopted their own human trafficking

²² *Id.* at § 7102(9)(A), (B) – (10).

²³ See Bridgette Carr et al., *Human trafficking Law and Policy* xv-xvii (2014) (listing and describing reauthorizations and amendments to the TVPA).

²⁴ See Karen E. Bravo, *Follow the Money?: Does the International Fight Against Money Laundering Provide a Model for International Anti-Human Trafficking Efforts?*, 6 U. St. Thomas L.J. 138, 151-55, 186-88 (2008); see also, Trafficking in Persons Report (TIP), *supra* note 10, at 43-44.

²⁵ *Follow the Money?*, *supra* note 24, at 152-55. The President has the discretion to withhold or withdraw non-humanitarian, non-trade related foreign assistance as well as funding for government employees' participation in educational and cultural exchange programs. See *id.*

²⁶ *Id.* at 151-55, 186-88.

legislations.²⁷ The California definition excerpted below exemplifies the types of definitions deployed and the types of exploitation targeted by the domestic states. California law defines human trafficking as:

[A]ll acts involved in the recruitment, abduction, transport, harboring, transfer, sale or receipt of persons, within national or across international borders, through force, coercion, fraud or deception, to place persons in situations of slavery or slavery-like conditions, forced labor or services, such as forced prostitution or sexual services, domestic servitude, bonded sweatshop labor, or other debt bondage.²⁸

The international and domestic U.S. definitions formulated and deployed in international and domestic instruments demonstrate legislators' struggles to identify and combat these egregious forms of exploitation.

C. State Efforts Against Human Trafficking

Based on public and well publicized evidence, states appear to be actively engaged in combating human trafficking. States have put in place legal prohibitions against both traditional (slavery) as well as new (human trafficking) forms of exploitation.²⁹ Examples of such instruments include domestic anti-slavery statutes, domestic anti-human trafficking statutes, the United Nations Trafficking Protocol, European Union instruments, and other regional instruments entered into by states in coordination with other states.³⁰

Perhaps no state has been as engaged in the fight against human trafficking as the United States. As described by Secretary of State John Kerry in the 2014 Trafficking in Persons Report: "Among [the challenges in which the United States is engaged in] one absolutely inextricably linked to the broader effort to spread the rule of law and face the crisis of failed and failing states, we find perhaps no greater assault on basic freedom than the evil of human trafficking."³¹

In the domestic regime, anti-human trafficking efforts, for example, are also pursued. Within the United States, at the subnational level, individual states have adopted their own anti-trafficking legislation. These may vary in scope and level of implementation and are enacted with the purpose of

²⁷ See Polaris Project, *2013 Analysis of State Human Trafficking Laws*, available at http://www.polarisproject.org/storage/2013_State_Ratings_Analysis_Full_Report.pdf.

²⁸ Cal. Penal Code § 236.1 (West 2012).

²⁹ United Nations Office on Drugs and Crime (UNODC), *Global Report on Trafficking in Persons 2009*, 22-35, available at http://www.unodc.org/documents/Global_Report_on_TIP.pdf.

³⁰ UNODC, *Global Report on Trafficking in Persons 2012*, 81-88, available at http://www.unodc.org/documents/data-and-analysis/glotip/Trafficking_in_Persons_2012_web.pdf.

³¹ Letter from U.S. Secretary of State John Kerry, *supra* note 9, at 2.

eliminating the forms of exploitation brought to the attention of legislators.³²

State efforts do not end with the passage of anti-trafficking legislation. National and subnational task forces respond to allegations of trafficking, and educate the public about its evils.³³ Criminal charges are pursued against alleged human traffickers, and victims are rescued from their domination.³⁴ Efforts to rehabilitate victims include, in some cases, permission to remain and perhaps nationalize in the country of rescue.³⁵

These efforts would appear to absolve the state of “blame” or “responsibility.” Yet, what is the lived reality of individuals and vulnerable groups subjected to the forms of exploitation characterized as human trafficking; how does that reality illuminate a contradictory role of the state; what is the source of their vulnerability; how is their vulnerability conceptualized, implemented, and policed? Responses to these questions, entertained in the following two sections, indicate that States are *not* blameless onlookers with respect to the traffic in human beings. They are *not* whole-heartedly committed crusaders against the profitable illicit trade in humans and their labor. Instead, there are other, contradictory role(s) of the state: facilitator, implementer, and enforcer of vulnerability to exploitation that give rise to human trafficking.³⁶

III. THE SCOPE OF STATE POWER

*The state maketh and un-maketh;
It giveth and it taketh away
It makes members and non-members,*

³² See Polaris Project, A Look Back: Building a Human Trafficking Legal Framework 2014, available at <http://www.polarisproject.org/storage/2014SRM-capstone-report.pdf> (Over a thousand human trafficking bills have been introduced in all fifty states and D.C. since 2015). For a more comprehensive account of state legislation adopted to address human trafficking, see 2013 Analysis of State Human Trafficking Laws, *supra* note 27.

³³ These include, on the regional level, the Council of the Baltic States' (CBSS_ Task Force against Trafficking in Human Beings with Focus on Adults (2014 TIP Report, at 428)); the South Asian Association for Regional Cooperation's (SAARC) Regional Task Force (2014 TIP Report, at 429). On the subnational level, such efforts include the U.S. State of Indiana's IPATH. See *Indiana Protection for Abused and Trafficked Humans Task Force*, <http://www.indianaagainstrafficking.org/> (website under construction).

³⁴ UNODC, Global Report on Trafficking in Persons 2014, 51-57, available at http://www.unodc.org/documents/human-trafficking/2014/GLOTIP_2014_full_report.pdf.

³⁵ In the U.S., for instance, each year up to 5,000 victims of human trafficking can receive permanent residence by means of a T visa. 2013 Analysis of State Human Trafficking Laws, *supra* note 27, at 5. A few states such as California, Florida, and Missouri have enacted statutes to accord victims the same benefits and services as refugees. *Id.*, at 43.

³⁶ See Bravo, *supra* note 13, at 291 (“Today, despite the mobilization by state actors of anti-trafficking efforts on international and domestic fronts, such actors play a role in modern trafficking.”).

Exploiter, exploited, and exploitable
In accordance with law.
And is, itself, exploiter, exploited, and exploitable.
In accordance with law.

The above poem attempts to capture the essence of the contradictions inherent in the role of state entities with respect to human trafficking and similar forms of exploitation. Through the state's powers to legislate and to police it can redefine reality. The state has the power to create and enforce paradigms of subordination and exploitation that serve to normalize the exploitation of individuals and groups who are made vulnerable by its legislative and policing power. For example, the state can redefine an individual human being into an "other" (a non-member, non-citizen, felon, or enemy combatant, for example), a human being illegal in the society (legally excluded, although often physically present), or not endowed with the full panoply of rights recognized in fully human members.³⁷ The consequences that come with exercise of this power include exploitation.

I acknowledge, and have described in Part II.3 above, the expected and public anti-human trafficking (and anti-exploitation) actions and reactions of states. These are demonstrated by and reflected in anti-trafficking conventions and national legislations as well as anti-human trafficking task forces, domestic laws, and public outreach campaigns. However, as explored more fully in Part IV below, there are other role(s) of the state. These roles include facilitator of exploitation and creator and enforcer of vulnerable status of individual human persons and groups of human persons. These roles stem from the powerful and influential roles of states, generally, in constructing and enforcing legal, economic, and political reality.

A. The State

The "state" referred to in this Essay is the nation or Westphalian state -- an entity exercising sovereignty over territory and people.³⁸ According to the 1933 Montevideo Convention,³⁹ which has attained the status of customary law,⁴⁰ the prerequisites of statehood are: a defined territory, settled population, a government in control, and the capacity to enter into foreign

³⁷ See, e.g., Karen E. Bravo, *On Making Persons: Legal Constructions of Personhood and Their Nexus with Human Trafficking*, 31 N. ILL. L. REV. 467, 481-94 (2011).

³⁸ See ROBERT H. JACKSON, *QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD* 38 (1990).

³⁹ See Montevideo Convention, *supra* note 4, at Art. I.

⁴⁰ The sources of international law include, in addition to treaties, customary norms. See 1945 Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993, at Art. 38 (listing the sources of international law to be considered by the court in its deliberations).

relations.⁴¹

B. The Scope of State Power

Entities recognized as states under international law exercise sovereignty over their territory and have the power to enter into treaties with other States.⁴² The lawmaking and treaty making powers of the state confer upon the entity the ability to define, re-define, and re-cast reality.⁴³ That is, to set the lenses through which reality will be interpreted, priorities will be set, and policies implemented.

C. The Exercise of State Power

The state is a legal construct⁴⁴, which is endowed with legal existence through the recognition of other states.⁴⁵ With legal existence and recognition come the lawmaking, judicial, and police powers of the state.⁴⁶

1. Legislative

Through its legislative branch, however composed pursuant to its domestic legal and other traditions, the state enacts legislation. The legislative power encompasses all facets of human and non-human existence, including family structure,⁴⁷ property ownership, transportation, air quality, food production, and health.⁴⁸ In the first instance, the state's legislative power is internally focused,⁴⁹ but, as with the example of the TVPA, it may

⁴¹ Montevideo Convention, *supra* note 4, at Art. I.

⁴² See, e.g., HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF WORLD POLITICS* 8 (2d ed. 1977) (“[S]tates assert, in relation to their territory and population, what may be called internal sovereignty, which means supremacy over all authorities within that territory or population.”).

⁴³ See *id.*

⁴⁴ See JACKSON, *supra* note 38, at 3 (“The state . . . is constituted and operates by means of law in significant part.”).

⁴⁵ Analogous to the recognition/creation of corporate actors by the internal laws of state actors.

⁴⁶ Lassa Oppenheim, *International Law: A Treatise*, vol. I, 248-51 (4th ed. 1928).

⁴⁷ See, for instance, a failed attempt to regulate what constituted family for housing purposes in a city ordinance by circumscribing it to the nuclear family. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

⁴⁸ See, for instance, enumerated federal legislative powers in U.S. Const. art. I, § 8. Powers not specifically delegated by the Constitution, police powers (traditionally understood to encompass health, safety, morals, general welfare), are reserved to the states under the Tenth Amendment. See Randy E. Barnett, *The Proper Scope of the Police Power*, 79 *Notre Dame L. Rev.* 429, 485 (2004).

⁴⁹ However, through the treaty making power, the state also participated in the making of international law, as well as the constitution and functioning of international organizations. Further, through its actions (state practice), it participates in the formation of norms of customary law.

include provisions designed to have extraterritorial impact.⁵⁰ Further, in dualist systems, the national legislature transposes international obligations into domestic law in order to give it domestic effect.⁵¹

The subject of domestic law-making power is limited only by legislators' creativity and imagination.⁵² The content and scope of the legislation are constrained or expanded by cultural norms, domestic constitutional parameters, and international obligations that have been transposed into domestic law.⁵³ The legislative power always includes the power to define, as definitions (or legal identification) of actors, actions, and goals in furtherance of the legislation are essential parts of the statutes.

1. Judicial

Like the legislature, the judiciary's power to interpret the law is constrained by the parameters of the domestic constitutional regime, culture, and legal tradition.⁵⁴ Nevertheless, the scope of that power remains broad. In addition to the power to resolve disputes, and to determine the applicability of laws to an individual's actions (criminal law violations and sanctions for example), the judicial branch interprets the scope and contours of individual legislation, as well as their interaction with each other.⁵⁵ The judiciary may be the ultimate authority on the legitimacy (constitutionality) of individual

⁵⁰ The TVPA includes provisions pursuant to which the United States ranks individual countries' anti-trafficking efforts pursuant to unilateral standards created by the United States. See discussion *infra* Part II.2 above.

⁵¹ André Nollkaemper, *The Duality of Direct Effect of International Law*, 25 Eur. J. Int'l L. 105, 109-11, 113 (2014); see also Lassa Oppenheim, *International Law: A Treatise*, *supra* note 46, 733-34. Oppenheim expressed the traditional notion that a treaty is binding on States, not their subjects: "International Law is a law between States only and exclusively, treaties can have effect upon, and can bind, States only and exclusively." *Id.*, at 733. Accordingly, in a dualist system, the treaty must be transposed or incorporated into national law to be given legal effect internally.

⁵² See, e.g., Elizabeth Kolbert, *Cuomo Signs Bill Declaring Apple Muffin State's Own*, N.Y. TIMES (August 11, 1987), <http://www.nytimes.com/1987/08/11/nyregion/cuomo-signs-bill-declaring-apple-muffin-state-s-own.html> (showing states may legislate a specific flower, pie, or muffin.).

⁵³ See, e.g., Heather Barr, *In Afghanistan, Women Betrayed*, N.Y. TIMES (December 10, 2013), <http://www.nytimes.com/2013/12/11/opinion/in-afghanistan-women-betrayed.html?module=Search&mabReward=relbias%3Ar%2C%7B%221%22%3A%22RI%3A10%22%7D>.

⁵⁴ See, e.g., Gretchen Helmke, *Courts Under Constraints: Judges, Generals, and Presidents in Argentina*, 1-14 (Cambridge University Press, 2005).

⁵⁵ Justice Harlan F. Stone observed, "The statute was looked upon as in the law but not of it, a formal rule to be obeyed, it is true, since it is the command of the sovereign, but to be obeyed grudgingly, by construing it narrowly and treating it as though it did not exist for any purpose other than that embraced within the strict construction of its words." Harlan F. Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4, 13-14 (1936); see also R. Perry Sentell, *Statutes in Derogation of Common Law: In the Georgia Supreme Court*, 53 Mercer L. Rev. 41, 41-46 (2001).

legislative initiatives. The judiciary may narrow, expand, or nullify the legislation adopted by the legislative branch.⁵⁶

1. Executive

Through the executive power, the state implements and enforces the legal frameworks (and individual laws) created by the legislators and interpreted and upheld by the judiciary.⁵⁷ The executive power includes the application of police power within the domestic regime and of military power (which is directed either or both territorially or extraterritorially, depending on the legal tradition and constitutional framework of individual states).⁵⁸ As such, the executive ensures the implementation of the frameworks, whether these paradigms provide for the subordination or the equality and recognition of individuals and groups.⁵⁹

The consequences of these attributes of state power include the formulation of criteria and structures that reflect the relationships of subordination, the application of legitimacy or illegitimacy to human activity, the prioritization among competing policy possibilities, and the setting of standards with respect to innumerable aspects of individual human lives. The effect of the exercise of state power is both domestic and international.

Ideally, pursuant to democratic principles, the source of each state's power and the legitimation of its exercise spring from and are constrained by the consent of the inhabitants of the state's territory. That exercise, then, is deemed to reflect the interests, values, and policies of the nationals of that state. Collective moral responsibility for the acts and omissions of the state entity may come with the legitimating force of consent.

IV. STATE FACILITATION

States ... may be said to be complicit in creating and enforcing the vulnerability of some populations. That accusation is not negated by the mobilization of state

⁵⁶ *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 917 (2010); *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434, 1462 (2014). In *Citizens United*, the U.S. Supreme Court rejected efforts to narrow corporate power by invalidating or limiting the scope of campaign finance laws and affirming the constitutional free speech rights of corporate entities. 130 S. Ct. 876, 917 (2010). In *McCutcheon*, the Court limited the scope of the Voting Rights Act, so as to limit federal power to protect the rights of the individual voter. 134 S. Ct. 1434, 1462 (2014). In other words, the Court acted to re-define corporate entities with more personhood and constitutional protections, while limiting the policing of the voting rights to individual humans from discriminated groups.

⁵⁷ Michael Ambrogio, *The Extra-legislative Veto*, 102 Geo. L. J. 351, 353 (2014).

⁵⁸ See, e.g., U.S. Const. Art. II, §§ 2, 3.

⁵⁹ See *id.*, at Art. II, § 3 (“He shall take care that the Laws be faithfully executed”).

*resources against human trafficking.*⁶⁰

Through the state's power to legislate and police, it re-defines reality; it is the creator and enforcer of paradigms of subordination and exploitation that normalize the exploitation of the groups it makes vulnerable.

Contemporary forms of exploitation, including human trafficking, are based on categories of exclusion both internally and externally directed, created and policed by the state and created in order to preserve accumulated power both within states and among states. Pursuant to the categories, human persons are not merely and simply humans. Instead, each human individual is legally categorized; the legal categorization determines whether the human person belongs or does not belong in a particular sphere, whether that sphere is geographically, politically, culturally or otherwise delineated. Such categorizations include immigrants who are undocumented who do not belong, women and children who are subordinated by the legal or societal imperative of inequality, or exploited foreign workers "welcomed" in host states.⁶¹ Legally created categories serve to facilitate or encourage exploitation and non-belonging and the stripping of rights through the imposition of law. Exclusions based on race, national status, gender, and age are policed through and by the legal system, through imposition of police power, or through judicial or administrative determinations.⁶²

If the state is not a blameless onlooker with respect to human trafficking, the sources of the state's roles in relation to human trafficking include: (i) foundational concepts underlying statehood; (ii) the state's organizational principles of belonging and non-belonging; and (iii) economic and political policies backed by the state's legislative and policing powers.

A. Foundational Concepts Underlying Statehood

Among the foundational concepts underpinning "statehood" are state sovereignty and control of territory.⁶³ The implementation of these conceptual foundations is implicated in the creation of vulnerable and subordinated status both within and outside of states.

⁶⁰ See Bravo, *supra* note 13, at 292.

⁶¹ See, e.g., Ariel Kaminer & Sean O'Driscoll, *Workers at N.Y.U.'s Abu Dhabi Site Faced Harsh Conditions*, N.Y. TIMES (May 18, 2014), <http://www.nytimes.com/2014/05/19/nyregion/workers-at-nyus-abu-dhabi-site-face-harsh-conditions.html>.

⁶² Decisions to deport, for example.

⁶³ See *supra* Part III.1 (discussing the Montevideo Convention and the attributes of statehood).

1. Sovereignty

The term “sovereignty” and its dimensions is contested,⁶⁴ and refers to both an internal (domestic) and external (international) component.⁶⁵ As traditionally conceptualized, “sovereignty” was understood to mean the absolute power of the “sovereign” or governmental authorities over persons and things within the border of the state.⁶⁶ That absolute power was effectuated through the legislative, judicial, and executive powers discussed in Part III.3 *supra*. Contemporary understanding of the concept of sovereignty is now more constrained by, for example, international obligations imposed with the consent of the sovereign. Nevertheless, the understanding that the state exercises power within its territory, to the exclusion of other states or of international organizations, unless consented to by the state, continues to be fundamental in domestic and international law.⁶⁷

The consequences include the power of individual states to create legally enforceable systems of exploitation and subordination within their borders.⁶⁸ Although, in some cases, those systems may not be overtly enshrined in the language of legislation (that is, the intent or effect may be hidden or become apparent only following enforcement), the effects of legislative, judicial, and executive practices create vulnerability and facilitate exploitation. For example, legislation in the Gulf States excludes non-nationals from equal treatment, while U.S. militarization of its southern border drives would-be migrants into the arms of human smugglers and traffickers.⁶⁹ Pursuant to this framework, rights end at the border: the non-national is *not* protected by a *global* concept of common humanity, but in contrast, is excluded even if left to be vulnerable to exploitation, including human trafficking, lurking outside of an individual state’s border. While

⁶⁴ See STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 3-4 (1999) (listing four different ways in which sovereignty has been understood and described).

⁶⁵ See JACKSON, *supra* note 29, at 28 (“[T]he responsibility of a sovereign [state] is both external to other sovereigns and internal to its citizens.”).

⁶⁶ See BULL, *supra* note 33.

⁶⁷ Duncan B. Hollis, *Why State Consent Still Matters – Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 Berkeley J. Int’l L. 137, 173-74 (2005); see also Lassa Oppenheim, *International Law: A Treatise*, *supra* note 46, 17-23, 135.

⁶⁸ Examples would include a minimum wage that is below a living wage, or low standards of workplace safety. See *Halfhearted Labor Reform in Bangladesh*, N.Y. TIMES (July 17, 2013), <http://www.nytimes.com/2013/07/18/opinion/halfhearted-labor-reform-in-bangladesh.html>. More egregious examples include legal dispossession of traditional landowners and sale or licensing of their land to foreign or domestic investors. See, e.g., Michael Kugelman, *The Global Farmland Rush*, N.Y. TIMES (Feb. 5, 2013), <http://www.nytimes.com/2013/02/06/opinion/the-global-farmland-rush.html>; Neil MacFarquar, *African Farmers Displaced as Investors Move In*, N.Y. TIMES (Dec. 21, 2010), <http://www.nytimes.com/2010/12/22/world/africa/22mali.html>.

⁶⁹ Karen E. Bravo, *Free Labor! Toward a Labor Liberalization Solution for Modern Trafficking in Humans*, 18 TRANSNAT’L L. & CONTEMP. PROBS. 545, 586 (2009).

these systems may be subject to international scrutiny and even condemnation, the sovereignty of the state with respect to its domestic regime may foreclose both external and internal attempts to address the exploitative conditions and effects.

1. Borders

Intrinsic to the concept and exercise of internal sovereignty is control over borders – the limits of the geographic territory over which the state exercises most unfettered sovereign jurisdiction. Both in order to protect national security, and to maintain this crucial pre-requisite of statehood (defined borders), states protect and police their borders. That policing entails state maintenance of exclusive border-based power and responsibility. The methodologies utilized – both to ascertain the location of the boundaries and to maintain its function – are devised by each state individually, subject to treaty-based agreements to the contrary. States usually have discretion to determine how and when to deploy resources to preserve and protect their borders. These resources may be deployed in such a way as to use military and/or other coercive force to ensure the exclusion and non-entry of non-nationals of the state.⁷⁰

B. Organizational Principles of Membership and Non-Membership

The vulnerabilities that give rise to human trafficking are facilitated by categories of exclusion, both external and internal, created and policed by states, and deployed in the service of preservation of accumulated power. For example, paradigms of membership and non-membership enshrined by the state's role in the international legal system empower a citizenship-based in-group to the detriment of non-citizens.

1. Nationality & Citizenship

The non-citizen's subordinate status is “legalized” through the constitution, through laws, through customs, and through societal interactions of systems of exploitation and subordination. These systems help to create, reinforce, and police subordination of the non-national. The

⁷⁰ Examples include the U.S. Border Patrol deployed on the United States side of its border with Mexico. The analogous power of subnational actors within component states is exemplified by Texas Governor Rick Perry's deployment of state National Guard troops to the Texas/U.S. border with Mexico in order to prevent the entry of desperate non-national migrant children fleeing violence in the Central American states of citizenship. See Manny Fernandez & Michael Shear, *Texas Governor Bolsters Border, and His Profile*, N.Y. TIMES (July 21, 2014), <http://www.nytimes.com/2014/07/22/us/perry-to-deploy-national-guard-troops-to-mexico-border.html>.

paradigm of exclusion constructed through laws is exploited by private parties who are empowered to exploit inequitable relationships because of their own membership in the in-group and/or their mastery of its legal structure.

The paradigms of subordination and exploitation are enhanced where the state strengthens laws with respect to who may enter and who may not, as well as where the state is making it more difficult for a human being to move from a situation of exploitation to a new situation of opportunity. The state also then enforces those paradigms through, for example, anti-immigrant/anti-mobility laws (often to the benefit of the exploiter). Through these laws, their implementation and enforcement, they provide the pre-conditions and enforcement mechanisms for human traffickers.⁷¹

2. *Gender and Age-Based Subordination*

Other paradigms of exclusion and/or subordination within individual states also empower would-be exploiters. Most pertinent to the empowerment of human traffickers is the subordination of women and children in individual domestic regimes. What is the status of a child who is arrested because she is prostituted? She may be arrested and charged, while the pimp and/or john is not. This is an example of perpetuation through domestic laws of a system of inequality and subordination. That is, the law reflects the power relationships among these different groups that undermine overt support of rights protection. Only recently have some U.S. jurisdictions changed this specific pattern through adoption of corrective legislative provisions so that underage individuals who become part of the commercial sex industry are not prosecuted for prostitution.

3. *Economic and Political Policies: Trade Liberalization, Globalization, and the Curious Case of Labor Immobility*

The state also facilitates exploitation through adoption of conflicting economic and political instruments and policies. A paradigmatic example is the tension between the state's simultaneously conflicted flirtation *with* and resistance *to* globalization, the contradiction between pro-globalization trade liberalization and anti-immigration and anti-human mobility laws.⁷² This contradiction in laws and policies creates incentives and conditions that demand transnational movement of humans while simultaneously seeks to

⁷¹ A human trafficker is telling the truth when he or she informs the victim that if s/he goes to the police s/he will be deported, s/he will be arrested, and s/he will be sent home in disgrace. The state therefore lends validity to and reinforces the coercive control mechanisms employed by the human trafficker.

⁷² See Bravo, *supra* note 49, at 594 (exploring the contradiction and its effects and calling for a multilateral agreement to liberalize the movement of labor).

prevent and punish such movement. This tension between international trade law and domestic immigration law fosters illegal movement across borders and results in the vulnerability of would-be mobile labor providers to human rights abuses such as trafficking and other forms of exploitation.

Looking around the globe, this current era of globalization is based on trade liberalization. However, while the movement of products, money, and services, are liberalized, States demand the immobility of humans who themselves are a unit of economic production. The message is: “You unit of economic production, you thinking person, you may not move. Your movement is forbidden” (even if you may need to move because of the economic effects of trade liberalization). That contradiction is enshrined in domestic immigration laws which seek to reinforce and barricade the border. States barricade the border with respect to people, but with respect to little else, and expect human beings to sit quietly and legally starve, rather than to seek out opportunities that require a legally unsanctioned passage of borders.

The consequences are detrimental to vulnerable and “undesirable” humans who seek to move – either to avoid negative economic consequences of trade liberalization in countries of origin or to seek new opportunities in destination countries. How does a would-be mobile human evade or overcome exclusion? Lacking sufficient resources, she or he may contract or trade his or herself (either body or labor) in order to gain border passage. Attempts to evade the consequences of the trade will be policed by the state. That is, the mobile outsider may be arrested, punished, and deported according to the national security and anti-immigrant laws of the destination state. The contradiction in policy and implementation makes true the claims of the smuggler-trafficker, who predicts arrest and deportation of his victims/merchandise/cargo to those who dare to seek official help or rescue from the exploitation she or he imposes.

States also “profit” from their creation of regulatory regimes that exploit their nationals. In the “race to the bottom,” states that decline to transpose minimum international labor standards (including wages) in their domestic regimes attract higher levels of foreign investment.⁷³ States that allow (or fail to police) predatory and exploitative debt bondage maintain their “attractive” investment status at the bottom of global labor standards ranking systems. These legal and physical obstacles benefit capital: individual states compete to lower their labor, environmental, and other human rights costs so as to attract foreign investment. This race to the bottom (lowest standards = lowest costs) succeeds, so that liberalized global capital flows to the states that offer the best bargains.

⁷³ See Julfikar Ali Manik and Jim Yardley, *Building Collapse in Bangladesh Leaves Scores Dead*, N.Y. TIMES (Apr. 24, 2014), <http://www.nytimes.com/2013/04/25/world/asia/bangladesh-building-collapse.html>? (regarding the Rana Plaza collapse, the result of, among other things, poor regulations).

In addition, maintenance of the comparative advantage of cheaper labor and substandard regulatory regimes compared to other states attracts foreign investment and income to the powerful elites within individual states that control state levers of power.

States outsource to the human smuggler-trafficker their own labor recruitment function. That is, while the state enacts and enforces anti-immigrant and anti-mobility laws, human smuggler-traffickers “informally” supply the demands of domestic labor markets for low-cost and compliant labor. Meanwhile, the enforcement functions of the state “benefit” the economy by maintaining a low (*i.e.*, exploitative) wage level.⁷⁴ In sum, the existence and labor supply activities of traffickers and smugglers (that is, the exploited labor that they supply to individual domestic economies), allow states to have an official anti-immigrant/anti-human mobility policy, at the same time that their economies’ demand for low cost labor is fulfilled.

However, our diagnosis cannot end here. While states play a facilitator and enforcer role in human trafficking, states themselves are exploited and exploitable in furtherance of the exploitation of their nationals. The exploitability of states and states’ exploitation by non-state actors contributes to the creation and perpetuation of human trafficking.

V. STATE EXPLOITATION

At the same time, the “state,” itself a creation of laws, is exploited and exploitable by other more powerful states and by private actors. These actors exploit the structure of international law and statehood so as to create and profit from the global market in people and their labor and to escape from local and international criminal laws.

A. *Quasi-Sovereignty and Other Sources of State Exploitation*

The structure of international law and the domestic legal structure of the state make the entity susceptible to exploitation.

1. *Quasi-Sovereignty and the Juridical Equality of States*

The modern international legal system and international state relations are based upon the concept of juridical equality of states. That is, the state, itself a creature of laws (both domestic and international), is legally equal to all other states. This necessary legal fiction, while facilitating state-to-state

⁷⁴ Some of that recruitment function is performed by state-to-state labor supply agreements, such as the formal and informal arrangements between the Philippines and various Gulf States for the provision of domestic servants and health care workers. See Bravo *supra* note 49, at 582-83.

relationships, the entry into treaties and other forms of international obligations, and the “equal” representation of the nationals of all states on the international plane, reflects a decision to juridically ignore sharp differences in economic and political power of states.⁷⁵ As a consequence, when a powerful state or group of states exercises economic or political power to coerce another less powerful state into action or inaction, the coerced treaty is not subject to legal challenge.⁷⁶

That inequality is embedded in the very structure of the United Nations, the universal membership international organization formed with the purpose of ensuring world peace. The structure of the Security Council, enshrining greater legal power than other U.N. members in five Permanent Members (the victors of World War II), facilitates exploitation with respect to the Permanent Members’ abuse of their own citizens as well as with respect to the Permanent Members’ interactions with other states. Thus, the Permanent Members’ abuse or exploitation of their own populations can be condemned only with the individual members’ consent (or refraining to exercise its veto). The same analysis applies with respect to members’ violations of international law, which can be condemned by the Security Council only with these members’ consent.⁷⁷

2. *The Myth of Sovereignty*

I have written elsewhere of the myth of sovereignty and some of its consequences for less powerful states. In brief, the myth of sovereignty is “both a yearned-for psychological and essential truth and a factual lie. It is a ‘truth’ which [states] crave, as an essential characteristic of the free people and states they now are . . . It is a ‘lie’ because economic, political and geo-strategic realities place limitations on the [newer states’] ability to act externally”⁷⁸ Here, I will explore the impact of that myth in making

⁷⁵ See JACKSON, *supra* note 29, at 21-26, 190-91.

⁷⁶ See Richard Kearney & Robert Dalton, *The Treaty on Treaties*, 64 AM. J. INTL. L. 495, 533-35 (1970) (describing how the inclusion of disparity in power among states’ parties has been rejected as the basis for invalidating the treaty under the coercion provision of the Vienna Convention on the Law of Treaties). Non-treaty examples include the power of the Gulf States to extract exploitative labor supply arrangements with the Philippines and other labor exporting states. The impact on the Philippine migrant workers includes their subjugation to exploitation and abuse, with little legal (or even economic) consequence. See, e.g., Jason DeParle, *Domestic Workers Convention May Be Landmark*, N.Y. TIMES (Oct. 8, 2011), http://www.nytimes.com/2011/10/09/world/domestic-workers-convention-may-be-landmark.html?_r=0 (describing abuse of migrant domestic workers in the Gulf States).

⁷⁷ Examples include China’s human rights abuses of its Uighur minority population; the United States’ segregation of its Black population; and Russia’s 2014 invasion and annexation of Ukraine’s Crimean region.

⁷⁸ Karen E. Bravo, *CARICOM, the Myth of Sovereignty, and Aspirational Economic Integration*, 31 N.C.J. Int’l L. & Com. Reg. 145, 162 (2005).

citizens of individual states vulnerable to exploitation.

The concept of sovereignty conveys the control of the state entity over, among other things, its territory and its people. The extent of that control is disputed, and the gap between legal and real control can be vast. Thus, a state may ostensibly control territory, but be unable to legally, politically, economically provide for or control that territory.⁷⁹ As a consequence, however, the citizens of that territory suffer poverty and vulnerability to exploitation, including human trafficking.⁸⁰ Nor is that vulnerability only applicable in the economic sense. In the 2014 Child Migrant Crisis in the United States, the inability of Central American governments to exercise law enforcement control within their borders, together with the inability of Mexico and the United States to control their own borders, created economic opportunities for human smugglers and traffickers to exploit these states' vulnerabilities as their citizens fled poverty and violence.

It also, under the rubric of state sovereign responsibility, includes international responsibility for or obligation towards its citizens. That obligation and power, although "legally" constrained by humanitarian and human rights obligations can, in reality, be unchecked.⁸¹ The state and its essential attribute of sovereignty is used as a shield to escape the consequences of such abuses.⁸²

3. The State as a Tool of Private Power

The state, its legal fictions and structure, are exploited and exploitable by private actors. The identities and characteristics of these actors may vary, but they are able to, among other things, "buy" state actors. This may be accomplished through, for example, outright monetary purchase, or through the wielding of other types of power (for example, a promise to or a threat not to invest) so that the state adopts legislation, implementation, and policies that benefit the private actors to the detriment of the state's inhabitants and/or citizens. Examples include corporate actors that provide incentives for legislators, law enforcement, or the military to act to the corporation's advantage. The mechanisms may include maintenance or introduction of regulatory regimes that enshrine low environmental or labor standards. Such

⁷⁹ For example, Pakistan's legal control over its tribal territories has not (yet) translated to effective state control.

⁸⁰ It is, after all, the poor citizens of poor countries who, in their journeys toward economic or other sanctuary who are most vulnerable to exploitation by smugglers or traffickers. *See, generally*, 2014 TIP Report, *supra* note 33.

⁸¹ *See, e.g.*, JACKSON, *supra* note 29, at 19, 21. Contemporary examples include the crisis in Syria and the human rights abuses committed there, where internal elites take advantage of the legal shield of sovereignty to abuse its people.

⁸² *See id.*, at 27 (describing formal, but not real equality among states in the modern international regime: "Negative sovereignty can also be defined as freedom from outside interference: a formal-legal condition.").

standards, however, while theoretically subject to challenge are legally enacted and enshrined within domestic laws.

Other examples of the state's use as a tool by private actors include incentives not to enforce law and/or standards as they are written. There, the division of functions within state branches and the policy positions that may change with transitions in administration give rise to the gaps or contradictory enactments that lead to negative consequences for those affected.

4. The Challenge of Powerful Non-State Actors

Finally, the state is exploitable and exploited as the non-state actor's power increases in relationship to the power held by states. The power of corporate actors, militant groups, and transnational criminal networks to disrupt and/or subvert the activities of the state have been enhanced as the loci of international political and economic power are more widely dispersed in a multi-polar world. The activities of these entities, to the extent that they are able to directly challenge and/or disrupt the state, makes the state unstable, and deprives the citizens of the "protection" of the state.

VI. CONCLUSION

Human trafficking exists today, but this contemporary form of exploitation is not aberrational. Human trafficking and similar forms of exploitation arise from structural foundations. They are present, and so we must recognize that relationship, and must deploy innovative techniques to address them.

Interrogating the state's roles in human trafficking leads to the conclusion that much remains to be learned and understood if a more complete understanding of human trafficking is to emerge. This Essay points to the need for a structural understanding where the roles and interactions of multiple actors, policies, and conceptual frameworks are examined so as to lead to a better understanding of the structures of vulnerability and exploitation that both facilitate and sustain human trafficking.

This requires more than producing a Trafficking in Persons (TIP) Report. Producing a TIP Report informing other states of how badly they are handling their human trafficking problems does little. Its principal result is to encourage targeted states and their often abashed governments to pass laws which they then do not enforce because of lack of interest or resources.

States, the preeminent actors in international law, must identify, understand, and reckon with their own roles in the flourishing and maintenance of human trafficking.