

Two Cheers for the Trafficking Protocol

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Abstract

The Trafficking Protocol makes an easy target for attack. Its origins lie in an attempt to control a particularly exploitative form of migration that was challenging the ability of States to control their own borders. Its parent instrument is a framework agreement to address transnational organised crime. While paying fleeting attention to the rights of victims, the Protocol, with its emphasis on criminalisation and border protection is nowhere near being a human rights treaty. On top of all that it does not even have a credible enforcement mechanism, allowing states parties wide latitude in interpreting and applying their obligations. Strangely, these seemingly insurmountable flaws have not stopped the Protocol's emergence as perhaps the single most important development in the fight against human trafficking. Without the Protocol, arguments around definitions would have continued to block the evolution of principles and rules. Without the Protocol it is likely that the human rights system would have continued its shameful tradition of sidelining issues such as forced labour, forced sex, forced marriage and the ritual exploitation of migrant workers through debt. Most critically, the Protocol provided the impetus and template for a series of legal and political developments that, over time, have served to ameliorate some of its greatest weaknesses, including the lack of human rights protections and of a credible oversight mechanism.

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Introduction

I have spent much of the past fifteen years writing of and around the Trafficking Protocol:¹ about the drafting process and the substance of its provisions;² about its relationship with other aspects of the international legal framework;³ and about the problems of interpretation and application encountered by States Parties.⁴ While criticising its many shortcomings I have also regularly defended the Protocol

¹ In full: UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Transnational Organized Crime, 15 November 2000.

² A T Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis', *Human Rights Quarterly*, vol. 23, 2001, p. 975.

³ A T Gallagher, *The International Law of Human Trafficking*, Cambridge University Press, New York, 2010; UN Office of the High Commissioner for Human Rights, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary', New York and Geneva, 2010.

⁴ UN Office on Drugs and Crime (UNODC), 'Issue Paper: Abuse of a Position of Vulnerability and other "Means" within the Definition of Trafficking in Persons', UNODC, Vienna, 2012.

against attack, including from human rights scholars and advocates unsettled by its criminal justice orientation and offended by the fact that the major contemporary legal instrument to address human exploitation was developed outside the human rights system.⁵

In this article I will seek to weave some of these strands together, incorporating additional insights drawn from experiences working with legislators and practitioners who have frontline responsibility for implementing the Trafficking Protocol's core obligations. As the title suggests, my findings are mixed. On the positive side there is much to applaud. This instrument has done more than any other single legal development of recent times to place the issue of human exploitation firmly on the international political agenda. It has served to crystallise a phenomenon that for too long was left conveniently undefined and under-regulated. It has provided the international community and States with an invaluable—albeit incomplete and imperfect—road map for change.

The single achievement that made all this possible was the incorporation into the Trafficking Protocol of a definition of 'trafficking in persons'. Until that point the term 'trafficking' had not been defined in international law, despite its inclusion in a number of treaties. The reasons are complex, relating principally to differences of opinion concerning the ultimate end result of trafficking; its constitutive acts, and their relative significance; and the relationship between trafficking and related phenomena such as prostitution and irregular migration. The absence of a definition also reflected the marginal place of trafficking within the international human rights system and the associated reluctance of States to tie themselves to specific and detailed rules. As long as the concept of trafficking remained unclear, it was virtually impossible to formulate substantive obligations and to hold States to account for violations. The adoption of an international legal definition of trafficking in persons was a genuine breakthrough because it provided the necessary prerequisite for the elaboration of a meaningful normative framework. Obligations that we now take for granted, for example to criminalise trafficking and to protect victims, would be meaningless without the anchor of an agreed definition. The definition was also critical in forging a common vision between States. Today, the old idea of trafficking as being concerned solely with the cross-border sexual exploitation of women and children has lost all authority. While States continue to prioritise certain forms of trafficking over others, their laws almost uniformly recognise the essence of the Protocol's conception of trafficking: that it can take place within as well as between countries; that it can be used against women, men and children; and that the purposes of trafficking extend to many of the ways in which individuals are severely exploited for private gain.

And, on an issue that had long been marginalised by States and the international community, the Trafficking Protocol proved to be a game-changer, triggering unprecedented levels of action. In the several years that followed its adoption, a major regional treaty on the subject was developed⁶ along with important soft law, including, in 2002, the United Nations (UN) 'Recommended Principles and Guidelines on Human Rights and Human Trafficking'.⁷ Intergovernmental bodies outside the UN system, along with civil society groups, became involved in researching the issue and initiating or supporting anti-trafficking efforts.

⁵ See for example AT Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway', *Virginia Journal of International Law*, vol. 49, 2009, p. 789.

⁶ Council of Europe, 'Convention on Action Against Trafficking in Human Beings', 16 May 2005.

⁷ UN High Commissioner for Human Rights, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking', UN Doc. E/2002/68/Add.1, 20 May 2002 (hereinafter UN Trafficking Principles and Guidelines).

Ratification of the Protocol was extremely rapid, allowing it to enter into force a mere two years after adoption.⁸ States very quickly began implementing its core obligations by introducing new laws and policies aimed at criminalising trafficking as well as, in most cases, providing at least minimal protection for victims. Having been almost completely absent from the Trafficking Protocol's negotiations, and prevaricating in the years that followed, the International Labour Organization (ILO) has come to the fore in recent years: adding its voice to the global movement against exploitation by adopting instruments on domestic servitude⁹ and forced labour¹⁰ and issuing increasingly authoritative studies of the scope and scale of trafficking-related exploitation.¹¹ There can be no doubt that the nature and pace of developments since 2000 would have been very different without the impetus and foundation provided by the Protocol.

While lauding its considerable impact and achievements, it would be unwise to overlook the challenges and obstacles that the Trafficking Protocol has either generated or contributed to. My concerns are not the usual ones—or at least I draw different conclusions from the weaknesses that others typically ascribe to the Protocol. Its criminal justice focus and feeble human rights protections could have been a disaster but proved not to be fatal, largely because of developments that followed in the wake of the Protocol's adoption in December 2000. The negative impact of the Protocol's weak implementation machinery has been similarly softened by the emergence of external compliance mechanisms. Both these matters are considered further below. I then turn to other aspects of the Protocol's legacy. Of particular concern is the heavy burden of human rights violations that have come to be associated with the Protocol and the kind of response it has encouraged from States. To what extent does the reality of what Global Alliance Against Traffic in Women (GAATW) has termed 'collateral damage'¹² cast a shadow on the Protocol's achievements and how can the risks be better managed? Another critical challenge relates to the elusiveness of trafficking itself. Despite widespread acceptance of the Protocol's rather complicated definition, its parameters have proved fluid and continue to be contested. This is causing significant problems at the national level where criminal justice agencies in particular are struggling to draw an appropriate line between the crime of 'trafficking' and other forms of exploitation.

The Criminal Justice Focus and Fragile Human Rights Protections

It is not useful or realistic to lament the Trafficking Protocol's criminal justice focus. Such criticisms are naïve because they fail to appreciate that the alternative—a human rights treaty on trafficking—was never a serious possibility in the first place because it would not have received the necessary level of political support. However, States *were* prepared to develop an instrument of international cooperation that identified trafficking as a problem of transnational crime requiring a coordinated response and that imposed specific obligations of criminalisation and cross-border collaboration. After considerable prodding, States

⁸ As of July 2014, the Trafficking Protocol had been ratified or acceded to by 159 States.

⁹ International Labour Organization, Convention Concerning Decent Work for Domestic Workers (ILO No.189), 16 June 2011.

¹⁰ International Labour Conference, Text of the Protocol to the Forced Labour Convention, 1930, Provisional Record 9A, 103rd Session, Geneva, 2014.

¹¹ International Labour Office, 'Caught at Sea—Forced Labour and Trafficking in Fisheries, 2013 and Profits and Poverty: The Economics of Forced Labour', ILO, 2013.

¹² GAATW, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights Around the World*, GAATW, 2007.

were also willing to include a few human rights protections as well as a savings clause that guaranteed the Protocol and its parent instrument could not be used to modify existing human rights protections.¹³

While accepting a qualified victory, human rights advocates were nevertheless right to be nervous about the Protocol's sparse and feeble human rights protections.¹⁴ The failure to clearly specify certain rights, such as the right to immediate protection and support and the right of access to an effective remedy, implied that such rights did not in fact exist. A similar inference could be made of the Protocol's failure to articulate certain critical obligations such as the obligation to proactively identify victims.

The response to this rather dangerous situation was swift and effective. Less than two years after the Protocol's adoption, the UN High Commissioner for Human Rights issued the highly influential 'Recommended Principles and Guidelines on Human Rights and Human Trafficking'. While crafting what has come to be known as a 'rights-based approach' to the issue, the UN Trafficking Principles and Guidelines did not seek to present an alternative to the Protocol. Rather, they carefully grafted human rights onto the skeleton that it provided. For example, the Protocol's nod to the special situation of children¹⁵ is fleshed out with a clear explanation of the rights to which trafficked children are entitled under international law, as well as an affirmation that the 'best interests of the child' must be the primary consideration in any decision regarding children who have been trafficked.¹⁶ The Protocol's rather vague reference to remedies (national law to provide the *possibility* of compensation¹⁷) is clarified in accordance with established rules of international law: States are obliged to provide victims of trafficking with access to effective remedies and this requires attention to a range of legal and procedural issues including the right to stay and provision of information and protection.¹⁸ Even the criminal justice obligations of the Trafficking Protocol, its least ambiguous provisions, were expanded and clarified with reference to the standard of 'due diligence' and the establishment of a now well-recognised connection between victim support and an effective criminal justice response.¹⁹ The UN Trafficking Principles and Guidelines contained the first-ever acknowledgement of the risk of 'collateral damage' and the need for responses to trafficking to be monitored closely for their negative impact on existing rights and freedoms.²⁰ They also articulated, for the first time, the now widely endorsed principle of non-criminalisation of victims in relation to offences committed as a result of being trafficked.²¹

Few commentators have appreciated the impact of this instrument on what was to follow. By affirming and extending the Protocol, rather than seeking to displace it, the UN Trafficking Principles and Guidelines provided a way forward that has supported the evolution of a cohesive 'international law of human trafficking'

¹³ Trafficking Protocol, Article 14.

¹⁴ For example, States Parties are required to provide assistance for and protection of trafficked persons '[i]n appropriate cases and to the extent possible under its domestic law' (Article 6(1), 6(2)); to *consider* implementing a range of measures to provide for the physical and psychological recovery of victims of trafficking (Article 6(3)); to *endeavour* to provide for the physical safety of trafficking victims within their territory (Article 6(5)); and ensure that domestic law provides victims with the *possibility* of obtaining compensation (Article 6(6)).

¹⁵ Trafficking Protocol, Article 6(4).

¹⁶ UN Trafficking Principles and Guidelines, Principle 10 and Guideline 8.

¹⁷ Trafficking Protocol, Article 6(6).

¹⁸ UN Trafficking Principles and Guidelines, Principle 17 and Guideline 9.

¹⁹ *Ibid.*, Principles 9, 12–16 and Guidelines 5, 6.

²⁰ *Ibid.*, Principle 3, Guidelines 1(7), 3(5).

²¹ *Ibid.*, Principle 7.

which weaves together human rights and transnational criminal law.²² That can be seen most clearly in European law around trafficking. Both the 2005 Council of Europe Convention and the 2011 European Union Directive reiterate the core provisions of the Protocol in relation to criminalisation, cooperation, prevention and victim support, while articulating relevant human rights in far greater detail, frequently incorporating concepts and language first set out in the UN Trafficking Principles and Guidelines.²³ The international human rights system, regional institutions and courts have continued this unified approach, contributing to clarification of the precise nature and scope of the rights of victims and the corresponding obligations of States, while also affirming obligations of criminalisation, prosecution and prevention.²⁴

As a result there is now widespread acceptance that victims of trafficking are indeed the holders of a special set of rights conferred upon them by their status as trafficked persons and that those rights go well beyond the ones recognised in the Protocol. These include: the right to be identified quickly and accurately; the right to immediate protection and support; the right to legal information and the opportunity to decide whether and how to cooperate in the prosecution of their exploiters; the right to not be detained; the right to not be prosecuted for offences that relate directly to the fact of having been trafficked; the right to be returned home safely or to benefit from another solution if safe return is not possible; and the right to an effective remedy that reflects the harm committed against them. It is also now widely accepted that certain categories of victims, most particularly children, benefit from additional, status-related rights in recognition of their special vulnerabilities and special needs. In short, no State could (or indeed does) convincingly argue that its human rights obligations in this area are limited to those set out in the Trafficking Protocol.

The Challenge of Weak Implementation Machinery

Strong and credible international compliance machinery is rightly considered to be an essential aspect of international legal regulation, and trafficking is no exception. Unfortunately, despite its position as the central instrument of legal obligation in this area, the Trafficking Protocol loses out on this front, operating under the very loose oversight of a working group of States Parties attached to the broader Conference of Parties to the UN Convention against Transnational Organized Crime and the Protocols Thereto (UNTOC) that meets annually.²⁵ The Working Group does not equate, in any respect, to a human rights treaty body or equivalent compliance body. It does not examine reports from States Parties on implementation of the Protocol. It does not issue recommendations to individual States Parties, engage in a constructive dialogue, or otherwise interact with States

²² While also acknowledging other areas of law, including refugee law and international criminal law.

²³ Council of Europe, 'Convention on Action Against Trafficking in Human Beings', 16 May 2005; Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (2011 EU Trafficking Directive).

²⁴ See, for example, Human Rights Council Resolution 20/1, 5 July 2012, especially at paragraph 4(a) '[States to] ensur[e] that, in order to most effectively protect victims and bring their abusers to justice, national laws criminalize all forms of trafficking in persons in accordance with the provisions of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ...' and paragraph 5 (encouraging States that have not yet done so to ratify the Protocol and 'to take immediate steps to incorporate provisions of the Protocol into domestic legal systems').

²⁵ 'Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its fourth session, held in Vienna from 8 to 17 October 2008', UN Doc. CTOC/COP/2008/19, 1 December 2008, Decision 4/4 (at 11).

Parties in any meaningful way. A further useful distinction is provided by the current (unreported) controversy over the question of non-governmental organisation (NGO) participation in its sessions—something that is taken for granted within the human rights system. Some States are strongly supportive of opening its sessions up to outsiders. However others are resisting fiercely. There is also considerable opposition to proposals that the supervisory machinery attached to UNTOC be strengthened.²⁶ Among States Parties to the Trafficking Protocol in particular, there appears to be little appetite for another monitoring mechanism in what has become a crowded and contested field.

Within these limitations the Working Group has made some progress, particularly in expanding understanding of the Trafficking Protocol's core provisions and affirming that States Parties' human rights obligations extend well beyond the minimal provisions of the Protocol. For example, it has noted that, with respect to victims, States Parties should '[e]nsure victims are provided with immediate support and protection, irrespective of their involvement in the criminal justice process.'²⁷ This recommendation, which goes beyond the strict requirements of the Protocol, makes an important contribution to bringing that instrument in line with emerging international consensus on the need to ensure the provision of immediate protection and support to victims is not made conditional on their cooperation with criminal justice agencies.²⁸ Another relates to the contentious issue of non-punishment and non-prosecution for status-related offences. While the Protocol is silent on this point, the Working Group has followed the UN Trafficking Principles and Guidelines and European law in recommending that States Parties consider 'not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts.'²⁹ It has affirmed the need for a rights-based approach in relation to several provisions of the Protocol including the requirement that States Parties address trafficking-related demand.³⁰ Another substantive and potentially far-reaching achievement of the Working Group relates to its support for a series of studies examining what it termed 'problematic' concepts in the Protocol's definition of trafficking. This work has done much to shed light on the 'practice' of criminal justice responses to trafficking at the national level and has also provided much needed conceptual clarity to States and the international community.³¹

Fortunately, external developments have worked to soften the negative impact of the Protocol's weak compliance machinery. Within the European system for example, the forty-two contracting States to the Council of Europe Convention are subject to a rigorous oversight mechanism that includes country assessment visits.³² Contracting States are of course assessed against that instrument and not

²⁶ See, for example, 'Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its fifth session, held in Vienna from 18 to 22 October 2010', UN Doc. CTOC/COP/2010/17, 2010, paragraphs 97–108.

²⁷ Conference of the Parties to the UNTOC, Working Group on Trafficking in Persons, 'Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009', UN Doc. CTOC/COP/WG.4/2009/2, 2009, paragraph 13(c).

²⁸ See, for example 2011 EU Trafficking Directive, Article 11(3).

²⁹ *Ibid.*, paragraph 12(b). See also Working Group on Trafficking in Persons, 'Non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking', UN Doc. CTOC/COP/WG.4/2010/4, 2009.

³⁰ Conference of the Parties to the UNTOC, 'Report on the meeting of the Working Group on Trafficking in Persons held in Vienna from 6 to 8 November 2013', UN Doc. CTOC/COP/WG.4/2013/5, 2013, at paragraph 17.

³¹ See further the discussion at Part 4, below.

³² Generally on the structure of this monitoring mechanism see A T Gallagher, *The International Law of Human Trafficking*, above note 3, pp. 473–477. For detailed information including individual country reports see the official anti-trafficking website of the Council of Europe, retrieved 7 January 2015, <http://www.coe.int/t/dghl/monitoring/trafficking>

the Trafficking Protocol. However the correlation between the two is high and the added protections in the former makes its assessment machinery an even more valuable tool from the perspective of human rights. As noted previously, the international human rights system's attention to trafficking has improved dramatically over the past decade, helped by a growing awareness of a synthesised 'international law of human trafficking'.³³ The Human Rights Council,³⁴ treaty bodies,³⁵ the Special Rapporteur on trafficking in persons, especially women and children,³⁶ and other mechanisms³⁷ regularly draw attention to obligations under the Protocol as well as those that have built on its foundations. The recent adoption of new ILO instruments on domestic servitude and forced labour, both of which reference the Protocol, can be expected to further reinforce implementation of the Protocol by bringing the ILO supervisory bodies into this expanded network of implementation machinery.

The unilateral compliance mechanism established by the United States (US) government can be justifiably criticised on many grounds.³⁸ However it too has played a role in reinforcing the core provisions of the Trafficking Protocol; for example in relation to whether States have criminalised trafficking, whether they are prosecuting and appropriately punishing offenders, and whether they are cooperating with each other to that end. The reports have also evolved over time to place increased emphasis on those underdeveloped aspects of the Protocol that have subsequently been clarified and extended as explained previously. For example, country assessments now routinely consider how the State under review treats victims of trafficking in both law and practice—focusing on issues as diverse as detention of victims in shelters³⁹ to protection of trafficked persons who are cooperating in the prosecution of their exploiters.⁴⁰ The reports also address, albeit somewhat unevenly, deeper structural issues—such as public sector corruption—that directly impact on how trafficking happens and how it is responded to.⁴¹

Finally, it is important to recognise the role of an increasingly vibrant civil society in exposing human trafficking and placing pressure on States and others to respond. Exploitation in the global fishing industry has now been taken up by the US government and international organisations,⁴² but only after researchers and advocates did much of the hard work of documenting the horrific abuses

³³ Most clearly set out in the Commentary to the UN Trafficking Principles and Guidelines (see above note 3).

³⁴ For example, above note 24.

³⁵ For example, UN Committee against Torture: Concluding Observations: Estonia, UN Doc. CAT/C/EST/CO/5, 2013, paragraph 13; UN Committee on the Rights of the Child, Concluding Observations: Afghanistan, UN Doc. CRC/C/AFG/CO/1, 2011, paragraph 73; UN Committee on the Elimination of Discrimination against Women, Concluding Observations: Saudi Arabia, UN Doc. CEDAW/C/SAU/CO/2, 2008, paragraphs 23–24. See also UN High Commissioner for Refugees, 'Guidelines on International Protection: The application of Article 1(A)(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked', UN Doc. HCR/GIP/06/077, 2006.

³⁶ For a detailed reflection on the impact of the Trafficking Protocol on the work of the mandate see the Special Rapporteur's '[s]tocktaking exercise on the work of the mandate on its tenth anniversary' contained in 'Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy Ngozi Ezeilo', UN Doc. A/HRC/26/37/Add.2, 2014 (hereinafter Special Rapporteur on Trafficking: 2014 Stocktaking Exercise).

³⁷ For example, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak', UN Doc. A/HRC/7/3, 2008, paragraphs 56–58.

³⁸ A T Gallagher, 'The trafficking watch list may be flawed, but it's the best measure we have', *The Guardian*, 27 June 2014, retrieved 8 July 2014, <http://www.theguardian.com/global-development/poverty-matters/2014/jun/27/human-trafficking-watchlist-report>

³⁹ See, for example, the Malaysia country report in the US Department of State, *Trafficking in Persons Report 2014*, p. 260, retrieved 7 January 2015, <http://www.state.gov/j/tip/rls/tiprpt/>

⁴⁰ See, for example, the Ireland, Kazakhstan and Paraguay country reports: *ibid.*, pp. 214, 226, 310.

⁴¹ See, for example, the Azerbaijan and Thailand country reports: *ibid.*, pp. 85–87, 372–376.

⁴² See, for example, the New Zealand and Taiwan country reports: *ibid.*, pp. 291–293, 368; and International Labour Conference, 'Caught at Sea'.

involved.⁴³ NGOs such as Verité and Humanity United are conducting in-depth and tightly focused research that would be difficult for public entities to replicate.⁴⁴ One new and abundantly funded NGO has jumped into the fray with its own compliance mechanism, which at this stage principally collates derived data to rank countries from best to worst in a ‘Global Slavery Index’.⁴⁵

The Challenge of ‘Collateral Damage’

At the time of the Trafficking Protocol’s adoption there was little understanding of how *responses* to trafficking could seriously compromise human rights. Advocates involved in the negotiation expressed their concerns, particularly in relation to the criminal justice environment within which the Protocol was situated, but had little idea of how things would play out in practice because national responses to trafficking at that point were minimal. By 2002, there was a much better understanding of the nature of this particular challenge and the UN Trafficking Principles and Guidelines asserted strongly that ‘[a]nti-trafficking measures shall not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked, and of migrants, internally displaced persons, refugees and asylum seekers.’⁴⁶

Unfortunately, the possibility of ‘collateral damage’ has become a well-documented reality as measures taken in the name of addressing trafficking and related exploitation have been shown to have a highly adverse impact on individual rights and freedoms. Examples include: detention of trafficked persons in immigration or shelter facilities (by NGOs as well as by government service providers); prosecution of trafficked persons for status-related offences including illegal entry, illegal stay and illegal work; denial of exit or entry visas or permits to particular groups on the basis of them being ‘at risk’ of trafficking; raids, rescues, and ‘crack downs’ that do not include full consideration of and protection for the rights of involved individuals; forced repatriation of victims in danger of reprisals or re-trafficking; support and assistance that is made conditional on a trafficked person cooperating with criminal justice agencies; denial of a right to a remedy; and violations of the rights of persons suspected or convicted of involvement in trafficking and related offences, including unfair trials and inappropriate sentencing.

The Protocol’s contribution to the problem of ‘collateral damage’ must be acknowledged. By failing to place the victim at the centre of the anti-trafficking response and failing to specify core rights and obligations it introduced an element of ambiguity that facilitated responses that were not respectful of individual rights and freedoms. The US Department of State *Trafficking in Persons Reports* must also be held to account on this score. Despite clear indications that US pressure was contributing to inappropriate and even harmful responses, it was only in 2009

⁴³ In relation to trafficking in New Zealand’s fishing fleet see, for example, C Stringer, G Simmons & D Coulston, ‘Not in New Zealand’s waters, surely? Labour and human rights abuses aboard foreign fishing vessels’, New Zealand Asia Institute Working Paper Series, 2011.

⁴⁴ Verité, ‘Risk Analysis of Indicators of Forced Labor and Trafficking in Illegal Gold Mining in Peru’, 2013; Verité, ‘Forced Labor in the Production of Electronic Goods in Malaysia’, 2014.

⁴⁵ Walk Free, ‘Global Slavery Index 2014’, retrieved 31 January 2015, <http://www.globalslaveryindex.org>. For a critique of the methodology and approach used by the authors of the Global Slavery Index see AT Gallagher, ‘The Global Slavery Index is Based on Flawed Data—Why does No one Say So?’, *The Guardian*, 28 November 2014, retrieved 31 January 2015, <http://www.theguardian.com/global-development/poverty-matters/2014/nov/28/global-slavery-index-walk-free-human-trafficking-anne-gallagher>

⁴⁶ UN Trafficking Principles and Guidelines, Principle 3.

that the negative impacts of anti-trafficking interventions were formally acknowledged. While attention to this issue has continued in subsequent reports, coverage is uneven and rarely figures in the country assessments—principally because harm caused by anti-trafficking responses is not part of the formal evaluative criteria.⁴⁷ Fortunately, many other players in the vastly expanded anti-trafficking community are paying increased attention to human rights violations associated with anti-trafficking responses. Within the UN’s human rights system for example, the Special Rapporteur on trafficking in persons, especially women and children, has made this a constant theme of her work⁴⁸ and several of the treaty bodies have picked up issues of concern to their respective mandates.⁴⁹ But the harms that are occurring in the criminal justice sector in particular, largely prompted by a desire on the part of underperforming States to assert the credibility of their response to the US government, continue to go largely unnoticed and unchallenged.

Where Does Trafficking Begin and End? The Challenge of an Ambiguous Definition

The development of an international legal definition of trafficking was a great victory but it came at a heavy price. States involved in negotiating the definition did not agree on many points and consensus was only achieved through the adoption of an unwieldy formulation that included a number of vague and undefined terms. Over the years, these compromises have been used to support expansive interpretations of trafficking that seem to go well beyond the intention of the drafters and perhaps even the broader goals of the Protocol. Extreme claims, such as ‘all pornography is trafficking’ or ‘all prostitution is trafficking’ are easily discredited through a careful application of the definition. However, other arguments are more difficult to refute. For example, some States have adopted a broad understanding of the term ‘abuse of a position of vulnerability’ that enables courts to characterise the prostitution or economic exploitation of poor migrants as ‘trafficking’.⁵⁰ Rigid adherence to the principle of the irrelevance of consent has been shown to have a similar effect.⁵¹ The failure of the Protocol to precisely delimit ‘exploitation’ (the ‘purpose’ of trafficking) has enabled States to extend the definition to include practices as diverse as illegal, unethical adoptions; commercial surrogacy; begging; prostitution/pornography; involvement in criminal activities; use in armed conflict or religious rituals; and kidnapping for purposes of extortion or political terrorism.⁵² Ambiguities in the definition have also lent support to the careless and increasingly frequent equation of trafficking with slavery and ‘modern slavery’ (the latter term unknown to international law).

Of course there are positive aspects to an expanded concept of trafficking. Many of the practices with which trafficking is associated, from forced marriage to debt

⁴⁷ See further discussion in AT Gallagher, ‘Improving the Effectiveness of the International Law of Human Trafficking: A vision for the future of the US Trafficking in Persons Reports’, *Human Rights Review*, vol. 12, 2011, p. 381.

⁴⁸ See Special Rapporteur on Trafficking: 2014 Stocktaking Exercise, above note 36.

⁴⁹ For example, ‘Committee against Torture, Concluding Observations: Japan’, UN Doc. CAT/C/JPN/CO/2, 2013, paragraph 21; Human Rights Committee, Concluding Observations: Turkey, UN Doc. CCPR/C/TUR/CO/1, 2012, paragraph 15; ‘Committee on the Elimination of Discrimination against Women, Concluding Observations: Australia’, UN Doc. CEDAW/C/AUL/CO/7, 2010, paragraphs. 30–31.

⁵⁰ See UNODC, ‘Issue Paper: Abuse of a Position of Vulnerability’, above note 4.

⁵¹ See UNODC, ‘Issue Paper: The Concept of “Consent” within the Definition of Trafficking in Persons’, vol. 108, no. 4, 2014.

⁵² Conference of the Parties to the UNTOC, Working Group on Trafficking in Persons, ‘Forms of exploitation not specifically mentioned in the Protocol’, UN Doc. CTOC/COP/WG.4/2013/4, 2013.

bondage to forced labour, have long been subject to legal prohibition at both national and international levels. However, international scrutiny has been almost non-existent and States have rarely been called to task for even the worst violations. The abject failure of the international community—including the international human rights system and the ILO—to secure substantial progress on any of these fronts over the past half century should not be forgotten. Recent legal and political developments around trafficking have changed this situation fundamentally, giving previously moribund prohibitions a new lease of life. New laws, institutions and compliance machinery strengthen the capacity of both national and international law to address such practices effectively. Civil society groups are no longer marginal actors. New organisations and new alliances are both creating and sustaining what appears to be an unstoppable momentum for change. It is not unreasonable to conclude that a broadening of the parameters of trafficking to embrace the many ways in which individuals are exploited for private gain—even those that appear to be at the less severe end of the spectrum—will have a similarly positive effect: focusing law, public attention and resources where they are so badly needed.

But the dangers associated with what one scholar has aptly termed ‘the expansionist creep’⁵³ must be openly acknowledged and actively managed. Making all exploitation ‘trafficking’ (and indeed, making all trafficking ‘slavery’—a category international law reserves for the most egregious exploitative practices) complicates the task of those who are at the front line of investigating and prosecuting trafficking, presenting particular challenges in countries that lack specialist capacity and robust criminal justice systems. In all countries the expansionist creep risks diluting attention and effort, and potentially deflecting attention from the worst forms of exploitation that are most difficult for States to address. The common equation of prostitution with trafficking provides a case in point: permitting States to claim easy credit for virtually effortless arrests and prosecutions that do little or nothing to address those serious forms of sexual exploitation that the Protocol was intended to challenge. Prosecuting employers for lesser labour exploitations in the name of addressing trafficking is just as questionable. In most countries a raft of penal provisions are available to address such conduct. Why is the blunt instrument of trafficking being favoured over these apparently more appropriate alternatives? It is equally important to question crude international assessment systems that recognise and reward prosecutions for ‘trafficking’ while ignoring valuable prosecutions for related offences, thereby incentivising States to make everything ‘trafficking’.

Conclusion

Fifteen years ago only a small handful of States specifically prohibited the process by which individuals were moved into and maintained in situations of exploitation at home or abroad. Many of the practices we now associate with trafficking were outlawed in most countries but these laws, like their international equivalents, were almost never invoked. International scrutiny of State actions with respect to such exploitation was extremely limited and ineffective.

With the benefit of hindsight we can identify the Trafficking Protocol as the trigger and foundation for dramatic and irreversible change. While an imperfect

⁵³ J Chuang, ‘Exploitation Creep and the Unmaking of Human Trafficking Law’, *American Journal of International Law*, vol. 108, 2014.

instrument in many respects, the Protocol provided both framework and impetus for the subsequent evolution of a comprehensive ‘international law of human trafficking’ that articulates, with much greater clarity than was ever previously possible, the obligations of States in relation both to ending impunity for traffickers and providing support, protection and justice for those who have been exploited. This is a singular achievement and one that should not be forgotten as we work to address the many challenges ahead.

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