
From the Selected Works of Anne T Gallagher

2018

Trafficking in Transnational Criminal Law

Anne T Gallagher, AO



Available at: https://works.bepress.com/anne_gallagher/70/

Trafficking in transnational criminal law¹

Anne T. Gallagher

Introduction

The raft of international agreements on slavery that were concluded in the latter part of the nineteenth century and the early twentieth century (see Chapter 1) did not purport, and were never considered, to cover the practices that are now associated with trafficking – including sexual exploitation, forced labour, debt bondage, and child labour. However, the international movement to abolish the transatlantic slave trade provided the framework within which another battle, this time against the cross-border movement of women and girls into prostitution and/or sexual exploitation, would be fought. Between 1904 and 1933, four different treaties dealing with the traffic in women and girls were concluded.² In 1949, these were consolidated into one instrument: the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.³ The 1949 Convention is limited to trafficking for prostitution, and ostensibly applies to both women and men. It aims to prohibit and control the (undefined) practices of trafficking, procurement, and exploitation, whether internal or cross-border, and irrespective of the victim's age or consent. Despite trenchant criticisms, the Convention survived as the only specialist treaty on trafficking for more than half a century. The only other international instruments concluded during that period to refer to trafficking were two of the core human rights treaties: the Convention on the Rights of the Child (CRC – which requires States Parties to take all appropriate measures to: “prevent the abduction of, the sale of or traffic in children for any purpose or in any form”)⁴ and the Convention on the Elimination of all forms of Discrimination against Women (CEDAW – which requires States Parties to take all appropriate measures to: “suppress all forms of traffic in women and exploitation of the prostitution of women”).⁵

This narrow characterisation of trafficking and its monopolisation by the UN's human rights system continued unchallenged until the last decade of the twentieth century. The catalyst for change was the link established between trafficking and the newly identified international threats of ‘migrant smuggling’ and transnational organised crime. This quickly led to the development of a new legal instrument outside the human rights framework; an instrument that expanded the concept of ‘trafficking’ in fundamental ways; and an instrument that has since

been acknowledged by States to be “the principal legally binding global instrument to combat trafficking in persons”.⁶

This chapter considers the “transnational criminal law”⁷ regime that was created around trafficking in persons. That regime comprises two treaties, both adopted by the UN General Assembly in 2000, and since widely ratified:⁸ a ‘parent’ instrument – the United Nations Convention Against Transnational Organized Crime (UNTOC);⁹ and a specialised treaty – the Protocol against trafficking in persons, especially women and children. Parts 1 and 2 of the chapter provide an overview of the Convention and the Protocol, respectively; and Part 3 considers the impact of the Protocol on the international legal and policy framework around trafficking, and discusses several of the challenges that have emerged in the years since its adoption.

Part 1: The Organized Crime Convention

Proposals for a treaty on transnational organised crime were first raised in November 1994, but it was several years before the UN General Assembly established an intergovernmental group of experts to prepare a preliminary draft.¹⁰ Following receipt of the report of the group of experts,¹¹ the General Assembly decided to establish an open-ended, intergovernmental Ad Hoc Committee to elaborate “a comprehensive international convention against transnational crime”, and to discuss the possible elaboration “of international instruments addressing trafficking in women and children . . . and illegal trafficking in, and transporting of migrants, including by sea”.¹² Three years and eleven sessions later, the Ad Hoc Committee concluded its work in October 2000, finalising not just the UNTOC, but also three additional treaties (Protocols), dealing, respectively, with Smuggling of Migrants;¹³ Trafficking in Persons, Especially Women and Children; and Trafficking in Firearms.¹⁴

The significance of these developments should not be underestimated. The Vienna Process, as it came to be known, represented the first serious attempt by the international community to invoke international law as a weapon against transnational organised crime. Perhaps even more notable was the selection of trafficking and migrant smuggling as the subjects of additional agreements. Both issues were, at the time of drafting, high on the international political agenda. While human rights concerns may have provided some impetus (or cover) for collective action, it was clearly the sovereignty and security issues surrounding trafficking and migrant smuggling, as well as the perceived link with organised criminal groups operating across national borders, that provided the true driving force behind such efforts.¹⁵

Key features and obligations

The Organized Crime Convention is essentially an instrument of international co-operation: its stated purpose being to promote interstate co-operation in order to combat transnational organised crime more effectively (Article 1). In this respect, its goal is to enlarge the number of States taking effective measures against transnational crime, and to forge and strengthen cross-border links.¹⁶ More specifically, the Convention seeks to eliminate “safe havens”, where organised criminal activities or the concealment of evidence or profits can take place, by promoting the adoption of basic minimum measures.

Article 3 sets out three prerequisites for application of the Convention to a particular situation. First, the relevant offence must have some kind of transnational aspect. A transnational offence is defined in Article 2 of the Convention as one which is committed in more than one State; or committed in one State but substantially planned, directed, or controlled in another State; or committed in one State but involving an organised criminal group operating in more than one

State; or committed in one State but having substantial effects on another. Second, it must involve an organised criminal group, defined as:

a structured group of three or more persons existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences . . . in order to obtain, directly or indirectly, a financial or other material benefit.

Third, it must constitute a “serious crime”, meaning conduct constituting a criminal offence, “punishable by a maximum deprivation of liberty of at least four years or a more serious penalty”. These broad definitions enable States to use this instrument to address a wide range of contemporary criminal activity, including trafficking and related exploitation. This is especially important in view of the fact that States may become a party to the Convention without having to ratify any or all of the Protocols.

The core obligation of the Convention is that of criminalisation. States Parties are required to criminalise a range of offences, whether committed by individuals or corporate entities, including: participation in an organised criminal group,¹⁷ public sector corruption,¹⁸ laundering of the proceeds of crime,¹⁹ and obstruction of justice.²⁰ These offences are also to be made subject to sanctions that take into account the gravity of the offence.²¹ Critically, the obligation of criminalisation stands independently of the transnational nature, or of the involvement of an organised criminal group.²² In other words, these are not to be considered elements of the offence for criminalisation purposes.²³

A lack of communication and co-operation between national law enforcement authorities has been identified as one of the principal obstacles to effective action against transnational organised crime, including trafficking. The Convention sets out a range of measures to be adopted by parties to enhance effective law enforcement in this area through, *inter alia*, improving information flows and enhancing co-ordination between relevant bodies.²⁴ The practical application of these provisions is likely to be enhanced by the inclusion of a detailed legal framework on mutual legal assistance in investigations, prosecutions, and judicial proceedings in relation to applicable offences.²⁵ The relevant provisions constitute, in effect, a mini-treaty that can be used by States as the legal basis of a request for mutual legal assistance for a range of purposes, including taking of evidence, effecting service of judicial documents, execution of searches, identification of the proceeds of crime, and production of information and documentation. States Parties are also encouraged to establish joint investigative bodies,²⁶ to come to formal agreement on the use of special investigative techniques,²⁷ to consider the transfer of criminal proceedings²⁸ and sentenced persons,²⁹ and to facilitate extradition procedures for applicable offences.³⁰ National law enforcement structures are also to be strengthened through education and training of relevant officials in order to prevent, detect, and control transnational organised crime.³¹ Parties are also to endeavour to take certain legal and financial steps to prevent transnational organised crime.³² The reality that developing countries will require financial and technical assistance to fully implement the Convention’s provisions is acknowledged in a detailed article that sets out a range of international co-operation measures, including the establishment of a dedicated UN funding mechanism.³³

The Convention contains several important provisions on victims of transnational organised crime. States Parties are to take appropriate measures within their means to provide assistance and protection to victims – particularly in cases of threat of retaliation or intimidation.³⁴ Appropriate procedures to provide access to compensation and restitution are to be established,³⁵ and, subject to their domestic laws, Parties are to enable the views and concerns of victims to be presented and considered during criminal proceedings against offenders.³⁶ Appropriate measures are also

to be taken to protect witnesses (including victims who are witnesses) from potential retaliation or intimidation.³⁷ The only other provision touching upon victims relates to the requirement that Parties participate, as appropriate, in international projects to prevent transnational organised crime: “for example, by alleviating the circumstances that render socially marginalized groups vulnerable to the action of transnational organized crime”.³⁸

Relationship between the Convention and the Trafficking Protocol

The general rules governing the relationship between the Convention and its Protocols are set out in the Convention itself, with additional guidance provided by particular provisions of the Protocols. When read together, it is possible to identify four basic principles. First, as the Protocols were not intended to become stand-alone treaties, States must ratify the Convention before ratifying any of its Protocols;³⁹ and a Party to the Convention is not bound by a Protocol unless it also becomes party to that Protocol.⁴⁰ Second, the Convention and its Protocols must be interpreted together, taking into account their stated purposes.⁴¹ Third, the provisions of the Convention apply, *mutatis mutandis*, to the Protocols.⁴² This means that in applying the Convention to the Protocols, modifications of interpretation or application should be made only when (and to the extent that) they are necessary.⁴³ Fourth, offences established by the Protocols are to be regarded as offences established by the Convention. As a result, the Convention’s general provisions on matters such as victim protection, law enforcement co-operation, mutual legal assistance, and extradition, for example, are available and applicable to States in their implementation of the more specific and detailed provisions of the Protocols.⁴⁴

Part 2: The Trafficking Protocol

The origins of the Trafficking Protocol can be traced back to Argentina’s interest in the issue of trafficking in minors, and to its dissatisfaction with the slow progress on negotiating an additional protocol to the CRC to address child prostitution and child pornography. Argentina was also concerned that a purely human rights perspective to this issue would be insufficient, and accordingly lobbied strongly for trafficking to be dealt with as part of the broader international fight against transnational organised crime. Its proposal for a new convention against trafficking in minors was discussed at the 1997 session of the UN Commission on Crime Prevention and Criminal Justice.⁴⁵ The timing was fortuitous. The powerful European institutions had recently decided to take the issue of trafficking seriously and were in the midst of developing detailed policies and responses. The United States had also become active, with its President preparing to issue a detailed memorandum on measures to be taken by its own government to combat violence against women and trafficking in women and girls. A general awareness was also developing, amongst an influential group of States, of the need for a holistic approach where the crime control aspects of trafficking were addressed along with traditional human rights concerns.⁴⁶

Argentina’s original proposals related only to the trafficking of women and children. At the first session of the Ad Hoc Committee established to draft the Organized Crime Convention, the United States produced an initial draft that referred to “trafficking in persons”.⁴⁷ Those supporting the latter approach argued that limiting the proposed instrument to women and children was unnecessarily restrictive – particularly if the end purposes of trafficking were expanded beyond sexual exploitation. According to the *travaux préparatoires*, almost all countries expressed their preference for the Protocol to address all persons, rather than only women and children; although it was agreed that particular attention should be given to the protection of women and children.⁴⁸

Following a recommendation of the Ad Hoc Committee, the UN General Assembly modified the Committee's mandate to enable the scope of the proposed Protocol to be expanded to cover trafficking in persons, especially women and children.⁴⁹

Drafting process

Before considering the substantive provisions of the Protocol, it is relevant to briefly touch on several aspects of the drafting process that were both unusual and influential. First, the level of civil society participation was unprecedented. Unlike its human rights counterpart, the crime prevention system of the United Nations is not of great interest to the international NGO community. The annual sessions of the UN Crime Commission are almost devoid of NGO input; and the deliberations of the Commission are very rarely exposed to civil society scrutiny. In the context of the Protocol negotiations, however, government delegations and the Secretariat were forced to deal with a swelling group of vocal and increasingly well-organised NGOs. While many of the organisations represented in Vienna had little international lobbying experience, the great number of submissions and interventions made by them suggest that this was not an obstacle to action. Collectively, the NGOs focused almost exclusively on the Trafficking Protocol, and only passing attention was paid to the Migrant Smuggling Protocol that was being drafted simultaneously. Of particular interest to NGOs was the issue of prostitution, and the way in which it was to be dealt with through the definition of trafficking.⁵⁰ Another very unusual aspect of the negotiations was the sustained involvement of an informal group of Intergovernmental Organisations (IGOs) and instrumentalities: the UN High Commissioner for Human Rights, the United Nations Children's Fund, the International Organization for Migration, the UN High Commissioner for Refugees, and, on one occasion, the UN Special Rapporteur on Violence Against Women. The aim of this coalition was to ensure that both Protocols represented a net advance for human rights.

A close analysis of the negotiations supports the conclusion that the sustained and active IGO/NGO involvement had a strong educative effect on the drafting group and contributed to the rapid pace of negotiations. In addition, sustained pressure from these quarters clearly influenced the decision of States to include/adopt: (1) a coercion-based definition of trafficking which recognises a number of end purposes in addition to sexual exploitation; (2) specific references to international law, including human rights law, refugee law, and humanitarian law; (3) an anti-discrimination clause; and (4) the protection of rights as a principal objective.

Definition, purpose, and scope

Under Article 3, trafficking comprises three separate elements: an action (recruitment, transportation, transfer, harbouring, or receipt of persons); a means (threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or abuse of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person); and a purpose (exploitation).⁵¹ Exploitation is defined to include, "at a minimum", exploitation of prostitution, other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs.⁵²

The core aspects of the Protocol's definition can be summarised as follows:

- Internal and cross-border movement: trafficking can take place within a country (internal trafficking), as well as involve the movement of a victim from one country to another.

Sometimes migrants who move safely from one country to another are subsequently trafficked within their country of destination.

- Purposes and profile of victims: trafficking can take place for a range of purposes; it is not limited to sexual exploitation. Women and girls, men and boys, can all be victims of trafficking.
- Process and result: the concept of trafficking in international law does not just refer to the *process* by which an individual is moved into a situation of exploitation – it extends to include the maintenance of that person in a situation of exploitation. Accordingly, it is not just the recruiter, broker, or transporter who can be identified as a trafficker, but also the individual or entity involved in initiating or sustaining the exploitation.
- The role of ‘consent’: the definition includes a provision to the effect that the consent of a victim to the intended exploitation is irrelevant where any of the means set out above have been used.⁵³ In other words: “Once it is established that deception, force or other prohibited means were used, consent is irrelevant and cannot be used as a defence”.⁵⁴

The stated purpose of the Trafficking Protocol is three-fold: first, “to prevent and combat trafficking in persons, paying particular attention to the protection of women and children”; second, to protect and assist victims of trafficking; and, third, to promote and facilitate co-operation among States Parties to this end.⁵⁵ The structure of the Protocol generally follows this three-part approach. In terms of its scope of application, it is relevant to note that some commentators have misunderstood the Protocol as requiring Parties to take action against trafficking only in respect to situations with a transnational element or involving an organised criminal group.⁵⁶ This interpretation does hold up, indeed, with respect to the interstate *co-operation* obligations of the Trafficking Protocol; but it fails to capture accurately the nature of States’ obligations under the instrument as a whole. The provisions of both the Convention and the Protocol operate to require that the offence of trafficking be established in the domestic law of every State Party, independently of its transnational nature, or of the involvement of an organised criminal group.⁵⁷

Criminalisation obligations

The obligation to criminalise trafficking when committed intentionally is contained in Article 5 and is a central and mandatory provision of that instrument (see Table 3.1).⁵⁸ Article 5 also obliges Parties to criminalise attempting to commit such an offence,⁵⁹ participating as an accomplice in such an offence,⁶⁰ organising or directing others to commit such an offence,⁶¹ and obstruction of justice when carried out with respect to offences established by the Protocol.⁶² Importantly, the obligation to criminalise extends only to “trafficking” as defined in that instrument, and not to “related conduct”.⁶³ In other words, it is the *combination* of constituent elements making up the crime of trafficking that are to be criminalised, not the elements themselves.⁶⁴ The obligation extends to both natural and legal persons; although the liability for legal persons does not need to be “criminal”.⁶⁵

Interestingly, the requirement that Parties impose appropriate penalties for trafficking, accepted without question throughout the negotiation process, was quietly omitted from the final text of the Protocol. Absent a specific provision on the subject, the relevant provisions of the Organized Crime Convention apply. In accordance with their obligations under that instrument, States Parties are required to ensure that sanctions adopted within domestic law take into account, and be proportionate to, the gravity of the offences.⁶⁶ The *mutatis mutandis* requirement also means that

Table 3.1 Key provisions/obligations of States Parties to the Trafficking Protocol

The purposes of the Trafficking Protocol are:	
“(a) To prevent and combat trafficking in persons, paying particular attention to women and children;	Article 2
(b) To protect and assist the victims of such trafficking, with full respect for their human rights; and	
(c) To promote cooperation among States Parties in order to meet those objectives.”	
The key obligations of States Parties to the Trafficking Protocol are:	
To criminalise ‘trafficking in persons’ as defined in the Protocol; and to impose penalties that take into account the grave nature of that offence.	Article 5
To protect, to the extent possible under domestic law, the privacy and identity of victims of trafficking in persons; and to consider the provision of a range of social services to enable their recovery from trauma caused by their experiences.	Article 6
To ensure that the legal system contains measures that offer victims the possibility of obtaining compensation.	Article 6
To consider allowing victims to remain in their territory, whether permanently or temporarily, taking into account humanitarian and compassionate factors.	Article 7
To accept the return of any victims of trafficking who are their nationals, or who had permanent residence in their territory at the time of entry to the receiving State. When returning a victim, due regard must be taken of their safety, with the return preferably being voluntary.	Article 8
To establish policies, programmes, and other measures to prevent and combat trafficking and to protect victims of trafficking from re-victimisation.	Article 9
To provide and/or strengthen training for officials in the recognition and prevention of trafficking, including human rights awareness training.	Article 10
To strengthen such border controls as might be necessary to prevent trafficking, without prejudice to other international obligations allowing the free movement of people.	Article 11

there are further mandatory provisions of the Convention which create obligations on Parties to take certain measures with respect to offences established under the Protocol. These include obligations to:

- Criminalise the laundering of the proceeds of trafficking;⁶⁷
- Take appropriate measures to ensure that conditions of release for defendants do not jeopardise the ability to secure their presence at subsequent criminal proceedings;⁶⁸
- Establish a long statute of limitations period for trafficking offences;⁶⁹
- Provide, to the greatest extent possible, for the tracing, freezing, and confiscating of the proceeds of trafficking, in both domestic cases and in aid of other Parties;⁷⁰
- Provide other Parties with mutual legal assistance in investigation, prosecution, and judicial proceedings for trafficking offences;⁷¹
- Criminalise obstruction of justice;⁷²
- Protect victims and witnesses from potential retaliation or intimidation;⁷³
- Take appropriate measures to encourage those involved in trafficking to co-operate with or assist national authorities;⁷⁴ and
- Provide for channels of communication and police-to-police co-operation in relation to the investigation of trafficking offences.⁷⁵

Obligations related to victim protection and support

Part Two of the Trafficking Protocol, dealing with protection of the trafficked person, contains several important protective provisions. However, there is very little in the way of 'hard' or detailed obligations. Parties are required to:

- Protect the privacy and identity of trafficking victims in appropriate cases and to the extent possible under domestic law – including by making legal proceedings confidential to the extent that this is also possible under domestic law;⁷⁶
- Ensure that, in appropriate cases, victims receive information on relevant court and administrative proceedings, as well as assistance to enable their views to be presented and considered during criminal proceedings;⁷⁷
- Endeavour to provide for the physical safety of trafficking victims within their territory;⁷⁸ and
- Ensure that domestic law provides victims with the possibility of obtaining compensation.⁷⁹

In terms of victim assistance and support, the relevant provision requires Parties to: “consider adopting legislative or other appropriate measures to provide for the physical, psychological and social recovery of victims of trafficking”.⁸⁰ Special reference is made to the provision of housing, counselling, and information in a language the victim understands; medical, psychological, and material assistance; and employment, education, and training opportunities.⁸¹ In effect, this means that a State will not be breaching either the letter or the spirit of the Convention if it decides to provide no material, medical, or other assistance whatsoever to any victim of trafficking within its territory. States also retain an implied right under the Convention to link the provision of such assistance to victims' willingness to co-operate with criminal justice agencies.

While the Protocol does not set out different and special measures for trafficked children, it does contain several provisions aimed at ensuring a relatively higher degree of protection. The most significant of these relates to the definition of trafficking in children – specifically: the omission of a means element. In applying the Protocol's protection and assistance provisions, Parties are required to take into account the special needs of child victims, including appropriate housing, education, and care.⁸²

Obligations related to legal status and repatriation

The status of the victim in the receiving State was a critical issue in the negotiations. While NGOs and the Inter-Agency Group argued strongly for the inclusion of some kind of right of trafficked persons to remain in the receiving country, at least temporarily, this option was never seriously under consideration. According to the *travaux préparatoires*:

Most delegations were concerned that the Protocol might inadvertently become a means of illicit migration if States Parties were obliged to adopt legislation permitting victims to remain in the countries to which they were trafficked.⁸³

States recognised, however, that in some cases there would be a legitimate need for victims to remain in their country of destination – for example: “for humanitarian purposes and to protect them from being victimized again by traffickers”.⁸⁴ The final text provides that the State Party is to consider adopting legislative or other measures permitting victims of trafficking to remain in their territories, “temporarily or permanently, in appropriate cases”⁸⁵ – with appropriate consideration being given to “humanitarian and compassionate factors”.⁸⁶

The related issue of repatriation, dealt with in a separate article,⁸⁷ was also a very sensitive issue in the negotiations. The Ad Hoc Committee rejected a proposal that identification as a trafficked person be sufficient to protect them from immediate expulsion against their will, and that the protection and assistance provisions of the Protocol become immediately applicable.⁸⁸ The final article on repatriation provides that States Parties of origin are to facilitate and accept, without undue or unreasonable delay, the return of their trafficked nationals and those who have a right of permanent residence within their territories.⁸⁹ In returning a trafficking victim to another State Party, destination States are required to ensure that such return takes place with due regard both for the safety of the trafficked person and for the status of any legal proceedings relating to the fact of that person being a victim of trafficking.⁹⁰ While such return “shall preferably be voluntary”,⁹¹ these words are to be understood as not placing any obligation on the returning State.⁹² In order to facilitate repatriation, Parties are required to communicate with each other in verifying nationalities, as well as travel and identity documents.⁹³ The relevant article also contains several savings clauses, preserving rights that may be afforded victims under domestic law, as well as under any other bilateral or multilateral agreements that govern the issue of return of victims of trafficking.⁹⁴

Obligations of prevention and co-operation

Article 31 of the UNCTOC contains a comprehensive list of measures to be taken by States to prevent transnational organised crimes, including trafficking in persons.⁹⁵ Prevention provisions in the Trafficking Protocol itself operate to supplement those measures. These provisions are, for the most part, couched in qualified terms – making it difficult to isolate specific obligations. Parties are required to establish policies, programmes, and other measures aimed at preventing trafficking and protecting trafficked persons from re-victimisation.⁹⁶ They are further required to endeavour to undertake additional measures, including information campaigns and social and economic initiatives, to prevent trafficking.⁹⁷ These measures should include co-operation with NGOs, relevant organisations, and other elements of civil society.⁹⁸ Parties are also required to adopt legislative or other measures “to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking”.⁹⁹

Despite its attention being drawn to the issue,¹⁰⁰ the Ad Hoc Committee did not directly address the problem of national anti-trafficking measures being used for discriminatory purposes or with discriminatory results. This gap is, however, at least partly ameliorated by a provision that the application and interpretation of measures pursuant to the Protocol “shall be consistent with internationally recognized principles of non-discrimination”.¹⁰¹ Discussions on the need to avoid conflict with existing principles of international law also produced a broad savings clause to the effect that nothing in the Protocol is to affect the rights, obligations, and responsibilities of States under international law, including international humanitarian law, international human rights law, and, in particular, refugee law and the principle of *non-refoulement*.¹⁰²

More specific obligations of prevention are set out in relation to law enforcement and border controls – supplementing the extensive ones set out in the UNCTOC itself.¹⁰³ In the area of law enforcement, Parties accept a general obligation to co-operate through information exchange aimed at identifying perpetrators or victims of trafficking, as well as methods and means employed by traffickers.¹⁰⁴ Parties are also to provide, or strengthen, training for law enforcement, immigration, and other relevant personnel, aimed at preventing trafficking, as well as at prosecuting traffickers and protecting the rights of victims.¹⁰⁵ Training is to include a focus on methods to protect the rights of victims.¹⁰⁶ It should take into account the need to consider human rights, child- and gender-sensitive issues, and encourage co-operation with NGOs, as well as with other relevant organisations and elements of civil society.¹⁰⁷

Border controls, sanctions on commercial carriers, and measures relating to travel or identity documents are all seen as important means of deterring traffickers. During the drafting process, the Inter-Agency Group recommended that emphasis in relation to border control should be on measures to assist border authorities in identifying and protecting victims, as well as intercepting traffickers.¹⁰⁸ The final text requires Parties to strengthen border controls, as necessary, to detect and prevent trafficking,¹⁰⁹ to take legislative or other appropriate measures to prevent commercial transport being used in the trafficking process, and to penalise such involvement.¹¹⁰ Parties are also to take steps to ensure the integrity of travel documents issued on their behalf, and to prevent their fraudulent use.¹¹¹

Improved co-operation between countries on the issue of trafficking is the *raison d'être* of the Protocol;¹¹² and the obligation of co-operation is, accordingly, integrated into a range of provisions, including those related to the sharing of information¹¹³ and the repatriation of victims.¹¹⁴ Cross-border co-operation is also envisaged with respect to the strengthening of border controls and general law enforcement against trafficking.¹¹⁵ These specific provisions are supplemented by the Convention, which, as noted above, constructs a detailed model of mutual legal and other assistance to facilitate co-operation between States in the prevention and suppression of transnational organised crime. The Protocol also makes brief reference to the need for improved co-operation *within* countries: specifically, between criminal justice and victim support agencies in matters related to the prevention of trafficking and the provision of assistance to victims.¹¹⁶

Part 3: impacts and challenges

The impact of the Trafficking Protocol, almost two decades after its adoption, has been profound. 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 – roadmap. The single achievement that made all this possible was the incorporation into the Protocol of a definition of “trafficking in persons”. As long as the concept of trafficking remained unclear, it was virtually impossible to formulate substantive obligations and 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 pre-prerequisite for the elaboration of a meaningful normative framework. Obligations that are now taken 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 twentieth-century 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.

More generally, 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 years following the Protocol’s adoption, a major regional treaty on the subject was developed,¹¹⁷ along with important soft law including, in 2002, the *United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking*.¹¹⁸ Intergovernmental bodies outside the United Nations system, along with civil society groups, became involved

in researching the issue and initiating or supporting anti-trafficking efforts. Ratification of the Protocol was extremely rapid – allowing it to enter into force a mere two years after adoption.¹¹⁹ 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. After being noticeably 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 servitude¹²⁰ and forced labour,¹²¹ and by issuing increasingly authoritative studies of the scope and scale of trafficking-related exploitation.¹²² In 2015, the Association of Southeast Asian Nations (ASEAN) adopted a regional treaty on trafficking, closely modelling this instrument on the Protocol and the Organized Crime Convention.¹²³ 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.

The challenge of 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 co-operation that identified trafficking as a problem of transnational crime requiring a co-ordinated response, and that imposed specific obligations of criminalisation and cross-border collaboration. After considerable prodding, States were also willing to include low-threshold human rights protections, as well as a savings clause that guaranteed that the Protocol and its parent instrument could not be used to modify existing human rights protections.¹²⁴

While accepting a qualified victory, human rights advocates were nevertheless right to be nervous about the Protocol’s sparse and heavily qualified human rights protections. 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 *Principles and Guidelines* did not seek to present an alternative to the Protocol. Rather, they carefully grafted human rights onto the skeleton that the Protocol provided. For example, the Protocol’s nod to the special situation of children¹²⁵ 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.¹²⁶ The Protocol’s rather vague reference to remedies (*i.e.*, national law to provide the *possibility* of compensation)¹²⁷ 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 the provision of information and protection.¹²⁸ Even the criminal justice obligations of the Trafficking Protocol, its least ambiguous provisions, were fleshed out 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.¹²⁹ The *Principles and Guidelines* contained the first-ever acknowledgement of the risk of “collateral damage”, and of the need for responses to trafficking to be monitored closely for their negative impact on existing rights and freedoms.¹³⁰ They also articulated, for the first time, the principle of non-criminalisation of victims in relation to offences committed as a result of their trafficking.¹³¹

Few commentators have appreciated the impact of the *Principles and Guidelines* 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 for the evolution of a cohesive, ‘international law of human trafficking’, which weaves together human rights and transnational criminal law.¹³² This can be seen most clearly in European law around trafficking. Both the 2005 Council of Europe Convention and the 2011 EU Directive reiterate the core provisions of the Protocol in relation to criminalisation, co-operation, prevention, and victim support, while articulating relevant human rights in far greater detail – frequently incorporating concepts and language first set out in the *Principles and Guidelines*.¹³³ 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.¹³⁴ The most recent addition to the international legal framework around trafficking, the ASEAN Convention against Trafficking in Persons, Especially Women and Children, has continued the tradition of affirming the Protocol’s core provisions while expanding on its meagre human rights protections.

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 co-operate 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 needs. In short, no State could 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 Organized Crime Convention that meets

annually.¹³⁵ The Working Group does not equate, in any respects, to a human rights treaty body or equivalent compliance body. It does not examine reports from Parties on implementation of the Protocol. It does not issue recommendations to individual Parties, engage in a constructive dialogue, or otherwise interact with Parties in any meaningful way. A further useful comparison is provided by the current (unreported) controversy over the question of 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 to outsiders, while others resist fiercely. There is also opposition to proposals that the supervisory machinery attached to the UNCTOC and its Protocols be strengthened.¹³⁶ Among Parties to the Trafficking Protocol, in particular, there appears to be little appetite for another monitoring mechanism in what has become a crowded, contested field.

Within these limitations, the Working Group on Trafficking has made some progress – particularly in expanding understanding of the Trafficking Protocol’s core provisions, and in affirming that Parties’ human rights obligations extend well beyond the minimal provisions of the Protocol. For example, it has been noted that, with respect to victims, Parties should: “Ensure victims are provided with immediate support and protection, irrespective of their involvement in the criminal justice process”.¹³⁷ This recommendation, which goes beyond the strict requirements of the Protocol, makes an important contribution to aligning that instrument with emerging international consensus on this issue. Another relates to the contentious issue of non-punishment and non-prosecution of trafficked persons for status-related offences. While the Protocol is silent on this point, the Working Group has recommended that 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”.¹³⁸ It has affirmed the need for a rights-based approach in relation to several provisions of the Protocol, including the requirement that Parties address trafficking-related demand.¹³⁹ 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.¹⁴⁰ This work has done much to elucidate the ‘practice’ of anti-trafficking work at the national level, and it has also provided much needed conceptual clarity to States and the international community.

Fortunately, the shortcomings of the Protocol’s compliance machinery have been ameliorated somewhat by external developments. Within the European system, for example, the 46 Parties to the Council of Europe Convention are subject to a rigorous oversight mechanism that includes country assessment visits.¹⁴¹ Parties are, of course, assessed against that instrument, and not against the Trafficking Protocol. However, the correlation between the two is high, and the added protections in the former make its assessment machinery an even more valuable tool from a human rights perspective. 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’.¹⁴² The Human Rights Council,¹⁴³ treaty bodies,¹⁴⁴ the Special Rapporteur on trafficking in persons,¹⁴⁵ and other mechanisms¹⁴⁶ regularly draw attention to obligations under the Protocol, as well as to 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 US Government – the annual US Department of State Trafficking in Persons Report – can be justifiably criticised on many grounds.¹⁴⁷ 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 co-operating 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. 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 shelters,¹⁴⁸ to protection of trafficked persons who are co-operating in the prosecution of their exploiters.¹⁴⁹ The reports also address, albeit somewhat unevenly, deeper structural issues – such as public sector corruption – that directly impact how trafficking happens and how it is responded to.¹⁵⁰

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 Organisations¹⁵¹ – but only after researchers and advocates did much of the hard work documenting the horrific abuses involved.¹⁵² NGOs, such as Verité and Humanity United, are conducting in-depth and tightly focused research that would be difficult for public entities to replicate;¹⁵³ and innovative research is being commissioned and funded by privately financed entities such as the Freedom Fund.¹⁵⁴ One new and abundantly funded NGO has jumped in with its own compliance mechanism, which at this stage principally collates and extrapolates derived data to rank governments from best to worst in a ‘*Global Slavery Index*’.¹⁵⁵

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, beyond 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 phrase “abuse of a position of vulnerability” that enables courts to characterise the prostitution or economic exploitation of poor migrants as “trafficking”.¹⁵⁶ A strict adherence to the principle of the irrelevance of consent has been shown to have a similar effect.¹⁵⁷ 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 and pornography, involvement in criminal activities, use in armed conflict or religious rituals, and kidnapping for purposes of extortion or political terrorism.¹⁵⁸ Ambiguities in the definition have also lent support to the careless and increasingly frequent equation of trafficking with slavery and ‘modern slavery’ (a term unknown to international law).

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

That said, the dangers associated with what one scholar has aptly termed “the expansionist creep”¹⁵⁹ must be openly acknowledged and actively managed. Making all exploitation ‘trafficking’ (and, indeed, making all trafficking ‘slavery’) 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 away from the worst forms of exploitation that are most difficult for States to address. The 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 egregious 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 offences is 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.

Conclusion

At the beginning of this century 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 see clearly that it was the adoption of the Trafficking Protocol, under the expansive umbrella of the UNCTOC, that changed this situation dramatically and irreversibly. While imperfect instruments in many respects, the Protocol and its parent Convention 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 to 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.

Notes

- 1 This chapter draws on several previous works of the author, including: Gallagher, A. T., *The International Law of Human Trafficking* (Cambridge: Cambridge University Press, 2010), especially chapter 2; and Gallagher, A. T., “Two Cheers for the Trafficking Protocol” (2015) 4 *Anti-Trafficking Review* 14–32.
- 2 International Agreement for the Suppression of the White Slave Traffic 1904, 1 LNTS 83; International Convention for the Suppression of the White Slave Traffic 1910, 3 LNTS 278 (both amended by a Protocol approved by the General Assembly on 3 December 1948, 30 UNTS 23); International Convention for

- the Suppression of Traffic in Women and Children 1921, 9 LNTS 415; International Convention for the Suppression of the Traffic in Women of Full Age 1933, 150 LNTS 431 (amended by a Protocol approved by the General Assembly on 20 October 1947, 53 UNTS 13).
- 3 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949, 96 UNTS 271 (1949 Trafficking Convention).
 - 4 Convention on the Rights of the Child 1989, 1577 UNTS 3 (CRC), Article 35.
 - 5 Convention on the Elimination of All Forms of Discrimination Against Women 1979, 1249 UNTS 13 (CEDAW), Article 6.
 - 6 Conference of Parties to the United Nations Convention on Transnational Organized Crime, Decision 4/4, “Trafficking in Human Beings”, reproduced in Conference of Parties to the United Nations Convention on Transnational Organized Crime, *Report of the Conference of Parties to the United Nations Convention on Transnational Organized Crime on Its Fourth Session, Held in Vienna From 8 to 17 October 2008* (UN Doc. CTOC/COP/2008/19, 2008), p. 12, para. (d).
 - 7 Gallagher, *The International Law of Human Trafficking* (Cambridge: Cambridge University Press, 2010).
 - 8 As of March 2016, 186 States have ratified or acceded to the Convention against Transnational Organized Crime; and 169 States have ratified or acceded to the Protocol.
 - 9 United Nations Convention Against Transnational Organized Crime 2000, 2225 UNTS 209 (Organized Crime Convention).
 - 10 UN General Assembly, *Follow-Up to the Naples Political Declaration and Global Action Plan Against Organized Transnational Crime* (UN Doc. A/RES/52/85, 1997).
 - 11 UN Economic and Social Council Commission on Crime Prevention and Criminal Justice, *Report of the Meeting of the Inter-Sessional Open-Ended Intergovernmental Group of Experts on the Elaboration of a Preliminary Draft of a Possible Comprehensive International Convention Against Organized Transnational Crime* (UN Doc. E/CN.15/1998/5, 1998).
 - 12 UN General Assembly, *Transnational Organized Crime* (UN Doc. A/RES/53/111, 1999).
 - 13 United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime 2000, GA Res. 55/25, Annex III, UN GAOR, 55th Sess., Supp. No. 49 (UN Doc. A/45/49 Vol. I, 2001), p. 62 (Migrant Smuggling Protocol).
 - 14 United Nations Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime 2000, GA Res. 255 (UN Doc. A/RES/55/255, 2001) (Firearms Protocol).
 - 15 See, generally, Gallagher, A. T., “Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway” (2009) 49(4) *Virginia Journal of International Law* 833–841.
 - 16 UNODC, *Legislative Guide to the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (Hereafter: *Legislative Guide*) (Vienna: UNODC, 2004), pp. xvii–xviii.
 - 17 *Ibid.*, Article 5.
 - 18 *Ibid.*, Article 8.
 - 19 *Ibid.*, Article 6. “Proceeds of crime” is defined in Article 2(e).
 - 20 *Ibid.*, Article 23.
 - 21 *Ibid.*, Article 11(1).
 - 22 *Ibid.*, Article 34(1). This provision does not apply to the extent that the Convention itself (at Article 5) would require the involvement of an organised criminal group.
 - 23 United Nations, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (Hereafter: *Travaux Préparatoires for the Organized Crime Convention and Protocols*) (Vienna: UNODC, 2006), p. 285.
 - 24 Organized Crime Convention 2000, Article 26.
 - 25 *Ibid.*, Article 18.
 - 26 *Ibid.*, Article 19.
 - 27 *Ibid.*, Article 20.
 - 28 *Ibid.*, Article 21.
 - 29 *Ibid.*, Article 17.
 - 30 *Ibid.*, Article 16.
 - 31 *Ibid.*, Article 29.
 - 32 *Ibid.*, Article 31.
 - 33 *Ibid.*, Article 30.
 - 34 *Ibid.*, Article 25(1).

- 35 *Ibid.*, Article 25(2).
- 36 *Ibid.*, Article 25(3).
- 37 *Ibid.*, Article 24.
- 38 *Ibid.*, Article 31(7).
- 39 *Ibid.*, Article 37(2). See, also, *Legislative Guide*, p. 253. As the *Legislative Guide* points out, this provision ensures that in a case arising under one of the Protocols to which the States concerned are parties, all of the general provisions of the Convention (for example, relating to mutual legal assistance and protection of victims) will also be available and applicable.
- 40 Organized Crime Convention 2000, Article 37(3).
- 41 *Ibid.*, Article 37(4); Trafficking Protocol 2000, Article 1(1). See, further, *Legislative Guide*, pp. 253–255.
- 42 Trafficking Protocol 2000, Article 1(2).
- 43 *Legislative Guide*, p. 254. The Interpretive Note on Article 1 of the Trafficking Protocol states that: “[t]his paragraph was adopted on the understanding that the words ‘*mutatis mutandis*’ meant ‘with such modifications as circumstances require’ or ‘with the necessary modifications’. Provisions of the United Nations Convention Against Transnational Organized Crime that are applied to the Protocol under this article would consequently be modified or interpreted so as to have the same essential meaning or effect in the Protocol as in the Convention” – *Travaux Préparatoires for the Organized Crime Convention and Protocols*, p. 330.
- 44 Trafficking Protocol 2000, Article 1(3). See also *Legislative Guide*, p. 254.
- 45 UN Commission on Human Rights, *Measures to Prevent Trafficking in Children: Report of the Secretary-General* (UN Doc. E/CN.15/1997/12, 1997).
- 46 For a detailed examination of the origins of the Protocol, see Vlassis, D., “The UN Convention Against Transnational Organized Crime”, in Berdal, M. R. and Serrano, M. (eds.), *Transnational Organized Crime and International Security: Business as Usual?* (London: Lynne Rienner, 2002), p. 83 (Vlassis, “The UN Convention Against Transnational Organized Crime”).
- 47 *Draft Protocol to Combat International Trafficking in Women and Children, Supplementary to the United Nations Convention Against Transnational Organized Crime: Proposal Submitted by the United States of America* (UN Doc. A/AC/254/4/Add.3, 1998).
- 48 *Travaux Préparatoires for the Organized Crime Convention and Protocols*, p. 322.
- 49 UN General Assembly Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Progress Report of the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime* (UN Doc. A/AC.254/30-E/CN.15/2000/4, 2000), para. 34.
- 50 See, further, Gallagher, A. T., “Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis” (2001) 23 *Human Rights Quarterly* 975, at p. 1002.
- 51 Trafficking Protocol 2000, Article 3.
- 52 *Ibid.*
- 53 *Ibid.*, Article 3(b).
- 54 *Legislative Guide*, p. 270.
- 55 Trafficking Protocol 2000, Article 2.
- 56 Hathaway, for example, asserts incorrectly that “slavery or other forms of exploitation that occur entirely within the borders of one country without the involvement of outside parties are beyond the scope of the Trafficking Protocol”. See Hathaway, J. C., *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2005), p. 11.
- 57 Organized Crime Convention 2000, Article 34(2). See, also, Conference of the Parties to the UN Convention against Transnational Organized Crime, *Criminalization Within the Scope of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto* (UN Doc. CTOC/COP/2008/4, 2008), para. 2 (“the offences need to be criminalized in domestic law independently of the transnational nature or the involvement of an organized criminal group”); *Legislative Guide*, at p. 276 (“transnationality is not required as an element of domestic offences”), and also at pp. 18–19, 275–276, 341; *Travaux Préparatoires for the Organized Crime Convention and Protocols*, at 285. On the matter of involvement of an organised criminal group, see, also, for example, *Legislative Guide*, at p. 276 (“the involvement of an organized criminal group must not be required as a proof in a domestic prosecution”).
- 58 *Legislative Guide*, pp. 269–270.
- 59 “[S]ubject to the basic concepts” of the legal system of the State: Trafficking Protocol 2000, Article 5(2)(a). The *Legislative Guide*, at pp. 271–272, notes that this caveat was introduced to accommodate legal systems which do not recognise the criminal concept of “attempt”.
- 60 Trafficking Protocol, Article 5(2)(b).

- 61 *Ibid.*, Article 5(2)(c).
- 62 Organized Crime Convention 2000, Article 23.
- 63 *Legislative Guide*, pp. 267–269.
- 64 *Legislative Guide*, pp. 268–269.
- 65 Organized Crime Convention 2000, Article 10; *Legislative Guide*, p. 270.
- 66 Organized Crime Convention, Article 11(1).
- 67 *Ibid.*, Article 6.
- 68 *Ibid.*, Article 11(3).
- 69 *Ibid.*, Article 11(5).
- 70 *Ibid.*, Articles 12–14.
- 71 *Ibid.*, Article 18.
- 72 *Ibid.*, Article 23.
- 73 *Ibid.*, Articles 24–25.
- 74 *Ibid.*, Article 26. For examples of measures that could be taken to this end, see the *Legislative Guide*, at p. 275.
- 75 Organized Crime Convention 2000, Article 27.
- 76 Trafficking Protocol 2000, Article 6(1). Reference should also be made to Article 24(2)(b) of the Organized Crime Convention, which provides for witnesses to be able to give evidence in safety.
- 77 Trafficking Protocol, Article 6(2).
- 78 *Ibid.*, Article 6(5). Note that this is a minimum standard which, in certain cases (such as in relation to witnesses) would be supplemented by additional requirements contained in Articles 24 and 25 of the Organized Crime Convention.
- 79 Trafficking Protocol 2000, Article 6(6).
- 80 *Ibid.*, Article 6(3). The type of assistance set forth in this paragraph is applicable to both the receiving State and the State of origin of the victims of trafficking in persons – but only regarding victims who are in their respective territory. See *Travaux Préparatoires for the Organized Crime Convention and Protocols*, p. 373.
- 81 Trafficking Protocol 2000, Article 6(3).
- 82 *Ibid.*, Article 6(4). The provision requires consideration of “age, gender and special needs of victims of trafficking in persons, in particular the special needs of children”.
- 83 *Travaux Préparatoires for the Organized Crime Convention and Protocols*, p. 380.
- 84 UN General Assembly Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime* (UN Doc. A/AC.254/4/Add.3/Rev.7, 2000), footnote 27.
- 85 Trafficking Protocol 2000, Article 7(1).
- 86 *Ibid.*, Article 7(2).
- 87 *Ibid.*, Article 8.
- 88 Inter-Agency Submission, p. 9.
- 89 Trafficking Protocol, Article 8(1). See, further, *Travaux Préparatoires for the Organized Crime Convention and Protocols*, at p. 386 and 397.
- 90 Trafficking Protocol, Article 8(2).
- 91 *Ibid.*
- 92 *Travaux Préparatoires for the Organized Crime Convention and Protocols*, at p. 388. On the issue of repatriation in the absence of consent, the Ad Hoc Committee agreed, during negotiations, that “bilateral and multilateral agreements should be encouraged” – *Ibid.*, at p. 384.
- 93 Trafficking Protocol 2000, Articles 8(3)–8(4).
- 94 *Ibid.*, Articles 8(5)–8(6). See also *Travaux Préparatoires for the Organized Crime Convention and Protocols*, at p. 389.
- 95 Organized Crime Convention 2000, Article 31(7).
- 96 Trafficking Protocol 2000, Article 9(1).
- 97 *Ibid.*, Article 9(2).
- 98 *Ibid.*, Article 9(3).
- 99 *Ibid.*, Article 9(5).
- 100 HCHR Submission, p. 25; Inter-Agency Submission, p. 13.
- 101 Trafficking Protocol 2000, Article 14(2).
- 102 *Ibid.*, Article 14(1).
- 103 In particular, Articles 27–29 of the Organized Crime Convention.

- 104 Trafficking Protocol 2000, Article 10(1).
 105 *Ibid.*, Article 10(2).
 106 *Ibid.*
 107 *Ibid.*
 108 Inter-Agency Submission, para. 10. See, also, *Travaux Préparatoires for the Organized Crime Convention and Protocols*, at p. 407.
 109 Trafficking Protocol 2000, Article 11(1).
 110 *Ibid.*, Articles 11(2)–11(4).
 111 Trafficking Protocol 2000, Article 12. For examples of the kinds of measures that could be taken to this end, see the *Legislative Guide*, at pp. 298–299.
 112 Trafficking Protocol 2000, Preamble.
 113 *Ibid.*, Article 10.
 114 *Ibid.*, Article 8.
 115 *Ibid.*, Articles 11–13.
 116 *Ibid.*, Articles 6(3) and 9(3).
 117 Council of Europe Convention on Action against Trafficking in Human Beings 2005.
 118 United Nations High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (UN Doc. E/2002/68/Add.1, 2002) (hereafter *UN Trafficking Principles and Guidelines*).
 119 As at March 2016, the Trafficking Protocol had been ratified or acceded to by 169 States.
 120 International Labour Organization Convention Concerning Decent Work for Domestic Workers 2011, ILO No. 189.
 121 International Labour Conference, Text of the Protocol to the Forced Labour Convention 1930, Provisional Record 9A, 103rd Session, Geneva, 2014.
 122 See, for example, International Labour Organization, *Caught at Sea – Forced Labour and Trafficking in Fisheries* (2013); and, *Profits and Poverty: The Economics of Forced Labour* (2014).
 123 Association of Southeast Asian Nations (ASEAN) Convention against Trafficking in Persons, especially Women and Children 2015.
 124 Trafficking Protocol 2000, Article 14.
 125 *Ibid.*, Article 6(4).
 126 *UN Trafficking Principles and Guidelines*, Principle 10 and Guideline 8.
 127 Trafficking Protocol 2000, Article 6(6).
 128 *UN Trafficking Principles and Guidelines*, Principle 17 and Guideline 9.
 129 *Ibid.*, Principles 9, 12–16, and Guidelines 5 & 6.
 130 *Ibid.*, Principle 3 and Guidelines 1(7) & 3(5).
 131 *Ibid.*, Principle 7.
 132 While also acknowledging other areas of law, including refugee law and international criminal law.
 133 Council of Europe Convention on Action against Trafficking in Human Beings 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.
 134 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”).
 135 Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *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, 2008), Decision 4/4 (at 11).
 136 See, for example, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *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), para. 97–108.
 137 Conference of the Parties to the United Nations Convention against Transnational Organized Crime 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), para. 13(c).

- 138 *Ibid.*, para. 12(b). See, also, UN 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).
- 139 Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *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), para. 17.
- 140 UNODC, *Abuse of a Position of Vulnerability and Other 'Means' Within the Definition of Trafficking in Persons* (2012); UNODC, *The Role of Consent in the Trafficking in Persons Protocol* (2014); UNODC, *The Concept of Exploitation in the Trafficking in Persons Protocol* (2015).
- 141 See, further, Chapter 4.
- 142 Most clearly set out in the *Commentary to the United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking* (2010).
- 143 See, for example (n.134), above.
- 144 For example, UN Committee against Torture, *Concluding Observations: Estonia* (UN Doc. CAT/C/EST/CO/5, 2013), para. 13; UN Committee on the Rights of the Child, *Concluding Observations: Afghanistan* (UN Doc. CRC/C/AFG/CO/1, 2011), para. 73; UN Committee on the Elimination of Discrimination against Women, *Concluding Observations: Saudi Arabia* (UN Doc. CEDAW/C/SAU/CO/2, 2008), paras. 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/06/07, 2006).
- 145 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 Human Rights Council, *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).
- 146 For example, Human Rights Council, *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), paras. 56–58.
- 147 See Gallagher, A.T., "The Trafficking Watchlist May Be Flawed, But It's the Best Measure We Have" *The Guardian* (27 June 2014).
- 148 See, for example, the Malaysia country report in the United States of America Department of State, *Trafficking in Persons Report June 2014*, at p. 260.
- 149 See, for example, the Ireland, Kazakhstan, and Paraguay country reports: *ibid.*, at p. 214, 226 & 310.
- 150 See, for example, the Azerbaijan and Thailand country reports: *ibid.*, at pp. 85–87 & 372–376.
- 151 See, for example, the New Zealand and Taiwan country reports: *ibid.*, at pp. 291–293 & 368; and International Labour Organization, *Caught at Sea – Forced Labour and Trafficking in Fisheries* (Geneva: ILO, 2013).
- 152 See Murray, S., "Casting a Tight Net" (Fall, 2015) *Stanford Social Innovation Review*, https://ssir.org/articles/entry/casting_a_tight_net
- 153 See, for example, Verité, *Risk Analysis of Indicators of Forced Labor and Trafficking in Illegal Gold Mining in Peru* (2013); and *Forced Labour in the Production of Electronic Goods in Malaysia* (2014).
- 154 See, for example, The Human Trafficking Pro-Bono Legal Centre and the Freedom Fund, *Ending Impunity, Securing Justice: Using Strategic Litigation to Combat Modern Day Slavery and Human Trafficking* (2015); and London School of Hygiene and Tropical Medicine and the Freedom Fund, *Safer Labour Migration and Community-based Prevention of Exploitation: The State of the Evidence for Programming* (2016).
- 155 Walk Free, *The Global Slavery Index* (2013); Walk Free, *The Global Slavery Index* (2014).
- 156 See UNODC, *Issue Paper: Abuse of a Position of Vulnerability and Other 'Means' Within the Definition of Trafficking in Persons* (Vienna: UNODC, 2012).
- 157 See UNODC, *Issue Paper: The Concept of 'Consent' Within the Definition of Trafficking in Persons* (Vienna: UNODC, 2014).
- 158 See UNODC, *Issue Paper: The Concept of 'Exploitation' in the Trafficking in Persons Protocol* (Vienna: UNODC, 2015).
- 159 Chuang, J.A., "Exploitation Creep and the Unmaking of Human Trafficking Law" (2014) 108(4) *The American Journal of International Law* 609–649.