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TRAFFICKING IN HUMAN BEINGS

Human rights and trans-national criminal
law, developments in law and practices

Kristina Touzenis

Trafficking in Human Beings

**Human rights and transnational criminal law,
developments in law and practices**

Kristina Touzenis

UNESCO migration studies 3

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Introduction

Trafficking in human beings¹ is a process, with people being abducted or recruited in the country of origin, transferred through transit regions and then exploited in the country of destination. In the case of internal trafficking, all three stages occur within the borders of a single country. Coercive or deceptive recruitment methods vary, as do transport modes. Further, the forms of exploitation differ, although for several years the focus has been on sexual exploitation rather than on forced labour and other forms of exploitation. Inadequate knowledge of this crime is often a consequence of failure to identify victims as such. Among those who are identified, adult women are most frequently reported to be trafficked, followed by children. The factors that make people vulnerable to trafficking and exploitation are complex and determined, in part, by the stage of the trafficking process the victim is in. Often there are vulnerabilities related to the conditions in the country of origin. Also the transport itself makes people vulnerable, as they may not have proper documents or financial means and, therefore, depend on traffickers. The exploitation phase produces additional vulnerabilities, for example, when victims have irregular status in the country or are physically isolated. Far less information on offenders is available than on their victims. Traffickers can be involved in various functions – such as, recruiters, transporters or exploiters – and various activities during different stages of the trafficking process, including forging documents, corruption and the withholding of their victims’ documents. Organized criminal groups can be heavily involved in human trafficking, at different operational levels.²

The number of people globally trafficked across international borders is between 600,000 and 800,000 per year. The main criticism of human trafficking estimates is that the ranges are often excessively wide, sometimes as much as 10 times that of the low estimate. ILO has estimated that the minimum number of persons in forced labour, including sexual exploitation as a result of trafficking, at any given time is 2.5 million. Of these, 1.4 million are in Asia and the Pacific, 270,000 in industrialized countries, 250,000 in Latin America and the Caribbean, 230,000 in the Middle East and Northern Africa, 200,000 in

1 The Council of Europe Convention Against Trafficking in Human Beings, May 16 2005, CETS no. 197, and the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, G.A. Resolution 55/25, Annex II, UN Doc A/55/383 (Nov. 25, 2000), refer to trafficking in “human beings” and trafficking in “persons” respectively. Throughout this paper the terms are used interchangeably with human trafficking.

2 UN.GIFT Trafficking an overview. UN 2008, p. 1.

countries with economies in transition and 130,000 in sub-Saharan countries.³ In reports providing human trafficking estimates, the methodology for calculating any estimates used is rarely given. Reports also often fail to indicate whether estimates are annual figures or cover a period of several years. The quest for numbers alone will not lead to a greater understanding of human trafficking practices, and, therefore, the development of a more effective international response. It is necessary to understand the complexities of trafficking as a whole in order to develop more effective responses.

Trafficking in human beings is an extremely grave offence against the individual. Not only the process of establishing control over the liberty, freedom of movement and earning capacity of vulnerable people, but the ways in which such power is established then maintained, together result in serious violations of the physical and mental integrity of the victims. Trafficking in persons is dynamic, adaptable, opportunistic, and like many other forms of criminal activity, it takes advantage of conflicts, humanitarian disasters and the vulnerability of people in situations of crisis. It is multidisciplinary and involves a wide range of actors.⁴

In 2000 the United Nations adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children (Trafficking Protocol),⁵ supplementing the United Nations Convention against Organized Crime (UNTOC).⁶ The Protocol entered into force on the 25th of December 2003. At the same time the Protocol against the Smuggling of Migrants by Land, Air and Sea (Smuggling Protocol), supplementing the United Nations Convention against Trans-national Organized Crime was adopted.⁷ The two protocols are also known as the Palermo Protocols, after the city in which they were adapted. The Convention and the Protocols were negotiated at a series of eleven meetings of a special intergovernmental Ad-hoc Committee under the auspices of the UN Crime Commission, which were held in Vienna from January 1999 until October 2000 and more than 100 countries took part.

The Palermo Protocols are framed around a central dichotomy between coerced and consensual irregular migrants. People who are trafficked are assumed not to have given their consent and are considered to be “victims or “survivors,” whereas people who are smuggled are considered to have willingly engaged in a criminal enterprise. There is also a gender dimension to these distinctions: those who are smuggled are mostly assumed to be men, whereas victims of trafficking are associated with the traditional targets of protective concern⁸ – women and children, which affects protection schemes. The protocols share several key features. Both require State Parties to criminalize the relevant conduct of traf-

3 ILO: A Global Alliance against Forced Labour, ILO, 2005.

4 UN.GIFT: Human Trafficking an overview. UN 2008, p. 6.

5 Signatories: 117, Parties: 124 as of February 2009.

6 Entry into Force: 29 September 2003, in accordance with article 38. Registration: 29 September 2003, No. 39574. Status: Signatories: 147, Parties: 147 as of February 2009.

7 Entry into force: 28 January 2004. Signatories 112; Parties: 116 as of February 2009.

8 Bhabha, J.: Trafficking, Smuggling, and Human Rights, at <http://www.migrationinformation.org/USfocus/display.cfm?ID=294> (visited September 2008).

fickers or smugglers, to establish and implement domestic law enforcement mechanisms, and to cooperate with other states to strengthen international prevention and punishment of these activities. Both stipulate that the migrants themselves should not be subject to criminal prosecution because of their irregular entry.⁹

Trafficking and smuggling are widely regarded as a criminal justice issue. They affect territorial integrity because they involve the facilitation of crossing of borders and remaining in a State in violation of national criminal and immigration laws. Trafficking and smuggling also undermine the rule of law and political foundation of States, because traffickers and smugglers, such as organised criminal groups, resort to violence and corruption as a means to advance their business. The usual response at the national level has been crime and immigration control in order to prosecute and punish traffickers/smugglers and reduce the flow of trafficked/smuggled people.¹⁰ But trafficking in human beings poses problems outside the scope of criminal law, and in fact, the Trafficking Protocol is based on what is occasionally referred to as the 4 Ps: Prevention, Protection, Prosecution, and Policy, which gives a very basic overview over the contents of provisions the Protocol include. Protection of victims and prevention of trafficking are not only questions of criminal law and responsibilities but overlaps with many human rights and human rights concerns.

Aims and structure of the research

UNESCO has already carried out research in specific countries (Benin, Nigeria and Togo, Lesotho, Mozambique and South Africa). Activities until now have been focused on how to obtain more effective and culturally appropriate responses to trafficking in these specific countries. The research has focused on how to combat root causes and gather best practices. The analysis and evaluation of national laws and examples of best practices will be a valuable resource for the subsequent analysis of the effectiveness and relevance of the international legal framework – and both can be analysed in the light of the other. Different from these previous activities this research will not only focus on trafficking on women and children but will also include examples from other regions. But the initial overview and subsequent use of existing UNESCO research should serve two ways: providing concrete examples for this paper and presenting what has already been carried out and its use, and in return this paper will put the previous reports into a more complete and structured framework. It should be a good example also of how field research and theory always should work together and support each other.

It should be clear that the UNTOC and its Protocols are not human rights instruments but fall into the category of international/trans-national criminal law instruments, but

9 Ibid.

10 Obokata, T.: Trafficking and Smuggling of Refugees from a Human Rights Perspective. Paper presented to the International Conference on Refugees and International Law: The Challenge of Protection (Conference presentation 15-16 December 2006, Refugee Studies Centre, University of Oxford).

nonetheless these instruments mark an important step forward in the battle against some of the most exploitative and dangerous situations that migrants can encounter. Although motivated primarily by law enforcement concerns, the protocols contain important protective measures, which, if implemented fully, could significantly advance the human rights of migrants.¹¹ This research will include an analysis which will clarify why the UNTOC and its Protocols contain provisions that can accomplish this and will therefore bridge two parallel but interacting legal systems: Trans-national Criminal Law and International Human Rights Law.

The research will be mainly legal analysis. The first part focusing on the development and creation of the Palermo Protocols and on their contents – how they protect victims, what are States' obligations, how are the different legal concepts in the Protocols defined. The development of the Palermo Protocols will give a background for both the analysis of the provisions and the relation between the human rights regime and the criminal law regime these instruments may establish, but will also provide a background for an analysis of how flexible and operational the Protocols are in a world where human trafficking takes many different forms.

The second part will be dedicated to the analysis of how the Protocols create a bridge between the above mentioned two legal systems: Human Rights and Criminal Law. In this context trafficking will be analysed both from a human rights and a criminal law perspective, and the rules pertaining to trafficking and smuggling will be considered on the basis of the first part of the research to show how both regimes influence and are influenced by these rules. In this context special attention will be given to the provisions in the Protocols which regard protection and assistance, but also those that address the elimination of root causes and international cooperation will be examined in this particular context, also demonstrating how respect of these provisions actually may help implementing of the purely criminal law aspects of the Protocols.

The distinction between trafficking and smuggling is likely to result in separate legislative and law enforcement responses. The use of coercion or deception by traffickers as well as subsequent exploitation have the effect of portraying trafficked people as victims of human rights abuses, and this reinforces a case for their protection even when they enter into a State and/or stay irregularly. However, the definition of smuggling suggests that those smuggled are willing participants who violate national immigration laws and regulations. Therefore, States are more likely to apply enforcement measures such as arrest, detention and deportation against them. Nevertheless, smuggling of human beings can equally raise a wide variety of human rights issues. For instance, common causes of smuggling, such as poverty, humanitarian crises, discrimination on account of race, gender, and other distinctions, are all pertinent human rights issues. Smuggled people may also experience acts amounting to torture, inhuman or degrading treatment, including sexual and physical violence, exhaustion and malnutrition, and even lose their

11 Bhabha, J.: *Trafficking, Smuggling, and Human Rights*.

lives during the course of their journey. A human rights framework is also relevant in dealing with smuggling of human beings.¹²

Trafficking and exploitation is – and is recognised as being – a violation of the victim’s human rights. It should not only be viewed as an issue for criminal law enforcement but as a concern regarding human rights implementation. But trafficking is not itself a human rights issue – but a criminal law issue with a strong human rights dimension. This should be kept in mind. Trafficking poses a serious threat to both security of States and of human beings and to the protection and promotion of human rights. Questions such as protection of victims of trafficking and the necessity to have a human rights approach to these, the possibilities of – within the criminal law regime – considering trafficking a crime against humanity, the possibilities of prosecuting but also of protecting witnesses, the necessity to combine a more holistic protection of migrants rights (human rights) in order to effectively combat trafficking networks (criminal law) will be considered. Thus the analysis will also briefly include considerations on how it is necessary to address violations of human rights which are part of the root causes, and also how such a protection will further the prevention of trafficking and how it may influence the possibilities of combating international organised crime, again showing how the two systems interact and overlap. An interesting aspect of this is how the protocols may in some cases give more force to human right implementation since they could be more easily justiciable than many rights found in human rights instruments.

Problems and concerns related to the Protocols have surfaced in the past years. It is argued that they focus too narrowly on sexual exploitation in a way that both genders ‘victims’ and diverts attention away from other forms of trafficking. Similarly, others claim current policies take an overly state-centric perspective, leading to a focus on the symptoms of a problem without properly addressing its causes. The securitization of the issue, it is asserted, serves not only to criminalise and thus demonize individuals who are otherwise survivors of gross human rights violations, but offers the state an opportunity to unduly extend its authority over its citizens, in many cases severely encroaching on civil liberties.¹³ These critiques will form part of and be addressed by the analysis of the relevance and flexibility of the Protocols in the research.

Examples will also be drawn from regional and national legislation which should be in conformity with the Protocols when States are parties to these and when possible and appropriate case law will be included. It is also relevant to draw upon regional and national law, including case law, since different legal systems influence each other and are used to interpret terms found in one another.

12 Obokata, T.: Trafficking and Smuggling of Refugees from a Human Rights Perspective. Paper presented to the International Conference on Refugees and International Law: The Challenge of Protection.

13 Howard, N. and Lalani, M.: “Editorial Introduction: The Politics of Human Trafficking”. *St. Anthony’s International Review*. Oxford 4:1 (2008): 5-15.

The legal aspect of trafficking is crucial, whether from a human rights angle or that of criminal prosecution. Now literature on this aspect is emerging even when trafficking is considered from other angles. A huge part of current literature tends to focus on sexual exploitation and trafficking, thus failing to focus on other kinds of exploitation and problems related to trafficking for other purposes, something that this research tries to avoid.

The legal aspect is the focus for this paper, but concrete experiences and examples are included to create a visible link between law and reality – or rather to show that the two do not exist independently of each other.

Foreword: UNESCO on Trafficking of Human Beings

UNESCO has carried out research on trafficking within the framework of the “Slave Route Project” which is composed of four main programmes; a scientific programme on thematic networks on fighting against racism, discrimination and xenophobia; teaching and education on the slave-trade and slavery; promotion of cultures and artistic and other expressions resulted from interactions caused by the slave-trade; cultural tourism for identification, restoration and promotion of sites important for the memory of slavery.

Over the past 15 years the Slave Route Project has achieved the establishment of academic networks which have fostered research on key aspects of the slave trade and slavery. The publication of several studies, documentary films and articles in the international press have brought this work to the attention of the general public, thereby enhancing the project’s visibility. UNESCO’s Culture and Education Sectors strive to encourage reflection, scientific and historical research and the dissemination of information on slavery and its consequences. The Social and Human Sciences Sector and the Communication Sector also participate importantly in the project by developing new initiatives to combat the lingering consequences of the slave trade and slavery such as discrimination and racism and in this context research on trafficking has been carried out.

The Social and Human Science Sector has, within this framework carried out research with the goal to improve the understanding of the factors related to human trafficking, especially focusing on the African socio-cultural context. This has led to publications which provide knowledge basis for efficient countermeasures in six African pilot countries (Benin, Lesotho, Mozambique, Nigeria, South Africa and Togo). The research has not only resulted in publications which facilitate the transfer of knowledge, experiences and best practices but also promoted interaction and cooperation between researchers, decision-makers, representatives of international organizations and civil society on the issue of trafficking of especially women and children.

UNESCO has thus carried out research in Africa aimed at analysing the root causes of trafficking and of gathering best practices. Reports on the countries concerned, structured around a fixed pattern of information, give a picture of reasons for and consequences of trafficking in the region. These individually and as a whole contributes to an improved knowledge of factors related to trafficking in the African context, which in turn can be used to improve the efficiency of counter trafficking measures, benefitting from the

enhanced knowledge of the phenomenon. Apart from the country specific research, a major report on Best Practices was published in 2005. The outcome of this activity has been not only the reports but also an improved cooperation between researchers and stakeholders, and a contribution to awareness raising activities in the region regarding trafficking. The importance of country research lies in the new angles such research brings such as literature reviews and meta-analysis of existing statements on trafficking.¹⁴ Furthermore the UNESCO Trafficking Statistics Project in Bangkok is tracing the origin of numbers cited by various sources worldwide, attempting to ascertain the methodology by which these numbers were calculated, and evaluating their validity is important, but the recent reports (2006 and 2008) from UNODC should also be mentioned for their ample coverage both quantitatively and qualitatively when it comes to gathering and presenting what numbers may be found on trafficking. The structure of the six country reports – giving an overview of who the victims are, who the traffickers are, what the routes and general context are, the forms of exploitation and recommendations for improvement proves a valuable source of knowledge on these countries also for comparative purposes.

ROOT CAUSES

The overview in each study on the root causes – most often common – and the legal framework in place – most often not adequate – is useful in that it gives a state of the art picture of the situation regarding trafficking in these countries and shows how much they are alike and where intervention is needed – both at a legal level but also regarding awareness raising and interventions that go well beyond a mere trafficking question; to poverty eradication and education. The UNODC Global Report in Trafficking of Human Beings from 2008 shows that some steps have been taken on the legislative level to follow the recommendations which were put forward also in these papers, but much still remains to be done.¹⁵ All the report underline that legal reform on its own will not

14 UNESCO: Human Trafficking in Lesotho: Root Causes and Recommendations, p. 22.

15 E.g. for Lesotho: Enact a specific national law on human trafficking making trafficking in human beings a serious criminal offence, in line with the UN Convention. The law should be comprehensive and address all aspects of trafficking and should provide *inter alia*: appropriate sanctions for offenders, protection of trafficked persons from prosecution, rehabilitation and where possible compensation for trafficked persons and confiscation by the state of proceeds earned from trafficking. Pass into law, as soon as possible, the Children's Protection and Welfare Bill. The provisions of the Bill on trafficking are comprehensive and would compliment a national law on human trafficking. The Bill also has provisions to enforce compulsory registration of children born in the country. Setting up of mobile registration centres would facilitate implementation of this law. To sign and ratify the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa. Many of the root causes of human trafficking are addressed in this legal document (gender inequality, HIV and AIDS). Ratify the UN Convention on the Rights of Migrant Workers and Members of their Families. Enter into extradition treaties with other countries in order to establish a smooth and swift system of prosecution and punishment of traffickers. An extradition agreement with South Africa is not sufficient, since women and children are trafficked to other countries in the region and beyond. Establish bilateral and multilateral agreements to run joint actions against human trafficking and

suffice to combat trafficking – policy reforms regarding poverty, migration, gender issues and involving civil society are all necessary in order to create a framework in which to combat trafficking.¹⁶

exploitation of women and children in transit and destination countries. Provide adequate training for all stakeholders: chief of communities, border officials, media, the judiciary and police officers to become sensitive towards trafficking offences, in particular with regard to the causes of trafficking, identifying cases of trafficking and the prevention methods.

In South Africa: Define precisely the crime of trafficking in accordance with international standards, and include expressly all exploitative practices covered by the international definition of trafficking such as debt bondage, forced labour, and forced prostitution; *South Africa established specific offences to criminalize trafficking for sexual exploitation and child trafficking for a wide range of purposes. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 (Act No. 32 of 2007) serves as the basis to fight the trafficking of persons for purposes of sexual exploitation, while the Children's Act 2005 (Act No. 38 of 2005) can be used to prosecute cases of child trafficking. In addition, the South African Constitution of 1996 prohibits slavery, servitude and bonded labour. Comprehensive legislation based on the UN Trafficking Protocol has been drafted and is due to be passed by parliament in 2009 (UNODC Global Report on Trafficking in Persons 2008, p. 127).* Prioritize the fight against human trafficking as an issue to be incorporated in the Millennium Development Goals (MDG); Ensure that definitions of trafficking reflect the need for special safeguards and care for children, including appropriate legal protection; Ensure that trafficked persons are not punished for any offences or activities related to their having been trafficked, such as prostitution and immigration violations; Ensure that victims of trafficking are protected from summary deportation, or return where there are reasonable grounds to suspect that such return would present a significant security risk to the trafficked person or to his/her family; Consider temporary or permanent residency in countries of transit or destination (reflection delay) for trafficking victims in exchange for testimony against alleged traffickers, or on humanitarian and compassionate grounds; Ensure that victims of trafficking are offered the possibility of obtaining compensation for damages suffered; Provide for proportional criminal penalties to be applied to persons found guilty of trafficking in aggravating circumstances, including offences involving trafficking in children or offences committed or involving complicity by State officials; and Proceeds of trafficking, and related offences, to be used for the benefit of trafficked persons.

For Mozambique: National legislation on trafficking in persons should, at a minimum: define precisely the crime of trafficking in accordance with international standards, and include expressly all exploitative practices covered by the international definition of trafficking such as debt bondage, forced labour, and forced prostitution; *Mozambique adopted specific legislation on trafficking in persons in April 2008. Before that, provisions in the criminal code concerning the violation of labour laws, abduction or kidnapping were used to prosecute some forms of trafficking in persons. A National Action Plan for Children, which considers many forms of child abuse, was adopted by the Social Welfare Ministry. (UNODC Global Report on Trafficking in Persons 2008, p. 125)* ensure that definitions of trafficking reflect the need for special safeguards and care for children, including appropriate legal protection; ensure that trafficked persons are not punished for any offences or activities related to their having been trafficked, such as prostitution and immigration violations; ensure that victims of trafficking are protected from summary deportation, or return where there are reasonable grounds to suspect that such return would present a significant security risk to the trafficked person or to his/her family; consider temporary or permanent residency in countries of transit or destination (reflection delay) for trafficking victims in exchange for testimony against alleged traffickers, or on humanitarian and compassionate grounds; ensure that victims of trafficking are offered the possibility of obtaining compensation for damages suffered; provide for proportional criminal penalties to be applied to persons found guilty of trafficking, including offences involving trafficking in children or offences committed or involving complicity by State officials; and proceeds of trafficking, and related offences, to be used for the benefit of trafficked persons.

16 See e.g. UNESCO: *Human Trafficking in South Africa: Root Causes and Recommendations*, p. 56-60.

Broadly speaking, poverty, unemployment, socio-cultural practices degrading women, increase in prostitution, lack of information, gender imbalances, and a high level of demand for cheap labour as well as sex workers put certain demographic groups at higher risks of being trafficked.¹⁷ These are mentioned in all the reports from the pilot studies as main causes of trafficking.

Women and children happen to be the main component of this group. In e.g. Lesotho, persons who fall prey to trafficking are male and female street children, sex workers and ordinary women and girls living a normal life in their homes. They are either forcibly bundled into private vehicles and abducted or voluntarily agree to be taken across the border on false promises of employment. Others are sex workers who willingly go, thinking they are dealing with genuine paying clients only to fall prey to violence and abuse.¹⁸

A number of factors contribute to the phenomenon of trafficking in human beings, in particular children, in West Africa. Predominant among these are poverty, large family size, lack of educational opportunities and lack of employment. Other factors facilitating trafficking in persons in Benin, Nigeria and Togo include ignorance on the part of families and children of the risks involved in trafficking, the high demand for cheap and submissive child labour in the informal economic sector, the desire of youth for emancipation through migration, institutional lapses such as inadequate political commitment, non-existent national legislation against trafficking in human beings, and the absence of a judicial framework allowing for the perpetrators and accomplices of trafficking to be held responsible and punished for their acts. Other contributory factors in trafficking in persons in the region include porous borders, corrupt government officials, involvement of international organized crime groups or networks, limited capacity of or commitment by immigration and law enforcement officers to control trafficking at the borders and lack of political will or desire to enforce existing legislation or mandates.¹⁹

In the case of women and children trafficked in the West Africa region, push factors include the difficult socioeconomic environment and deep-rooted, abject poverty, regional inequalities and inadequate programmes for the creation of employment or revenue-generating activities, particularly for youth in rural areas. Failure of structural adjustment programmes to regulate the economic situation and the massive debt of many countries has resulted in economic decline, placing millions below the poverty line, and making children and their families vulnerable to forms of exploitation to include trafficking. Economic insecurity and poverty are aggravated by political instability and a lack of accountability of government institutions, which have been either under military regimes or under one party rule.²⁰

17 These pull factors are mentioned through all the country reports.

18 UNESCO: *Human Trafficking in Lesotho: Root Causes and Recommendations*, p. 26.

19 UNODC: *Measures to Combat Trafficking in Human Beings in Benin, Nigeria and Togo*. 2006. p. 11.

20 Ibid. p. 25.

In West Africa existing knowledge on specific features of the trafficking of children and women shows a close interaction between the cultural domain and the changing social, political and economic relations. Sector-specific patterns of trafficking exhibit an interface between local, regional and global forces. Trafficking linked with export-oriented agriculture and commercial services in tourism appear more sensitive of global forces, whereas trafficking linked with domestic services tends to be reactive to national and regional forces. Actors in West Africa have taken steps to build regional networks of knowledge and action to address the context-specific dimensions of the problem. Like-minded organisations have formed alliances through creating and maintaining a database by which to share knowledge.²¹

The causes or factors contributing to the trafficking in persons in the West Africa region can be classified as ‘intermediate’ and ‘deep structural’ causes. Intermediate causes, such as the lack of job opportunities in rural areas, children’s desire for more freedom or the failure of parents to recognize the dangers to their children, can be more easily and quickly addressed than deep structural causes. Deep structural causes, such as the historically accepted practice of child placement outside of the home, regional inequalities and countries’ massive structural debt, as well as the endemic practice of those in power trying to protect their interests, require long-term approaches.²²

INFORMATION

In *Searching for Best Practices to Counter Human Trafficking in Africa: A Focus on Women and Children* from 2005 it is mentioned that “although addressing human trafficking has become a political priority for many governments, many aspects of the phenomenon remain poorly understood. Available information about the magnitude of the problem is limited.” This is a common problem with all sorts of irregular migration. It is further noted that in general, the existing body of knowledge about human trafficking serves to raise public consciousness about the issue, but remains insufficient to lend support to a more comprehensive action programme for addressing different dimensions of the problem.

21 UNESCO: *Searching for Best Practices to Counter Human Trafficking in Africa: A Focus on Women and Children*. p. 60.

22 UNODC: *Measures to Combat Trafficking in Human Beings in Benin, Nigeria and Togo*. 2006. p. 28.

Considering the complexity of the problem and the context of our research – being without the benefit of field research and observation of practices in action, it is both impossible and unethical to make pronouncements on the impact of a particular practice, let alone name any of them “best practices”. Our emphasis is on an understanding of the cognitive function of particular epistemic communities engaged in the struggle against human trafficking in order to appreciate the specific choices made (for action) in their context.

In the field of human trafficking, epistemic egalitarianism should foster such dialogues between policy-making bodies, engaged grass-roots organisations and scholars to address the congruence of forces behind the phenomenon in the interest of human rights protection. This means including also ‘people living with human trafficking’ (as trafficked persons, returnees and their families) to take part as ‘knowing subjects’ on how best to protect their rights. Such dialogues can be built on experiences of inclusion already taking place in several countries, notably the participation by returnees in the formulation of intervention at micro level. Their narratives and insights should be channelled into the policy field and scholarly interpretative works. This may help to foster a shared understanding of the problem and a collective support that does not take for granted some standardised definition of human trafficking, but is capable of responding to diversity of needs and ‘situated’ rights of trafficked persons and their families.

UNESCO: *Searching for Best Practices to Counter Human Trafficking in Africa: A Focus on Women and Children*, p. 3 and 4

In all the reports the focus is on human trafficking of women and children in Africa. While each group has its own particular situation, both groups make a clear showcase of severe violations of human rights in situation of human trafficking. The study highlights the ways that lack of recognition of children’s rights and women’s marginalized and discriminatory location at both public and private sphere has placed them at a higher risk of being trafficked. As will be seen below the focus on women and children is most certainly justified, but also dangerous in the sense that it exclude trafficking of men from the debate, but including a discussion on discrimination in the public and private sphere is extremely interesting and will be briefly mentioned below.

In applying a human rights based approach to the problem of human trafficking, UNESCO chooses to focus its attention on the groups that show severe violations of human rights in situation of human trafficking – women and children. It should always be clear that a human rights approach to trafficking is a human rights approach to the victims, not a human rights approach to trafficking as a legal concept and definition. It should also be clear that women and children are not alone in being victims. As will be

shown below the definition and concept of trafficking must be looked at with criminal law eyes to make any sense and be operational.

It is true that there are particular push factors, which place girls and young women at a higher risk than boys or young men. Girls in many societies are less valued than boys. Girls are expected to sacrifice their education and assume domestic responsibilities such as taking care of their parents and siblings. Since they will leave the family upon marriage, they are regarded as a poor investment and this makes it easier for the parents to send them out to work. Additionally, domestic work is regarded as preparation for marriage.²³ The trafficking in children is further fostered by West and Central African nations' historical and cultural patterns of migration and the placement of children outside the home. The practice of "child fosterage", sending children to live with extended family or friends to be educated, trained or to work, is a culturally accepted practice in West Africa and is done to foster extended family solidarity and to further the educational and vocational training of the child. Difficult financial situations within the family often are the basis for the placement. This "strategic fostering out of children" is said to be a stronger causal factor in child trafficking than poverty. The majority of trafficked children come from polygamous, large and poorly educated families where the children have limited (if any) opportunities for training and education. Children are often withdrawn from school and forced to help support the family. Parents, who may not even be able to feed their children, are often willing to "give" them to traffickers who promise to provide the child with a job, an education or training.²⁴

But it is very important not to focus only on women and children thus rendering trafficking of men for especially labour exploitation invisible.

BEST PRACTICES

Being a multi-causal problem, human trafficking cannot be addressed by one practice. Likewise no single organisation is capable of 'solving' all affiliated problems, nor should it enforce one vision of the problem as global. A combination of practices capable of creating synergetic effects and consolidating policy goals among engaged actors is sorely needed. Finding Best Practices to counter human trafficking begins with the recognition that such practices are elements in a broader process of social transformation. They are initiatives to transform a complex web of social relationships – specifically those that are causal related to human trafficking. Social contexts in which the causes of trafficking are progressive and cumulative pose a considerable challenge in determining priorities and boundaries of action.²⁵

23 Ibid.

24 Ibid.

25 UNESCO: *Searching for Best Practices to Counter Human Trafficking in Africa: A Focus on Women and Children*. p. 61.

The perhaps most innovative report made with UNESCO support is 'Poverty, Gender and Human Trafficking: Rethinking Best Practices in Migration Management' which in the author's words "*tries to unpack the interconnectedness between human trafficking and poverty in Sub-Saharan Africa, based on a critical analysis of migration processes in relation to human rights abuse.*" Linking poverty, trafficking and policy responses as this report does is most interesting from various points of view: it shows how trafficking is linked to poverty and to human rights violations directly and indirectly related to poverty and it demonstrates how migration policies influence trafficking patterns and possibilities. It thus demonstrates how trafficking must be addressed in both a wider human rights framework but also in a wider migration framework. Showing examples of best practices and presenting suggestions such as involving former trafficked persons in policy development shows how this report can be used by practitioners, policy-makers and academics alike by having a firm base in theory applied to practice. As is concluded in the report:

The arenas of action are both social and political. Anti-trafficking organisations and the practices they adopt are bearers of beliefs derived from their moral and cognitive visions. From the institutional standpoint – even if an organisation recognises that the problem of trafficking has multiple roots, makes sure that the planned interventions are 'multi-pronged' and 'multi-level', and employs participatory measures – it cannot address the occurrence of human trafficking at all levels. Practical responses need to be scrutinised regarding the discrepancy between field analysis and choice of intervention.

The need to have a holistic approach when combating trafficking, to understand that trafficking is not just a potential violation of human rights in the trafficking situation, but a consequence of larger human rights violations and that looking at trafficking outside e.g. poverty, gender and migration discourses simply has no sense is also emphasised in the report: *The diversity of forms of human mobility in the contemporary context of global linkage requires an analytical approach which can explain why the needs of the constituents of social structures and human agency (gender, class, generation and ethnicity) have converged to produce what is known as human trafficking. Without adequate explanation policy tends to shift stance and direction. Reactions premised on human rights concerns have contributed to new international, regional and national legislative frameworks that oppose abusive and exploitative practices in migration. A key concern remains the wide landscape of policy issues underlying the problem, and how policy approaches – in diverse areas such as migration management, crime control, labour standards, poverty reduction and particular needs of communities at risk – can be coordinated to curtail practices of human trafficking and ensure human rights protection.*

The study also gives interesting insight into the mechanisms behind especially child trafficking and the various forms this takes in the region.

The approach to describing and using best practices is also extremely interesting, particularly with the mentioning of the necessity of including and using "epistemic communities": *Haas defines epistemic communities and their role in problem-solving in the context of*

international cooperation in terms of commonality of beliefs, notions of validity and policy enterprises. They are carriers of scientific knowledge into the policy field and 'channels through which new ideas circulate from societies to governments as well as from country to country'. Because of the knowledge they have, epistemic communities are able to penetrate government departments and make their ideas part of policy. Epistemic communities operate only in fields of policy where science is significant. In the field of human rights there is scepticism about the existence of such a community (p. 84). The report mentions justly that the human rights theme is the central concern of all epistemic communities working on human trafficking. Two frames for human rights issues can be discerned. One uses the definition of human trafficking by the Trafficking Protocol for trafficked persons, and the other follows the lines of socioeconomic rights – taking the identification of poverty, gender, vulnerability and ethnic identity as causal factors (p. 86). Looking into international organisations the report mentions that all UN agencies cooperate in lobbying for the strengthening of legislation and law enforcement to protect the rights of trafficked persons. UNICEF appears more concerned with 'the recovery and reintegration of trafficked persons', whereas ILO-IPEC exhibits a more pronounced profile on the rescue, repatriation, and restoration of the rights of trafficked persons, and the prosecution of offenders through the strengthening of the judiciary and police. Action at the sub regional level reinforces its in-country programmes, since the organisation believes that concerted action is needed in both sending and receiving countries to stop cross-border child trafficking (p. 88). The report also underlines the differences and difficulties agencies encounter depending on whether their approach is mainly human rights, mainly migration or mainly crime. The report concludes: *Our review of the profile of epistemic communities active in the global struggle against human trafficking reveals a way of functioning which does not entirely fit the original meaning of the concept. In its original meaning an epistemic community carries scientific knowledge into policy making, and hence seeks to affect outcomes. In human trafficking, such communities appear more bound or obstructed by the 'realist' politics of sovereignty and interests of nation-states. The knowledge generated by the humanities and social sciences does not yet seem to have made major impacts on policy decisions. Evidence produced on human trafficking is now subject to query from a methodological point of view. Processes of epistemic deference in policy choices are not transparent at many levels, and therefore the risks of making inappropriate judgement cannot be overstated. Socially meaningful ends such as human rights protection are currently being pulled in different directions by the disparate interpretations depending on which humans, which location and which interest. Contending epistemological dispositions on human trafficking are closely linked with how international migration is explained in the contemporary context of globalisation. Despite the shared position that accepts human trafficking as an assault on human dignity and endorses the protection of the human rights of those trafficked, substantive differences regarding practical approaches are prevalent.*

THE WAY FORWARD IN POSSIBLE RESEARCH

The pilot country studies give a very useful and workable overview of the situation in each country and could thus be extended to cover other countries, e.g. pilot countries in other regions. What would be recommendable is not to focus only on women and children but study trafficking of humans in general. Already statistics and information may well be at least slightly distorted by the fact that so much attention has been devoted exclusively to these two, admittedly very vulnerable, groups and research in general would benefit from not excluding trafficking of men for e.g. labour exploitation. Research is also needed on the demand side of trafficking, on the real impact of counter trafficking programmes, on the experience of survivors and their ability to reintegrate, on agencies involved in law enforcement.²⁶ The problem regarding numbers is always present due to the character of the phenomenon. Research based on an estimation of numbers use a three level research: 1) estimating the number of people at high risk, 2) accounting for the factors that influence recruitment, transit, and destination activities of traffickers, and 3) using reported and unreported known cases to estimate the universe of trafficking victimization has been called for.²⁷

Further studies on trafficking “trends” in the sense of how trafficking has changed character over the past decades would also be extremely useful for understanding how traffickers adapt to new situations and how responses must be formed to counter-act such transformations.

The fact that there is confusion as to what trafficking actually is and what it may cover (e.g. trafficking does not cover giving shelter and aid to persons in distress even if these persons have been trafficked and one might be seen as “harbouring” them – intent is needed to commit a crime) – from a definition point of view – leads to conclude that awareness-raising is necessary, also in the researcher community where, justly so, not all researchers are familiar with (penal) law principles. Training and information of this kind would be most useful in order to avoid spreading wrong notions about trafficking.

A possible collaboration with UNODC/UNICRI/ILO/IOM on the quality of legislation and implementation presented as a qualitative study would be a useful tool for many practitioners, organisations, and academics alike. Such collaboration would also open a possibility for UNESCO to do a qualitative research but with ample support from e.g. UNODC’s quantitative data.

26 Laczko, F.: Enhancing Data Collection and Research on Trafficking in Persons, in Savona, E.U.; Stefanizzi, S.: Measuring Human Trafficking, complexities and pitfalls. p. 37-43.

27 Albanese, J.: A Criminal Network Approach to Understanding and Measuring Trafficking in Human Beings, in Savona, E.U.; Stefanizzi, S.: Measuring Human Trafficking, complexities and pitfalls. p. 55-69.

Definition of Trafficking

A major but relatively unappreciated problem about devising an appropriate legal response to trafficking is that there is arguably a major conceptual misunderstanding about what legally happens when it takes place. The Protocol has been criticised for its focus on trafficking as a trans-national crime, while saying very little about the victims. This missed a very important point: Trafficking involves many areas of law: criminal, human right, immigration, labour, anti-vice and even tort/delict.²⁸ But it is fundamentally a criminal act, albeit with a human rights dimension as will be examined below. This notion is for some challenging; how can such egregious offences not amount to a human rights violation? The answer is that in the absence of state involvement, deliberate neglect or complicity, trafficking is simply one other criminal activity such as murder, theft or rape.²⁹ The most effective use of international and regional law will be in addressing the crime correctly.³⁰ This does not mean ignoring the human rights dimension but addressing the problem within the correct framework enhances understanding and this helps clarify also the human rights dimension.³¹

Responses to trafficking are often limited by the lack of clarity in terms and definitions used by governments, international agencies, NGOs, academics and the media. In particular it is necessary to pay attention to the fact that often there is no clear distinction made between trafficking and migration, trafficking and smuggling, trafficking and prostitution and between voluntary and forced prostitution. This is a serious issue since it results in distorted data and confused debates with unfortunate policy and public responses.³² Some debates concerning female migrants (trafficking victims, forced prostitute) and confusion regarding the definition has lead to the effect of making cross border movement of women seem illegitimate. Statements such as “the definition of trafficking fails to distinguish between trafficking and voluntary consensual migration, implying that trafficked persons will receive the same treatment as “illegal” (my quotation marks) migrants (...) The Protocol also foregrounds prostitution as the main site of trafficking

28 Both Civil Law concepts.

29 See below for an in depth analysis.

30 Piotrowicz, R.: Trafficking in Human Beings – Developments in Protection: is there a traffic jam? Presentation delivered at the Round Table on International Migration Law and Migration Policies in the Mediterranean Context. The International Institute of Humanitarian Law. San Remo, Italy. 16th Dec. 2008.

31 See below.

32 Cameron, S and Newman, E.: Understanding Human Trafficking, in Cameron, S. and Newman, E. (Eds.): Trafficking in Human – social, cultural and political dimensions, p. 13.

and considers the consent of the “victim” irrelevant³³ do absolutely nothing to help this confusion. Both of these claims are clearly wrong and it takes a very brief reading of the definition to realise this. The definition quite clearly – as will be seen below – requires certain coercive or fraudulent measures to be used against the victim who then is not a consensual migrant, and consent is only irrelevant in cases these measures have been used. It is true that concrete cases may be difficult to determine when migrants arrive and may have consented to the journey but not to elements of exploitation (again this will be examined below) but that by no means signifies that the definition in itself is unclear or does not take into consideration the distinctions.

The definition developed and agreed to in 2000, as the second to last defined Article after three years of negotiations, by the international community for trafficking in persons is found in Article 3 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: “*Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power, or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.*”

The definition refers to three distinct elements:

ACT	MEANS	PURPOSE
(what is done)	(how it is done)	(why it is done)
Recruitment	Threat or use of force	Exploitation, including
Transport	Coercion	Prostitution of others
Transfer	Abduction	Sexual exploitation
Harbouring	Deception	Forced labour
Receipt	Fraud	Slavery or similar practices
	Abuse of power or vulnerability	Removal of organs
	Giving payments or benefits	

All three elements must be present. The only exception is for child victims of trafficking who do not require illegal means.

The elements present in the definition indicate that trafficking includes a number of actors, each of whom may play a role in creating a victim of trafficking, from the acquaintance in the victim’s village who knows someone who can organise a job or a visa,

33 Kapur, R.: Migrant Women and the Legal Politics of Anti-trafficking Interventions, in Cameron, S. and Newman, E. (Eds.): *Trafficking in Human – social, cultural and political dimensions*, p. 114.

to the individual who facilitates illegal crossing of the border, to the person who supplies rooms to accommodate victims in transit and the employer who at the end “buys” the victim. Trafficking thus does not require that just one person carried out all the activities from recruitment through to exploitation. The state is not usually involved in these acts, although it may be through the activity of corrupt law enforcement and border officials who facilitate or ignore the work of traffickers. This may occur in origin, transit and destination states. The primary threat to victims however is clearly one of criminal acts at the hands of private persons and such acts are not necessarily human rights violations on the part of a state.³⁴

Current discussion on the trafficking of women and children in Africa exhibits some tension at various levels. A key contention lies between human rights norms and the definition of ‘tradition’. The failure to integrate human rights norms to protect trafficked persons is due to the absence of a definition of human trafficking in the juridical systems of many countries, combined with structural weakness in the judiciaries. This weakness is regarded as an outcome of ‘missing ingredients’ such as: political will, resources, and awareness among law enforcers (border police, magistrates, local chiefs and others). It is important to point out that the discussion on ‘traditions’ has not fully unearthed their dynamic nature. A tradition – such as the ‘placement’ of children – can be subject to alteration by exogenous forces which commercialise it, which in turn allows for trafficking. The issue at stake is not only what kind of legal label should be placed on this practice, but also adequate understanding of those forces that nullify the defining. Public and political debates on human mobility and trafficking should be about ways to connect cultural factors with other relevant structural issues.

UNESCO: *Poverty, Gender and Human Trafficking in Sub-Saharan Africa: Rethinking Best Practices in Migration Management*, p. 71

When a country is a party to the TOC Convention and the Protocol, it must bring its definition of trafficking in persons in its national Criminal Code in line with the Protocol; the precise wording of that definition may differ from that contained in the Protocol, but the conduct of trafficking must be criminalised. Article 5 of the TIP Protocol requires States parties to criminalize trafficking in persons as defined in Article 3. In addition to the criminalization of the trafficking crime, the Protocol requires criminalization also of:

- Attempt to commit the crime of trafficking
- Participation as an accomplice

34 Piotrowicz, R.: Trafficking of Human Beings and their Human Rights in the Migration Context, in Cholewinski, R.; Perruchoud, R. and MacDonald, E.: *International Migration Law – developing paradigms and key challenges*. p. 278.

- Organizing or directing others to commit trafficking.³⁵

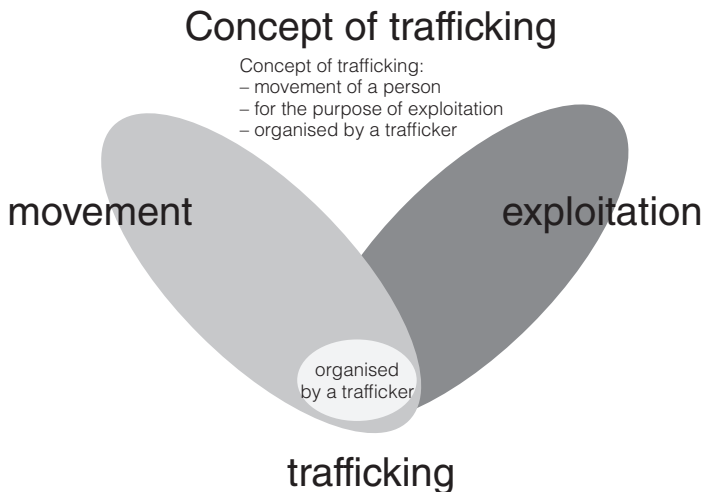
The complexity of the definition, or perhaps rather the complex representations of the definition, have brought problems when it has been adopted word for word in national legislation and passed to law enforcement officials as an operational definition of a crime

35 The United States Code, as amended by the Victims of Trafficking and Violence Protection Act 2000, establishes the following activities as criminal offences of trafficking: *Section 1590 Trafficking with respect to peonage, slavery, involuntary servitude, or forced labour* Whoever knowingly recruits, harbors, transports, provides or obtains by any means, a person for labor or services in violation of this chapter shall be fined under this title or imprisoned not more than 20 years, or both. *Section 1591 Sex trafficking of children or by force, fraud or coercion* Whoever knowingly 1. in or affecting interstate commerce, recruits, entices, harbors, transports, provides or obtains by any means a person; or 2. benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph 1, knowing that force, fraud or coercion described in subsection (c) (2) will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b). This law distinguishes between sex trafficking and other forms of trafficking. Sex trafficking is a criminal offence only if it is carried out by force, fraud or coercion, or if the victim is a minor (in the latter case, there is no force, fraud or coercion required). If a case of sex trafficking involves peonage (i.e. debt bondage), slavery, involuntary servitude or forced labour, it can also be prosecuted. Section 1590 (Trafficking with respect to peonage, slavery, involuntary servitude, or forced labour) provides for imprisonment up to a maximum of 20 years. Under aggravating circumstances (if death results from trafficking or if the act includes kidnapping, attempted kidnapping, aggravated sexual abuse, an attempt to commit aggravated sexual abuse or an attempt to kill), imprisonment may be for any term of years or life. Sex trafficking according to section 1591 (Sex trafficking) leads to imprisonment up to a maximum of 20 years in case of sex trafficking of a minor who is between 14 and 18 years old. If the victim is younger than 14 or if the crime involves force, fraud or coercion, imprisonment can be for any term of years or life. Both provisions also provide for fines – together with, or instead of, imprisonment.

Prior to the ratification of the Organized Crime Convention and the Trafficking in Persons Protocol and Migrants Protocol, Nigerian law, including the Penal Code, the Criminal Code, the Labour Act and the Immigration Act, had criminalized various offences relating to human trafficking, but the legislation was widely seen as ineffective. In 2003, the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act was adopted. The Act criminalizes human trafficking as such. This Act was amended in December 2005 to increase penalties for traffickers.

In 2003, the Italian Parliament introduced a new law on measures against trafficking in human beings, which modified articles 600, 601 and 602 of the Criminal Code. Article 601 of the Criminal Code defines trafficking in human beings as follows: *Article 601 Human trafficking* Whosoever commits human trafficking found in the conditions under Article 600 or, with the aim of committing crimes contained in the first paragraph of the same article, induces through deception or forces through violence, threats, abuse of authority or profiting from a situation of physical or psychological inferiority or from a situation of necessity, or through promises or giving sums of money or other advantages to those having authority over the person, to allow entry or a stay or to leave the territory of the State or to internal transfer, is subject to punishment by a prison sentence of between eight to twenty years. The sentence is increased by one third to one half if the facts contained in the first paragraph relate to minors of less than 18 years or which are directed towards exploitation of prostitution or with the aim of subjecting that person to the extraction of organs. See UNODC: *Toolkit to Combat Trafficking in Persons*. 2006.

they are supposed to detect or prevent. They consequently resort to various shortcuts to enforce the law and, in doing so, often misapply or misinterpret the definition.³⁶



Whereas it is true that the definition may be complex, it should not be presented to people in the field as inoperative. The three elements must be there for a case to constitute trafficking, and it is not always those three elements that are clear upon e.g. arrival. But in these cases it should not be forgotten that e.g. abuse and bodily harm are criminal offenses outside the trafficking context, and can be prosecuted as such. The trafficking definition further follows classical criminal law in giving intent (to exploit) a central role. This is not necessarily easy to prove, but on the other hand does not differ terribly from other definitions or understandings of when crimes can be prosecuted. As the ‘purposes’ for which people are recruited are an intrinsic part of the definition of what trafficking involves, it is worth noting that they refer to a wide range of situations involving forced labour or slavery-like situations. They also involve the “exploitation of the prostitution of others or other forms of sexual exploitation”. The crucial importance of avoiding confusion regarding the definition and its practical operational value underscores the importance of understanding and remembering that trafficking is a criminal law concept, but with a strong human rights dimension. Trafficking must be addressed from a criminal law perspective, and trafficking victims must be addressed with a human rights perspective.

36 Global Alliance Against Traffic in Women: Collateral Damage – The Impact of Anti-Trafficking Measures on Human Rights around the World. *Global Alliance Against Traffic in Women*. 2007. p. 3.

TRAFFICKING AND SMUGGLING – AN IMPORTANT DISTINCTION

Many of the employment opportunities that smuggled migrants are keen to access constitute "forced labour" in international law terms – paradoxically, they are forced but chosen opportunities. Are these workers smuggled because they surely consent, or are they trafficked because the exploitative offer is actually a threat? Not accepting means they lose the opportunity to find work. There is no question that smugglers take advantage of the migrants' desperation or vulnerability. But are all exploitative offers coercive and is coercion always exploitative? No. Just because the smuggler's offer is exploitative does not necessarily mean the migrant is coerced. If the migrant has no other acceptable options, then the exploitative offer becomes coercive. For instance, if the migrant would starve, or be unable to get medicine for a child unless he or she took up the offer, then the offer would be coercive. Further the fact that the victim knew in advance that s/he was going to engage e.g. in prostitution does not mitigate the criminality of the trafficker – if the means of trafficking are utilized and the element of exploitation remains. The gravity of it is not diminished because the victim was aware of the nature of the work but not of the working conditions.³⁷ In these situations, the fact that the migrant consents to be smuggled (because the deal is mutually advantageous) does not alter the fact that it is coercive. The critical issue is to determine which alternatives are considered acceptable and which are not.³⁸

The regime created by the two protocols (whereby trafficked persons are accorded greater protection and therefore impose a greater financial and administrative burden on States Parties than smuggled migrants) creates a clear incentive for national authorities to identify irregular migrants as having been smuggled rather than trafficked. There is plenty of anecdotal evidence indicating that this is occurring. The possibility of individuals being wrongly identified was not even considered during the drafting process – despite the best efforts of a coalition of UN agencies.³⁹ This is an obvious problem which has to be addressed in order to ensure adequate and correct implementation of both protocols. A smuggled person, like many (but not all) trafficked persons, has clandestinely crossed a border or been transported, but unlike trafficking, smuggling is not linked to work. Whereas the illegal crossing of borders is the aim of smuggling, the aim of trafficking is the exploitation of one's labour. In other words, the issue of smuggling concerns the protection of the state against irregular migrants, while the issue of trafficking concerns the protection of individual persons against violence and abuse.⁴⁰

37 UNODC: *Toolkit to Combat Trafficking in Persons*. 2006. p. xvi.

38 Bhabha, J.: *Trafficking, Smuggling, and Human Rights*.

39 Gallagher, A.: Trafficking, smuggling and human rights: tricks and treaties. *Forced Migration Review*, issue 12, Jan. 2002, p. 27.

40 Ditmore, M. and Wijers, M: The negotiations on the UN Protocol on Trafficking in Persons. *Nemesis* 2003 nr. 4. p. 80.

Smuggling of migrants and human trafficking both involve moving⁴¹ human beings for profit. However, as seen above, in the case of human trafficking, two additional elements beyond smuggling must be present: there must be some improper form of recruitment⁴², such as the use of coercion, deception or some abuse of authority;⁴³ and the activity must have been undertaken for some exploitive purpose, although that purpose need not necessarily have been fulfilled. In human trafficking, the major source of revenue for offenders and the economic driving force behind the offence are the proceeds derived from the exploitation of victims in prostitution, forced labour or in other ways. In smuggling, the smuggling fee paid by the irregular migrant is the major source of revenue and there usually is no ongoing relationship between the offender and the migrant once the latter has arrived at the destination. The other major difference between smuggling and trafficking is that smuggling is always trans-national in nature, but trafficking may or may not be.⁴⁴ Trafficking in persons and smuggling of migrants are distinct crimes, but they represent overlapping crime problems. Their legal definitions contain common elements. Actual cases may involve elements of both offences or they may shift from one to the other. Many victims of human trafficking begin their journey by consenting to be smuggled from one State to another. Smuggled migrants may later be deceived or coerced into exploitive situations and thus become victims of human trafficking. In fact, it may

41 Transportation routes and methods depend upon geographical conditions. People are moved by aircraft, boat, rail, ferry and road or simply on foot in order to reach the country of destination. The route may include a transit country or it may be direct between the origin and destination locations. In the case of trafficking the crossing of borders may be done overtly or covertly, legally or illegally. Related criminal offences include abuses of immigration and border control laws, corruption of officials, forgery of documents, acts of coercion against the victim, unlawful confinement and the withholding of identity papers and other documents.

42 The most common recruitment methods include: • Individual recruiters looking for interested males and females in bars, cafes, clubs, discos and other public places • Recruitment via informal networks of families and/or friends • Advertisements offering work or study abroad • Agencies offering work, study, marriage or travel abroad • False marriages • Purchase of children from their guardians. UN.GIF: Human Trafficking: An Overview. p. 11.

43 Basic means of recruitment are: • Complete coercion through abduction or kidnapping • Selling a person, typically a child • Deception by promises of legitimate employment and/or entry • Deception through half-truths • Deception about working conditions • Abuse of vulnerability. UN.GIF: Human Trafficking: An Overview. p. 12.

44 See below.

often be difficult for law enforcement officials and victim service providers to determine whether a particular case is one of smuggling or trafficking.⁴⁵

TRAFFICKING AND SEXUAL EXPLOITATION

One of the most controversial and hotly debated issues during the negotiations concerned the first major lobbying goal of the participating NGOs; the definition of trafficking. This is not surprising, as one of the fundamental problems in combating trafficking until then had been the lack of international consensus on a definition and thus on precisely which practices should be included as unlawful. Underlying this lack of consensus are two diametrically opposed views on sex work. One sees all sex work as trafficking per se. The other view holds that conditions of (forced) labour in all industries, including the sex industry, should be addressed. The debate whether prostitution per se is slavery and therefore equivalent to trafficking in persons was related most directly and vehemently to the definition of trafficking in the Protocol, but permeated the whole negotiating process.⁴⁶

45 In a study carried out by The Institute on Race and Justice Northeastern University Boston on law enforcement and trafficking in the US it was found that: Local law enforcement perceive human trafficking as rare or non-existent in their local communities; however, agencies serving larger communities are more likely to identify human trafficking, particularly sex trafficking as a more pervasive problem • All types of law enforcement agencies, including those serving the smallest jurisdictions, have investigated at least one case of human trafficking. • Over half of the law enforcement agencies serving large jurisdictions (with a population of over 250,000) have investigated trafficking cases • When controlling for size and location of communities, the degree to which law enforcement is prepared to identify human trafficking cases is a significant indicator of whether or not they actually investigate cases • Nearly 92 percent of law enforcement agencies reported a connection between human trafficking and other criminal networks such as drug trafficking and prostitution • Agencies that have identified cases of human trafficking report using pro-active investigative strategies such as gathering information on human trafficking indicators during the course of other investigations.

46 Ditmore, M. and Wijers, M: *The negotiations on the UN Protocol on Trafficking in Persons*. p. 78-79.

There is tension between two key sets of concerns: the sovereignty and interests of nation-states as discrete units in international relations; and the violations of the human rights of persons in a particular process of migration labelled 'human trafficking'. When there is insufficient grasp of the reasons for the phenomenon of human trafficking, policy tends to lurch inconsistently in different directions – often suppressing the voices of those affected. There are currently six perspectives on sex trafficking and related actions:

- A moral problem that leads to intervention for the abolition or prohibition of prostitution or commercial sex;
- A problem of organised crime that leads to legislative reforms, policing and the penalising of criminal networks;
- A migration problem that leads to border controls (passport and identification papers);
- A public order problem that leads to awareness campaigns, publicity about risks, and changing cultural practices;
- A labour problem that leads to intervention such as improving working conditions and labour monitoring systems, and abolishing child labour;
- A human rights problem and a gender issue that lead to intervention to address violence against women and children

UNESCO: *Poverty, Gender and Human Trafficking in Sub-Saharan Africa: Rethinking Best Practices in Migration Management*, p. 60

Lobbying efforts by the Human Rights faction focused on the definition of trafficking in persons, promoting a broad and inclusive definition to cover all trafficking into forced labour, slavery and servitude, irrespective of the nature of the work or the sex of the trafficked person, and clearly excluding voluntary, non-coercive prostitution or other sex work. This means that sex work and trafficking are different issues, whereby trafficking is defined by the presence of coercion, deception, debt bondage, abuse of authority or any other form of abuse in relation to the conditions of recruitment and/or the conditions of work. It also means that a distinction is made between adults and children, whereby, to qualify as trafficking, an element of coercion is not required in the case of children as their legal status is different from that of adults. Additionally, the human rights faction worked to include human rights protections for trafficked persons, regardless of their willingness to act as witnesses for the prosecution and including the right to a safe shelter, social, medical and legal assistance, the ability to sue for back wages and damages, as well as residency and working permits during judicial proceedings. Finally, an important goal was the inclusion of an anti-discrimination clause to ensure that trafficked persons are not subjected to discriminatory treatment in law or in practice.⁴⁷ The other bloc regards the institution of prostitution itself as a violation of human rights, akin to slavery. This lobby

47 Ibid. p. 81.

group argued that 'trafficking' should include all forms of recruitment and transportation for prostitution, regardless of whether any force or deception took place. This is in line with their view of prostitution per se as a violation of women's human rights.⁴⁸ The Human Rights faction, who supported the view of prostitution as work, argued that force or deception was a necessary condition in the definition of trafficking for sex work and for other types of labour. They also maintained that trafficking for prostitution should not be treated as a different category to other types of labour. This was based on the recognition that men, women and children are trafficked for a large variety of services, including sweatshop labour and agriculture, as well as fear of the potentially repressive consequences of attempts to turn the Protocol into an anti-prostitution document.⁴⁹ These two positions ended up revolving around the notion of "consent". Several government delegations argued that the definition of trafficking had to specifically include situations in which a person both consented to travel and consented to do sex work, even if no force or deception was involved. This position has as its root the idea that a woman's consent to sex work is meaningless. This definition of trafficking differed little from the proposed definition of trafficking in children: in this view, neither women nor children can be said to "consent" to travel for work in the sex industry.⁵⁰ As can be seen from the final definition the Human Rights Caucus' view was adopted, avoiding rendering women incapable of consenting. It is left up to States' national legislation whether prostitution is in itself a crime. The focus on sex workers has however had tremendous influence on the trafficking debate also after the adoption of the Protocol, which is evident e.g. in the focus on trafficking of women and of women and children for sexual exploitation, a focus which is not necessarily promoting the human rights of trafficking victims, nor the fight against traffickers in the most effective way, as will be considered below.

CONSENT

In many trafficking cases, there is initial consent or cooperation between victims and traffickers followed later by coercive, abusive or exploitive circumstances. Any initial consent is effectively later nullified by initial deception, later coercion, or an abuse of authority at some point in the process in accordance with Article 3, subparagraph (b), of the Trafficking in Persons Protocol. This raises practical problems in cases where accused traffickers raise evidence of victim consent as a criminal defence. Subparagraph (b) of the definition clarifies that consent becomes irrelevant whenever any of the "means" of trafficking has been used. Consent of the victim can still be a defence in domestic law, but as soon as means such as threats, coercion or the use of force or abuse of authority are established, consent becomes irrelevant and consent-based defences cannot be raised. In most criminal justice systems, the effect would be that prosecutors would raise evidence

48 Ibid.

49 Doezema, J.: Who gets to choose? Coercion, consent and the UN Trafficking Protocol. *Gender and Development*, Volume 10 Number 1, March 2002.

50 Ibid.

of improper means and defence counsel would tender evidence of victim consent, leaving the court to assess first the validity of the prosecution evidence and then the validity of the defence. Under the Trafficking in Persons Protocol, it is possible that a valid consent, completely free of any improper means, might be obtained. The definition of trafficking and the modus operandi of most traffickers make this a relatively unlikely scenario however, and investigators and prosecutors should carefully consider all of the evidence and elements of any case before reaching this conclusion. Where a person is fully informed of, and consents to, a course of conduct that might otherwise constitute exploitation and trafficking under the Protocol, no offence of trafficking would occur. However, trafficking does occur if consent at any stage of the process is nullified or vitiated by the application of improper means by traffickers. Effectively, the consent of the victim at one stage of the process cannot be taken as the consent at all stages of the process, and without consent at every stage a trafficking offence has taken place. The nature of the activity consented to is less important than the question of whether valid consent is established at the outset and has been maintained at all subsequent stages of the process. If such consent does not exist or is nullified at any stage, it is trafficking. If the consent is maintained, it is not trafficking, even if the subject has consented to engage in actions that are illegal in the destination State, such as prostitution or drug trafficking. A further issue in many cases will be the legal question of whether a particular victim had the capacity to consent to recruitment or subsequent treatment in national law. Under Article 3, subparagraph (c), of the Trafficking in Persons Protocol, consent and the presence or absence of improper means of trafficking become completely irrelevant if the victim is a child under 18 years of age, and under the national laws of many States parties, the capacity to consent, especially to sexual activity, may be even further restricted.⁵¹ Real consent is only possible and legally recognisable, when all the relevant facts are known and a person is free to consent or not. Moreover, one cannot legally consent to forced labour, slavery or practices similar to slavery or servitude.⁵²

What began as a voluntary activity on the part of the migrant will still qualify as a case of trafficking in persons if the initial consent of the victim was gained through the use of deception, coercion or any other means, and exploitation subsequently takes place.⁵³ In other words, it is the means of consent, rather than consent per se, that is important. The problem is how the means of consent can be determined other than by the sole testimony of an alleged victim of trafficking. It may be argued that migrants who are not “well informed” in making their decision to migrate cannot later claim they had false expectations and were thus a victim of trafficking. This makes some sense, but there is also a fine line between being given enough information and correct information. As economists often argue, if one assumes a rational decision making process, then one assumes perfect market information. Whose responsibility is it, to provide all the information? Is it the

51 UNODC: Toolkit to Combat Trafficking in Person. 2006. p. xvii.

52 UNGIFT: The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper 023 Workshop: The Effectiveness of Legal Frameworks and Anti-Trafficking Legislation. p. 5.

53 UNODC: Toolkit to Combat Trafficking in Person. 2006. p. xvii.

recruitments agency's responsibility, or is the onus on the individual migrant who may be self-delusional or in denial of warnings of the risks involved? Or are the specifications as detailed in the contract sufficient? Even then, we know that many migrant workers do not understand and cannot recall the conditions in the contracts they have signed.^{54 55}

Defendants have a right to a defence but, once the elements of the crime of trafficking are proven, any allegation that the trafficked persons 'consented' is irrelevant. Real consent is only possible and legally recognizable, when all the relevant facts are known and a person is free to consent or not. Defendants do not lose their right to raise all defences. Thus, despite evidence that the victim consented to migrate, to carry false documents and to work illegally abroad, defendants cannot argue that the victim 'consented' to work in conditions of forced labour, slavery or servitude. For example, a woman can consent to migrate to work in prostitution in a particular city, at a particular brothel, for a certain sum of money.⁵⁶ However, if the defendant intended actually to hold the woman in forced or coerced sex work, then there is no consent because everything the defendant trafficker told the woman is a lie. No one can consent to a lie. Even if a person agrees to work in very bad conditions, for very little money, with very little freedom, he would still be a victim of trafficking if the trafficker intended to hold him/her in debt bondage, involuntary or forced conditions.⁵⁷ In most criminal justice systems the effect would be that prosecutors would raise evidence of improper means and the defence counsel would tender evidence of the victim's consent, leaving the court to assess the validity of the evidence of both the prosecution evidence and the defence.⁵⁸

54 Jureidini, R.: *Trafficking and Contract Migrant Workers in the Middle East*. The standard contract introduced by the Sri Lankan government in 2000 [*Contract of Employment for Domestic Helpers from Sri Lanka in the Middle East Countries*] was only written in English and Arabic. In addition, it makes explicit what is normally left implicit in contracts, namely that: The employee may terminate this contract without any notice to employer for any of the following just causes: maltreatment by the employer or any member of his household; violation of the terms and conditions of this contract; non-payment of salary; physical molestation and assault. (Clause 10b) Under "Special Provisions" (Clause 12), the contract also stipulates: The employer shall treat the employee in a just and humane manner. In no case shall physical violence be used upon the employee. (Clause 12b) Such provisions are instructive because they are indicative not only that such practices actually occur, but their inclusion should also be a warning to the migrants themselves.

55 Ibid.

56 A specific case is from Murmansk where Russian women took a bus to a small Norwegian town, where they spent the week-end selling alcohol and souvenirs. Soon they were selling their bodies as well, and bringing home large sums of money. The news of this enterprise spread among friends and as many as 70 women began boarding the bus each week. This was voluntary prostitution and the women were able to return home at will. Although, given the opportunism of organised crime it is likely that the prostitution later became more organized, more exploitative and more coercive, but this was not the case at the outset. See Williams, P: *Trafficking in Women: The Role of Trans-national Organised Crime*, in Cameron, S. and Newman, E. (Eds.): *Trafficking in Human – social, cultural and political dimensions*, p. 129.

57 Jordan, A.D.: *The Annotated Guide to the Complete UN Trafficking Protocol*. International Human Rights Law Group. 2002. p. 11.

58 UNODC: *Toolkit to Combat Trafficking in Persons*, 2008, p. 7.

Agency

The degree of victimization and exploitation of trafficking victims may vary but fundamentally they are all victimized and exploited – or there would be no case or talk of trafficking. This reality coexists with the fact that trafficking victims have “agency”. The idea that a person may be responsible for some of the decisions that resulted in their finally being trafficking may seem unattractive to some involved agents. The preferred simplistic view is that the victim must be “blameless” in all regards. Trafficking victims, who have displayed some agency at a certain point (i.e. most), are most often treated as “co-conspirators”. This distinction is unproductive since it denies the multiplicity of factors that facilitate the operations of trafficking networks worldwide. Notions that an individual must be entirely “blameless” to be considered a victim of trafficking may arise in part as a result of confusion between “agency” and “choice”.⁵⁹ Many people who are trafficked are actively seeking a migration route, but they do not choose to be exploited. Persuading, by various means, to gain the consent of an individual to accept work in another country is important to ascertain the extent of coercion and that there is a possible trafficking agent involved in the first instance. On the other hand, where the prospective migrant worker did not need convincing or cajoling prior to departure, but human rights or criminal violations are present on arrival in the receiving country, there may be doubts as to the whether the person is trafficked or not, here consent is an important factor.⁶⁰

In this context it is crucially important to mention, and to keep in mind, that trafficked victims are not voiceless and helpless receivers of aid and assistance. They are resourceful and active human beings who have a will and often also – when given the possibility – a plan for what they want to do and where they want to go.⁶¹ Victims should not be “infantilised” – by now not even children should be infantilised since their agency and opinion should be given due weight according to the CRC – but respected.

MEANS USED BY TRAFFICKERS

Force and coercion

There is always a point in the trafficking chain at which people are subjected to force or coercion: when they are recruited, during transportation, upon entry or during work. Both overt and subtle forms of coercion are used, such as the confiscation of papers, non-payment of wages, induced indebtedness or threats to denounce irregular migrant

59 Cameron, S.: Trafficking of women for prostitution, in in Cameron, S. and Newman, E. (Eds.): Trafficking in Human – social, cultural and political dimensions, p. 86.

60 Jureidini, R.: Trafficking and Contract Migrant Workers in the Middle East”.

61 This is an aspect very often overlooked and when overlooked results in perplexity when women turn from trafficking victims to traffickers.

workers to authorities if they refuse to accept the working conditions. Currently, few traffickers are prosecuted, whereas workers are locked up and deported. Part of the difficulty in prosecuting employers, contractors, recruiting and transporting agents may be due to the current trend towards increasing penalties for the hiring of “illegal” workers and punishing the off-the-books workers themselves.⁶²

Several forms of coercion in both recruitment and employment can be difficult to detect. Besides physical restraints there can also be restraints which are less overt such as confiscation of papers, non-payment of wages, and threat to denounce irregular migrant workers to authorities.

Fraud, deception and abuse of power

The Palermo Protocol adds to coercion, fraud, deception and abuse of power as a means of trafficking. Importantly, the Palermo Protocol connects the issue of coercion to that of consent. In other words it is absolutely irrelevant if the victim apparently voluntarily entered or stayed in a situation or conditions of labour exploitation if they were put in that situation through the use of threats, force, coercion, abduction, deception or fraud or by an abuse of power or an abuse of their own position of vulnerability. Most of these concepts will already be clear in national law however coercion and abuse of power/vulnerability are unlikely to be.⁶³ It therefore becomes important that these concepts are explained so that law enforcers can appropriately identify cases of trafficking and use adequate investigation techniques and protection measures to enable potential victims to give a full account of their situation and for this to be properly identified as a case of trafficking. This is particularly important in cases of labour exploitation where cases cover a wide range of situations including those of regular economic migrants whose vulnerable position as foreigners (perhaps also with limited language skills and knowledge of their rights), is exploited by traffickers for forced labour.⁶⁴

If the original facilitators of migration act in good faith, it would be difficult to categorize them as traffickers. However, the employer, or some other middle-man, might have every intention to exploit the migrant worker. What might begin as a migration turns into trafficking. In a study of over 140 trafficked children in the United States, it was found that every one of them was smuggled with their parents’ consent, but neither the

62 In OSCE Human Trafficking for Labour Exploitation/Forced and Bonded Labour: Identification – Prevention – Prosecution Report of the 3rd *Alliance against Trafficking in Persons* Conferences on Human Trafficking for Labour Exploitation/Forced and Bonded Labour. Vienna, 7 and 8 November 2005 p. 13.

63 OSCE Occasional Paper Series n. 1. A Summary of Challenges: Facing Legal Responses to Human Trafficking for Labour Exploitation in the OSCE Region. p. 8.

64 Ibid. And Anti-Slavery International “*Trafficking for Forced Labour UK Country Report*”, (Skrivankova, K.) 2006: in a study conducted in the UK of 27 migrant workers trafficked into forced labour none of the cases were identified as trafficking by the agencies that initially identified them and the majority of the victims had entered the UK legally.

parents nor the children (and in some instances the first person in the chain of traffickers/smugglers/transporters/employers) were aware of the deceit and subsequent exploitation until afterwards.⁶⁵ Proving deception is not simple. Perhaps it is most easily determined in cases of replacement contracts where the contract signed before departure for the country of origin can be compared with the replacement contract on arrival at the country of destination. The extent to which the replacement contract is signed voluntarily also needs to be resolved.⁶⁶ It cannot be assumed that once the migrant worker has arrived (s)he will have little choice but to agree. Other than that, if deceived, or if expectations on arrival were not met, a victim's statement may not be sufficient for prosecution since it may be assumed that, if an agent were asked if he or she had deceived the worker, the answer would be "no". Family members and friends of the alleged victim could be interviewed for verification of original expectations, but would they be accepted as reliable or more reliable than the alleged victim?⁶⁷ Deception may only be clear in extreme cases.⁶⁸

Abuse of a position of vulnerability

The "abuse of a power or of a position of vulnerability" contained in Article 3 of the Protocol is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved. This is to acknowledge that many trafficked people are under the influence of someone to whom they are vulnerable; such as a person holding a position of official authority or a person who is influential to them such as a parent or spouse. It is logically and legally impossible to consent to being exploited where consent has been obtained through improper means, or in the case of children, where their particular status as vulnerable persons makes it impossible for them to consent in the first place.⁶⁹

The terms "abuse of a position of vulnerability", and the UN's interpretive note on that wording, make it clear that trafficking can occur without any use of force. The definition recognizes that many trafficked people are told what to do by someone close to them, such as a parent, a spouse or a community leader. Persons in these situations may have no culturally acceptable or legal means to refuse and so they "submit" to the situation. They are still victims of trafficking.⁷⁰

65 Jureidini, R.: *Trafficking and Contract Migrant Workers in the Middle East*.

66 This practice began in Lebanon in 2006 following the Philippines government's insistence on minimum contractual requirements before a migrant domestic worker can leave the country legally.

67 Jureidini, R.: *Trafficking and Contract Migrant Workers in the Middle East*.

68 Ibid. In a questionnaire administered to migrant domestic workers in Lebanon, interviewees were asked if there were any differences between what they thought they were coming to and what they found when they arrived. Very few interviewees answered this question which suggested that they did not fully understand question itself, or they did not know or remember what was written in the contracts they signed in the first instance.

69 UNGIFT: The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper 023 Workshop: The Effectiveness of Legal Frameworks and Anti-Trafficking Legislation. p. 5.

70 Jordan, A.D.: The Annotated Guide to the Complete UN Trafficking Protocol, p. 8.

The Travaux Préparatoires, in paragraph 63, indicate that the reference to the abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.

DEFINITIONS OF EXPLOITATION

The Protocol makes reference to some specific forms of exploitation; however the list is not exhaustive and it may include other forms as well. The choice made was to extend as much as possible the definition of trafficking in persons to include any possible – known or still unknown – form of exploitation. Consequently the Protocol is well equipped to fight against new forms of exploitation that might constitute the necessary elements of the offence.⁷¹

A form of trafficking currently under investigation takes place in the northern part of Nigeria and involves the luring of young children to Saudi Arabia to be killed for blood money known as “diya”. The method is quite simple: the trafficker, often female, takes a child trafficked to Saudi Arabia to go shopping; when she spots an affluent Arab’s car, she pushes the child in the path of the car to get run over and possibly killed. There are two types of penalties for anyone who kills another human being in Saudi Arabia. The first is the death penalty; the second is offering compensation to the relatives of the dead victim, if the relatives accept (“diya”). The trafficker opts for the second option and obtains an equivalent of about Naira 3,500,000 (local currency, equivalent to some US \$27,000). The trafficker returns to Nigeria and informs the parents of the trafficked child that the child died of natural causes. The trafficker pays the parents about Naira 100,000 an equivalent (about US \$775) as the wages of the child while in Saudi Arabia. Parents do not typically probe the trafficker’s story, often accepting the death of the child as the will of Allah. Many simply accept the supposed wages. There is little research on this form of trafficking, but interviews suggest that those recruited are women and children from poor family backgrounds and rural communities.

UNESCO: *Human Trafficking in Nigeria, Root causes and Recommendations*, p 29

All the forms of exploitation mentioned in the Protocol are left undefined, but most of them e.g. forced labour, slavery, practices similar to slavery and servitude have been defined elsewhere in other international treaties. The Vienna Convention on the Law of Treaties

71 UNODC: *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols thereto*, 2004, para. 35.

prescribes that a treaty shall be interpreted in good faith in conformity with the ordinary meaning given to its terms in their context and in the light of the treaty's object and purpose. Any subsequent agreement between the parties or practices in the application of the treaty, establishing the agreement of the parties regarding its interpretation, shall also be taken into consideration. Supplementary means of interpretation shall also be considered when interpreting a Treaty, including the preparatory works and the circumstances at its conclusion.⁷²

Early drafts of the Protocol made specific references to specific forms of trafficking such as:

1. forced marriage
2. marriage of convenience
3. illegal adoption
4. sex tourism
5. forced domestic labour
6. pornography

These specific forms may be addressed and may fall within the current purposes of trafficking, as stated in the Protocol. For example, pornography can be considered as another form of sexual exploitation. Similarly, domestic service could be either considered a form of trafficking for labour or services or a form of servitude. According to the UN Working Group on Contemporary Forms of Slavery, early and forced marriage are contemporary forms of slavery⁷³ and in many cases they are not related to trafficking, but they may be. The Supplementary Convention on Slavery also defines forced marriage as a practice of slavery⁷⁴ and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage provides for minimum rules on the entering into marriage – voluntarily. Besides, State Parties may add other forms of exploitation since the Protocol's definition only covers these forms of trafficking “as a minimum.”⁷⁵

72 Vienna Convention on the Law of Treaties Art. 31.1.

73 UN DOC E/CN.4/Sub.2/2003/31 para. 5.

74 Article 1.1.c Any institution or practice whereby: (i) A woman, without the right to refuse, is promised or given in marriage on payment of consideration in money or in kind to her parents, guardian, family or any other person or groups; or (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or (iii) A woman on the death of her husband is liable to be inherited by another person.

75 Mattar, M.: The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: Reflections After Five Years. Concord Center Annual Conference on Disposable People: Trafficking in Persons. Tel Aviv, Israel December 22, 2005.

Forced labour

Bonded labour and debt bondage are two ways of referring to the same issue. Debt bondage was defined in the 1865 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery⁷⁶ as being the practice of repaying a loan with services, whose length, value and nature have not been specified, performed by the debtor or by another person.⁷⁷ In this case the person making the loan can potentially add interest to the loan to gain control over the debtor who may even remain in the conditions of bonded labour for ever. Victims trafficked for labour or sexual exploitation are often kept in a condition of bonded labour because they are told they have to repay their travel and other expenses that the traffickers have paid in advance.⁷⁸

The Protocol does not define any of the mentioned forms of exploitation related to forced labour. But a definition for each of them can be found in the relevant international convention. Article 2, paragraph 1 of ILO Forced Labour Convention, 1930 (No. 29) defines forced labour as “*all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily*”. States Parties ratifying this Convention are also committed to ensuring that the illegal exaction of forced labour is a punishable penal offence under national legislation. The concept of forced labour as defined by ILO Convention 29⁷⁹ comprises three basic elements:

- a) **the activity exacted must be in the form of work or service;**⁸⁰

- b) **the menace of a penalty used to exact the work or service can take different forms**, including the loss of rights and privileges. The ILO identified a number of practices that constitute such penalties and might be indicators of forced labour situations. These include: *Physical or sexual violence against the worker, his/her family or close associates; Restriction of the worker’s movement; Debt bondage or bonded labour; Withholding wages, non-payment of wages or illegal wage deductions; Retention of identity documents; Threat of denunciation to the authorities and of deportation*. Most of these practices are, in themselves, crimes provided for under States’ legal systems. However, the imposition of forced labour, which can include one or more of the above practices, is of a different order, with a scope of application that is not exactly the same.

76 Adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI) of 30 April 1956 and done at Geneva on 7 September 1956.

77 Art. 1(a).

78 Scarpa, S.: *Trafficking in Human Beings – modern slavery*. p. 19.

79 Supplemented by the ILO Abolition of Forced Labour Convention, 1957 (No. 105), which does not change the concept of forced labour provided by Convention 29. ILO Convention 182, 1999, seeks to secure the prohibition and elimination of the worst forms of child labour, including trafficking of children.

80 ILO Convention 29 excludes from its sphere of application a number of activities, including work exacted in virtue of compulsory military service, and any work or service exacted as a result of a conviction in a court of law, provided it is supervised by a public authority.

- c) **it is undertaken involuntarily by the victim.** This aspect includes situations in which there was initial willingness on the part of the victim, but where external constraints and coercion come into play at a later stage and the victim is no longer free to withdraw his/her consent.⁸¹

According to the ILO Guidelines on Human Trafficking and Forced Labour Exploitation legislatures and law enforcement have to take into account that the seemingly “voluntary offer” of a worker/victim may have been manipulated or was not based on an informed decision. The ILO notes that a forced labour situation is determined according to the nature of the relationship between a person and an “employer” and not by the type of activity performed. The legality or illegality of the activity under national law is irrelevant to its determination as forced labour.

Penal law often does not place the emphasis on coercion, and often have rather subjective criteria as to what constitutes forced labour. In most cases common sense will show when one human being is exploiting another human being to make unfair profits. It is however important to underline that simply poor working conditions do not alone constitute forced labour, there must be an element of intention to exploit. In the fight against forced and bonded labour, the Protocol is enormously useful for the work of ILO since before its adoption the agency looked only on the State and whether the State conducted forced labour – with the Protocol the focus was broadened and so was the understanding of what forced labour is – now it is shown that 80% of forced labour is in the private sector.⁸²

It is especially important to note that traffickers cannot circumvent the definition of trafficking by paying the victim a small sum or by giving certain benefits or by engaging the person in legal activities if otherwise some of the conditions of forced labour are present – e.g. if the person does not have his/her identity documents or is being threatened with denunciation to immigration authorities etc. The fact that the victim is not in a slavery-like condition but does have a slightly better standard of living does not mean that forced labour/exploitation/trafficking is not taking place and cannot be prosecuted and proved.

Trafficking and labour rights

Trafficking violates the most basic rights of any person in relation to a work situation – the freedom from coercion at work, the freedom to set up associations and bargain collectively, and the freedom from discrimination at work. Further trafficking of children has been defined by the ILO as one of the worst forms of child labour, which seriously harms the development of the child. These four core principles are enshrined in the

81 Pereira, S. and Vasconcelos, J.: *Human Trafficking and Forced Labour – Case studies and responses from Portugal*, International Labour Office, Geneva, 2008, p. 10.

82 Plant, R.: *the Labour Dimension of Human Trafficking*. Alliance against trafficking in persons, Vienna, ILO, 2004.

ILO Declaration on Fundamental Principles and Rights at Work that was adopted by ILO members in 1998. The Declaration is based on eight core Conventions, two of which are most closely related to the Palermo Protocol (No. 29 on Forced Labour and No. 182 on the Worst Forms of Child Labour). They are also among the most widely ratified Conventions of the ILO. The principles have to be respected and promoted by all member States even if they have not ratified the respective conventions. The States which ratify Convention No. 29 undertake “to suppress the use of forced labour or compulsory labour in all its forms within the shortest possible period” (Art.1, para. 1, of the Convention). The States Parties to the Convention must ensure that “the illegal exaction of forced or compulsory labour shall be punishable as a penal offence” and “that the penalties imposed by law are really adequate and are strictly enforced” (Art. 25 of the Convention). Convention No. 182 requires that each ratifying State take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.⁸³

It has been argued that trafficking is fundamentally a labour market problem.⁸⁴ This is most certainly a big part of the problem and underestimating the positive effect it could have to focus on labour market regulations and respect for labour rights is very grave. But it is obviously only part of the problem and the solution.

The issue of trafficking is closely related to undocumented entry or stay in foreign countries. ILO’s Migration for Employment Convention (Revised), 1949 (No. 97), and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) provide a normative framework for the protection of likely and actual victims of trafficking. With regard to measures to prevent misleading information on employment abroad, C. 97 states that ratifying States undertake to maintain an adequate and free service to assist migrants for employment, and in particular to provide them with accurate information. Ratifying States will also take all the appropriate steps against misleading propaganda relating to emigration and immigration. Convention No. 143 is primarily aimed against the organised movement of migrant workers by labour traffickers. Ratifying States shall take measures to detect, eliminate and apply sanctions for clandestine movement of migrants in abusive conditions and illegal employment of migrant workers, on the one hand, and on the other, provide a minimum level of protection to workers in an irregular situation.⁸⁵ Considering the growing role of private employment agencies in the recruitment and placement of migrant workers, and recalling the need to protect migrant workers against fraudulent and abusive practices, including trafficking, the Private Employment Agencies Convention (No. 181) offers guidance for designing a legal framework to address trafficking of human beings. States that ratify the Convention shall adopt appropriate measures to provide adequate protection for and prevent abuses of migrant workers recruited or placed in its territory by private employment agencies. These

83 ILO Action Against Trafficking in Human Beings. ILO 2008. p. 7.

84 For a good analysis see Plant, R.: *The Labour Dimension of Human Trafficking. Alliance against trafficking in persons*, Vienna, ILO, 2004.

85 ILO Action Against Trafficking in Human Beings, p. 7.

measures include laws or regulations which provide for penalties, including prohibition of those private employment agencies which engage in fraudulent practices and abuses.⁸⁶

Respecting labour rights is an often, if not overlooked at least diminished, part of fighting trafficking. But it is a highly important tool and labour rights, and a promotion of solidarity through unions including with non-nationals, regular or not, will help promote better working conditions for all, less exploitation (and thus less trafficking cases too). What must be underlined is that nobody in the working forces gains from having a certain group left outside the protection of labour laws since it will only create unhealthy competition and lower wages also for nationals in regular employment.

Slavery and servitude

The 1957 Supplementary Convention on the Elimination of Slavery, Slave Trade, and Institutions and Practice Similar to Slavery defines Slavery as “the status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised” (repeating the definition of Art. 1.1 of the anti slavery Convention from 1926).

It should be underlined that slavery according to this definition can occur *regardless* of whether the victim receives remuneration. This is particularly relevant when traffickers try to avoid prosecution paying their victims thus trying to render the offence less evident.

According to Art 1 of the Supplementary Convention on Slavery States Parties have to adopt all the measures to abolish 1) debt bondage that is to say the status or condition arising from a pledge by a debtor of his personal services or those of a person under his control as security for a debt if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined; 2) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change her/his status.

Both the Universal Declaration of Human Rights of 1948, Art. 4, and the International Covenant on Civil and Political Rights of 1966, art. 8(2) state that no person shall be held in servitude, but neither of them defines the term. Servitude has been interpreted to be broader than slavery. An early draft of the Protocol (7th revised draft) defined servitude in the context of trafficking as: “The condition of a person who is unlawfully compelled or coerced by another to render any service to the same person or to others and who has no reasonable alternative but to perform the service, and shall include domestic service and debt-bondage.” The Travaux Préparatoires to the ICCPR Art. 8 on slavery

86 Ibid. p. 8. See below for State responsibility in protecting from abuse by individuals in a human rights context.

and servitude clarifies that while slavery was narrowly defined servitude was considered to be applicable to all conceivable forms of dominance and degradation of human beings by human beings.⁸⁷

The Supplementary Convention, art. 1(c) defines marriage as a form of slavery in certain cases. “Any institution or practice, whereby (i) a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or guys, (ii) the husband of a woman, his family, or his clan has the right to transfer her to another person for value received or otherwise, or (iii) a woman on the death of her husband is liable to be inherited by another person”.⁸⁸

Trafficking in modern times is commonly regarded as a “contemporary” form of slavery. The term denotes that it is different from the traditional forms of slavery with a set of characteristics that sets it apart from the latter. For instance legal ownership of people is not a defining attribute under contemporary forms of slavery.⁸⁹ Contemporary forms of slavery are also less permanent, in addition racial bias is not the key justification for enslavement, whereas “ethnic and racial” differences were used in the past to explain and excuse slavery. The profit to be made from slavery and the slave trade has become a more important consideration in modern times.⁹⁰

The relationship between trafficking and slavery/enslavement is critical. While it may be easy to treat these two acts synonymously, trafficking and slavery are not necessarily the same. The key element of slavery as stipulated in the Slavery Convention is the right of ownership. In the context of trafficking of human beings subsequent exploitation can effectively amount to slavery because the right of ownership is fully exercised and retained when people are exploited.⁹¹ But not only slavery-like exploitation amounts to trafficking.

In *Prosecutor v. Kunarac*⁹² the ICTY elaborated on the meaning of slavery and enslavement noting that a mere ability, among others, to buy, sell or trade people, although an important factor to be taken into consideration, is in itself insufficient in determining whether or not the enslavement is committed.⁹³ Trafficking may then be treated as slavery simultaneously mainly when people are exploited afterwards by the traffickers themselves – or the same organisation – as this ensures the continuous exercise of the right of ownership.⁹⁴ The

87 Scarpa, S.: Trafficking in Human Beings – modern slavery. p. 87.

88 (E/CN.4/Sub.2/2003/31).

89 Bales, K.: *New Slavery: A Reference Handbook*, p. 9.

90 Obokata, T.: *Trafficking of Human Beings from a Human Rights Perspective – towards a holistic approach*. p. 18.

91 *Ibid.* p. 19.

92 *Prosecutor v. Kunarac*, IT-96-23, Trial Judgment, 22 Feb. 2001.

93 *Kunarac*, para 543.

94 Obokata, T.: *Trafficking of Human Beings from a Human Rights Perspective – towards a holistic approach*. p. 20.

duration of the suspected exercise of powers attaching to the right of ownership is another factor that may be considered when determining whether someone was enslaved.⁹⁵

As mentioned above, the absence of slavery does not create an absence of trafficking, since exploitation may well take place outside slavery like situations. It may seem evident but too often the mistake is made that exploitation below the threshold of slavery excludes that the crime of trafficking has been taking place or effectively equalling trafficking with slavery which is incorrect and would exclude many cases which actually are clear trafficking cases.

Exploitation of the prostitution of others and other forms of sexual exploitation

In 1949 the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others was adopted. The Convention represents a step forward compared to previous anti-slavery conventions because it uses a race, gender and age neutral terminology, not only being applicable to white women and children, but more generally to persons, including also men and boys. But the Convention proved ineffective in protecting the rights of trafficked women and combating trafficking. It does not take a human rights approach, it does not regard women as independent actors endowed with rights and reason and it excludes a vast number of victims by focusing only on prostitution.⁹⁶

Neither “exploitation of the prostitution of others” nor “other forms of sexual exploitation” is defined in the Palermo Protocol, partly due to the discussion taking place regarding prostitution and the possibility of prostitution not always amounting to exploitation mentioned elsewhere in this paper. The Travaux Préparatoires mentions that the Protocol addresses the exploitation of prostitution and other forms of sexual exploitation only in the context of trafficking in persons. The terms “exploitation of prostitution of others” or “other forms of sexual exploitation” are not defined in the Protocol. The Protocol is therefore without prejudice to how State Parties address prostitution in their respective domestic law.⁹⁷ This leaves State Parties free to decide how to deal with the phenomenon in their national systems and allows the anti-trafficking discussion to transcend the general debate about the rights and wrongs of prostitution to a significant extent.⁹⁸

Compared to other industries the sex industry has attracted a lot of attention from both traffickers and researchers (the attention given from researchers may even be proportionately bigger than the one given by traffickers as will be examined below). The

95 Kunarac, para 542.

96 Report of the Special Rapporteur on violence against women, its causes and consequences. UN DOC E/CN.4/2000/68 para. 22.

97 UN DOC A/55/383/add.1 para. 64.

98 Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children, UN DOC E/CN.4/2006/62/Add.2 para. 33.

sex industry is frequently illegal or only partially decriminalised which makes it a perfect locus operandi for organised criminal groups and further the demand is enormous and there is a strong demand for cheaper services.⁹⁹

Removal of organs

The proposal to include organ removal as a purpose of trafficking was made very late in the negotiations. It survived the objection that the protocol was dealing with trafficking in persons, not organs.

There is no definition of what constitutes removal of organs, but the Travaux Préparatoires and the UNODC Legislative Guide¹⁰⁰ explain that the removal of organs from a child with the consent of a parent or guardian for legitimate medical or therapeutic reasons is out of the scope of the Protocol. The non-exhaustiveness of the forms of exploitation covers the fact that medical progress now also allows for transplantation of e.g. ligaments and corneas to cover such situations when they fulfil the requirements of the crime.

As with trafficking in persons for other exploitative purposes, victims of trafficking for the purpose of organ removal are selected from vulnerable groups (for instance, those who are suffering from extreme poverty) and traffickers are often part of trans-national organized crime groups. The commission of this crime can be distinguished from others in terms of the sectors from which traffickers and organ “brokers” derive: doctors and other health-care practitioners, ambulance drivers and mortuary workers are often involved in organ trafficking in addition to the actors involved in other criminal trafficking networks. Furthermore, issues of consent and exploitation related to organ removal are complicated by the fact that often victims will consent to the removal of their organs and will receive the agreed payment for them. However, as is common in situations of trafficking in persons for any exploitative purpose, the provision of the “service” is driven by extreme poverty and abuse of vulnerability. Thus far, there is inadequate information available about trafficking in persons for the purpose of organ removal.¹⁰¹

99 Cameron, S and Newman, E.: Trafficking in humans: Structural factors, p. 31.

100 Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children, UN DOC E/CN.4/2006/62/Add.2 Para. 34.

101 UNODC: Toolkit to Combat Trafficking in Persons, 2008, p. 494.

Focusing on specific Groups – Pros and Cons

The negotiations on the Protocol were carried out by government representatives, the vast majority of whom were male, and NGO lobbyists, who were almost uniformly female. This stereotypical divide between the male embodiment of political authority and the female embodiment of day-to-day experience was complicated by the necessity to discuss prostitution. This introduced a moral element in the debate, whereby the women taking part were in a position of “moral authority”, while men were morally on the defensive. This factor was most evidently present in the debates on addressing the demand side of prostitution, but more generally acted as an undercurrent during all debates.¹⁰² It is broadly held that prostitution is different from other work and, for many, the fact that a woman agrees to migrate so that she may work as a sex worker negates any possibility of her being a trafficking victim – also presumptions the other way around are possible; that a woman who has agreed to the conditions she actually then finds herself in can only be a trafficking victim. Both presumptions are wrong. She is a victim of trafficking if she is deceived about the conditions of work and/or coerced or forced to work in exploitative conditions. This is the same standard generally applied to definitions of trafficking for all types of work.¹⁰³ The designation of prostitution as different from other work emphasises the distinction between sex work and other forms of dangerous, low-status labour undertaken by women, such as domestic or factory work. It hides the commonality, the shared experience of exploitation which links people in all such work.¹⁰⁴

When estimating the hidden number of trafficking crimes, keeping in mind that the majority of known trafficking victims are women, it might be informative to look at the reporting practices of women in general and their relationship with affluence. When reporting practices of women are compared with the human development indicators, it can be noted that women from less developed countries tend to report less in general than women who live in more affluent countries. In addition, trafficking victims are often even more reluctant than other victims to report crimes because of fear of retaliation by traffickers or deportation by authorities.¹⁰⁵ On the other hand the “visibility bias” is the

102 Ditmore, M. and Wijers, M: The negotiations on the UN Protocol on Trafficking in Persons, p. 79.

103 Cameron, S and Newman, E.: Trafficking in humans: Structural factors, p. 33.

104 Ibid. p. 34.

105 Kangaspunta, K.: Collecting Data on Human Trafficking: Availability, Reliability and Comparability of Trafficking Data, in Savona, E.U.; Stefanizzi, S.: *Measuring Human Trafficking, complexities and pitfalls*. p. 30.

idea that trafficking for forced prostitution is more likely to be detected than trafficking for forced labour. Prostitution (whether forced or voluntary) involves the general public because it must be visible – taking place in streets, bars or public spaces in urban areas – to attract potential clients. Conversely, most of the victims of forced labour often work in hidden locations, such as agricultural fields in rural areas, mining camps and garment factories or within the closed environment of a house in the case of domestic servitude. As a consequence, the detection of victims of trafficking for forced labour is less probable than the identification of victims of trafficking for forced prostitution.¹⁰⁶

Admittedly, looking at the numbers reported, trafficking in women and children is a big problem, but the prominent focus on the trafficking of women over men arguably has links to assumptions about gender and, in particular, a generalized notion of female vulnerability. That is, many female migrants are conceptualized as trafficked while male migrants are seen more commonly as irregular migrants.¹⁰⁷ This notion may to some extent at least also influence statistics. And yet there are significant signals in many countries and regions that male migrants are also severely exploited and violated in ways that constitute human trafficking.¹⁰⁸ For several years, trafficking for sexual exploitation has dominated discussions concerning the purpose of human trafficking. Trafficking in persons for forced labour has not been viewed as a significant issue in many countries. The identification of male victims who might be expected to be trafficked for forced labour purposes has not been successful in many countries.¹⁰⁹ Far fewer sources have identified either male victims or victims who have been subjected to forced labour, when

106 UNODC: *Toolkit To Combat Trafficking In Persons, 2008*, p. 52.

107 Trafficking of men – a trend less considered. In “A Global Eye on Trafficking”, Issue 1, December 2007. IOM.

108 Ibid: A man at a local train station offered 16-year old Shen, from a small Chinese farming community, a well-paying job in a nearby city which he eagerly accepted. Within hours, he and 12 others were bundled into a minivan and dumped at a brick yard where they were beaten, barely fed, and forced to perform heavy labour for 20 hours per day. Guards at the kiln would beat them with iron bars and wooden staves when they worked too slowly, at times smashing brick across a worker’s head or body. Guard dogs kept Shen and the other slaves living in fear. Shen often saw local uniformed police officers visit the brickyard. “They were paid off by the owner. The whole village was his,” Shen said. “It was very ‘black’,” he said, using the Chinese term for evil or corrupt. Thirty-two year old “Sandro,” from the interior of Mexico, found himself in a migrant shelter in Tijuana. A recruiter approached him in the shelter and urged him to come to the U.S.-Mexico border to “take a look.” As they neared the border, the recruiter (knowledgeable of the shift change in the border patrol), pushed him over the border and instructed him to “run.” Sandro was guided by Mexican traffickers to a “safe house” where he was tied to a bed and raped about 20 times. He was then transported, at gun point, to another “safe” house in San Diego and forced into domestic servitude. Eventually, he was taken to a construction site during the day. His pay check was confiscated by his traffickers. He felt he had no recourse since he lacked even basic identification papers. His abuse continued when one of his traffickers forced him at gunpoint to perform sexual acts. He was later rescued and has since received temporary residency in the United States. (US State Departments Report of Trafficking in Persons 2008).

109 Kangaspunta, K.: *Collecting Data on Human Trafficking: Availability, Reliability and Comparability of Trafficking Data*, p. 2.

the popular perception, at least, is that it is men especially who might be expected to be trafficked for forced labour purposes.¹¹⁰

A serious problem connected to the lack of focus on trafficking for labour exploitation is that debates tend to focus on prostitution rather than on the process of trafficking.¹¹¹ Human trafficking for sexual exploitation is reported more frequently than trafficking for forced labour at the global level. Reporting varies per (sub-) region, with sexual exploitation reported by many sources in relation to Central and South Eastern Europe and by relatively fewer to Africa. Where sources expressly report exploitation of boys, this tends to be in the labour market, while sexual exploitation is reported more frequently among female children.¹¹² It should be remembered that the Protocol's definition is gender-neutral and that the title only says "especially" women and children. During the draft process states expressed the view that the Protocol should address all persons.¹¹³ The gender-neutrality is also reflected in the content of types of exploitation in the definition.¹¹⁴ Nevertheless, for several years, human trafficking for sexual exploitation has dominated discussions concerning the purpose of trafficking in persons. Trafficking in persons for forced labour has not been viewed as a major problem in many countries, and the identification of trafficking victims who are exploited through forced labour has been even less successful than in the case of sexual exploitation. In many countries, human trafficking for forced labour has only been included in legislation in recent years in order to comply with the definition of the Trafficking Protocol.¹¹⁵

One reason for the low numbers of reported cases involving forced labour and male victims is connected to trafficking legislation which, in many countries, is restricted only to sexual exploitation. In 2008, most of the countries considered by the UNODC Global report had a trafficking in persons offence in place, that included the criminalization of trafficking for forced labour, but this is a recent development. For instance, about 10 European countries expanded their definition of trafficking to include forced labour during the years 2005-2008. For many years, a large number of East Asian countries only considered trafficking for sexual exploitation, which remains the case in many countries in the region. A similar situation exists in Latin America.¹¹⁶ In this case, forced labour cases are not classified as human trafficking crimes and, as a result, they are not included in statistics or reports. In addition, many victim support organisations provide services only for women and child victims. In countries where trafficking legislation covers also

110 UNODC: *Global Patterns in Human Trafficking, 2006*, p. 33.

111 Obokata, T.: *Trafficking of Human Beings from a Human Rights Perspective – towards a holistic approach*, p. 28.

112 UNODC: *Global Patterns in Human Trafficking, 2006*, p. 33.

113 UN DOC A/AC.254/5/Add.3/Rev2.

114 Obokata, T.: *Trafficking of Human Beings from a Human Rights Perspective – towards a holistic approach*, p. 29.

115 UNODC: *Global Patterns in Human Trafficking, 2006*, p. 65.

116 UNODC: *Toolkit to Combat Trafficking in Persons, 2008*, p. 51.

labour exploitation and services are not restricted to women and children, several male victims have entered the victim protection programme.¹¹⁷

Apart from the evident fact that men can be trafficked as well, the historical linkage of “women and children” has proven problematic in many ways. Often this linkage entails the treatment of women as if they were children and denies women the rights attached to adulthood, such as the right to have control over one’s own body and life. When laws target typically “female” occupations, they tend to be overly protective and prevent women from making the same type of decisions that adult men are able to make. This is reflected in the position that prostitution is “forced” by definition, which effectively places women on the same level as children and denies them the agency to make their own decision to engage in sex work among the options available to them. Examples of corresponding strategies are anti-trafficking measures which aim to prohibit or prevent women from migrating for (sex) work and the type of prevention campaigns which predominantly aim to scare women from going abroad by warning them about the dangers of being trafficked, up to the use of (semi-pornographic) illustrations of women. Moreover, the linkage of women with children emphasises a single role for women as caretakers of children and obscures women’s increasing role as the sole supporter of dependent family members and, consequently, as economic migrants in search of work.¹¹⁸

It is true that many aspects of trafficking (migration, empowerment, human rights) are to some extent gendered. Economic inequality is often gendered, the majority of the world’s poor are women; industries are gendered, generally women are trafficked into sweatshops, domestic work¹¹⁹ and prostitution where men are trafficked into agricultural labour and mining; traditional gender roles often impede women’s participation in public and economic life which creates a disadvantage. Trafficking has also supplied domestic workers to destination countries exactly because women in these have moved out into the labour market and now need domestic help.¹²⁰

Apart from conventional conceptions and gender divisions on who are “victims” and who are irregular migrants - women seen as vulnerable, men as active – there are a great number of linked factors which can influence a trafficked male’s perception of his situation and the likelihood of seeking help. Exploitation is a normative aspect of migrant labour and migrant workers may see their trafficking as ill fortune rather than a violation of their human rights. Others may feel that their own participation in the recruitment process disqualifies them as trafficked victims.¹²¹ Being labelled a “victim” may have

117 Kangaspunta, K.: *Collecting Data on Human Trafficking: Availability, Reliability and Comparability of Trafficking Data*, p. 2.

118 Ditmore, M. and Wijers, M: The negotiations on the UN Protocol on Trafficking in Persons, p. 82

119 This paper does not dwell on the particular problems of human rights abuse of domestic workers. Shortly it can be mentioned that due to the marginalisation and often total isolation and dependence upon the employers, domestic workers are in an especially vulnerable situation and abuse take place very often.

120 Cameron, S and Newman, E.: *Trafficking in humans: Structural factors*, p. 41.

121 IOM: *Trafficking of men – a trend less considered*.

an impact on how men see themselves, as the term stands in contrast to social norms of men as caretakers of their families. As such, it is not only about what services and interventions are developed but also how these interventions are framed and offered to the target group. This also makes clear the need to better understand and appreciate the gender dimensions of trafficking, both to assess trafficking vulnerabilities and to provide appropriate interventions and assistance.¹²²

The focus on women and children obviously is founded on three main factors: that these two groups are considered more vulnerable in general; that statistics underpin the need for this focus; that trafficking is often linked to sexual exploitation even if trafficking is actually also for other forms of exploitation. Whereas there is a concrete and urgent need to protect these two groups of victims, it is important not to create an invisible group of trafficked persons – both in reality and in research. It is necessary to have a gender equality based approach to the problem; first because it is true that because of discriminatory attitudes towards women and girls, these are more vulnerable, also because we need to recognise that mistreating women often leads to mistreatment of children. Secondly a gender sensitive approach is needed because sometimes it is assumed that boys cannot fall victim to trafficking and exploitation – this makes them double victims because they are further marginalised and hide their suffering perhaps even more than girls do.¹²³ A parallel situation can be mentioned when focus on children who move across borders is exclusively on victims of trafficking and not on child migrants. Child migrants are still in need of particular protection but this group of children has for a long time been “invisibilised” because focus has been exclusively on child victims of trafficking. A balanced focus is needed.

122 Ibid.

123 ECPAT newsletter 42/2003 Rethinking the trafficking paradigm.

Criminal Law

Trafficking and smuggling are criminal justice issues. They affect territorial integrity because they involve the facilitation of crossing of borders and remaining in a State in violation of national criminal and immigration laws. Trafficking and smuggling also undermine the rule of law and political foundation of States, because traffickers and smugglers such as organised criminal groups resort to violence and corruption as means to advance their business.¹²⁴ The usual response at the national level has been crime and immigration control in order to prosecute and punish traffickers/smugglers and reduce the flow of trafficked/smuggled people. Within the international legal system, trafficking and smuggling of human beings have been dealt with by what is known as “trans-national criminal law.” Unlike international criminal law, which gives rise to direct control of crimes by international tribunals, trans-national criminal law promotes “the indirect suppression by international law, through domestic penal law, of criminal activities that have actual or potential trans-boundary effects.”¹²⁵

As a general observation, whether or not a specific case is to be considered as a case of trafficking in persons in the sense of the Protocol depends on the nature of the criminal act committed. At a minimum, this involves the combination of the three constituent elements of the definition in the Protocol. It is clear from this definition that by far

124 Various issues and approaches to trafficking also have implications for rule of law. Trafficking in human beings is a multinational crime problem of ever-growing proportions, increasingly perpetrated by organized and sophisticated criminal enterprises. These criminal activities and the official corruption linked to trafficking undermine democratic institutions and challenge the principle of rule of law. Weak institutions and inadequate legislation limit the capacity of governments to suppress criminal activity and to prosecute offenders. Efforts to prosecute trafficking raise numerous legal issues relating to both legislation and law enforcement. Prohibition of trafficking and smuggling of human beings through criminal law is one obligation imposed upon States under international human rights law. In relation to trafficking, some of the existing human rights instruments explicitly require States to prohibit the act. They include the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949 (1949 Convention), the Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW), the Convention on the Rights of the Child 1989 (CRC), and its Optional Protocol on Sales of Children, Child Prostitution and Child Pornography 2000. Regionally, the Charter of Fundamental Rights of the European Union 2000, Council of Europe Convention on Action against Trafficking in Human Beings 2005, the American Convention on Human Rights 1969 (ACHR), and the Inter-American Convention on International Traffic in Minors 1994 are also pertinent.

125 Obokata, T.: Trafficking and Smuggling of Refugees from a Human Rights Perspective. Paper presented to the International Conference on Refugees and International Law: *The Challenge of Protection* (15-16 December 2006, Refugee Studies Centre, University of Oxford). p. 2.

not all cases of, for example, slave labour or sexual exploitation are human trafficking cases. Thus, in legal proceedings, as well as in the production and compilation of data, a choice must be made whether or not to classify an identified case of exploitation as human trafficking or not. A priori classifications will have to be revised in the course of investigations and proceedings. A particularity of human trafficking may be that it is often the victims who are accused and arrested for various offences (irregular residence, illegal work, procurement) rather than the human traffickers and that much investigative effort has to be spent to uncover the exploitative links between trafficker and victim.¹²⁶

Requirements for national legislation

The act of trafficking and the exploitation of their labour expose victims to a variety of criminal acts including deprivation of liberty, theft of identity documents, sexual, physical and psychological abuse and blackmail (threats to inform relatives or police about the victims' activity). Trafficking is itself a breach of the laws of many, if not most, states.¹²⁷

While those States Parties to the Protocol are required to criminalize domestically the conduct of trafficking in persons, as defined in the Protocol, many States are still not party to the Protocol. As it usually takes some years from the signature and ratification of the Protocol to the adoption of relevant anti-trafficking laws, and other states have not yet signed or ratified the Protocol at all, there are still many States without any specific anti-trafficking laws in place. At the same time there are some States not party to the Protocol who nevertheless have anti-trafficking laws in place, even if the definition of human trafficking offences may not always conform to that in Article 3 of the Protocol.¹²⁸

The obligation to prohibit trafficking is strengthened when the right to life is involved, as it may often be. In *Osman v. United Kingdom*,¹²⁹ the European Court of Human Rights held that states' primary duty to secure the right to life include putting in place effective criminal law provisions to deter the commission of offences against the person,¹³⁰ this obligation may well extend to other serious offences against the person. States are also under a clear obligation to prohibit acts amounting to torture, inhuman or degrading

126 UNGIFT: The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper 024 Workshop: Quantifying Human Trafficking, its Impact and the Responses to it. p. 12.

127 Piotrowicz, R.: *Trafficking of Human Beings and their Human Rights in the Migration Context*, p. 276.

128 UNGIFT: The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper 024 Workshop: Quantifying Human Trafficking, its Impact and the Responses to it. p. 5.

129 Case 87/1997/871/1083. The Court's case-law referred to 21.2.1975, *Golder v. the United Kingdom*; 18.1.1978, *Ireland v. the United Kingdom*; 27.9.1995, *McCann and Others v. the United Kingdom*; 9.6.1998, *L.C.B. v. the United Kingdom*; 10.7.1998, *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom*.

130 Judgement of 28 October 1998.

treatment.¹³¹ In *A v. United Kingdom*¹³² the ECtHR found that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals¹³³ (see further below on State's obligation to protect).

The lack of specific legislation against trafficking in persons is arguably the most serious obstacle in countering the crime. In the absence of legislation, it is very difficult to punish human trafficking and bring the traffickers to justice. However, even where provisions against trafficking in persons exist under national law, these often cover only parts of the crime in trafficking in persons as defined in the UN Protocol. For example, legislation may still be based on previous conceptions (e.g. the 1949 Convention mentioned elsewhere) of trafficking in women and children and may hence be "limited to equating

131 According to the Convention Against Torture, ICCPR Art. 7, ECHR Art. 3, Art 5.2 of the ACHR, Art. 5 of the African Charter.

132 The applicant was a British citizen, born in 1984. In May 1990 he and his brother were placed on the local child protection register because of "known physical abuse". The cohabitant of the boys' mother was given a police caution after he admitted hitting A. with a cane. Both boys were removed from the child protection register in November 1991. The cohabitant subsequently married the applicant's mother and became his stepfather. In February 1993, the head teacher at A.'s school reported to the local Social Services Department that A.'s brother had disclosed that A. was being hit with a stick by his stepfather. The stepfather was arrested on 5 February 1993 and released on bail the next day. On 5 February 1993 the applicant was examined by a consultant paediatrician, who found the following marks on his body, *inter alia*: (1) a fresh red linear bruise on the back of the right thigh, consistent with a blow from a garden cane, probably within the preceding twenty-four hours; (2) a double linear bruise on the back of the left calf, consistent with two separate blows given some time before the first injury; (3) two lines on the back of the left thigh, probably caused by two blows inflicted one or two days previously; (4) three linear bruises on the right bottom, consistent with three blows, possibly given at different times and up to one week old; (5) a fading linear bruise, probably several days old. The paediatrician considered that the bruising was consistent with the use of a garden cane applied with considerable force on more than one occasion. The stepfather was charged with assault occasioning actual bodily harm and tried in February 1994. It was not disputed by the defence that the stepfather had caned the boy on a number of occasions, but it was argued that this had been necessary and reasonable since A. was a difficult boy who did not respond to parental or school discipline. The jury found by a majority verdict that the applicant's stepfather was not guilty of assault occasioning actual bodily harm. A. applied to the Commission on 15 July 1994. He complained that the State had failed to protect him from ill-treatment by his step-father, in violation of Articles 3 and/or 8 of the Convention; that he had been denied a remedy for these complaints in violation of Article 13; and that the domestic law on assault discriminated against children, in violation of Article 14 in conjunction with Articles 3 and 8.

133 *A v. The UK* App 25599/94 Judgement of 23/9/98, para. 22 (see, *mutatis mutandis*, the *H.L.R. v. France* judgment of 29 April 1997, Reports 1997-III, p. 758, § 40). Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity (see, *mutatis mutandis*, the *X and Y v. the Netherlands* judgment of 26 March 1985, Series A no. 91, p. 11-13, §§ 21-27; the *Stubbings and Others v. the United Kingdom* judgment of 22 October 1996, Reports 1996-IV, p. 1505, §§ 62-64; and also the United Nations Convention on the Rights of the Child, Articles 19 and 37).

human trafficking with exploitation in the sex industry while ignoring exploitation in the labour market". Where this is the case, the focus of anti-human trafficking activities is then on women forced into prostitution, while trafficking of men (e.g. for exploitation on the labour market) may be dealt with under existing labour laws. The understanding of human trafficking depends, first and foremost, on the underlying legal instruments that define and criminalize the crime as well as on the focus of law enforcement efforts dedicated to giving effect to these laws.¹³⁴

Since terms such as "trafficking", "abduction" and "sale of children" all have different meanings, depending on the particularity of contexts. Even the term consenting party is controversial as it regards the involvement of the parents and sometimes the children in the decision-making process. A criminalisation approach may have to impose penalties on entire communities.¹³⁵ But in case the local practice does actually not fit the trafficking definition¹³⁶ there will be no criminal law foundation to impose penalties for the crime of trafficking on entire communities. There may on the other hand be a need for a) prosecuting some individuals for mistreatment or such offences in relation to exploitation and b) a human rights based approach to eradicating root causes of exploitation and of trafficking-like situations, such as discrimination, poverty and lack of education.

There is an urgent need to harmonize legal definitions, procedures and cooperation at the national and regional levels in accordance with international standards. The development of an appropriate legal framework that is consistent with relevant international instruments and standards will also play an important role in the prevention of trafficking and related exploitation. States should consider amending or adopting national legislation in accordance with international standards so that the crime of trafficking is precisely defined in national law and detailed guidance is provided as to its various punishable elements. All practices covered by the definition of trafficking such as debt bondage, forced labour and enforced prostitution should also be criminalized. States should also enact legislation to provide for the administrative, civil and, where appropriate, criminal liability of legal persons for trafficking offences in addition to the liability of natural persons, this includes reviewing current laws, administrative controls and conditions relating to the licensing and operation of businesses that may serve as cover for trafficking such as marriage bureaux, employment agencies, travel agencies, hotels and escort services. Making legislative provision for effective and proportional criminal penalties (including custodial penalties giving rise to extradition in the case of individuals) is part of creating an adequate legislative framework.¹³⁷ Where appropriate, legislation should provide for additional penalties to be applied to persons found guilty of trafficking in aggravating

134 UNGIFT: The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper 024 Workshop: Quantifying Human Trafficking, its Impact and the Responses to it. p. 6.

135 UNESCO: *Searching for Best Practices to Counter Human Trafficking in Africa: A Focus on Women and Children*, p. 19.

136 As mentioned by the same author immediately below, in the following textbox

137 The United Nations High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking – Guidelines 7.1-2.

circumstances, including offences involving trafficking in children or offences committed or involving complicity by State officials.¹³⁸

Bound as it is by social and cultural contexts the interpretation of crime and penalty has been subject to many queries. It is however absolutely crucial to keep in mind that the basis for the trafficking definition is classical criminal law, with notions such as intent central to the concept, otherwise confusion may very easily arise.

Particular concern about the interpretation of crime – in the context of those who give non-commercial help to would-be migrants crossing national borders for reasons of political safety perhaps destroying ethical norms of human solidarity – has led to a differentiation between ‘human smuggling’ and ‘human trafficking’.

UNESCO: *Searching for Best Practices to Counter Human Trafficking in Africa: A Focus on Women and Children*. p. 18

This concern is misleading and not at all well founded when one keeps in mind the very definition of trafficking. Anybody giving aid to somebody crossing a border irregularly without intent of exploitation will not be committing a trafficking related crime. In case illegal activities such as forging documents are involved the person would be liable to prosecution according most national legislation, but that would internationally fall within the crime of smuggling. If the person is simply giving shelter and help to people in distress with no intent of aiding illegal activity the person cannot be held liable of any crime.

OFFENDERS

Article 2 and 3 of the TOC determines who can be prosecuted:

2(a) Organized criminal group shall mean a structured group¹³⁹ 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 established [by] the Convention [or Trafficking Protocol], in order to obtain, directly or indirectly, a financial or other material benefit.

3.2 ... an offence is trans-national in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning,

138 Ibid. Guidelines 7.3-4.

139 In Europe, groups operating in the field of human trafficking are mainly loose networks rather than mafia-type, hierarchical organizations. They include different nationals operating in their area of competence and, while they specialize in human trafficking, they also operate in related crimes such as pimping, forgery of documents, smuggling of migrants and money-laundering. UNGIFT: *Trafficking an overview*. p. 23.

directing or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State.

It is important to note that they do not cover trafficking by one or two persons. For example, “traffickers” of domestic workers are often a wife and husband who bring a worker from abroad and force her to work in a foreign country with little or no pay or freedom. They would not be covered by 2(a). Also not clearly covered is trafficking that is done entirely within a country by nationals of the country. From the perspective of the victims, the harm can be just as great whether there are one or ten traffickers and whether the trafficking is cross-border or internal. So the punishments for the traffickers and the protections for the rights of trafficked persons should be the same regardless of whether the trafficking is internal or across borders and whether there are one or twenty traffickers.¹⁴⁰ It is however important to keep in mind that for the victim it is less relevant whether the exploiter is prosecuted for the crime of trafficking or for labour exploitation may not be crucial as long as the crime is prosecuted/punished. It is very often overlooked that it is not always necessary to prove trafficking in order to effectively protect people in exploitative situations and effectively repress offenders. Most of the components of the trafficking crime are punishable without trafficking as a whole taking place. What may be problematic is if trafficking has not taken place and the victim therefore is not granted proper protection in form of e.g. an offer to remain in the country of origin but is repatriated without concern for his/her safety and well-being.

A structured group means a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure, while serious crime is conducting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.¹⁴¹ The Travaux Préparatoires mention that “structured group” can be used in a broad way to include both the groups organised with a hierarchical or other kind of elaborate structure and this where the roles of its members are not formally defined. Moreover the “financial or other” benefit should also be interpreted broadly.¹⁴²

The involvement of organised criminal groups in trafficking has become more apparent in modern times and it has been noted that this marks the transition from the traditional forms of slavery to modern trafficking of human beings. Organised crime groups very quickly respond to demand for trafficked people in destination states, and the groups also offer an apparent alternative for people wishing to migrate. The study of organised crime has been associated with economic analysis of criminal organisations. Under this analysis selling of illegal goods and services is the primary purpose of organised crime, and criminal groups are regarded as rational entities which attempt to maximise their profit by responding to demand. Such an analysis allows an understanding of the dynamics of

140 Jordan, A.D.: *The Annotated Guide to the Complete UN Trafficking Protocol*, p. 13.

141 TOC Arts 2(b) and (c).

142 UN DOC A/55/383/Add.1 para 4.

supply and demand in the trafficking market.¹⁴³ However it may not provide a full picture of trafficking, for the reason that it is also carried out by others that organised criminal groups e.g. friends and families, legitimate entities, job recruitment agencies and marriage agencies have become part of trafficking in one way or another. Focusing exclusively on a classical idea of an organised criminal group may run the risk of ignoring other actors.¹⁴⁴ It is thus very important to consider who else may be part of the trafficking chain – knowingly and with intent for prosecution purposes, and unknowingly and without intent for prevention and information purposes.

INTERNAL TRAFFICKING

There is a discussion as to whether the Protocol is applicable to internal trafficking since it does not – contrary to the Smuggling Protocol – mention borders in its definition. During the drafting stage of the Protocol, a discussion arose as to whether or not trafficking should be confined to international movements. All drafts of the Protocol refer to “international trafficking”.¹⁴⁵ Many delegates felt the necessity for this inclusion in order to make the Protocol compatible with the TOC.¹⁴⁶ Nevertheless the view was increasingly taken that inclusion of the term “international” limited the scope of the instrument and that it failed to protect all persons who were victims of trafficking.¹⁴⁷ This view prevailed.¹⁴⁸ It has however to be taken into consideration that the Protocol is a protocol to the Convention on *International* Organised Crime and therefore cannot be seen outside the scope of this Convention. But the Convention and the Protocol must be interpreted together. In interpreting the various instruments, all relevant texts should be considered and provisions using similar or parallel language should be given generally similar meaning. In interpreting a Protocol, the purpose of that Protocol must also be considered, which may modify meanings applied to the Convention in some cases.¹⁴⁹ Article 4 of the Protocol mentions the “trans-national” aspect of the crime and seems to create confusion when considering that “international” was taken out of the drafts.

If the former approach is taken, however, and internal trafficking is included, the category of exploited workers considered the definition not only of “exploited workers” but of “trafficked person” may be extended to people who are actually not trafficked, and with the confusion already existing around the definition this seems undesirable. If the latter, narrower definition is applied it may risk being under-inclusive and risk taking away focus

143 Obokata, T.: *Trafficking of Human Beings from a Human Rights Perspective – towards a holistic approach*. p. 30-32.

144 Ibid. p. 32.

145 UN DOC A/AC.254/Add.3/Rev.1 through 7.

146 UN DOC A/AC.254/4/Add.3/Rev.5.

147 Ibid.

148 Obokata, T.: *Trafficking of Human Beings from a Human Rights Perspective – towards a holistic approach*. p. 23.

149 UNODC: Toolkit to prevent Trafficking in Persons. 2006. p. 5.

from the exploitation which is non-international, this approach has also been criticised for ultimately focusing only on border security, and even for trying to promote the legalisation of prostitution (from those who see trafficking only as a sexual exploitation problem). Both approaches have pros and cons – it is true that the Protocol does not mention international borders, and that its “twin” the Smuggling Protocol does – it is also true that the Protocol cannot be taken out of context – the Convention. From a practical aspect both ways of looking at trafficking may be legitimate – the important thing is not to include exploitation which does not contain all the elements in the definition as trafficking and also to keep in mind that focusing on international trans-border trafficking does not suggest that other forms of exploitation should not be addressed, nor that there are no international framework for doing so.

UN agencies consider both internal and international trafficking.¹⁵⁰

VICTIM CENTRED CRIMINAL LAW APPROACH

When responding to human trafficking within the criminal justice system, it is important to have the best interests of the trafficked victim at the forefront of all activities.¹⁵¹ A victim-centred criminal justice response to trafficking is most effective in terms of achieving a successful prosecution of the traffickers and protecting and supporting the human rights of the trafficked victim. Prioritising the well-being of the trafficked victim and their recovery

150 UNODC considers internal trafficking and is the UN Agency responsible for the UN TOC. See e.g. UNODC *Toolkit to Prevent Trafficking in Persons*, 2008, p. 4.

151 The European Council Framework Decision of Mark 15, 2001 on the Standing of Victims in Criminal Proceedings defines a victim as: “A natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State.” The European Convention on Action Against Trafficking in Human Beings, May 16, 2005, CETS No. 197, provides that: “Victim shall mean any natural person who is subject to trafficking in human beings.” Following on from this reasoning, one possible definition of a ‘victim of trafficking in persons’ is “a person who has suffered physical, mental or economic harm from the crime of trafficking in persons, as defined by Article 3 of the Trafficking Protocol.” This should be so irrespective of whether or not there is a strong suspicion against an alleged trafficker or, or official recognition of victim status; so as not to deny victims from receiving the full range of rights of assistance and protection available to them as victims. Where victim assistance and support measures to be withheld pending the verification of a the perpetrator as a trafficker or the victim as an officially recognized victim, further harm could result to them amounting to secondary victimization and ultimately leave them vulnerable again to being re trafficked. Therefore, specifically on the basis of the definition of trafficking in persons provided by Article 3 of the Protocol, a victim is anyone who is subjected to a combination of elements: acts, means and purpose established by Article 3(a) of the Protocol. However, where the person who has suffered harm is a child, they are to be considered as victims regardless of whether ‘means’ have been established. However, where a definition of a victim of trafficking is linked to the offence, questions are raised as to the level of proof needed to ascertain that an offence has indeed been committed. See The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper 023 Workshop: The Effectiveness of Legal Frameworks and Anti-Trafficking Legislation.

from a trafficking ordeal is compatible with achieving the desired results in a criminal prosecution. This already testifies to how the criminal law and human rights protection is closely linked. Furthermore the identification¹⁵² of a trafficked victim is vital to ensure that they may be granted access to protection and support services. If a trafficked victim is not identified as such, he/she may be treated as an irregular immigrant if they are in the country irregularly, or he/she may be left without resources, protection or appropriate support in order to recover from the trafficking ordeal. This is to the detriment of the trafficked victim and to the trafficking investigation. Without access to protection and support services, trafficked victims may not recover to gain the sufficient confidence and security to cooperate with law enforcement officials in their criminal investigations. Without evidence and testimony from trafficked victims, it is often difficult to prosecute the traffickers with full effect.¹⁵³ It will be discussed more in detail below how the strong link between prosecution – respect for the rule of the law – and human rights protection – the criminal law and human rights law aspects – may reinforce each other, but already the rather simple statement that it is detrimental not only to the trafficked person but also to the investigation and prosecution if the rights of a trafficked person is not one of the priorities, shows how the two branches of law are dependent one upon the other to obtain effective implementation.

RELATED OFFENCES – INTERACTION BETWEEN THE TOC AND THE PROTOCOL

The Convention and the Protocol must be interpreted together. In interpreting the various instruments, all relevant instruments should be considered and provisions using similar or parallel language should be given generally similar meaning. In interpreting a protocol, the purpose of that protocol must also be considered, which may modify meanings applied to the Convention in some cases. The provisions of the Convention apply to the Protocol, *mutatis mutandis*. This means that, in applying provisions of the Convention to the Protocol, minor modifications of interpretation or application can be made to take account of the circumstances that arise under the Protocol, but that modifications should not be made unless necessary, and then only to the extent necessary. This general rule does not apply where the drafters have specifically excluded it. Protocol offences shall also be regarded as offences established in accordance with the Convention.

152 Proper identification of trafficked victims can be broken down into four stages and can be applied to both adult and child victims of trafficking. The four stages include; i) initial identification to assess if one or more indicators of human trafficking is present, ii) enquiries to corroborate these indicators, iii) further action which may include offering victims access to recovery and support services, evidential interviews or arrest and iv) active review of the action to establish that the indicators are corroborated further or to assess if further indicators of trafficking are present. See UNGIFT: The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper. 006 Workshop: Criminal Justice Responses to Human Trafficking.

153 UNGIFT: The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper. 006 Workshop: Criminal Justice Responses to Human Trafficking, p. 3.

This principle, which is analogous to the *mutatis mutandis* requirement, is a critical link between the Protocol and Convention. It ensures that any offence or offences established by a State in order to criminalize trafficking in human beings, as required by Article 5 of the Trafficking in Persons Protocol, will automatically be included within the scope of the basic Convention provisions governing forms of international cooperation, such as extradition (Art. 16) and mutual legal assistance (Art. 18). It also links the Protocol and Convention by making applicable to Protocol offences other mandatory provisions of the Convention. In particular, obligations under Articles 6 (criminalization of the laundering of proceeds of crime), 10 (liability of legal persons), 11 (prosecution, adjudication and sanctions), 12 to 14 (confiscation), 15 (jurisdiction), 16 (extradition), 18 (mutual legal assistance), 20 (special investigative techniques), 23 (criminalization of obstruction of justice), 24 to 26 (witness and victim protection, and enhancement of cooperation with law enforcement authorities), 27 (law enforcement cooperation), 29 and 30 (training and technical assistance) and 34 (implementation of the Convention) apply equally to the offences established in the Protocol. Establishing a similar link is therefore an important element of domestic legislation to implement the Protocol.¹⁵⁴ As will be seen below implementation is mainly obstructed by lack of adequate and conformed laws, but in every case which may or may not at the end amount to a trafficking case it should never be forgotten that many common crimes are part of trafficking, crimes which usually are punishable by national penal law. Further it must be underlined that states do not only have obligations towards non-nationals who have been subject to abuse or exploitation according to the Protocol but according to the main Human Rights instruments in general.¹⁵⁵

154 UNODC: Toolkit to Combat Trafficking in Persons, 2008, p. 12.

155 The International Covenant on Civil and Political Rights (ICCPR) apply to both nationals and non-nationals. (Some rights in the ICCPR are expressly limited to citizens, such as political rights in Art. 25 ICCPR. See also Art. 16 ECHR, which reads: “Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens”. The clauses enumerated are respectively concerned with the rights to freedom of expression, peaceful assembly and association, and the right to non-discrimination. However, Art. 16 ECHR has been interpreted restrictively by the European Court of Human Rights. See *Piermont v. France* (1995) 20 EHRR 301. Moreover, Article 16 ECHR remains controversial vis-à-vis the expansive and universal protection afforded by more general human rights instruments.). They adopt all-embracing language such as “everyone”, “all persons”, and “no one” and also contain non-discrimination clauses requiring each State Party to respect and ensure the rights recognised therein to all individuals within its territory without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Although nationality is not explicitly remunerated as a prohibited ground of discrimination in either instrument, these provisions are clearly open-ended. The applicability of the ICCPR and its non-discrimination clause to non-nationals has been declared unequivocally by the Human Rights Committee in its *General Comment 15/17 on the Position of Aliens under the Covenant*: In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike ... see UN, ESCOR, Human Rights Committee, 27th Session, 1986, General Comment 15/17 on the Position of Aliens under the Covenant, reproduced in UN Doc. A/41/40, Annex VI, paras. 1 and 2. The Committee is empowered to issue

Common criminal offences

Trafficking is often only one of the crimes committed against trafficked persons. Other crimes may be committed to ensure the compliance of victims, maintain control, protect trafficking operations or maximize profits. Victims may be subjected to threats, physical and sexual violence or other mistreatment. Passports and other identity documents may be taken from them. They may be forced to work without payment, often in occupations that are unpleasant, difficult, dangerous or illegal in the State where they occur, such as prostitution, the making of pornography and trafficking in illicit commodities such as narcotic drugs. Apart from other offences committed against victims, former victims who assist authorities may be threatened with or subject to retaliatory violence and public officials may be subject to corruption, threats or both. These acts constitute criminal offences in most States and could be invoked to address certain elements of the full range of crimes. This could be useful in States where a distinct criminal offence of trafficking does not yet exist, or where penalties for trafficking do not sufficiently reflect the seriousness of the crime. There may also be cases where the existing evidence is not sufficient to support prosecution for human trafficking, but may be sufficient for a prosecution for related offences. The prosecution of accused individuals for additional or overlapping offences may also be useful in demonstrating to courts the seriousness of a particular trafficking operation. In some instances, for example, evidence relating to certain aspects of the trafficking operation (e.g. total number of victims, length of time of the operation, the corruption involved and the seriousness of the harm done to the victims) may only be fully revealed by bringing additional charges before the court. Such offences include, but are not limited to, the following: Slavery; Slavery-like practices; Involuntary servitude; Forced or compulsory labour; Debt bondage; Forced marriage; Forced prostitution; Forced abortion; Forced pregnancy; Torture; Cruel, inhuman or degrading treatment; Rape or

General Comments under Art. 40(4) of the ICCPR. These Comments are not legally binding, but nonetheless constitute authoritative interpretations of the ICCPR's provisions. The position of non-citizens under the International Covenant on Economic, Social and Cultural Rights appears somewhat more limited than the rights enjoyed under the ICCPR and ECHR. Although the ICESCR is also phrased in all-embracing language, there are differences of opinion whether the non-discrimination provision in Article 2(2) ICESCR can be of assistance to non-nationals. These differences centre upon the lack of clear open-ended language as to the prohibited grounds of discrimination enumerated in Art. 2(2) ICESCR. The Limburg Principles on the Implementation of the ICESCR (UN Doc. E/CN.4/1987/17, Annex) assert unequivocally that "the grounds of discrimination mentioned in article 2(2) are not exhaustive" (Principle 36). Art. 2(2) ICESCR should also be read in the context of an explicit restriction on the *economic* rights of non-citizens in the clause that follows, Art. 2(3) ICESCR: "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals". The very existence of Art. 2(3) ICESCR, however, arguably confirms that the ICESCR does apply to non-citizens. See Cholewinski, R.: *Overview of Social and Economic Rights of Refugees and Asylum Seekers in Europe: International Obligations. Education and Employment*. And Touzenis, K: *The Justiciability of Economic and Social Rights*, under review for the *Desacatos Journal*, Mexico and *V. v. Einwohnergemeinde X. und Regierungsrat des Kantons Bern, International Federation of Human Rights Leagues (FIDH) v. France, Khosa & Ors v Minister of Social Development & Others*.

sexual assault; Causing bodily injury; Murder; Kidnapping; Unlawful confinement; Labour exploitation; Withholding of identity papers; Corruption.¹⁵⁶

A CRIME AGAINST HUMANITY?

At the international level, the principle of individual responsibility under international criminal law is applicable to trafficking in human beings as a way to enforce human rights norms and principles directly, similar to criminal proceedings at a national level.¹⁵⁷

Crimes against humanity have been identified in international law and developed since the adoption of the Statute of the International Military Tribunal of Nuremberg, as serious violations of fundamental human rights, perpetrated either in war¹⁵⁸ or in peacetime as part of a systematic or widespread attack against a civilian population. The definition of crimes against humanity in the Statute of the International Criminal Court (the Rome Statute) in Article 7 which includes a list of act which, when committed as part of a widespread and systematic attack against a civilian population will constitute a crime against humanity.¹⁵⁹

156 UNODC: *Toolkit to Combat Trafficking in Persons*, 2006, p. 35.

157 Obokata, T.: *Trafficking of Human Beings from a Human Rights Perspective – towards a holistic approach*. p. 133.

158 This paper does not analysis the effects of armed conflict on trafficking, but not surprisingly political turmoil and conflict act as a catalyst for people to leave home and both regular and irregular armed forces may engage in trafficking of especially uprooted people to gain a profit. Further it has by now been proved that the presence of troops very often results in a rise in trafficking cases and cases of forced prostitution. See Cameron, S and Newman, E.: Trafficking in humans: Structural factors, in Cameron, S. and Newman, E. (Eds.): *Trafficking in Human – social, cultural and political dimensions*, and See also Touzenis, K.: *Unaccompanied Minors – rights and protection (2006) for an analysis of children in trafficking and war and as IDPs*.

159 For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. 2. For the purpose of paragraph 1: (a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack; (c) 'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children; (e) 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the

The gravity of trafficking is perhaps best exemplified by its inclusion as both a war crime and a crime against humanity in the ICC. Clearly not all trafficking occurs during armed conflict, and that which does not cannot be a war crime. Nevertheless the increased vulnerability to such practices which may arise during armed conflict is recognized by the Statute, and a number of offences linked to trafficking are stated to be war crimes such as deportation of the population (Art. 8(2)(b)(viii)), outrages upon person dignity (Art. 8(2)(b)(xxi)), rape, sexual slavery and enforced prostitution (Art. 8(2)(b)(xxii); 8(2)(c)(vi)).¹⁶⁰

The characteristic element of the ICC definition of crimes against humanity is the “widespread and systematic attack against a civilian population”. The Statute indicates that it means a course of conduct involving the multiple commissions of serious violations of fundamental human rights, pursuant to or in furtherance of a State or organizational policy to commit such attack. The last is of significant weight since it refers not only to State policies but also to the policies of organizations.¹⁶¹ Criminal organizations either in association with or independently of national policies, and particularly those of a certain size which are active in international organized crime may fall within the scope of Article 7 – when their activity may be characterized as widespread or systematic.¹⁶² Widespread means a large-scale nature and the number of victims¹⁶³ and systematic requires the organised nature of the acts of violence.¹⁶⁴

Situations which constitute trafficking can quite easily be considered under Article 7 and all these kinds of trafficking reduce the human being to forms of property over which an unlimited power is exercised by another human being.¹⁶⁵ The definition in Article 7 builds on all previous ones that have been codified on slavery over the past 50 years. It is certainly the most detailed and includes new references to gender and acts that have never been mentioned before such as forced pregnancy, rape or sexual slavery which were considered simply implicit in earlier treaties.¹⁶⁶

custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.

- 160 Piotrowicz, R.: *Trafficking of Human Beings and their Human Rights in the Migration Context*, p. 288.
- 161 Pocar, F.: *Human Trafficking: A Crime against Humanity*, in Savona, E.U.; Stefanizzi, S.: *Measuring Human Trafficking, complexities and pitfalls*. p. 6.
- 162 Ibid. p. 7.
- 163 *Prosecutor v. Tadic*, IT-94-1-T, Trial Judgement, 7 May 1997, para 648; *Prosecutor v. Blaskic*, IT-95-14-T, Trial Judgement, 3 March 2000, para. 206; *Prosecutor v. Akayesu*, ICTR-96-4-t Trial Judgement, 2 September 1998, para. 580.
- 164 Tadic Trial Judgment, para. 648, Blaskic Trial Judgement, para 203, Akayesu Trial Judgement, para. 580.
- 165 Pocar, F. *Human Trafficking: A Crime against Humanity*, in Savona, E.U.; Stefanizzi, S.: *Measuring Human Trafficking, complexities and pitfalls* p. 8 and see Obokata, Q.: Trafficking in Human Beings as a Crime against Humanity: Some Implications of the International Legal System, in *International and Comparative Law Quarterly*, 2005.
- 166 Scarpa, S.: *Trafficking in Human Beings – modern slavery*. p. 125.

Article 7(2)(c) defined enslavement as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such powers in the course of trafficking in persons, in particular women and children”. Commentators on this provision have argued that it would be wrong to interpret the crime of enslavement in such a way as to restrict the Court’s jurisdiction in respect of this crime to traditional forms of slavery. Furthermore new forms of enslavement would fall within the Court’s jurisdiction as other inhumane acts intentionally causing great suffering, or serious injury to bodily or mental health. Considering that the prohibition against slavery is among the rules of customary law and that it has evolved clearly in international treaties one can easily conclude that enslavement should not be construed narrowly and that the narrow definition found in instruments from the beginning of the last century does not preclude the application of the prohibition contained therein to contemporary features of such a practice.¹⁶⁷

A Trial Chamber of the ICTY applied such an approach in 2001 in the Kunarac et al.¹⁶⁸, when it accepted in connection to the trafficking of women in wartime, that enslavement may occur even when the victims still enjoy de jure a certain freedom of movement, but the situation in which they find themselves leaves them no real choice of escape. Since the existence of war according to the ICC should not be considered a necessary substantive element of crimes against humanity the view expressed by the ICTY may well serve as precedent for a similar situation in peacetime.¹⁶⁹

Most cases of trafficking are very unlikely to meet the criteria for a crime against humanity, but the simple fact that it is included in the ICC is significant. In a case which would amount to a crime against humanity individual accountability for a breach of a serious crime against individuals would exist and so would universal jurisdiction by states. Universal jurisdiction has been established over such offences as piracy, slave trade, genocide, war crimes and crimes against humanity as a principle of customary law.¹⁷⁰

167 Pocar, F.: *Human Trafficking: A Crime against Humanity*, p. 9.

168 *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic. Case IT-96-23&23/1*, para 539-543. Judgement confirmed by appeal on 12 June 2002.

169 Pocar, F.: *Human Trafficking: A Crime against Humanity*, p. 10.

170 *R v. Bow Street Metropolitan Stipendiary Magistrates ex parte Pinochet Ugarte and Demjanjuk v. Petrovsky*. Obokata, T.: *Trafficking of Human Beings from a Human Rights Perspective – towards a holistic approach*. p. 140-41.

Human Rights Law

It has widely been accepted in modern times that trafficking entails a human rights dimension. In addressing trafficking in human rights terms it is possible to relay on existing human rights instruments, as mentioned. There is a wide range of instruments both at a regional and international level, which can be applicable to trafficking.¹⁷¹

171 The European Union has adopted the *Charter of Fundamental Rights of the European Union* 2000, Article 5(3) of which provides for the prohibition of trafficking in human beings. The Council of Europe *Convention on Action Against Trafficking in Human Beings* is being treated elsewhere in this paper. The *African Charter of Human and Peoples' Rights* (Article 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa concerns the rights to life, integrity and security of the person. Paragraph 2 (g) of that article states that States parties shall take appropriate and effective measures to prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk.), *The European Convention on Human Rights*, *The American Convention on Human Rights* (The American Convention on Human Rights (also known as the Pact of San José, Costa Rica), entered into force in 1978. It has been acceded to by Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela (Bolivarian Republic of). Article 6 of this Convention, entitled "Freedom from slavery", states: 1. No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women. 2. No one shall be required to perform forced or compulsory labour. This provision shall not be interpreted to mean that, in those countries in which the penalty established for certain crimes is deprivation of liberty at forced labour, the carrying out of such a sentence imposed by a competent court is prohibited. Forced labour shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner.), the *Arab Charter on Human Rights* (The Arab Charter on Human Rights was adopted by the Council of the League of Arab States in 1995 and revised in 2004. Article 10 of the revised Charter prohibits trafficking in persons. That article reads: 1. All forms of slavery and trafficking in human beings are prohibited and are punishable by law. No one shall be held in slavery and servitude under any circumstances. 2. Forced labour, trafficking in human beings for the purposes of prostitution or sexual exploitation, the exploitation of the prostitution of others or any other form of exploitation or the exploitation of children in armed conflict are prohibited. Article 9 of the Charter states that "trafficking in human organs is prohibited in all circumstances". the *Inter-American Convention on International Trafficking in Minors*, *The Convention on Preventing and Combatting Trafficking in Women and Children for prostitution* (The SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia is a commitment to enhance the welfare of children in the region. Article IV, paragraph 3 (a) of this Convention commits States parties to ensure that there are appropriate legal and administrative mechanisms and social safety nets in place to protect children from, among other things, trafficking.), *The African Charter on the Rights and Welfare of the Child* (The African Charter on the Rights and Welfare of the Child entered into force on 29 November 1999. Article 29 of this Charter states that States parties shall take appropriate measures to prevent: (a) The abduction, the sale of, or trafficking of children for any purpose or in

All recent instruments on trafficking refer to the human rights dimension of the issue. They also, to a greater or lesser extent, outline specific obligations undertaken by the state which may be considered human rights obligations, either because they reflect existing requirements, such as the duty not to return an individual to a territory where his/her life is under threat, or else constitute new positive duties voluntarily assumed by the state towards those within its jurisdiction.¹⁷²

Human rights issues are not only a concern upon arrival of the trafficked person but also during the transportation. Instances of torture, inhuman and degrading treatment are common during the process and many traffickers as well as smugglers and in some cases border officials may use physical or sexual violence as a means to demand payment for their services.¹⁷³

Upon arrival restriction of movement, work conditions, consequences of racism and law enforcement practices such as detention centres, repatriation and rights linked to legal processes are some of the issues with a human rights aspect in the trafficking context.¹⁷⁴

Again it must be underlined that the Trafficking Protocol is not a human rights instrument. The UN Crime Commission, which developed the Trafficking Protocol, is a law enforcement body, not a human rights body.¹⁷⁵ That is to say it is not a body occupied with monitoring human rights violations. The Trafficking Protocol is primarily a law enforcement instrument. From the human rights perspective, it would perhaps have been preferable if an international instrument on trafficking had been created within a human rights body rather than in a law enforcement body. However, the impetus for developing a new international instrument arose out of the desire of governments to create a tool to combat the enormous growth of trans-national organized crime. Therefore, the drafters created a strong law enforcement tool with comparatively weak language on human rights protections and victim assistance.¹⁷⁶ Does this necessarily mean that the Protocol is irrelevant for human rights protections? Not at all and even within the Protocol the reference to the wider international legal framework is found – Art. 14 of the Protocol

any form, by any person, including parents or legal guardians of the child; (b) The use of children in all forms of begging.), the *Convention on the Elimination of All Forms of Discrimination against Women* (mentioned elsewhere in this paper), The *Convention on the Rights of the Child* (treated elsewhere in this paper). Also the two *Covenants on Civil, Political and on Economic, Social and Cultural Rights* touch upon trafficking aspects and rights of victims even if not mentioning particularly trafficking. The *International Convention on the Rights of All Migrant Workers and Members of their Families*.

172 Piotrowicz, R.: *Trafficking of Human Beings and their Human Rights in the Migration Context*, p. 278.

173 Obokata, T.: *Trafficking of Human Beings from a Human Rights Perspective – towards a holistic approach*, p. 125.

174 Ibid. p. 126-7.

175 Priority areas within the mandate of the UN Crime Commission are: international action to combat national and trans-national crime, including organized crime, economic crime and money laundering; promoting the role of criminal law in protecting the environment; crime prevention in urban areas, including juvenile crime and violence; and improving the efficiency and fairness of criminal justice administration systems.

176 Jordan, A.D.: *The Annotated Guide to the Complete UN Trafficking Protocol*, p. 2-3.

makes the obvious evident – the Protocol does not exist in a vacuum: it compliments and is complimented by other instruments including the major human rights conventions and it cannot be seen as isolated from these.

Adopting a lens exclusively of organised crime, which is legally correct when considering what trafficking is, and often practically necessary in order to deal with the problem in any effective and reasonable way at all, simply because adopting any other lens when deciding upon whether a case is a trafficking case or not, only leads to confusion. However, this often translates into policies that do not uphold the best interests of the individual and ignore the human rights aspect of the Protocol and the human rights dimension of the crime.

Although trafficked persons are recognised by law as ‘victims,’ survivors of human trafficking are often only assisted by authorities if they ‘co-operate with law enforcement officials’ and agree to testify: otherwise, they are often treated as irregular immigrants in need of deportation. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power defines “Victim of Crime” as: “Persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States.” Under this Declaration, the person is to be considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted.¹⁷⁷ This means that conditioning the protection of a victim of trafficking upon the criminal case against the trafficker goes against basic UN principles of Justice.

Even in cases of cooperation, trafficked persons are liable to be deported, thus removing the critical incentives for cooperation in the first place. Too often repatriations take place in the absence of any risk and security assessment which in many cases only lead to cases of re-trafficking – to the detriment both of State security and objectives and obviously of the individual’s security. In cases where states have tried to combat human trafficking with tighter border controls, serious consequences result. Such measures can simply divert irregular migrants into more dangerous and hidden migratory routes or towards new destinations. Lack of legal rights to mobility compels marginal and vulnerable groups to lead underground lives, enhancing their manifold vulnerability to harms such as trafficking. It can also lead to a loss of individual freedoms. Specifically, the current securitarian approach, in which human trafficking is positioned as a problem of illegal migration, diverts attention from the global structural inequalities in the distribution of wealth and access to education, health care and social security, and gender-based or religious violence, and ethnic conflicts. This approach may also promote a false image of human trafficking and illegal migration and draw attention away from the dependence of big capital on the cheap and malleable workers that populate the unregulated and unprotected labour market.¹⁷⁸

177 UN GA Res. 49/34, Annex (29 Nov. 1985) UN DOC A/RES/40/34. para. 1.

178 Howard, N. and Lalani, M.: “Editorial Introduction: The Politics of Human Trafficking”, p. 9-10.

DEVELOPMENT OF THE PROTOCOL AND HUMAN RIGHTS

As a basis for understanding the negotiations process it is useful to recall that from the very beginning of negotiations until adoption of the UNTOC almost three years of negotiations took place. The beginning of the negotiations of the UNTOC and its Protocols reflects very well what continues to be a problem in implementation: the differences in national legal systems. Further at that point it was a problem even to define what constitutes “organised crime”.¹⁷⁹

Quite obviously the delegates negotiating the documents were government delegates, with specific approaches. It was however quite early on in the process recognised that civil society had important information and input to give and thus an invitation to civil society was issued, acknowledging that the idea they may come up with might never see the light of day in the final document. The inputs were however so important that many are reflected in the Protocol.¹⁸⁰

Numerous delegates expressed the view that trafficked persons were valuable as witnesses and, therefore, deserving of protections during trials but that they should be deported immediately after the trial. One delegate even wanted assurances that the Protocol would not prevent his government from ‘prosecuting the victims’. Whereas the developed countries were mostly concerned about according rights to ‘illegal migrants’, the developing countries were especially concerned about the financial costs of taking up obligations to provide protection and assistance. This meant that both types of countries had their own – be it different – interests in keeping such provisions discretionary.¹⁸¹ What should be mentioned is that the wording of Art. 6 at the origin was actually mandatory, and that several States expressed concern that it should remain so and that the existing protection schemes would be lessened by the wording of the Protocol.¹⁸² It was therefore underlined that the protection in the Protocol must be the minimum common denominator and States are encouraged to go well beyond which is now found in Art. 34 of the UNTOC. What is very regrettable is that law enforcement around the world has not really adopted the idea that effective prosecuting depends on protection and respect from the victims. This problem is again addressed in the Protocol itself since it is clearly recognised that training is a crucial element both for prosecuting, protecting and generally implementing effectively. The need for training is an important and incorporated aspect for protection as well as for prosecution.¹⁸³

179 Puleo, J.: The Negotiation Process, intervention in the Conference: ten years after the institution of the ad hoc inter-governmental committee for the elaboration of the Palermo protocol, Palermo: 21-22 May 2009.

180 Ibid.

181 Dittmore, M. and Wijers, M: *The negotiations on the UN Protocol on Trafficking in Persons*, p. 85.

182 Puleo, J.: The Negotiation Process, intervention in the Conference: ten years after the institution of the ad hoc inter-governmental committee for the elaboration of the Palermo protocol, Palermo: 21-22 May 2009.

183 Ibid.

Members of the Human Rights Caucus, which consists of non-governmental organizations from around the world, attended all of the negotiations for the new Trafficking Protocol. Its main goals were to ensure that the Trafficking Protocol (1) defines trafficking to include all trafficking into forced labour, slavery and servitude, according to the Protocol alone, no matter whether it is within or across a country's borders, and (2) recognizes the rights and meets the needs of trafficked persons. The first goal was accomplished to the extent possible in an international instrument. The Trafficking Protocol has a broad definition of trafficking and covers most international trafficking and some internal trafficking. The second goal was almost accomplished. Government delegates concentrated on creating a strong law enforcement instrument and many of them did not believe that human rights are appropriate in the Trafficking Protocol. Consequently, it may be noticed that the law enforcement provisions in the Trafficking Protocol contain mandatory language, such as "states parties shall," while the protections and assistance provisions (see Protocol Articles 6 and 7 and Convention Articles 24 and 25) contain weaker terms, such as "in appropriate cases" and "to the extent possible." Despite the weakness of the protections language, advocates can rely upon other international and regional human rights instruments that obligate governments to protect the rights of trafficked persons. Furthermore, Article 14 ensures that nothing in the Trafficking Protocol or the Convention can undermine international obligations to protect human rights. Accordingly, the Trafficking Protocol only establishes certain minimum standards and must be supplemented by human rights obligations contained in international and regional human rights instruments.¹⁸⁴ That said, the human rights aspect of the Protocol is not irrelevant at all. Nor is the fact that bringing perpetrators to justice for violent crimes and imposing upon states an obligation to do so within the trans-national criminal law area and not only within the human rights area may end up enforcing the states' obligation to protect through precedence and the development of case law holding states responsible for failure to protect individuals.

184 Jordan, A.D.: *The Annotated Guide to the Complete UN Trafficking Protocol*, p. 2-3.

THE PROTOCOL'S HUMAN RIGHTS ASPECTS

Some actually state that the 2000 Palermo Protocol against Trafficking is the first universal counter-trafficking instrument to adopt a multidisciplinary,¹⁸⁵ victim-centred approach.¹⁸⁶ And it is certainly true that the Protocol does have a multidisciplinary approach which is quite clearly reflected in the preventive measures set out in Article 9. This imposes on State Parties the explicit duty 'to protect victims of trafficking in persons, especially women and children, from revictimization' by undertaking educational measures; by appropriate coordination between governmental agencies and civil society; by undertaking bilateral or multilateral arrangements aimed at reducing 'poverty, underdevelopment and lack of equal opportunity' which 'make persons, women and children, vulnerable to trafficking'; and by discouraging 'the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.' But it should not be underestimated that the Protocol is first and foremost a criminal law instrument. The specific provisions on protection of trafficking victims are contained in session II of the Protocol. Article 6 is the core measure and is comprised of six paragraphs on 1) protecting identity and privacy; 2) adopting – if appropriate – measures designed to provide victims with information;

185 In research carried out by The Institute on Race and Justice Northeastern University Boston participants from all the international organizations represented noted that the importance of recognizing human trafficking issues can be approached from two perspectives. One, which can be called a human rights approach, highlights the human dimension of THB—with particular emphasis on the victim. The other, often referred to by participants as a criminal justice approach, emphasizes controlling THB through efforts of law enforcement and prosecution. The participants typically noted that there is nothing inherently contradictory in these approaches (e.g., victims' interests can be served when their offender is caught and punished), but they also suggested that cooperation is hindered when the players are approaching the situation from divergent paradigms. The participants report that the human rights approach is especially more common among NGOs; although many of the participants representing IOM and OSCE seemed partial to this approach as well. The crime control approach, not surprisingly, is more often linked to organizations such as Eurojust, Europol, and UNODC—each of which is geared toward stopping and preventing continued criminal behavior. Problems in cooperation arise, according to the human rights proponents, when criminal justice personnel promote a goal of catching and prosecuting the offender over the interests of the victim (who may not wish to assist law enforcement or prosecutors). Criminal justice personnel, on the other hand, become frustrated when they perceive victim advocates as thwarting efforts to combat human trafficking by failing to encourage victims to cooperate with law enforcement and prosecution. To exemplify the extremes of this conflict, one group suggested a zealot/skeptic continuum wherein the zealot (human rights approach) takes the position that victims are great in number and subject to considerable harm—including harm by criminal justice officials. At the other end of the continuum one finds the skeptic (crime control approach) who views trafficking victims as mostly complicit actors who are undeserving of the special attention so many want to afford them. Although none of the respondents, suggested this level of divergence is commonplace when employees of international organizations and NGOs are working with each another, the frequency with which participants noted the existence of contrasting approaches suggests it is something to which attention must be paid. See Reichel, P.L.: Cross-National Collaboration to Combat Human Trafficking Learning From The Experience Of Others. *Quite obviously such a diversion is harmful both the prosecution and to victims and it is essential that operators start recognizing that trafficking is a criminal law concept with a very strong and serious human rights component and none of these can be ignored.*

186 Wuiling, C: Assessing Criminal Justice and Human Rights Models in the Fight against Sex Trafficking: A Case Study of the ASEAN Region. Essex Human Rights Review Vol. 3 No. 1. p. 53.

3) examining the possibilities of guaranteeing physical, social and psychological recover; 4) taking into account age, gender and special needs of victims; 5) making efforts to provide for the physical safety of victims; 6) guaranteeing compensation.¹⁸⁷

There are two main advantages in applying a human rights framework to trafficking and smuggling. First, it promotes better understanding of the problems experienced by trafficked or smuggled people. They may be seen as victims of human rights abuses rather than criminals who violate national immigration laws and regulations, and therefore a victim-centred approach may be promoted. Victimisation may lead to deprivation of victims' sense of self-control and autonomy, and they can also feel isolated from their family, society and the world around them. The victim-centred approach could rectify this situation and empower victims by restoring their dignity and self-worth. Second, a human rights framework allows us to understand wider issues surrounding trafficking and smuggling of human beings, including the causes and consequences, in depth as these are issues pertinent to protection and promotion of human rights as noted above. In other words, it has the potential to promote a holistic approach which seeks not only legal, but also political, economic and social solutions.¹⁸⁸

The core distinguishing characteristic of trafficking is exploitation. This is reflected in the Protocol covering all forms of exploitation: sexual exploitation, labour exploitation, servitude and removal of organs – be it national or international, linked or not to organized crime and whether it concerns women, men or children.¹⁸⁹ Moreover, any effective strategy must be multidisciplinary, incorporating prevention, protection of the human rights of victims and prosecution of traffickers. Such a multidisciplinary approach is basic to the Protocol and should be basic to any national or international action on trafficking in human beings. At the same time, a distinction must be made between trafficking in human beings, irregular immigration and prostitution. Trafficking is more than an issue of irregular migration. If trafficking victims and irregular migrants are grouped together, victims of trafficking will be immediately returned to their country of origin and consequently denied their rights and protection as victims. This practice results in a vicious circle of victim recycling.¹⁹⁰ Many countries have adopted special protection mechanisms for victims of trafficking. These protection mechanisms generally apply to irregular aliens who have been trafficked. They can usually only make use of these special protection mechanisms if and for as long as they cooperate with the judicial authorities in the criminal proceedings. This approach is not satisfactory, and therefore an alternative form of adequate protection of victims of trafficking, namely, a human rights based approach is necessary. In such an approach assistance to and protection of

187 Scarpa, S.: *Trafficking in Human Beings – modern slavery*. p. 64.

188 Obokata, T.: *Trafficking and Smuggling of Refugees from a Human Rights Perspective*. p. 6.

189 OSCE: Human Trafficking for Labour Exploitation/Forced and Bonded Labour: Prosecution of Offenders, Justice for Victims. Report of the 5th Alliance against Trafficking in Persons Conferences on Human Trafficking for Labour Exploitation/Forced and Bonded Labour Vienna, 16 and 17 November 2006. p. 19.

190 *Ibid.* p. 19.

victims is not dependent on criminal proceedings or migration law requirements.¹⁹¹ That said, and underlined, it is necessary to keep in mind that trafficking and the definition of trafficking only works if it is kept in mind that the concept of trafficking itself is a criminal law concept. Human rights are absolutely necessary in order to protect the victims, but as seen elsewhere in this paper, it is crucial for the operational aspect of the trafficking definition that it is always clear that the concept is created within a criminal law framework and is a criminal law concept.

Rights related to proceedings

Article 6.2 states that each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

- (a) Information on relevant court and administrative proceedings;
- (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

Although this language is weak (“in appropriate cases”) and appears to permit governments to provide assistance to some trafficked persons and not to others, it nonetheless requires governments to adopt such measures. Governments must give information to trafficked persons through a translator or in writing in their own language about their legal status and the legal issues involved. Section 2(b) requires “assistance” in legal proceedings and this language must be interpreted to mean legal assistance because non-lawyers would not be competent to assist at “criminal proceedings”. Thus, governments must provide some legal assistance so that trafficked persons can protect their rights during the proceedings. This section also requires governments to enable trafficked persons to testify at the trial and at any sentencing hearings. As for the words “in appropriate cases”, governments cannot argue that some trafficked persons have a right to understand the legal proceedings and others do not. Information and assistance are always “appropriate” when a person is involved in legal proceedings, so the wording is bizarre at the least.

Article 6(2)(b) of the Protocol provides that States Parties shall ensure that their domestic, legal or administrative system contains measures that provide victims in appropriate cases with “assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.” By virtue of Article 6(2)(a) the Protocol also requires States to provide victims of trafficking with information on relevant court and administrative proceedings and, by virtue of Article 6(3)(b) with counselling and information, in

191 Rijken, C.: Koster, D.: *A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice*, p. 2.

particular about their legal rights, in a language they can understand.¹⁹² Article 6.2(b) and 6.3 together strongly support a government commitment to provide legal assistance. Although the term “counselling” could be interpreted to mean legal advice only, it must have a broader meaning. Legal counselling must be provided by a lawyer and not by a layperson. It must be provided at all stages of any legal proceedings involving the trafficked person. However, if governments are unable to afford legal services for trafficked persons, then counselling should be provided by advocates with legal expertise on trafficking-related issues. Counselling and information, in particular regarding their legal rights, in a language that the victims of trafficking in persons can understand is crucial. Trafficked persons can only realize their right of access to justice if they have a lawyer and, given that trafficked persons have no money, they cannot hire a private, non-government-funded lawyer. Many jurisdictions allow victims to hire a lawyer to advise and accompany them throughout the proceedings, if they pay for these services themselves. Victims of trafficking, however, usually have no financial means to pay for legal counselling. Therefore, it is necessary to make available state-paid legal counselling.¹⁹³ Trafficked persons are typically undocumented and do not understand the foreign legal system and they may face governments that are not interested in recognizing or respecting their fundamental human rights. Few trafficked persons have any legal representation and so most of them are deported, which effectively prevents them from recovering any financial redress or realizing any of their other rights. Legal representation, then, is essential.¹⁹⁴

The right of all people to equal treatment before national tribunals is established under international law and states must take positive steps to secure an effective right of access to courts.¹⁹⁵ But not only rights in proceedings are important – the simple access to justice is a fundamental right – and problem – for victims. Access to justice is a fundamental right and it is crucial not only for the single victim in the case of trafficking but access to justice helps giving more evidence based visibility to cases of trafficking.

Rights related to assistance

Article 6.3 states that each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society. This provision addresses the most important and urgent needs of trafficked persons. The language is weak

192 UNGIFT: The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper 023 Workshop: The Effectiveness of Legal Frameworks and Anti-Trafficking Legislation. p. 27.

193 Article 15(2) of the Council of Europe Convention on Action Against trafficking in Human Beings provides that parties “shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law.”

194 Jordan, A.D.: *The Annotated Guide to the Complete UN Trafficking Protocol*. International Human Rights Law Group. 2002. p. 22.

195 *Aire v Ireland* (App. 6289/73).

(“shall consider” and “in appropriate cases”) but it does reflect a consensus that certain services are necessary. Convention paragraph 25.1 contains stronger language requiring governments to provide assistance and protection to victims.¹⁹⁶ It could be used to overcome the weakness of paragraph 6.3.¹⁹⁷ Among the assistance which should be provided is: (a) Appropriate housing. In many countries, trafficked persons are deported immediately or held in prisons or detention centres because there is no appropriate shelter. Governments must recognize that, if trafficked persons are not provided any shelter and deported immediately, they may not report the crime to law enforcement. Thus, the lack of appropriate shelter results in re-victimization and allows the traffickers to remain unpunished and continue trafficking. However, many governments do not have resources to provide long-term housing. At a minimum, all governments should be obligated to provide or fund appropriate short-term emergency shelters and security for the shelters. It should not place trafficked persons in detention centres. Article 6.3(a) could be incorporated into domestic law in two parts. The first part would establish the principle that trafficked persons should never be held in detention centres, jails or prisons unless absolutely no other shelter is available. Under no circumstances should trafficked persons be housed with other detainees or prisoners; they must be segregated from detainees and prisoners. The second part would be a commitment by the government to provide funding or resources for “appropriate housing”.

Article 6.2(c) Medical, psychological and material assistance. All trafficked persons require some level of medical and/or psychological assistance as well as basic resources such as food and clothing. Governments that are financially able to provide such assistance should make a commitment to do so and governments that lack resources should use their ‘best efforts’. All governments holding confiscated trafficking assets should have an absolute obligation to provide such assistance.¹⁹⁸ Victims of trafficking will probably have immediate medical needs, which need to be addressed in the destination State as a first concern. They may have physical injuries or have been exposed to the risk of disease. They may have been forced to use narcotic or psychoactive drugs as a means of controlling them. The victims themselves may have developed drug addictions to assist them to cope with the situation. They may have mental health problems with associated physical conditions. Initial medical examinations and discussions, preferably undertaken in partnership with appropriate non-governmental organizations that can provide a

196 UNODC encourages States to implement measures to provide for the physical, psychological and social recovery of victims. This should include housing and counselling in a language the victims can understand medical, psychological and material assistance as well as employment, educational and training opportunities. The special needs of victims, in particular children, are to be taken into account; to provide for the physical safety of victims following rescue; to adopt measures that permit victims to remain in the territory, temporarily or permanently, in appropriate cases, giving consideration to humanitarian and compassionate factors; to facilitate preferably voluntary return of the victim without undue or unreasonable delay, with due regard for the safety of the victim.

197 Jordan, A.D.: *The Annotated Guide to the Complete UN Trafficking Protocol*. International Human Rights Law Group. 2002. p. 21.

198 Ibid. p. 22.

support person and interpreter, are a first step so that obvious injuries can be identified and a treatment plan initiated.¹⁹⁹

The European Court has held that failure of authorities to provide adequate medical treatment to some may constitute an issue under art 2 (right to life).²⁰⁰ Further the European Committee of Social Rights has held that legislation or practice that denies entitlement to medical assistance to foreigner nationals within the territory of a State Party, even if they are irregular, is contrary to the European Social Charter.²⁰¹

Art 6.3(d) establishes rules related to employment, educational and training opportunities. Especially for child victims access to education is crucial in order to avoid a break in their development and also as help to recover from traumatic experiences and further a return to “normality” which also will benefit the minor on a long-term basis.

Right to information

Trafficked persons need information, in a language that they understand, about the justice process and about their own rights and responsibilities as participants in criminal proceedings. Access to information is an important starting point for the participation of victims of trafficking in the criminal process. The most extensive list of rights is of no practical use to victims if they are not informed of those rights. Information helps to prepare and familiarize victims with the criminal proceedings and to ease their psychological stress and their anxiety. It is also a means of empowerment and enables victims to participate actively in the case and enforce their rights. The Trafficking in Persons Protocol requires States parties to provide victims of trafficking with information on relevant court and administrative proceedings and with counselling and information, in particular about their legal rights, in a language they can understand. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34, annex) states that victims of crime should be informed of their rights to seek redress, of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and when they have requested such information, and of the availability of health and social services and other relevant assistance.²⁰²

Four years after the adoption of the Protocol the Legislative Guide intervened on the discretionary character of many of the provisions dealing with the protection of victims and clarified the issue of some of these measures being mandatory while others are only optional. It is explained that generally the provisions of the Protocol setting out procedural requirements and basic safeguards are mandatory, while requirements to provide assistance

199 UNODC: *Toolkit for Combatting Trafficking in Persons*. 2006. p. 144.

200 *Cyprus v. Turkey* (App. 25781/94). States have discretion to define their level of health care provision.

201 *International Federation of Human Rights League v. France*, Complaint No 14/2003 (3/11/04).

202 UNODC: *Toolkit for Combatting Trafficking in Persons*. 2006. p. 142.

and support for victims incorporate some element of discretion. The nature of social obligations reflects concerns about the costs and difficulties in delivering social assistance to all victims (or indeed, the general population) in many developing countries.²⁰³ The Legislative Guide has to a great extent made it clear that the discretionary language used in many provisions cannot be considered as a justification for States' inaction when it comes to offering protection and assistance in accordance with these articles.²⁰⁴

Child victims

Article 6, paragraph 4 of the Trafficking in Persons Protocol provides that States parties, in considering measures to assist and protect victims of trafficking, must take into account the special needs of child victims. When the age of a victim is uncertain and there are reasons to believe that the victim is a child, a State Party should, in accordance with its legal system, treat the victim as a child in accordance with the Convention on the Rights of the Child until his or her age is verified. In addition, a State Party may also appoint, as soon as the child victim is identified, a guardian to accompany the child throughout the entire process until a durable solution in the best interest of the child has been identified and implemented. To the extent possible, the same person should be assigned to the child victim throughout the entire process. The State must ensure that, during the investigation, as well as the prosecution and trial hearings where possible, direct contact between the child victim and the suspected offender is avoided. Unless it is against the best interest of the child, child victims have the right to be fully informed about security issues and criminal procedures prior to deciding whether or not to testify in criminal proceedings. During legal proceedings, the right to legal safeguards and effective protection of child witnesses needs to be strongly emphasized. Child victims who agree to testify should be accorded special protection measures to ensure their safety. The State must provide appropriate shelters for child victims in order to avoid the risk of re-victimization. Child victims should be hosted in safe and suitable accommodation, taking due account of their age and special needs.²⁰⁵

203 Legislative Guide para 62-67

204 Scarpa, S.: Trafficking in Human Beings – modern slavery. p. 66

205 See Touzenis, K.: *Migrant Children's Human Rights*. IOM International Migration Law Series N 15. IOM 2008. The United Nations High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking in *Guideline 8 Special measures for the protection and support of child victims of trafficking states that*: The particular physical, psychological and psychosocial harm suffered by trafficked children and their increased vulnerability to exploitation require that they be dealt with separately from adult trafficked persons in terms of laws, policies, programmes and interventions. The best interests of the child must be a primary consideration in all actions concerning trafficked children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Child victims of trafficking should be provided with appropriate assistance and protection and full account should be taken of their special rights and needs. States and, where applicable, intergovernmental and non-governmental organizations, should consider, in addition to the measures outlined under Guideline 6: 1. Ensuring that definitions of trafficking in children in both law and policy reflect their need for special safeguards and care, including appropriate legal protection. In particular, and in accordance with the Palermo

Interaction with the TOC in witness and victim protection

The requirements of Article 6 of the Trafficking in Persons Protocol supplement the provisions of the Organized Crime Convention concerning the provision of assistance and protection to victims. Article 24 of the Convention refers to the dangers represented by “retaliation or intimidation” for those who cooperate with authorities, whereas Protocol Article 9, subparagraph (1)(b), also refers to protection from the risk of “revictimization.” The fears of victims are often fully justified by the very real prospect of retaliation if they assist the competent authorities. It is therefore essential that programmes to protect victims both during and after they have cooperated are implemented and adequately resourced. Such protection measures may include: (a) Physical protection, such as relocation and permitting limitations on the disclosure of information concerning identity and whereabouts; (b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness. Under the Convention and the Trafficking in Persons Protocol, the basic obligation to protect victims applies to any State Party in which the victims are found, including origin, transit, destination and repatriation States. Contacts with State authorities are usually very problematic for the victims, especially when traffickers have used fear of such authorities to intimidate victims. In such cases, non-governmental organizations may play an important role as an intermediary.²⁰⁶

Protocol, evidence of deception, force, coercion etc. should not form part of the definition of trafficking where the person involved is a child. 2. Ensuring that procedures are in place for the rapid identification of child victims of trafficking. 3. Ensuring that children who are victims of trafficking are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons. 4. In cases where children are not accompanied by relatives or guardians, taking steps to identify and locate family members. Following a risk assessment and consultation with the child, measures should be taken to facilitate the reunion of trafficked children with their families where this is deemed to be in their best interest. 5. In situations where the safe return of the child to his or her family is not possible, or where such return would not be in the child's best interests, establishing adequate care arrangements that respect the rights and dignity of the trafficked child. 6. In both the situations referred to in the two paragraphs above, ensuring that a child who is capable of forming his or her own views enjoys the right to express those views freely in all matters affecting him or her, in particular concerning decisions about his or her possible return to the family, the views of the child being given due weight in accordance with his or her age and maturity. 7. Adopting specialized policies and programmes to protect and support children who have been victims of trafficking. Children should be provided with appropriate physical, psychosocial, legal, educational, housing and health-care assistance. 8. Adopting measures necessary to protect the rights and interests of trafficked children at all stages of criminal proceedings against alleged offenders and during procedures for obtaining compensation. 9. Protecting, as appropriate, the privacy and identity of child victims and taking measures to avoid the dissemination of information that could lead to their identification. 10. Taking measures to ensure adequate and appropriate training, in particular legal and psychological training, for persons working with child victims of trafficking.

206 UNODC: *Toolkit to Combat Trafficking in Persons*. 2006. p. 140.

Compensation

Article 6(6) of the Protocol obliges State Parties to ensure that its domestic legal system contains measures that offer victims the possibility of obtaining compensation for damages suffered. Article 25(2) of the TOC states that State Parties shall establish appropriate procedures to provide access to compensation and restitution for victims.²⁰⁷ Receiving compensation is important for victims of trafficking not only because of the financial component but also because of its symbolic meaning: At a societal level, awarding compensation acknowledges that trafficking is a crime; At an individual level, the harm suffered by the victim is acknowledged and compensation can constitute a first step towards overcoming trauma inflicted and abuse suffered; At a practical level, compensation can assist victims rebuild their lives; At a retributive level, compensation paid by traffickers can constitute a form of punishment and deter other traffickers. The Protocol does not prescribe potential sources of victim compensation. This means that the following options are generally sufficient to meet Protocol requirements; Provisions allowing criminal courts to award criminal damages (to order that compensation be paid by offenders to victims) or impose orders for compensation or restitution against persons convicted of offences; Provisions allowing victims to sue offenders or others under statutory or common-law torts for civil damages; Provisions establishing dedicated funds or schemes whereby victims can claim compensation from the State for injuries or damages suffered as a result of a criminal offence.²⁰⁸

In accessing compensation to which they are entitled, victims often face a range of challenges; Where States do not have legislation ensuring the non-punishment of victims for acts they committed as a result of being trafficked, their ability to access compensation may be jeopardized; Victims may be removed from a country before they are aware of and/or able to seek compensation. Alternatively, compensation may be granted but there is no mechanism in place to ensure that the victim is located and the money forwarded to them. Victims may not have access to information and the resources necessary to seek compensation (for instance, they may not be able to afford to file a civil suit, they may not have adequate information about their rights to seek compensation, they may not have access to legal aid nor be able to afford legal representation). Victims may not be able to access compensation because there is no mechanism in place to provide for compensation and/or the assets of the trafficker are difficult to trace.²⁰⁹

Prosecution and investigation into where the profit goes and confiscation of profits would help when compensation has to be given. Unfortunately this aspect is not often underlined

207 Legislative Guides for the Implementation of the United Nations Convention Against Trans-national Organized Crime and the Protocols thereto, UNODC, October 2004, para. 60.

208 Ibid.

209 UNGIFT: The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper 023 Workshop: The Effectiveness of Legal Frameworks and Anti-Trafficking Legislation, p. 27.

and profits are hardly ever traced.²¹⁰ Again the close relationship between effective respect for human rights and respect for the rule of law and effective enforcement of criminal law is quite evident. Without remedies and prosecution there is no justice for the victims nor any deterrent for the perpetrators. The importance of exactly this aspect for the respect and effective implementation of human rights is evident also from the fact that a fair and effective trial is a human right in itself. Something which protects the accused ensures State action and provides a remedy for the victim – when respected obviously.

Residence and/or reflection period

Regarding the issue of the immigration status of a victim of trafficking, the Protocol in Article 7 does not provide for a binding obligation on states to grant a residence status to victims of trafficking. The Protocol merely asks states to consider, in “appropriate cases”, such a measure. This non-binding, discretionary, non-obligatory language is the language used by the Protocol in regarding to all protective measures that are provided in Article 6. There is no mandatory obligation to legislate on the immigration status of a victim of trafficking in persons. However, the Article urges states to “consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily, permanently, in appropriate cases.” In countries²¹¹ where measures

210 Rossi, E.: Intervention in the Conference: ten years after the institution of the ad hoc inter-governmental committee for the elaboration of the Palermo protocol, Palermo: 21-22 May 2009.

211 Italy: Article 18 of the 1998 (article not changed in subsequent revisions at the moment of writing). Italian Immigration Law provides victims of trafficking who are aliens a special residency period for a six-month period, regardless of their ability or willingness to give evidence as a witness in legal proceedings. The purpose of this is to give them the opportunity to escape from the violence and from the influence of the criminal organization and to participate in an assistance and social integration programme. The temporary residence permit allows access to assistance services, education or employment. The residence permit is valid for six months and can be renewed for one year, or for a longer period, if required. Italy grants protection to victims independently of their readiness to testify.

Norway: Article 8(2) of the Norwegian Immigration Act and Instruction AI-10/2006 provide a temporary residence permit to a person if there is reason to believe that he or she is a trafficked person. The reflection period is 6 months and allows the alleged trafficked person to participate in a programme providing him or her with legal aid, safe housing, health and social services and employment. The requirement for providing the reflection period is that the person wants to receive the support programme services and intends to break away from the trafficker and the trafficking situation; they are encouraged but not required to make an official complaint against the trafficker. Following the initial six months, the permit can be renewed for one year, or for a longer period, on a case by case decision made by the competent authorities. This decision of extending the residence permit emphasises more the need for the victim's cooperation or presence in the country to enable the successful prosecution of the trafficker.

Other strong examples of reflection periods / temporary residence permits being granted to victims of trafficking regardless of their willingness or ability to assist with criminal proceedings include the following: In June 2007, the Canadian Ministry of Citizenship and Immigration introduced measures extending the length of the temporary resident permit for victims to 180 days, up from 120. Depending on individual circumstances, this visa can be renewed at the end of the 180-day period. Victims of trafficking with a legal status of temporary residence permit, have access to federally-funded

have been adopted for the temporary or permanent residence of victims of trafficking they have had a positive effect on victims participating in the criminal justice process.²¹² Victims have used this time to decide to come forward and testify against traffickers, and non-governmental organizations providing support and assistance to victims have encouraged them to report incidents.

In the destination State, assistance and protection services for victims of trafficking cannot be offered effectively if the victims are not granted a reflection period or temporary residence status or if they are being criminalized because of their irregular residence or employment status. A reflection period or temporary residency status will also assist in providing the victim with the tools to make an informed choice about whether to participate as a witness in legal proceedings against the trafficker. A scheme can be developed to grant humanitarian protection to victims of trafficking. In some cases, that protection entitles the victims to other rights and benefits. Residence permits for trafficked persons are often referred to as “humanitarian residence permits” and may be issued either on a temporary or permanent basis. A number of international instruments exist under which these permits can be provided. These include declarations, conventions and guidelines of the United Nations, including the Trafficking in Persons Protocol, specific clauses of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990 and other binding documents of the Council of Europe, the European Union and OSCE. While the general emphasis in these documents is on providing a reflection period or temporary residence to assist the prosecution during criminal proceedings against the offender, there are often some other

emergency medical services, including psychological and social counselling and services such as legal assistance. Holders of this special temporary residence permit are able to apply for a work permit to protect them from revictimization. The Ministry of Interior of the Republic of Montenegro passed an ‘Instruction on the conditions and manner of regulating the residence of foreign citizens – victims of trafficking’ which states that where a foreign citizen is determined by the competent Ministry of Labour and Social Welfare as a victim of trafficking in need of protection and treatment, they should be granted three month, six month or one year residence permits. The period of the permit is determined on a case-by-case basis, and may be extended. See UNGIFT: The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper 023 Workshop: The Effectiveness of Legal Frameworks and Anti-Trafficking Legislation.

212 Even if the granting of reflection periods and residency status has a positive impact on the prosecution of offenders, but this should not be the sole foundation on which such status is granted; there are humanitarian considerations which promote the granting of residence permits whether a victim participates in legal proceedings or not. This is not mandated by the Protocol, yet States may wish to consider adopting such measures. Article 14(1) of the European Convention provides that victims of trafficking in persons shall be granted renewable residence permits, as a means of both meeting needs of victims and of combatting trafficking. The two requirements laid down by Article 14(1) of the European Convention for the issue of a residence permit are that: it may be necessary for the victim to stay owing to their personal situation (for their safety, health, family situation or other factor); it may be necessary for the victim to stay for the purpose of their cooperation with the competent authorities in investigation or criminal proceedings (this requirement acts to assuage fears of victims that they will be immediately sent back to their country of origin if they contact authorities). The European Convention residency permit does not stipulate a particular length of stay, but does provide that the residence permit must be renewable.

provisions made for the victims' temporary residence, whether they participate in legal proceedings or not, and for permanent residence under humanitarian considerations. States have introduced residence permits for trafficked persons based on different approaches, restricting in some instances the type of victim who may benefit from such permits or the nature of the circumstances that may make them eligible for a permit.²¹³ These restrictive definitions are generally the result of the legal definition of trafficking in use in the State and demonstrate the critical practical relevance of the scope of the legal definition of trafficking adopted by a State.²¹⁴

Though a victim's participation in the criminal justice process should not be a condition of the granting of the reflection period,²¹⁵ legislators should bear in mind that allowing victims adequate time to physically and psychologically stabilise, to come to terms with their new situation and to understand the options and services available to them, can ultimately make them decide to testify and in such cases they tend to be more credible witnesses than they would be without this period.²¹⁶ The legislative guide to the Protocol explicitly states that "there is no obligation to legislate measures relating to the status of victims".²¹⁷ However, in several countries where measures have been adopted for the temporary or permanent residence of victims of trafficking such as Belgium, Italy, the Netherlands, and the United States, such measures have had a positive effect on victims coming forward to testify against traffickers and on non-governmental organizations encouraging victims to whom they provide services to report incidents to the government.²¹⁸

213 Article 13 of the Council of Europe Convention Against Trafficking provides that "each party shall provide in its internal law a recovery and reflection period ..." Article 14 states that "each party shall issue a renewable residence permit to victims of trafficking.

214 UNODC: Toolkit on Combatting Trafficking in Persons. 2006. p. 118.

215 Article 13 of the European Convention stipulates that a minimum 30 day period of reflection should be granted by domestic law. This provision is intended to apply to victims of trafficking in persons who are illegally present in a country or who are legally residence but with a short-term residence period. Such persons are vulnerable after their trafficking experience and are likely to be removed from the territory in which they are. The Expert Group on Trafficking in Human Beings of the European Commission on Reflection Period issued an opinion on 16 April 2004, which stresses the status of victims of trafficking as victims of serious crime. In the background to the opinion issued, the Expert Group states that a reflection period should be followed by a temporary residence permit, regardless of whether the trafficked person is able or willing to give evidence as a witness in legal proceedings. This, it says, assists States in fulfilling their obligation to protect the human rights of trafficked persons and avoids the risk of treating such persons as purely instrumental in the criminal justice system. The opinion offered by the Expert Group also states that: One of the purposes of the reflection period is the identification of whether a person has been trafficked. Reflection periods should therefore be granted to all those who there is reason to suspect have been trafficked (as well as for reasons of enabling the person to recover and decide on their future course).

216 UNGIFT: The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper 023 Workshop: The Effectiveness of Legal Frameworks and Anti-Trafficking Legislation. p. 20.

217 Legislative guide para 67.

218 Mattar, M.: Omissions and Gaps: From the United Nations Protocol to the Council of Europe Convention Against Trafficking in Human Beings. Conference: From the United Nations Protocol to the Council of Europe Convention Against Trafficking in Human Beings: Recent Development and New Challenges. March 25, 2006. Johns Hopkins University (SAIS). Bologna Center.

Return

Article 8(2) of the Protocol states that: “When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.” The international principle of non-refoulement and the prohibition on inhuman or degrading treatment under international human rights law must be taken into account.²¹⁹ With respect to children, General Comment No. 6 on the Convention on the Rights of the Child makes clear that children who are at risk of being re-trafficked should not be returned to their country of origin unless it is in their best interests and appropriate measures for their protection have been taken. Complementary forms of protection should be considered where such return is not in their best interests.²²⁰ In 1999, the High Commissioner for Human Rights made the following view on the status of trafficked persons: “The High Commissioner is of the view that safe and, as far as possible, voluntary return must be at the core of any credible protection strategy for trafficked persons. A failure to include provision for safe and (to the extent possible) voluntary return would amount to little more than an endorsement of the forced deportation and repatriation of victims of trafficking. When trafficking

219 The Government of Canada offers various avenues for assisting victims of trafficking. The temporary residence permit is intended to provide a reflection period for the victim and an investigative window for law enforcement to define whether there is enough evidence to pursue a trafficking case. In June 2007, the Canadian Ministry of Citizenship and Immigration introduced new measures to help assist victims trafficked into Canada. The new measure extends the length of the temporary residence permit for victims to 180 days, up from 120. Depending on individual circumstances, this visa can be renewed at the end of the 180-day period. Victims of trafficking with a temporary residence permit have access to federally funded emergency medical services, psychological and social counselling and other programmes and services, such as legal assistance. Victims of trafficking are eligible to apply for assistance from funds maintained by the provincial governments for assistance to victims. Under the new measures announced in June 2007, human trafficking victims are now also able to apply for a work permit to protect them from revictimization. The fees for work permits are waived for holders of this special temporary residence permit. In addition to these measures, and depending on their particular circumstances, there are a number of other avenues that possible victims of trafficking may pursue. For example, they may apply for permanent residence from within Canada through the refugee determination process, on humanitarian and compassionate grounds or, over time, as members of the permit holder class. In Italy, Article 18 of the Immigration Law provides a temporary residence permit to trafficked persons to give them the opportunity to escape from the violence and influence of the criminal organization and to participate in an assistance and social integration programme. The temporary residence permit allows access to assistance services, education or employment. The residence permit is valid for six months and can be renewed for one year or for a longer period, if required. Italy grants protection to victims independently of their readiness to testify. This approach focuses upon the victim’s need for protection, rather than on the victim’s contribution to the State’s prosecution efforts. From a human rights perspective, this approach, which also includes the right of trafficked persons to work and to reintegrate into society, is the most effective response. See UNODC Toolkit to Combat Trafficking in Persons, 2008, p. 318.

220 See Touzenis, K.: *Migrant Children’s Human Rights*. IOM International Migration Law Series N 15. IOM 2008.

occurs in the context of organized crime, such an endorsement presents an unacceptable safety risk to victims.”²²¹

The Council of Europe Convention on Action against Trafficking in Human Beings Article 14 grants a far better protection stating that 1. Each Party shall issue a renewable residence permit to victims, in one or other of the two following situations or in both: (a) The competent authority considers that their stay is necessary owing to their personal situation; (b) The competent authority considers that their stay is necessary for the purpose of their cooperation with the competent authorities in investigation or criminal proceedings. 2. The residence permit for child victims, when legally necessary, shall be issued in accordance with the best interests of the child and, where appropriate, renewed under the same conditions. 3. The non-renewal or withdrawal of a residence permit is subject to the conditions provided for by the internal law of the Party. But the CoE Convention is a different instrument all together, also because the CoE is a different institution and it thus more easily “mix” different branches of law to an extended degree.

Where the protocol fails to address the human rights issue adequately

in addition to the important issues that the Protocol fails to address, the Protocol addresses some issues inadequately. Under the Protocol demand is addressed as an issue of prevention.²²² Article 9.5 calls upon states to adopt legislative or other measures, such as educational, social, or cultural measures to discourage demand. The European Council Convention while supporting the preventive approach under Article 5, also considers demand as an issue of criminalization and prosecution. Article 19 calls upon the State Parties to “consider” - “non-binding” language - establishing as an offense “use of the services of a victim [...] with the knowledge that the person is a victim of trafficking in human beings”. The explanatory notes to the Convention make it clear that: “Article 19

221 Informal Note by the United Nations High Commissioner for Human Rights Ad Hoc Committee on the Elaboration of a Convention of Trans-national Organized Crime, UN Doc A/AC.254/16, para 20. 54th Session of the General Assembly, 1 June 1999.

222 UNODC urges that States in implementing the Protocol 1. Establish, together with NGOs and civil society, comprehensive regional and national policies and programmes to prevent and combat human trafficking and to protect the victims; 2. Implement, together with NGOs and civil society, research, information and media campaigns and social and economic initiatives to prevent and combat trafficking in persons; 3. Undertake measures to alleviate the vulnerability of people (women and children in particular) to human trafficking, such as poverty, underdevelopment and lack of equal opportunity. 4. Undertake measures to discourage demand that fosters exploitation that leads to trafficking in persons. 5. Provide training to relevant officials in the prevention, prosecution of trafficking in persons and protection of the rights of the victims. 6. Exchange information on human trafficking routes, modus operandi, trafficker profiles and victims identification; 7. Undertake measures to prevent means of transport operated by commercial carriers to be used in the commission of human trafficking offences; 8. Strengthen cooperation among border control agencies by, *inter alia*, establishing and maintaining direct channels of communication.

is intended not to prevent victims of trafficking from carrying on an occupation...”; In other words: this is not a prostitution law - it is a trafficking law.²²³

The Protocol calls upon States to adopt the protective measures of Article 6 and the preventive measures of Article 9 in cooperation with NGOs and other members of civil society. It can be argued that the Protocol establishes an international obligation of cooperation. The European Council Convention in Article 35 addresses the role of civil society more explicitly providing that: “Each party shall encourage state authorities and public officials to cooperate with non-governmental organizations, other relevant organizations and members of civil society, in establishing strategic partnerships with the aim of achieving the purpose of this Convention.” In Article 16 the CoE Convention calls upon States to make available to victims contact information of NGOs. And in Article 28 it calls upon states to protect NGOs offering assistance to victims of trafficking from retaliation or intimidation.²²⁴

As mentioned, the CoE Convention is not a criminal law instrument only – which obviously makes its approach different. It provides specific regulatory requirements according to the victim (child/adult, forms of exploitation experienced, including mail-order brides and au-pairs). It imposes state obligations to raise awareness and create economic obligations for people vulnerable to trafficking (a parallel to the Protocols prevention) and also imposes an obligation to discourage the demand side through information and education, suggesting criminalizing demand (demand is actually criminalized in the Protocol since it is part of the trafficking chain – unless the focus is exclusively on prostitution where criminalizing of clients is not demanded).

The CoE Convention requires a compulsory assistance to victims (psychological, physical, and social recovery) including concrete measures which at a minimum must include a subsistence standard of living, medical treatment, secure accommodation, counselling, and education for children. A reflection period of 30 days is required and the State must offer residence permits not only based on cooperation in prosecution but also granted on humanitarian grounds, compensation and legal redress must be available.

RECOMMENDED PRINCIPLES AND GUIDELINES ON HUMAN RIGHTS AND HUMAN TRAFFICKING

The United Nations High Commissioner for Human Rights has developed Recommended Principles and Guidelines on Human Rights and Human Trafficking (E/2002/68/Add.1), which provide an important framework guiding the criminalization of trafficking in persons and the development of a legislative framework. According to these States

223 Mattar, M.: *Omissions and Gaps: From the United Nations Protocol to the Council of Europe Convention Against Trafficking in Human Beings.*

224 Ibid.

shall adopt appropriate legislative and other measures necessary to establish, as criminal offences, trafficking, its component acts and related conduct, they shall effectively investigate, prosecute and adjudicate trafficking, including its component acts and related conduct, whether committed by governmental or by non-State actors and ensure that trafficking, its component acts and related offences constitute extraditable offences under national law and extradition treaties. States shall cooperate to ensure that the appropriate extradition procedures are followed in accordance with international law. Effective and proportionate sanctions shall be applied to individuals and legal persons found guilty of trafficking or of its component or related offences. States shall, in appropriate cases, freeze and confiscate the assets of individuals and legal persons involved in trafficking. To the extent possible, confiscated assets shall be used to support and compensate victims of trafficking. States shall ensure that trafficked persons are given access to effective and appropriate legal remedies.²²⁵

Importantly the Guidelines mention ensuring that legislation prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for the activities they are involved in as a direct consequence of their situation as trafficked persons and ensuring that the protection of trafficked persons is built into anti-trafficking legislation, including protection from summary deportation or return where there are reasonable grounds to conclude that such deportation or return would represent a significant security risk to the trafficked person and/or her/his family.²²⁶ Providing legislative protection for trafficked persons who voluntarily agree to cooperate with law enforcement authorities, including protection of their right to remain lawfully within the country of destination for the duration of any legal proceedings is of the utmost importance as is making effective provision for trafficked persons to be given legal information and assistance in a language they understand as well as appropriate social support sufficient to meet their immediate needs. States should ensure that entitlement to such information, assistance and immediate support is not discretionary but is available as a right for all persons who have been identified as trafficked.²²⁷ Furthermore States should ensure that the right of trafficking victims to pursue civil claims against alleged traffickers is enshrined in law and guarantee that protections for witnesses are provided for in law.²²⁸

Quite clearly these Guidelines and Principles underscore the human rights dimension to the trafficking offence, simply by existing and in details with their contents. Since such instruments must be used in the interpretation of the Palermo Protocol it is difficult to imagine that the two do not influence one another, again showing how human rights influence criminal law and how criminal law must take into consideration human rights

225 Principles 12-17.

226 The United Nations High Commissioner for Human Rights Recommended Principles and – Guideline on Human Rights and Human Trafficking 7.5-6.

227 Ibid. Guideline 7.7-8.

228 Ibid. Guideline 7.9-10.

aspects and perhaps even end up giving “teeth” to human rights provisions, keeping in mind how these principles are based on human rights found in binding conventions.

THE COUNCIL OF EUROPE CONVENTION AGAINST TRAFFICKING AND THE EUROPEAN CONVENTION AND COURT OF HUMAN RIGHTS

The European Convention on Human Rights does not include a particular provision on trafficking, but Art. 4 prohibits slavery and servitude and bans forced and compulsory labour.

For years already, it has been established case law of the European Court of Human Rights that the European Convention on Human Rights entails not only negative, but also positive obligations for the State Parties to the Convention. According to this principle, State Parties should not only refrain from any action that might conflict with or cause a violation of the protected rights, but are also obliged to take all measures necessary to guarantee the undisturbed enjoyment of the rights granted. Earlier these positive obligations were defined per separate article, but since 2001, it is case law that positive obligations exist under all substantive provisions of the Convention.²²⁹ This therefore also goes for Article 4 stating that ‘[n]o one shall be held in slavery or servitude’ and ‘no one shall be required to perform forced or compulsory labour’. This was for the first time confirmed in the *Siliadin v. France* case.²³⁰ What can be concluded from this

229 ECHR, case no. 41340/98, 41342/98, 41343/98, and 41344/98, 31 July 2001, *Refah Partisi et. al., v. Turkey*.

230 In this case, a Togolese girl came to France as a minor and was put to work in the housekeeping of a French Togolese family. She had to work long hours, 7 days a week with virtually no leave. She had to sleep on a mattress on the floor of the children’s bedroom and was not paid. She was not allowed to go to school, her passport was taken from her and although promised, her stay was not regularised. Considering the facts and the circumstances of the case, this would constitute the crime of trafficking, as internationally defined. Yet, at that time, the French Criminal Code did not include a specific provision on trafficking, so the suspects were prosecuted for a) extracting work from a person by abusing her vulnerability and dependency and for b) subjecting a person to labour and residence conditions contrary to human dignity. Although convicted for the crime under a) in first instance, the accused were acquitted from all charges in appeal. The case was also dealt with in cassation, but not the criminal aspects of the case. In the end, the accused were sentenced to pay damages in a civil procedure, but no (criminal) punishment was imposed. *Siliadin* then requested the Strasbourg Court to consider the case, stating that French criminal law did not provide her with an adequate and effective protection against the servitude to which she had been subjected, or at least against the forced or compulsory labour that had been exacted from her. In her appeal, she argued that Article 4 of the Convention had been violated. In line with its earlier case law, the Court considered that the article gave rise to positive obligations on the states parties, consisting of the adoption and effective implementation of criminal-law provisions making the practices set out in Article 4 a punishable offence. In more concrete terms, the Court considered that states were under an obligation to penalise and punish any act aimed at maintaining a person in a situation incompatible with Article 4. This not only goes for violations resulting from acts of state (organs), but also from acts of private individuals.

case is that the Court emphasised that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies. If a state does not fulfil this obligation, in the sense that trafficking (in all its forms) is not adequately forbidden in criminal law or is not effectively fought, this may lead to state liability when trafficking is established. The scope of the state obligation in this respect is not fully clear. What exactly can be expected from a state in relation to the fight against trafficking, in order to conclude that state liability exists when the crime is not adequately addressed? Since the judgment does not go into the actual prevention of trafficking, nor into the active prosecution of this crime, this matter is still open to interpretation. It is a matter of time whether the rights protected in the European Convention and *mutatis mutandis*, in other human rights instruments, entail an obligation for the State Parties to only an effort to be made, or to a result to be achieved, with likewise implications for state liability. The judgment in *Siliadin v. France* may be seen as an adoption of the latter.²³¹

The Council of Europe Trafficking in Persons Convention has already been used as a comparison to the Protocol. The CoE Convention aims at preventing human trafficking, protecting victims, prosecuting traffickers and promoting international cooperation – much like the Palermo Protocol. Its human rights perspective and focus on victim protection is the main added value of the CoE Convention in relation to other international instruments. It requires State Parties to take a number of measures to assist victims in their recovery and to provide for a reflection period of at least 30 days. Moreover, it opens the possibility to grant residence permits not only on the basis of the person's co-operation with law enforcement authorities, but also on the basis of their personal situation. Article 1 of the Convention provides that its purpose include the protection and assistance of the victims and the designing of a comprehensive framework of the protection and assistance of victims and witnesses.

Notwithstanding the confusion which may be created by the CoE Convention in relation to what extent trafficking is a violation of the human rights of victims when there is no failure from the state, the Convention does impose direct human rights obligations on the state which are welcome. Article 5(3) stipulates the promotion of a human rights

Considering the actual treatment that the Togolese girl had undergone, the Court concluded that she had been subjected at the least to forced labour within the meaning of Article 4 of the Convention. Based on the specific circumstances of the case, the Court furthermore held that she had been held in servitude within the meaning of Article 4. Following the traditional meaning of the concept of slavery, the Court concluded, however, that it could not be considered that the girl had been held in slavery. The Court then held that a violation of Article 4 is a serious violation of the personal integrity. Since this is a fundamental value, only criminal law can guarantee the effective and necessary protection by the state against these violations. Because France did not have adequate criminal legislation that unambiguously made punishable the behaviour at issue and since the perpetrators of this behaviour had not been convicted, the Court judged that the state had violated its positive obligations under Article 4. For this violation, the state may be held liable.

231 Rijken, C.; Koster, D.: *A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice*, p. 22.

based approach in the development and implementation of policies and programmes that states are under an obligation to establish in order to combat trafficking, Chapter III on measures for the protection and promotion of the rights of victims sets out minimum standards for the provision of assistance to victims to promote physical, psychological and social recovery. These provisions neatly encapsulate the two main aspects of anti-trafficking: that of seeking to protect the victim and prosecute the traffickers.²³²

As can be seen below the CoE Convention deals more comprehensively with identification of victims and includes this as the first right of the trafficked person – to be properly identified.

A remarkable improvement from the Protocol from a victim protection point of view is that according to Art 14 State Parties shall grant as a minimum protection: an adequate standard of living; emergency medical treatment; translation and interpretation services; counselling and information services in a language the victim can understand on legal rights and services available; assistance in defending rights and interests; access to education;²³³ due consideration for safety and protection needs. Article 15 ensures that victims are also granted access to information on relevant judicial or administrative proceedings; legal assistance and free legal aid; compensation and the adoption of measures for the adoption of programmes for social assistance or social reintegration.

The CoE Convention has a number of improvements compared to the Protocol: it clarifies its scope of application so there can be no doubts and space for no counter-productive discussions on its scope of application whether national or trans-national committed by an individual or an organisation; it shifts focus from mainly prosecution to mainly victim protection; it addresses demand side; it deals specifically with identification; the protection and assistance provisions are clearly binding; the reflection period is obligatory; the chapter on criminal law (Art 18-26) is comprehensive; recognising the work of civil society.²³⁴

Some of these improvements are most of all clarifications of what could be deducted from the Palermo Protocol and the TOC together – e.g. some of the criminal law provisions which are not to be found in the Protocol but in the TOC, others are improvements in the sense that there is a victims centred approach with no direct need to refer to other human rights instruments – which nonetheless are applicable also in trafficking cases covered by the Protocol. The two instruments thus differ in their approach – in part because the Protocol is set into a larger framework of international law – a context it cannot and should not be taken out of, whereas the CoE Convention covers by itself a broader aspect of the trafficking question.

232 Piotrowicz, R.: *Trafficking of Human Beings and their Human Rights in the Migration Context*, p. 285.

233 The CRC has already granted the right to education to all children – including non-nationals.

234 Scarpa, S.: *Trafficking in Human Beings – modern slavery*. p. 163-64.

OTHER RELEVANT HUMAN RIGHTS INSTRUMENTS

Even when looked upon from a strict criminal law perspective, it should not be forgotten that international instruments interact, and a victim may well have entitlements under human rights law in other instruments. Should a victim present in a destination or transit country be able to demonstrate that his/her life or safety is at serious risk if he/she were to return to the country of origin, the victim may well be entitled to refugee status or subsidiary/complementary protection under other – non-trafficking – rules. Here we move away from specific human rights guarantees to victims of trafficking to the application of general human rights law, most particularly the obligation to respect, ensure and protect from torture, inhuman or degrading treatment or punishment.²³⁵ But also of other general human rights provisions e.g. those found in the ICESCR and in Labour law.

As mentioned above, several international instruments cover aspects of trafficking and States are under an obligation to ensure that individuals are not subject to the violations of human rights perpetrated by third parties (as will be examined more below). Obviously the ICCPR Art 8 prohibits all forms of slavery and Art 6 of the CEDAW provides that States take all measures to suppress the trafficking in women. Already mentioned are also the ILO instruments which recognise that trafficking victims have employment rights and benefits.

The ICCPR does not provide a definition of the terms “slavery”, “slave trade”, “servitude” and “forced compulsory labour”. The Vienna Convention on the Law of Treaties prescribes that a treaty shall be interpreted in good faith in conformity with the ordinary meaning given to its terms in their context and in the light of the treaty’s object and purpose. Any subsequent agreement between the parties or practices in the application of the treaty, establishing the agreement of the parties regarding its interpretation, shall also be taken into consideration. Supplementary means of interpretation shall also be considered when interpreting a Treaty, including the preparatory works and the circumstances at its conclusion.²³⁶ The mentioned terms had already been defined (as mentioned above) in the Slavery Conventions and the ILO Convention number 29 Concerning Forced or Compulsory Labour. So the terms in the ICCPR can be defined according to these, as the terms in the Protocol can be (see above for definition of servitude. Slavery was considered to be understood narrowly). The Human Rights Committee has formally stated that States should report on trafficking even if trafficking is not explicitly mentioned in Article 8.²³⁷ Article 8.3 contains the prohibition of forced or compulsory labour; its definition contains a subjective element of involuntariness differentiating this offence from slavery and servitude that are prohibited even when the victim consented to said exploitation.²³⁸

235 Piotrowicz, R.: *Trafficking of Human Beings and their Human Rights in the Migration Context*, p. 287.

236 Vienna Convention on the Law of Treaties Art. 31.1.

237 UN Human Rights Committee: General Comment 28 UN DOC HRI/GEN/1/Rev.8,220 para. 12.

238 Scarpa, S.: *Trafficking in Human Beings – modern slavery*. p. 88.

The Human Rights Committee has expressed appreciation to States which have adopted new measures to fight trafficking and has recommended adoption of such measures.²³⁹

The International Covenant on Economic Social and Cultural Rights does not contain any provisions dealing specifically with slavery or slavery-like practices, but it does set forth provisions relevant for trafficking on just conditions of work and on other social and economic rights which are not limited to nationals in the case of international trafficking where the victim will be entitled to certain social and economical rights which are often overlooked.

The ICESCR recognises the right of everyone to gain his living by work which he freely chooses or accepts and to safeguard it (Art. 6), to form or join trade unions (Art. 8), to social security (Art. 9), to education (Art. 13). ECOSOC, the Conventions monitoring body, has several times made reference to trafficking in its reports, underlining the need to assist and protect victims.²⁴⁰

With regard to children and the Convention on the Rights of the Child the explicit protection against trafficking in the CRC is found in Article 35. Article 35 provides that “States Parties shall take all appropriate, national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form”. The article does not elaborate the terms but the words “for any purpose or in any form” suggest that it is to be interpreted broadly. The responsibility for taking measures to avoid trafficking is placed clearly on the State, which implies a State responsibility if it does not succeed in prosecuting offenders, thus making the international obligation applicable at the “trafficker-level”.²⁴¹ In accordance with Article 35²⁴² States Parties should take appropriate measures to prevent such trafficking. Necessary measures include identifying unaccompanied and separated children; regularly inquiring as to their whereabouts; and conducting information campaigns which are age-appropriate, gender-sensitive and in a language and medium that is understandable to the child. Adequate legislation should also be passed and effective mechanisms of enforcement be established with respect to labour regulations and border crossing.²⁴³ This implies that Article 35 obliges States to prevent trafficking not only with criminal measures, but with a full range of rights-based measures. Article 2 of the Optional Protocol to the Convention on the Rights

239 Ibid. p. 90.

240 See above for the relevance of these instruments to non-nationals.

241 This principle is clearly stated in the Second Protocol to the CRC Art. 3 that provides that States Parties shall ensure the definition of the following acts as a crime, irrespective of whether they are committed domestically or trans-nationally, on an individual or organised basis – this will be discussed immediately below.

242 Art. 35 is important also because it applies to all forms of sale – including inter-country adoption, which have caused grave problems. See Van Bueren, Geraldine, *The International Law on the Rights of the Child*, p. 281 and p. 94-103.

243 The Committee on the Rights of the Child states in its General Comment n. 6 (2005), Thirty-ninth session 17 May-3 June 2005 on the Treatment of unaccompanied and separated children outside their country of origin, para. 52.

of the Child on the sale of children, child prostitution and child pornography,²⁴⁴ (OP II) which has entered into force as part of the CRC for the ratifying States helps clarify the definition of trafficking in Article 35, defining the sale of children as “...any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration”. A very important article in this Protocol is Article 3, which provides that States Parties shall ensure the definition of the following acts as a crime, irrespective of whether they are committed domestically or trans-nationally, on an individual or organised basis: *Offering, delivering or accepting, by whatever means, a child for the purpose of Sexual exploitation of the child; Transfer of organs of the child for profit; Engagement of the child in forced labour.* The OP II thus extends jurisdiction over adults involved in the “sale” of children and it strengthens existing CRC provisions regarding the sexual exploitation of minors. The Protocol only refers directly to child *trafficking* in the Preamble, where it is said that States Parties are “gravely concerned at the significant and increasing international traffic in children for the purpose of the sale of children, child prostitution and child pornography”. Many forms of trafficking fit into the definition of “sale of children”, and it must be borne in mind that very often the purpose for which children are sold coincide with the purpose for which they are trafficked, which falls within the scope of Article 2. Again States have to undertake all efforts to prevent or eliminate child trafficking on the basis of the CRC, and they can be held accountable for not doing so.²⁴⁵ But also the other articles of the CRC which provide protective rights, requiring States to take a range of actions to prevent violence, neglect and exploitation of children are of importance. Article 39 (above) has as its scope to require appropriate action for those who still fall victim. This is further emphasized in the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography. States Parties to the Protocol must adopt “appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process (Article 8). The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Trans-national Organized Crime, in its section on “Assistance to and protection of victims of trafficking in persons”, requires that assistance is given to enable children to express their views and their concerns and that these are considered at appropriate stages of criminal proceedings against offenders (Article 6.2 (b)).

244 Which has been ratified by 119 states by April 2007.

245 The monitoring body is the Committee on the Rights of the Child. The Committee on the Rights of the Child is the body that monitors how well States are meeting their obligations under the Convention on the Rights of the Child. When a country ratifies the Convention, it assumes a legal obligation to implement the rights recognized in the treaty. In order to monitor the compliance with these obligation State Parties should submit reports initially two years after joining and then every five years to the Committee stating what progress and what problems there might be regarding to the respect and implementation of the Rights of Children. In addition to the government report, the Committee receives information on a country’s human rights situation from other sources, including non-governmental organizations, UN agencies, other intergovernmental organizations, academic institutions and the press. In the light of all the information available, the Committee examines the report together with government representatives. Based on this dialogue, the Committee publishes its concerns and recommendations, referred to as “concluding observations”.

The OP II to the CRC, other than refining the definition of trafficking in Article 2, in Article 3 establishes that a wide range of offences²⁴⁶ shall be made offences under national penal law. Articles 4 and 5 establish that jurisdiction should be made extraterritorial. This is obviously most important since in most cases, international justice does not have jurisdiction over these crimes and thus national law and the principles of extraterritoriality are crucial to combat traffickers. The OP II also addresses the issues of protecting child victims recognising their vulnerability but including as an important aspect that the views and concerns of the child are taken into consideration and that the child be informed of her or his rights.²⁴⁷ Further it is ensured that States are under an obligation to protect the child victim and her or his family from retaliation, which in many cases is most relevant.²⁴⁸ Measures such as personnel training and special treatment in criminal procedures are also included. It is significant that prevention using awareness raising and the education and social integration of victims are imposed on States.²⁴⁹ This ensures a holistic approach to the problem and thus avoids focusing exclusively on the criminal aspect. It underlines that children should be at the centre of any actions against trafficking and that it is necessary to take all aspects of this crime into consideration. In Article 10 addressing root causes and international co-operation is ensured. This is important since international co-operation very often is mentioned in terms of international crime prevention and investigation. It is noteworthy that States “shall” implement these measures. It is much welcome that this provision is drafted in an imperative manner.

As mentioned above the ILO Conventions 29 and 105 on Forced Labour and 138 on Minimum age for Admission to Labour and 182 on Worst Forms of Child Labour are all relevant in the fight against trafficking.²⁵⁰ C29 defines forced labour and C105 specifies that forced labour can never be used for the purpose of economic development, discrimination or punishment or labour discipline.

The importance of employment rights such as the right to join unions and in general a well monitored labour market is of importance in the fight against trafficking – a point on which the Protocol is silent, but one should never forget that a certain aspect of international law is not necessarily covered only by one exclusive instrument and that there is no reason to repeat in every treaty what is already valid law.

246 In the context of sale of children as defined in Art 2.: (i) Offering, delivering or accepting, by whatever means, a child for the purpose of: a. Sexual exploitation of the child; b. Transfer of organs of the child for profit; c. Engagement of the child in forced labour; (ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption; (b) Offering, obtaining, procuring or providing a child for child prostitution, as defined in Article 2; (c) Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in article 2.

247 Art. 8.

248 Art. 8.1(f).

249 Art. 9.

250 See Touzenis, K.: *Migrant Children's Human Rights. IOM International Migration Law Series N 15.* IOM 2008.

PREVENTION – A HOLISTIC APPROACH

Adopting a human rights framework to trafficking allows addressing wider issues such as the causes and consequences of trafficking. It has the potential of promoting a holistic approach to the act. The causes of trafficking such as poverty,²⁵¹ persecution, humanitarian crisis and discrimination all raise human rights concerns²⁵² which can be addressed only within a human rights framework.

The OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking Guideline 7 states that Strategies aimed at preventing trafficking should take into account demand as a root cause. States and intergovernmental organizations should also take into account the factors that increase vulnerability to trafficking, including inequality, poverty and all forms of discrimination and prejudice.

Poverty, war, lack of information, gender inequality and high demand or cheap labour put demographic populations such as women and children at high risk. The general lack of prospects in rural areas often leads to trafficking, and many of those trafficked come from poor communities. One common dynamic is the following: in times of cutbacks in State services and subsidies, women assume the considerable burden of diminished resources as they are subject to the rigid gender-based division of labour assign[ed to] them [in] the household and men tend not to devote their earnings to the household, leaving the women responsible for the survival of their families. These women then seek to diversify their sources of income which increases their risk of being trafficked. Furthermore, they are more likely to send their children either to live with other family members in wealthier communities or to seek employment outside of the family network. This thereby increases the risk that those children will be trafficked, as the traditional practice of child fostering has been manipulated by traffickers in order to exploit children.

UNESCO: *Human Trafficking, in Nigeria – Root Causes and Recommendations*, p. 14

The root causes of trafficking are various and often differ from one country to another. In search of a better life elsewhere, disadvantaged people are often drawn into the control of criminals who will take advantage of their situation and exploit them. Economic hardship, conflict, crime and social violence, natural disasters and other such pressures create a desperate situation for millions of people and make them vulnerable to various

251 For the link between poverty and trafficking and smuggling see *Report of the Independent Expert on Human Rights and Extreme Poverty*, E/CN.4/2003/52, paras 30-35.

252 Obokata, T.: *Trafficking of Human Beings from a Human Rights Perspective – towards a holistic approach*. p. 35.

forms of exploitation and enslavement. Due to poor economic conditions in the state of origin, many people migrate to developed states in order to seek better opportunities.²⁵³ The fact that poverty has a negative impact on the enjoyment of human rights is explicit in the freedom from want in the Preamble of the UDHR and in Articles in the ICCPR and ICESCR on e.g. right to work and property and a decent standard of living. The Commission on Human Rights²⁵⁴ and the Committee on Economic, Social and Cultural Rights²⁵⁵ have recognised how poverty affects economic, social and cultural rights directly and also influence civil and political rights.²⁵⁶ Several obligations of states can be identified by reference to the aforementioned levels of obligations – respect, protect and fulfil. The obligation to respect requires the state to refrain from interfering with the enjoyment of economic social and cultural rights when things go well,²⁵⁷ in the context of poverty reduction states must respect the resources owned by the individuals or groups seeking to make the optimal use of their own knowledge and the freedom to satisfy their own needs.²⁵⁸ An obligation to protect/ensure means to protect from interference by third parties,²⁵⁹ much like the case of protection against trafficking, and the obligation to fulfil requires appropriate administrative and other measures towards the full realisation of economic, social and cultural rights.²⁶⁰

In order to eradicate trafficking of women and children there is a need to address its main root cause: poverty. Women are vulnerable to trafficking because they have less access to employment, resources and other means of earning a livelihood. Lack of access to education and means of livelihood expose children to situations of trafficking. It is critical that development policies are targeted at poverty alleviation.

UNESCO: *Human Trafficking in Lesotho: Root Causes and Recommendations*, p. 13

253 *Report of the Special Rapporteur on Sales of Children, Child Prostitution and Child Pornography: Mission to Morocco*, E/CN.4/2001/78/Add.1, para 21. *Review of Reports, Studies and Other Documentation for the Preparatory Committee and the World Conference: Contribution Submitted by the Special Rapporteur on Violence against Women*, A/CONF.189/PC.3/5 (2001), para 77.

254 E/CN.4/RES/2005/16 Resolution 2005/16 (Human Rights and Extreme Poverty).

255 E/C12/2001/10.

256 Obokata, T.: *Trafficking of Human Beings from a Human Rights Perspective – towards a holistic approach*. p. 123.

257 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997).

258 Report of the Independent Expert of Human Rights and Extreme Poverty, E/CN.4/1999/48.

259 Maastricht Guidelines para. 6.

260 Ibid.

Studies have revealed how, throughout the world, cutbacks in state services and subsidies meant a transfer of considerable costs to the private sector, which costs are carried primarily by women. Referring to many studies across the developing world the main mechanism of transmission of burdens have been identified as the rigidity of the gender division of labour in the household according to which domestic provisioning is women's main responsibility. Pressure to diversify sources of household income to meet basic needs further intensifies the demand on women's time and evidence of any corresponding rise in the range and intensity of men's inputs to the household and its survival is mostly either insignificant or totally absent. A spate of research on the grassroots impacts of structural adjustment programmes in different parts of the world demonstrated unequivocally that the burdens of debt crisis and neo-liberal reform were being shouldered unequally by women and men. Scholars have noted how this can lead to domestic conflict and violence with serious health consequences.

UNESCO: *Poverty, Gender and Human Trafficking in Sub-Saharan Africa: Rethinking Best Practices in Migration Management*, p. 42

In many societies, girls are less valued than boys and are expected to sacrifice their education and assume domestic responsibilities such as taking care of their parents and siblings. In addition, women who are marginalised economically, socially and politically, are unable to enjoy many basic rights enjoyed by men. These realities lead to a feminisation of poverty and a lack of choices which makes women more vulnerable to traffickers. Also racial discrimination may lead to lack of opportunities which may force people to seek opportunities elsewhere.²⁶¹ States are obliged to enact legislation to eradicate discrimination and ensure the right of equal access to e.g. health facilities, education, jobs, housing.²⁶² Discrimination is a problem both at the point of origin and destination. Discrimination can make it difficult or impossible to obtain education and work and thus make migration seem the only alternative and upon destination there may be a clear hierarchy of employability, salaries and conditions based on race.²⁶³

261 Obokata, T.: *Trafficking of Human Beings from a Human Rights Perspective – towards a holistic approach*, p. 123.

262 *Ibid*, p. 163.

263 Cameron, S and Newman, E.: *Trafficking in humans: Structural factors*, p. 45.

Legislative and legal regimes of land across the region contain many tensions between customary practices and the more 'modern' ways of settling land disputes. Where legal pluralism prevails land scarcity and increasing population density combined with market competition has fostered a situation in which 'different actors in different strata of society tend to "shop" for the best institution to represent their own interests'. Since women are usually not represented in decision making bodies, they have less claims and choices as to which plot of land they may work on. The multi-layered and gender-based control over land has implied that women farmers do face many stumbling blocks to build up sustainable enterprises, for they are also less able than men to make claims on outside resources. Yet they form the backbone of the agricultural sector in this region. On average African women comprise over 70 per cent of all agricultural labour and nearly 90 per cent of the labour engaged in food production. Women do 90 per cent of the hoeing and weeding, 90 per cent of the work of processing food crops and providing household water and fuel wood, 80 per cent of the work of food storage and transport from farm to village, and 60 per cent of the work of harvesting and marketing.

Economic stagnation and the failure of the adjustment policies have amplified migration as a component of traditional livelihood systems. A balanced account of the nexus between growth and poverty (reduction) cannot bypass an analysis of social relations – to which gender relations are central – for it is these that mediate between market forces and household resources. Local gender norms of entitlements have played a central role in transmitting the burdens of adjustment to women and children. Evidence on the gains from trade through export crops and the expansion of informal production should be reassessed from the perspective of the intensification of female and child labour and the corresponding rewards or lack thereof.

Identifying root causes such as poverty requires rigorous analysis of social change through a given period. Analysing processes of migration and their intersection with trafficking requires a combination of methods from different disciplines to explain the mechanisms to show the relevance of similarities and differences between economic sectors and regions. Pronouncements on what constitutes the root causes which are too previous or have limited validation may well reduce complex dynamics to factors in a static system and thereby misguide consequent action.

UNESCO: *Poverty, Gender and Human Trafficking in Sub-Saharan Africa: Rethinking Best Practices in Migration Management*, p. 44, 57 and 72

Trafficking in persons is – like all migration – the result of interlinked push and pull factors and is mainly related to the market economy law of supply and demand. But among the push and pull factors are poverty, lack of education, of employment, of opportunities in countries of origin and many of these can only be addressed within a human rights framework – the respect of international commitments to basic economic and social human rights.

It is generally acknowledged that trafficking is both a cause and a consequence of the violation of a person's human rights. In trafficking cases, a broad range of human rights can be and are violated. The most expressive violations are the violation of a person's personal and physical dignity, the right to personal freedom and security, and the principle of non-discrimination. Since these violations cover a broad area in the social sphere and are linked to different kinds of activities, attention to limit the chances of these violations occurring should be focused on by various disciplines. This means that an adequate response to the violation of these rights implies a multi-disciplinary approach, but with the intention of preventing the violation of a victim's human rights as a common denominator. Experience has shown that, without such a holistic approach, the interests of the victims and their special position are not sufficiently taken into account. Human rights instruments place obligations on states in which these interests are taken into account in a better way.²⁶⁴ It is recognised by the High Commissioner on Human Rights that such an approach is the only way to retain focus on the trafficked person and to prevent trafficking from being reduced to simply a migration problem, a public order problem, or an organised crime problem.²⁶⁵

There are several factors that make potential victims vulnerable to trafficking. It is a complex issue and there is no single categorization of vulnerability to human trafficking. A review of trafficking reports, however, reveals some of the contributing factors, while also showing how little we actually know about the issue of vulnerability to human trafficking. Potential and actual victims can be vulnerable to victimization throughout the trafficking process.

Collecting nation-by-nation data on the amount of human trafficking into and out of each country and the percentage of each country's population that can be considered in some way enslaved and including these figures in a study which looked at predictors of "human development" based on the United Nations Human Development Index,²⁶⁶ it was shown that human trafficking and enslavement were not just predictors of a low standard of living—they were by far the strongest predictor. This was true in every region

264 Rijken, C.; Koster, D.: *A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice*, p. 8.

265 Message from the UN High Commissioner for Human Rights, Mary Robinson, to the Ad Hoc Committee on the Elaboration of a Convention against Trans-national Organised Crime, Fourth session, Vienna 28 June – 9 July 1999.

266 The Index gauges the quality of life for residents in a given nation and combines economic well-being with social factors (such as literacy) and health factors (such as longevity). It was anticipated that the extent of human trafficking and slavery would be a predictor of poor human development.

of the world. Extent of democracy, amount of civil conflict, level of national debt, and level of corruption, among other factors, trailed participation in slavery as portents of poor human development. Early statistical analysis indicated several “push” factors; that is, factors that seem to enable trafficking from a given country. Those that appear to be significant are: (1) government corruption, (2) high infant mortality, (3) a very young population, (4) low food production, and (5) conflict and social unrest. Preliminary data are less clear in indicating factors that lead to human trafficking to a country.²⁶⁷

Push factors concern living conditions, but also the person of the potential victim. Living conditions are largely determined by the economic situation and perspectives in the country of origin of the victim, such as an unequal distribution of wealth, unequal opportunities on the labour market, and geographical or political circumstances. Personal circumstances and motives of the person also play an important role. This concerns such circumstances as an unstable family situation, an adventurous attitude, the urge to earn a lot of money, or simply the need to survive. Especially for women in many countries, there are additional push factors based on such historically or culturally determined factors as a subordinate position and having fewer rights than men, owning less capital (e.g., less land, lower incomes), and getting fewer chances on the labour market (for example, they are the first to lose their jobs in periods of economic recession, there are culturally or religiously determined obligations to take care of children or parents).²⁶⁸

Pull factors in countries of destination include the demand for a variety of services that trafficked victims can provide: sweatshop labour in the informal economy, domestic slavery, forced labour in a variety of sectors, forced prostitution, forced begging, petty theft. Again combating these pull factors must be done within a human rights framework using e.g. labour related rights to fight exploitation.

The link between poverty and human trafficking is complex. Poor people are vulnerable to trafficking by virtue of exerting little social power and having few income options. They often do not challenge social superiors in relation to migrant contracts and working conditions. However, it is not necessarily the poorest of the poor who become victims of trafficking, although in many cases victims are poor, especially victims in developing countries. When the countries reported most frequently as countries of origin and destination²⁶⁹ are compared against the United Nations Human Development Index, it can be seen that, while the top countries of destination are rated highly in terms of human development, most of the top countries of origin are at the middle human development level. Thus, it can be concluded that those targeted as victims of trafficking are not the poorest of the poor, but rather people with at least some resources.²⁷⁰

267 Bales, K.: Tracking Modern Day Slavery – NIJ Research in Progress Seminar, “Trafficking in Persons in the United States,” NIJ Issue 252, July 2005.

268 Rijken, C.; Koster, D.: *A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice*, p. 6.

269 e.g. in UNODC Trafficking in persons global patterns.

270 UN.GIFT: *Human Trafficking: An Overview*. p. 18.

It thus results that any effective prevention (one of the Protocol's 4 Ps) can only be achieved by promoting respect for a much wider area of human rights. Focusing only on prevention of trafficking will not bring about sustainable results – again seeing trafficking in a wider framework of international legal obligations is beneficial. Fighting trafficking also means fighting violations of economic and social rights and of discrimination, just to mention the most obvious. Obligations which are found in other human rights instruments have to be taken into consideration when it is determined what the P for Prevention means when applying the Protocol.

Bridging Branches of Law

The primary threat to victims of trafficking is clearly one of many criminal acts at the hands of private persons and such acts are not necessarily human rights violations on the part of a state. The legal regime for trafficking in human beings can be said both to reflect and to shape this reality, in that it addresses the rights and duties of states on the one hand by making trafficking a crime and attempting to address its prevention, and on the other, by acknowledging a human rights dimension to the issue.²⁷¹

Trafficking can be linked to organized criminal and law enforcement activities or can be viewed from the perspective of the victim, predominantly as a violation of human rights. These two perspectives are not mutually exclusive but rather inherently linked.²⁷²

In some respects, the variations found in the definition of trafficking in international instruments²⁷³ and frameworks are both inevitable and legitimate, and in no way

271 Piotrowicz, R.: Trafficking of Human Beings and their Human Rights in the Migration Context, p. 278

272 UNODC: Measures to Combat Trafficking in Human Beings in Benin, Nigeria and Togo. 2006. p. 24

273 e.g. the Convention on the Rights of the child and its Optional Protocol, ILO Worst Forms of Child Labour Convention (No. 182) and Recommendation (No. 190) the ILO Forced Labour Convention of 1930 (No. 29) and the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) of 1949. Additional international frameworks that can be used to supplement the Trafficking Protocol include the General Agreement on Trade in Services (GATS) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

ILO Convention 182, Article 3 clearly indicates the inclusion of trafficking of children in the areas of concern: "For the purposes of this Convention, the term *the worst forms of child labour* comprises: (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children."

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) - discrimination against women is defined as: "...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

represent confusion or disagreement. Each international instrument relates to the place the organisation of reference occupies in the international multilateral structure — be it a crime-focused or rights focused body. As a result, what might at first seem an uneven handling of trafficking issues across organisations is actually more a question of approach and context than a difference of intent.²⁷⁴ Historically the trafficking debate has focused on distinctions between a criminal and a human rights/protection-based approach. The Protocol confirms the need to recognize these as being essential rather than exclusive, and that both preventive and responsive activities need to be linked and integrated in order to combat trafficking.

Pertinent to trafficking of women and children the convention calls on states to take appropriate measures against all forms of trafficking in women.

The Convention on the Rights of the Child and its OPII contains very relevant articles on trafficking. The explicit protection against trafficking in the CRC is found in Article 35 Art 35 provides that “States Parties shall take all appropriate, national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form”. The article does not elaborate the terms but the words “for any purpose or in any form” suggest that it is to be interpreted broadly. The responsibility for taking measures to avoid trafficking is placed clearly on the State, which implies a State responsibility if it does not succeed in prosecuting offenders, thus making the international obligation applicable at the “trafficker-level”. In accordance with Article 35 States Parties should take appropriate measures to prevent such trafficking. Necessary measures include identifying unaccompanied and separated children; regularly inquiring as to their whereabouts; and conducting information campaigns which are age-appropriate, gender-sensitive and in a language and medium that is understandable to the child. Adequate legislation should also be passed and effective mechanisms of enforcement be established with respect to labour regulations and border crossing. This implies that Article 35 obliges States to prevent trafficking not only with criminal measures, but with a full range of rights-based measures. Article 2 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, (OP II) which has entered into force as part of the CRC for the ratifying States helps clarify the definition of trafficking in Article 35, defining the sale of children as “...any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration”. A very important article in this Protocol is Article 3, which provides that States Parties shall ensure the definition of the following acts as a crime, irrespective of whether they are committed domestically or trans-nationally, on an individual or organised basis: *Offering, delivering or accepting, by whatever means, a child for the purpose of Sexual exploitation of the child; Transfer of organs of the child for profit; Engagement of the child in forced labour.* The OP II thus extends jurisdiction over adults involved in the “sale” of children and it strengthens existing CRC provisions regarding the sexual exploitation of minors. The Protocol only refers directly to child trafficking in the Preamble, where it is said that States Parties are “gravely concerned at the significant and increasing international traffic in children for the purpose of the sale of children, child prostitution and child pornography”. Many forms of trafficking fit into the definition of “sale of children”, and it must be borne in mind that very often the purpose for which children are sold coincide with the purpose for which they are trafficked, which falls within the scope of Article 2. Again States have to undertake all efforts to prevent or eliminate child trafficking on the basis of the CRC, and they can be held accountable for not doing so.

274 ILO and IPEC: Unbearable to the Human Heart – child trafficking and actions to eliminate it. ILO 2002. p. 5.

THIRD PARTIES – HUMAN RIGHTS VIOLATIONS?

Physical aggression, rape, and murder are not in themselves violations of an individual's human rights. Human Rights were created to protect the individual against state action—to protect human beings from being abused by a power much stronger than them.

As mentioned above, the state is not usually involved in the acts carried out by traffickers, although it may be through the activity of corrupt law enforcement and border officials who facilitate or ignore the work of traffickers. This may occur in origin, transit and destination states. The primary threat to victims however is clearly one of criminal acts at the hands of private persons and such acts are not necessarily human rights violations on the part of a state. There may be a growing trend for recognising legal obligations of non-state actors and for holding them accountable according to human right standards the current status remains that they do not bear direct legal obligations and therefore cannot be held directly accountable.²⁷⁵

States are the bearers of obligations under international law; they are the laws' subjects and accordingly take on direct responsibilities and rights. But the concept of international legal personality, and the acknowledgement by the International Court of Justice that the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community,²⁷⁶ holds open the possibilities that the categories might be meaningfully reconsidered in time.²⁷⁷ And it has increasingly been maintained that the recent developments which have favoured the growth of powers on the part of non-state actors and the consequent limits imposed on the powers of states requires a re-examination of the obligations of non-state actors.²⁷⁸ It has been argued that non-state actors have obligations because they are also holders of duties to promote and protect human rights.²⁷⁹ Some rights in existing human rights instrument explicitly provide that individuals have duties towards other individuals as well as rights such as ICCPR preambles and ECHR Art 17 (on abuse of rights). Some human rights mechanisms such as the ECOSOC have stated that international financial institutions should pay greater attention to the protection of the rights to health in their lending policies, credit agreements and structural adjustment programmes and that all members of society including the private business sector have responsibilities in the

275 Obokata, T.: *Trafficking of Human Beings from a Human Rights Perspective – towards a holistic approach*. p. 127.

276 Reparations for Injuries Case, 1949 ICJ Rep 178.

277 Alston, P.: The “not-a-cat” syndrome, in Alston, P. (ed.): *Non-State actors and human rights*, p. 19

278 Obokata, T.: *Trafficking of Human Beings from a Human Rights Perspective – towards a holistic approach*. p. 128.

279 *Human Rights Principles and Responsibilities for Trans-national Corporations and Other Business enterprise*, E/CN.4/Sub.2/2002/WG.2/WP.1, *Report of the Sessional Working Group on the Working Methods and Activities of Trans-national Corporations in its Fourth Session*, E/CN.4/Sub.2/2002/13, *Report of the Special Rapporteur on Human Rights and Human Responsibilities*, E/CN.4/2002/107 and E/CN.4/2003/105.

realisation of the right to food.²⁸⁰ The UNHCHR has stressed responsibilities of non-state actors in relation to poverty,²⁸¹ and the Special Rapporteur on Sales of Children, Child Prostitution and Child Pornography has stated that international human rights law imposes direct obligations on the private sector.²⁸² Such views must be treated with caution though since international human rights law is not directly enforceable against non-state actors. They cannot be held directly accountable.²⁸³ What is true is that there is an increased tendency to hold especially multinational enterprises measurable against a human rights law and that e.g. codes of conduct²⁸⁴ tend to take into consideration the international human rights standards, even if this does not necessarily mean compliance with the latter.

Those who have been required to perform forced labour, detained against their will and subject to various kinds of abuse are clearly victims of crime. However those crimes are generally committed not by the state but by private individuals, acting either alone or in organised criminal groups. So the question becomes: do traffickers owe human rights obligations towards their victims, or are such obligations owed only by states?²⁸⁵ Further the question arises if states can be held accountable for lack of protection and if there arises an obligation on states to protect against other individuals acting privately.

Traditionally it has been argued that only states can violate human rights, that is individuals acting on behalf of the state. But as has been mentioned below states have an obligation to protect horizontally – by having adequate laws, processes, punishments for the crime of trafficking (as for other crimes that affect the human rights of individuals). A failure in the context of trafficking by the state to protect and to impose that trafficking cannot flourish unchecked may be considered a failure to fulfil the obligation to protect against human rights abuse.

The human rights norms and principles may be applied through national courts and tribunals and the horizontal application is possible at this level.²⁸⁶ The benefit of horizontal application is that it empowers victims by providing them with means to hold individual perpetrators accountable. This can be achieved in two ways, either by bringing criminal proceedings against perpetrators or to have the possibility of initiating civil actions against

280 ECOSOC General Comment 14 and 12.

281 HR/GVA/POVERTY/SEM/2001/4.

282 Report of the Special Rapporteur on Sales of Children, Child Prostitution and Child Pornography, E/CN.4/2001/78, para. 52.

283 Obokata, T.: *Trafficking of Human Beings from a Human Rights Perspective – towards a holistic approach*. p. 130.

284 See, Reinish, A.: *The Changing International Legal Framework for Dealings with Non-State Actors*, in Alston P.: *Non-State Actors and Human Rights*, p. 38-53.

285 Piotrowicz, R.: *Trafficking of Human Beings and their Human Rights in the Migration Context*, p. 276.

286 See Klein, D.E.: *A theory for the Application of Customary International Law of Human Rights by Domestic Courts*, in *Yale Journal of International Law* 332 (1998); Cooper, J.: *Horizontality: The Application of Human Rights Standards in Private Disputes*, in *English and Haves: An Introduction to Human Rights and Common Law* (2000).

them.²⁸⁷ This leads again to the conclusion that states must have effective prosecution mechanisms in order not to violate human rights obligations.

HORIZONTAL PROTECTION

It is extremely important to underline that having a human rights approach to the victims does not exclude a criminal law approach. It is much as with other State obligations to protect individuals from third persons who may interfere with their human rights. The State will fulfil such an obligation if it puts in place adequate national laws which live up to international standards. It is noteworthy that States have four levels of obligations regarding human rights implementation: the obligation to respect, to protect, to facilitate and to fulfil.²⁸⁸ In terms of international law, the obligation “to respect” requires States “to refrain from any actions which would violate any of the rights of the child under the Convention”.²⁸⁹ The obligation to protect and ensure goes well beyond “to respect”, since it implies an affirmative State obligation to do what is necessary to enable individuals to enjoy and exercise the relevant rights, including protection from third parties.²⁹⁰ The right to liberty, the right to dignity and security of person, the right not to be held in slavery or involuntary servitude, the right to be free from cruel and inhumane treatment, various economic and social rights, and specific rights of the child are among the human rights affected by the practice of trafficking. As governments are responsible for ensuring human rights on their territories, they have an obligation to protect individuals from such practices, prosecute violations, and provide effective remedies for victims.²⁹¹ It is clear also here that criminal law and human rights protection are closely linked – protection cannot be effective if there is no effective law enforcement and effective prosecution of acts criminalised according to national laws.

A clear example is that the protection of life in Art 6 of the ICCPR is not only a vertical protection (from the State) but also horizontal. It is the right not to be arbitrarily killed

287 Obokata, T.: *Trafficking of Human Beings from a Human Rights Perspective – towards a holistic approach*. p. 132. See Murphy, J.F.: Civil Liability for the Commission of International Crime as an Alternative to Criminal Prosecution, in *Harvard Human Rights Journal* 1(1999) and *Right to Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law: Note by the high Commissioner for Human Rights*, E/CN.4/2003/63, para. 18. Examples of civil proceedings are *Filaritiga v. Pena-Irala* from the US in which the court of Appeals applied the Aliens Tort Act to adjudicate on a case of deliberate torture inflicted upon a plaintiff. Other cases include *Tel-Oren v. Libyan Arab Republic*, *Fortu v. Suarez-Mason*, *Doe v. Karadzic*, *Kadic v. Karadzic*, *Abebe-Jira v. Negewo*, *Doe v. Islamic Salvation Front*.

288 Symonides, J. (ed.): *Human Rights: Concepts and Standards*, p. 127-129.

289 Alston, P.: “The legal framework of the Convention on the Rights of the Child”, 91/2 *Bulletin of Human Rights*, p. 5.

290 Symonides, J. (ed.): *Human Rights: Concepts and Standards*, p. 127-129; P. Alston, “The legal framework of the Convention on the Rights of the Child”, 91/2 *Bulletin of Human Rights*, p. 5.

291 Trafficking in Human Beings: implications for the OSCE. Organization for Security and Co-operation in Europe review conference, September 1999, ODIHR background paper 1999/3.

by state agents, (the duty on the State to respect) or by starvation, epidemics, poverty etc, (the duty of the State to ensure) or by ordinary crime (the duty of the State protect) which is done by enacting the relevant penal codes). Direct horizontal protection includes protection against slave-trade, propaganda for war or racial or religious hatred (Art 20 ICCPR). At a regional level ECHR prohibits slavery and forced and compulsory labour in Art. 4 – they are absolute, outside any derogation, but compulsory labour is subject to the exemptions in the art.: detention, military service, emergency or calamity, normal civic obligation. According to the ILO, forced and compulsory labour must first be performed involuntarily, the requirement to do the work must be unjust or oppressive or the work itself involves avoidable hardship. This is aimed at protecting the individual against the State, but the obligation to protect will oblige the State also to protect against third parties.²⁹²

The CoE Convention on Action Against Trafficking in Human Beings refers to trafficking as a “violation of human rights and an offence of the dignity and the integrity of the human being.”²⁹³ The human rights dimension is addressed in the Explanatory Report accompanying the Convention²⁹⁴ which points out that the recognition of trafficking as a human rights violation is already apparent from a number of important instruments. The explanation is that human rights may be owed horizontally by individuals towards each other. The report states that the case law of the European Court of Human Rights contains clear indications in favour of the applicability of the ECHR to relations between private individuals in the sense that the Court has recognized the liability of contracting States for acts committed by individuals or groups of individuals when these states failed to take appropriate measures of protection.²⁹⁵ This however still insists on the liability of states to ensure protection, the issue thus remains the extent to which states have taken appropriate measures of protection. The state must provide effective means of protection in order for this obligation to be fulfilled. This would include enactment of appropriate

292 The United Nations High Commissioner For Human Rights Principles and Guidelines on Human Rights and Trafficking Guideline 9: Access to remedies: Trafficked persons, as victims of human rights violations, have an international legal right to adequate and appropriate remedies. This right is often not effectively available to trafficked persons as they frequently lack information on the possibilities and processes for obtaining remedies, including compensation, for trafficking and related exploitation. In order to overcome this problem, legal and other material assistance should be provided to trafficked persons to enable them to realize their right to adequate and appropriate remedies. States and, where applicable, intergovernmental and non-governmental organizations, should consider: Ensuring that victims of trafficking have an enforceable right to fair and adequate remedies, including the means for as full a rehabilitation as possible. These remedies may be criminal, civil or administrative in nature. Providing information as well as legal and other assistance to enable trafficked persons to access remedies. The procedures for obtaining remedies should be clearly explained in a language that the trafficked person understands. Making arrangements to enable trafficked persons to remain safely in the country in which the remedy is being sought for the duration of any criminal, civil or administrative proceedings.

293 Preamble Recital 2.

294 CM(2005)32 Addendum 2 final, 3 May 2005.

295 Explanatory Report para 44 Z and *Others v. United Kingdom* para 73.

legislation that effectively criminalises trafficking and provides the necessary protection for victims.²⁹⁶

The United Nations High Commissioner For Human Rights Principles and Guidelines on Human Rights and Trafficking mentions in fact, within the human rights framework the importance of ensuring an adequate legal framework, saying that the lack of specific and/or adequate legislation on trafficking at the national level has been identified as one of the major obstacles in the fight against trafficking. Thus there is an urgent need to harmonize legal definitions, procedures and cooperation at the national and regional levels in accordance with international standards. The development of an appropriate legal framework that is consistent with relevant international instruments and standards will also play an important role in the prevention of trafficking and related exploitation. States should consider: 1) Amending or adopting national legislation in accordance with international standards so that the crime of trafficking is precisely defined in national law and detailed guidance is provided as to its various punishable elements: 2) Criminalizing all practices covered by the definition of trafficking such as debt bondage, forced labour and forced prostitution.²⁹⁷ 3) Enacting legislation to provide for the administrative, civil and, where appropriate, criminal liability of legal persons for trafficking offences in addition to the liability of natural persons. 4) Reviewing current laws, administrative controls and conditions relating to the licensing and operation of businesses which may serve as cover for trafficking such as marriage bureaux, employment agencies, travel agencies, hotels and escort services. 5) Making legislative provisions for effective and proportional criminal penalties (including custodial penalties giving rise to extradition in the case of individuals).²⁹⁸ 6) Where appropriate, ensuring that legislation provides for additional penalties to be applied to persons found guilty of trafficking in aggravating circumstances including offences involving trafficking in children or offences committed or involving complicity by State officials.²⁹⁹

Furthermore, and clearly still within a human rights framework, the UNHCHR's Guidelines mention the importance of ensuring an adequate law enforcement response, underlining that although there is evidence to suggest that trafficking in persons is increasing in all regions of the world, few traffickers have been apprehended. More effective law enforcement will create a disincentive for traffickers and will therefore have a direct impact upon demand. An adequate law enforcement response to trafficking is dependent on the cooperation of trafficked persons and other witnesses. In many cases, individuals are reluctant or unable to report traffickers or to serve as witnesses because they lack confidence in the police and the judicial system and/or the absence of any effective protection mechanisms. These problems are compounded when law enforcement officials are involved or complicit in trafficking. Strong measures need to be taken to ensure that such involvement is investigated, prosecuted and punished. Law enforcement officials

296 Piotrowicz, R.: *Trafficking of Human Beings and their Human Rights in the Migration Context*, p. 280.

297 Guideline 4.1.

298 Guideline 4.2.

299 Guideline 4.3.

must also be sensitized to the paramount requirement of ensuring the safety of trafficked persons. This responsibility lies with the investigator and cannot be abrogated.³⁰⁰

Several major instruments on trafficking also refer to it as, in itself, a violation of human rights. In other words, an essentially criminal activity, in which the state has no formal involvement, is said to be a human rights violation. This is significant because the discussion then turns to either state responsibility for criminal acts of private individuals, and/or private and individual responsibility for human rights violations.³⁰¹ Treating it as the latter seems wrong since the abuse carried out by the trafficker should be covered by national criminal law and simply considered a criminal law offence – such as “simple” murder or rape is. In order to consider a violation as a human rights offence the state must in some way be accountable. This is the case when the principle that states must not only respect but ensure human rights protection, suggesting that human rights may be breached by non-state actors but with accountability going back to the state for not fulfilling one of its obligation levels. In this case the accountability remains with the state and the individuals’ accountability remains confined to criminal law. A proof of this is that a victim cannot pursue remedy against another individual under human rights law. This means that the state has to remain the accountable entity, but that the obligation of the state extends to the level of ensuring protection against violations by private

300 Guideline 5. States and, where applicable, intergovernmental and non-governmental organizations should consider: 1. Sensitizing law enforcement authorities and officials to their primary responsibility to ensure the safety and immediate well-being of trafficked persons; 2. Ensuring that law enforcement personnel are provided with adequate training in the investigation and prosecution of cases of trafficking. This training should be sensitive to the needs of trafficked persons, particularly those of women and children, and should acknowledge the practical value of providing incentives for trafficked persons and others to come forward to report traffickers. The involvement of relevant non-governmental organizations in such training should be considered as a means of increasing its relevance and effectiveness. 3. Providing law enforcement authorities with adequate investigative powers and techniques to enable effective investigation and prosecution of suspected traffickers. States should encourage and support the development of proactive investigatory procedures that avoid over-reliance on victim testimony. 4. Establishing specialist anti-trafficking units (comprising both women and men) in order to promote competence and professionalism. 5. Guaranteeing that traffickers are and will remain the focus of anti-trafficking strategies and that law enforcement efforts do not place trafficked persons at risk of being punished for offences committed as a consequence of their situation. 6. Implementing measures to ensure that “rescue” operations do not further harm the rights and dignity of trafficked persons. Such operations should only take place once appropriate and adequate procedures for responding to the needs of trafficked persons released in this way have been put in place. 7. Sensitizing police, prosecutors, border, immigration and judicial authorities, and social and public health workers to the problem of trafficking and ensuring the provision of specialized training in identifying trafficking cases, combatting trafficking and protecting the rights of victims. 8. Making appropriate efforts to protect individual trafficked persons during the investigation and trial process and any subsequent period when the safety of the trafficked person so requires. Appropriate protection programmes may include some or all of the following elements: identification of a safe place in the country of destination; access to independent legal counsel; protection of identity during legal proceedings; identification of options for continued stay, resettlement or repatriation.

301 Piotrowicz, R.: *Trafficking of Human Beings and their Human Rights in the Migration Context*, p. 278.

individuals with the means mentioned elsewhere e.g. effective investigation, process and compensation.

Horizontal application does not necessarily mean that the state is in breach of its human rights obligations just because a person has been trafficked. There must also be some failure on the part of the state to secure the rights and freedoms guaranteed. This might include exposure of the victim to inhuman or degrading treatment or punishment by traffickers where the state lacks legislation capable of addressing that threat, or even where having such legislation in place but not in fact effectively implemented.³⁰²

The Human Rights Committee makes it clear that it sees the matter in terms of the obligations of states to “take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”³⁰³ Thus states must for example take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their powers.³⁰⁴ It is thus the failure of the state, not the criminal act of the trafficker, that brings about the breach of the victim’s human rights.³⁰⁵ The same may be the case if a state does not offer sufficient protection and assistance – e.g. in accordance with international standard of process – to a victim/witness through rehabilitation and reintegration.

PROTECTIVE MEASURES

Victims of trafficking are often seen as a threat to internal security and/or simply as irregular migrants. The development of international laws demonstrates that states do have certain obligations to protect though. Both the CRC Optional Protocol, the Council of Europe Convention on Trafficking and also the Protocol contain protection provisions. In relation to other human rights instruments the obligation to protect can be inferred from a general duty to secure, ensure and restore rights and to provide remedies.³⁰⁶

302 Ibid. p. 280.

303 ICCPR Human Rights Committee: General Comment 31, The Nature of the General Legal Obligations Imposed on State Parties to the Covenant, UN DOC CCPR/C/21/rev.1/Add.13 (26 May 2004) and Velásquez Rodríguez case at the Inter-American Court of Human Rights, Judgement of 29 July 1988.

304 General Comment 31, para 8.

305 Piotrowicz, R.: *Trafficking of Human Beings and their Human Rights in the Migration Context*, p. 281.

306 e.g. Art 2.3 of the ICCPR and the Human Rights Committee General Comment No 20, para 2.

One of the three purposes of the Trafficking Protocol is to protect and assist³⁰⁷ victims according to human rights principles. Consequently, even though the protections provisions are relatively weak, the Trafficking Protocol does obligate governments to adopt domestic laws and policies to protect the rights of, and provide assistance to, trafficked persons, in accordance with international human rights standards. It recognizes that certain types of protections and assistance are necessary and dictates that they must be consistent with international human rights norms.³⁰⁸

The exact consequence of the breach of an international norm is not always – or rarely – clear. In cases of trafficking whereby victims find themselves isolated from familiar networks of support, with neither source nor destination States willing to provide protection, the exact remedies available to such victims may be unclear.

Legal and political commitments dictate that protective measures are necessary to guarantee the human rights of the victim. The protective measures required include, but are not limited to, the following:

- Privacy and confidentiality.
- Right to information about their legal rights and the status of any legal proceedings.
- Provision of a “reflection period” to allow the victim time to recover from trauma and time to make an informed decision about next steps (including whether to participate as a witness in criminal proceedings).
- Possibility of regularised status through a system of temporary and permanent residence permit schemes following the reflection period.
- Access to accommodation, financial support, psychological and legal counselling, medical care and educational opportunities.

307 In the UNHCHR Guidelines it is mentioned (Guideline 4) that States should consider: 4. Making legislative provision for confiscation of the instruments and proceeds of trafficking and related offences. Where possible, the legislation should specify that the confiscated proceeds of trafficking will be used for the benefit of victims of trafficking. Consideration should be given to the establishment of a compensation fund for victims of trafficking and the use of confiscated assets to finance such a fund. 5. Ensuring that legislation prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for the activities they are involved in as a direct consequence of their situation as trafficked persons. 6. Ensuring that the protection of trafficked persons is built into anti-trafficking legislation, including protection from summary deportation or return where there are reasonable grounds to conclude that such deportation or return would represent a significant security risk to the trafficked person and/or her/his family. 7. Providing legislative protection for trafficked persons who voluntarily agree to cooperate with law enforcement authorities, including protection of their right to remain lawfully within the country of destination for the duration of any legal proceedings. 8. Making effective provision for trafficked persons to be given legal information and assistance in a language they understand as well as appropriate social support sufficient to meet their immediate needs. States should ensure that entitlement to such information, assistance and immediate support is not discretionary but is available as a right for all persons who have been identified as trafficked. 9. Ensuring that the right of trafficking victims to pursue civil claims against alleged traffickers is enshrined in law. 10. Guaranteeing that protections for witnesses are provided for in law.

308 Jordan, A.D.: *The Annotated Guide to the Complete UN Trafficking Protocol*. International Human Rights Law Group. 2002. p. 6

- Physical protection through bodyguards, alarm systems, safe-houses, identity change or other similar measures.³⁰⁹

The obligation to protect will at a minimum also include the observance of the principle of non-refoulement in cases where the victim may be in danger upon return.³¹⁰ Moreover it has been held that expulsion of a person to a state where he/she would be subject to slavery or forced labour might raise issues on the obligation to prohibit inhuman treatment.³¹¹ The issue of non-refoulement is strictly linked to granting of at least temporary residence permits and reflection periods to victims as discussed elsewhere.

THE OBLIGATION TO INVESTIGATE AND PROSECUTE (ENSURE) – RESPECT FOR THE RULE OF LAW

An important legal obligation imposed upon States is to investigate, prosecute and punish non-State actors, including traffickers and smugglers, with “due diligence.” This obligation has been established under international human rights law.³¹² International human rights law traditionally addressed only human rights violations committed by States. Trafficking diverges from this traditional paradigm of human rights violations due to the fact that it is by and large committed by organized criminal groups, by private rather than public actors. In *Velasquez Rodriguez v. Honduras*,³¹³ the Inter-American Court of Human Rights held that: The State is obliged to investigate every situation involving a violation of rights under the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised in the Convention.³¹⁴

In a similar vein, the European Court of Human Rights, in elaborating on a duty to investigate in *Ergi v. Turkey*,³¹⁵ held that the obligation to investigate is not confined to

309 OSCE Occasional Paper Series n. 1. *A Summary of Challenges: Facing Legal Responses to Human Trafficking for Labour Exploitation in the OSCE Region*. p. 14.

310 See e.g. *Bensaid v. UK* (App. 44599/98).

311 *Barar v. Sweden* (App. 42367/98).

312 Obokata, T.: *Trafficking and Smuggling of Refugees from a Human Rights Perspective*. p. 9.

313 Ser. C, No. 1(1988).

314 Obokata, T.: *Trafficking and Smuggling of Refugees from a Human Rights Perspective*. p. 9: This position has been affirmed in a more recent case before the Inter-American Court of Human Rights, *Judicial Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Ser. A, No. 18 (2003), paras. 140-142. See also, *Case of 19 Comerciantes v. Colombia*, Ser. C, No. 109 (2004); and *Case of the Mapiripán Massacre v. Colombia*, Ser. C, No. 134 (2005).

315 *Ergi v. Turkey* (App. 23818/94), Judgement of 28/7/98. See also *Osman v. United Kingdom* and *Z and Others v. United Kingdom*.

cases where it has been established that killing was caused by an agent of the State.³¹⁶ This obligation has been endorsed by other human rights mechanisms including the Human Rights Committee³¹⁷ and the Special Rapporteur on Violence against Women.³¹⁸ The first step which must be taken to fulfil this obligation is to establish jurisdiction over trafficking and smuggling.³¹⁹ The concept of the State's due diligence responsibility for private actors has been popularly used to promote the rights of trafficked victims who have had their rights violated by private actors acting in direct defiance of State laws or policies.³²⁰ In fulfilling its duty to 'ensure' respect of such rights, the State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.³²¹ The Velásquez 'due diligence' duty, while invaluable in holding the State responsible for the acts of private actors, does not adequately protect trafficked victims for several reasons. While the Velásquez judgment articulates three separate duties, of prevention, punishment, and victim compensation, its formulation of the State's duty to compensate victims is phrased in less obligatory terms than the first two duties. The Court held that 'States must prevent, investigate and punish any violation... and moreover, if possible, attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.'³²²

The obligation to investigate, prosecute and punish offenders has also been endorsed by other human rights mechanisms including the Human Rights Committee,³²³ and the Special Rapporteur on Violence against Women. The criminal justice response to trafficking which dominates at the national level is a necessary component of a human rights framework, prohibition of the practice coupled with punishment can deter traffickers from abusing human rights of victims. A criminal law response must then be facilitated in accordance with international human rights law, making certain that law enforcement does not in itself violate human rights.³²⁴

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- 316 Obokata, T.: *Trafficking and Smuggling of Refugees from a Human Rights Perspective*. p. 9 *Ergi v. Turkey* (App. 23818/94), Judgment of 28/7/98, para. 82. See also *Osman v. United Kingdom*, (App. 23452/94), Judgment of 28/10/1998, paras. 115-116; and *Z and Others v. United Kingdom* (App. 29392/95), Judgment of 10/5/01, para. 109.
- 317 General Comment No. 7 (Torture, Inhuman or Degrading Treatment and Punishment)(1982), Compilation of General Comments, *supra*, paras. 1 and 2; and *Herrera Rubio v. Colombia*, Communication No. 161/1983, CCPR/C/31/D/161/1983, para. 11.
- 318 See above, *Report of the Special Rapporteur on Violence against Women Its Causes and Consequences*, E/CN.4/2000/68, paras. 51-53.
- 319 Obokata, T.: *Trafficking and Smuggling of Refugees from a Human Rights Perspective*. p. 10
- 320 Wuiling, C: *Assessing Criminal Justice and Human Rights Models in the Fight against Sex Trafficking: A Case Study of the ASEAN Region*. Essex Human Rights Review Vol. 3 No. 1. p. 49.
- 321 Velásquez, n. 12 above, para. 174.
- 322 Wuiling, C: *Assessing Criminal Justice and Human Rights Models in the Fight against Sex Trafficking: A Case Study of the ASEAN Region*. p. 49.
- 323 General Comment No. 7 (Torture, Inhuman or Degrading Treatment and Punishment) 1982. And *Herrera v. Columbia*, Communication No 161/1983, CCPR/C/31/D/161/1983, para. 11.
- 324 Obokata, T.: *Trafficking of Human Beings from a Human Rights Perspective – towards a holistic approach*. p. 151. This includes right related to detention, due process and fair trial (Art. 14 of the ICCPR and

In *Assenov and Others v. Bulgaria*, the European Court of Human Rights held that States have a positive duty to investigate cases involving a breach of Art 3 (prohibition of torture), in line with a duty to “secure” rights and freedoms to all persons under their jurisdiction.³²⁵

The link between the rule of law – effective criminal laws and prosecution, and protection of individuals – and thus State’s human rights obligations (to protect) is evident here. In order for a State to fulfil its human rights obligations it must effectively deter (by having criminal laws) and prosecute offenders, who have exploited/mistreated/killed/maimed etc other individuals. The human rights dimension is clearly linked to the criminal law dimension in these cases.

HUMAN RIGHTS ASPECTS IN THE TOC – A CLEAR CRIMINAL LAW INSTRUMENT

Convention Article 25 Assistance to and protection of victims - 1. Each State Party shall take appropriate measures within its means to provide assistance and protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation. Article 25 actually contains stronger obligations than does Article 6 and is preferable to Article 6 in many respects. The Trafficking Protocol is subordinate to the main Convention and so the stronger provisions in the Convention should apply in such cases. Thus, where the two articles overlap or conflict, governments must adopt the stronger provisions found in Article 25 of the main Convention unless the Trafficking Protocol provision is specifically related to trafficking. Where the Trafficking Protocol provisions are less favourable to trafficked persons, they should not be adopted if the Convention contains better protections or assistance provisions. For example, Convention section 25.1 says a government “shall” provide assistance and protection, “within its means”, which means if the government has the resources, it must act. Trafficking Protocol section 6.3 says governments “shall consider” and act “in appropriate cases”, which does not require governments to do anything. Thus, governments must provide some level of assistance and protection according to the commitment they made in Article 25.1.³²⁶

Article 25.2 says that each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention. This language is much stronger than the language contained in Trafficking Protocol Article 6.6, which does not include the word ‘shall’. Article 25.2 recognizes that trafficked persons have a right to compensation and restitution. As stated previously, however, this right to compensation should not be limited to money from a government-operated

Art. 6 of the ECHR and *Brozicek v. Italy* (App 10964/84) as well as redress for victims.

325 App 24760/94, Judgement of 28/10/98.

326 Jordan, A.D.: *The Annotated Guide to the Complete UN Trafficking Protocol*. International Human Rights Law Group. 2002. p. 24.

victims compensation fund. Trafficked persons also must have the right to access the courts and seek compensation, restitution and damages.³²⁷

VICTIMS/WITNESSES

Too many trafficking victims are still seen as perpetrators and not as victims, probably because it often is up to police officers to identify them when searching for irregular migrants.

The terms victim and witness are not necessarily two of the same and will have different meanings between different jurisdictions. A person may be declared a victim after a judicial process. Once victim status is secured following the judicial process, the victim may have access to protection and support. In other jurisdictions, the term victim is used as a general interpretation of a person's status. The term 'witness' has a more limited meaning and relates to a person giving testimony in court, a person who has information about the particular crime and/or a person making a written statement or giving evidence in court. Different terminologies will be used by different Jurisdictions. For trafficking in persons investigations, victim-witnesses are generally the most vulnerable witnesses in the case. Measures for the protection and support of trafficked victims should therefore be developed and implemented in every jurisdiction to support the criminal justice system. The safety and support of the victim during the criminal investigation is the priority given their vulnerability and the trauma they have suffered as a result of being trafficked.³²⁸

The role of witnesses and the evidence they provide in criminal proceedings is often crucial in securing the conviction of offenders, especially in respect of organized crime such as human trafficking. This tool presents the provisions of the Organized Crime Convention relating to the protection of witnesses (Art. 24) and obstruction of justice (Art. 23, subpara. (a)). The protection may include physical protection, domestic or foreign relocation, special arrangements for giving evidence and relocation agreements. Prosecuting offenders or their accomplices under criminal law for intimidating or threatening witnesses is another means of protecting witnesses from such acts. According to Article 24 of the Organized Crime Convention, States parties must take appropriate measures within their means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by the Convention and, as appropriate, for their relatives and other persons close to them. These measures may include: Establishing procedures for the physical protection of such persons, such as relocating them and permitting limitations on the disclosure of information concerning their identity and whereabouts; Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness.

327 Ibid. p. 25.

328 UNGIFT: The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper. 006 Workshop: Criminal Justice Responses to Human Trafficking.

These requirements are mandatory, but only “where appropriate” and “within the means” of the State Party concerned. States Parties are also enjoined to consider entering into agreements or arrangements with other States for the relocation of witnesses (Art. 24, para. 3). This means that the obligation to provide effective protection for witnesses is limited to specific cases or prescribed conditions where, in the view of the implementing State Party, such means are “appropriate”. Officials might be given discretion to assess the threat or risks in each case and only extend protection where justified by the assessment, for example. The obligation to provide protection also arises only where such protection is within the “means”, such as available resources and the technical capabilities, of the State Party concerned. The term “witnesses” is not defined, but Article 24 limits the scope of witnesses to whom the obligations apply to “witnesses in criminal proceedings who give testimony concerning offences covered by this Convention, and, as appropriate, for their relatives or other persons close to them”. Witnesses can be either simple observers of a crime or victims of the crime. Witnesses can also be individuals who belonged to an organized criminal group or who committed a crime and then decided to collaborate with the justice system.³²⁹

329 The experience of States that have established witness protection schemes suggests that a broader approach to implementing this requirement may be needed to afford effective protection to witnesses and ensure their cooperation with investigations and prosecutions. Witness protection schemes should consider extending protection in the following cases: (a) to all persons who cooperate with or assist in investigations until it becomes apparent that they will not be called upon to testify; and (b) to persons who provide information that is relevant but not required as testimony or not used in court because of concerns for the safety of the informant or other persons. Legislators may therefore wish to make witness protection provisions applicable to any person who has or may have information that is or may be relevant to the investigation or prosecution of an offence covered by the Convention, whether this is produced as evidence or not. Police witness protection programmes aim to prevent offenders or their accomplices from approaching and intimidating the witness. In some cases, the participation of witnesses in a witness protection programme will be absolutely necessary to guarantee their safety. In other cases, protection measure may not be necessary at all. Police witness protection programmes require an enormous personal and psychological adjustment on the part of participants. Wherever possible, effective psychosocial support should also be provided to them. Given the costs and the implication of such programmes on the daily lives of the witnesses involved, such programmes are usually restricted to serious crime, including organized crime. Witness protection measures include, among other things, relocation of witnesses, change of identity, police escorts and financial and social assistance. Relocation includes the removal of the witnesses, possibly together with their families, from their place of living to a place where they are not easily recognized. Depending on the seriousness of the risk involved, relocation may be on a long-term basis or of a temporary nature, for example during criminal proceedings. Further, relocation might be necessary more than once, for example, if the witness or a family member makes a mistake that could lead to a heightened security risk or if a family member wants to leave the programme. Additional measures to prevent the tracing of protected witnesses through population registers, telephone books or vehicle registers might also be useful. Witness protection programmes are expensive, involving costs for protection services, removals, temporary residences, economic subsistence, housing and medical services. In order to maintain effective witness protection programmes, States need to ensure that sufficient funding is available. Witnesses for the programme must be assessed for suitability and selected carefully. In many instances, the provision of other measures such as the installation of panic alarms in the home or place of business of witnesses and provision of mobile telephones, supplemented by daily contact by law enforcement officials or police escorts, may be considered appropriate. Persons close to witnesses, such as their family members or staff of specialized victim support non-governmental organizations, may also face

Protection and support for the trafficked victim should be made accessible as soon as the victim has been identified and be extended to their involvement as a witness in the criminal justice system.³³⁰ Planning for the safety and security of the trafficked victim-witness in the criminal court proceedings is necessary. Measures need to be taken to ensure that the security and safety of the victim-witness is maintained. Investigating officers and prosecutors each have a role to play in this respect. Investigating officers are in a position to consider a wide range of witness protection and assistance measures in preparation for the court proceedings.³³¹

The Declaration, adopted by the General Assembly in 1985, recognizes that the victims of crimes and often their families, witnesses and others who aid them, experience additional hardship where they assist in the prosecution of offenders. In order to ensure that they do not suffer unnecessary harm if they cooperate in proceedings, the Declaration outlines 21 principles for victim support and assistance. Guiding requirements which emerge are that victims: Should be adequately recognized and treated with respect for their dignity; Are entitled access to judicial mechanisms and prompt redress for the harm and loss they have suffered; Are entitled to receive adequate specialized assistance in dealing with emotional trauma and other problems caused by their victimization. Paragraph 6 of the Declaration addresses the responsiveness of judicial and administrative processes to victims' needs, which should be facilitated by: (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information; (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system; (c) Providing proper assistance to victims throughout the legal process; (d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their family and witnesses on their behalf, from intimidation and retaliation; (e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.³³²

threats to their security. States should thus ensure that witness protection programmes can be extended to such persons. UNODC: Toolkit to Combat Trafficking in Persons. 2006. p. 92-94.

330 See UNODC: Toolkit to Prevent Trafficking in Persons, 2008, p. 231-33 Experience in South Africa reveals that a centralized, single witness protection agency in a Government ministry (for example the Ministry of Justice) can offer a greater guarantee of effective witness protection and help prevent failures resulting from incompetence or corruption. Such a centrally organized and administered agency should have its own budget, adequate funding, a central secure database, including data on the witnesses participating in protection programmes nationwide, and safe houses. It is also advisable to set up a specialized police unit responsible for carrying out the protection measures, because the use of normal police units on an ad hoc basis can compromise the integrity of the programme and prevent it from accumulating the necessary expertise.

331 UNGIFT: The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper. 006 Workshop: Criminal Justice Responses to Human Trafficking

332 UNODC: Toolkit to Combat Trafficking in Persons, 2008, p. 235.

It has already been stated elsewhere that the link between human rights protection and effective prosecution of traffickers is perhaps at it most evident in this context.

IDENTIFICATION

The Protocol is silent as to how victims of trafficking are to be identified³³³ and if you have no means to identify the victim, protection poses very practical problems. The Council of Europe Convention Against Trafficking in its Article 10³³⁴ is devoted to the identification process and call upon countries not to remove victims of trafficking from

333 UNODC proposes a standard checklist (obviously cases are not all alike – quite the contrary – so the list can be seen as a guideline and tool not a foolproof instrument). 1. Demographics (sex, current age, age at departure, education, occupation, nationality). 2. Does the victim possess false documents? 3. Does the victim allege kidnapping or admit travelling voluntarily? 4. Did the victim approach the offender or vice versa? 5. Was payment made to the victim or the victim's family? 6. Was payment made prior to departure or has debt or debt bondage occurred? 7. Did the victim make any payment to the offender? 8. Does the victim allege deception or violence on recruitment? 9. Does the victim allege exploitation or violence at the place of reception? 10. Was the victim involved in illegal activities at the place of reception? 11. Were other victims involved in the same recruitment, transport and exploitation? Offender 1. Demographics (sex, age, nationality/ethnic background, profession, education). 2. Is the offender integrated in the community of recruitment? 3. Does the offender have a criminal background? 4. Is the offender suspected of or have convictions for trafficking? 5. Is there evidence of involvement in a criminal organization? 6. Is there evidence of contact or involvement with corrupt officials? 7. Were false documents provided to the victim? 8. Was a recognized trafficking transit route used? 9. Were non-standard transport modes used? 10. Were safe houses used? 11. Were documents withheld from the victim? *Other* 1. How was contact made? 2. Through whom was recruitment made? 3. If deception is alleged, what was the nature of the deception? 4. If violence is alleged, was the violence actual or threatened? 5. Was the violence against the victim or the victim's family? 6. If false documents were used, what documents were falsified? 7. How long was the victim abroad? 8. Were other suspects involved in recruitment, transport, transit or reception?

334 Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combatting trafficking in human beings, in identifying and helping victims, including children, and shall ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims and, in appropriate cases, issued with residence permits under the conditions provided for in Article 14 of the present Convention. 2. Each Party shall adopt such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other Parties and relevant support organisations. Each Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence provided for in Article 18 of this Convention has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2. 3. When the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special protection measures pending verification of his/her age. 4. As soon as an unaccompanied child is identified as a victim, each Party shall: a) Provide for representation of the child by a legal guardian, organisation or authority which shall act in the best interests of that child; b) Take the necessary steps to establish his/her identity and nationality; c) Make every effort to locate his/her family when this is in the best interests of the child.

their territories until the identification process is complete. The United Nations High Commissioner For Human Rights Principles and Guidelines on Human Rights and Trafficking, Guideline 2 on identification of trafficked persons and traffickers underlines that trafficking means much more than the organized movement of persons for profit. The critical additional factor that distinguishes trafficking from migrant smuggling is the presence of force, coercion and/or deception throughout or at some stage in the process – such deception, force or coercion being used for the purpose of exploitation. While the additional elements that distinguish trafficking from migrant smuggling may sometimes be obvious, in many cases they are difficult to prove without active investigation. A failure to identify a trafficked person correctly is likely to result in a further denial of that person's rights. States are therefore under an obligation to ensure that such identification can and does take place. States are also obliged to exercise due diligence in identifying traffickers, including those who are involved in controlling and exploiting trafficked persons.³³⁵

The fact that the Protocol is silent on identification is a gap, but there is no reason why it should necessarily be a fatal or totally crippling gap. The obligations on States which the Protocol create, obviously requires States to identify victims – how this is done can be up to States as long as they follow the spirit of the Protocol and as long as they live up to the obligations in the Protocol. The fact that the protocol does not provide the recipe does not prevent States from cooking up an effective identification mechanism which enables them to live up to their obligations. Furthermore it is again important to recall that the Protocol exists in a framework which includes and relates to other international instruments, including e.g. the 1951 Refugee Convention and the ICCPR and ICESCR.

335 Guideline 2: States and, where applicable, intergovernmental and non-governmental organizations, should consider: Developing guidelines and procedures for relevant State authorities and officials such as police, border guards, immigration officials and others involved in the detection, detention, reception and processing of irregular migrants, to permit the rapid and accurate identification of trafficked persons. Providing appropriate training to relevant State authorities and officials in the identification of trafficked persons and correct application of the guidelines and procedures referred to above.

Ensuring cooperation between relevant authorities, officials and non-governmental organizations to facilitate the identification and provision of assistance to trafficked persons. The organization and implementation of such cooperation should be formalized in order to maximize its effectiveness. Identifying appropriate points of intervention to ensure that migrants and potential migrants are warned about possible dangers and consequences of trafficking and receive information that enables them to seek assistance if required. Ensuring that trafficked persons are not prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons. Ensuring that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody. Ensuring that procedures and processes are in place for receipt and consideration of asylum claims from both trafficked persons and smuggled asylum seekers and that the principle of non-refoulement is respected and upheld at all times.

NON-PUNISHMENTS OF VICTIMS

The essence of trafficking in human beings is that the victim is removed from their home environment. The victim may on the face of it have breached national immigration laws through illegal crossing of the border or having lied about the reasons for entry. By working the victim may also have breached local employment laws, and, in some cases, where work in the sex trade is concerned, there may be a breach of local vice laws. These factors make the victim vulnerable to the local law enforcement authorities and traffickers may exploit that vulnerability as a means of establishing and maintaining control over them.³³⁶

The Protocol is silent as to the status of the victim of trafficking who commits a “trafficking related offense” (irregular entry, prostitution, forgery of travel documents, improper stay), Article 26 of the Convention provides for the principle of “Non-punishments of the victims of trafficking”³³⁷, it may well be understood that the Protocol intends the same considering its provisions on protection, but clear cut provisions would have been preferable as would the clear principle of excuse from liability or immunity from liability.

In order for a trafficked person to be meaningfully recognized as a victim and enjoy the protections this status entails, the principle of non-punishment must be applied. This means that victims of trafficking should be immune from liability every time they commit an illegal act as long as those acts are related to their trafficking, as the nature of this offence may entail commission of offences by the victims. For instance, a trafficked persons should not be prosecuted or punished for trafficking related offences such as holding false passports or working without authorization even if they agreed to do these things. Similarly, regardless of whether or not prostitution is legal, States should not prosecute persons for being trafficked into sexual exploitation, even if they previously agreed to work in the sex industry. Neither the TOC Convention nor the Protocol explicitly obligates States Parties to refrain from criminalizing victims of trafficking in persons. However, there are various non-binding guidelines, declarations and resolutions which enjoin States to prevent trafficked persons from being prosecuted. Such guidelines are consistent with the treatment of trafficked persons as victims of crime, whether or not perpetrators of the crime are identified, arrested, charged, prosecuted or convicted.³³⁸

The United Nations High Commissioner for Human Rights’ Recommended Principles and Guidelines which offer considerations on non-punishment of trafficked persons states in Recommended Principle No. 7 concerning Protection and assistance that: “Trafficked persons shall not be detained, charged or prosecuted for the illegality of their

336 Piotrowicz, R.: *Trafficking of Human Beings and their Human Rights in the Migration Context*, p. 276.

337 Mattar, M.: *Omissions and Gaps: From the United Nations Protocol to the Council of Europe Convention Against Trafficking in Human Beings*.

338 See UNGIFT: The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper 023 Workshop: The Effectiveness of Legal Frameworks and Anti-Trafficking Legislation p. 17

entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.” Further, the UNHCHR Recommended Guideline No. 8 concerning special measures for the protection and support of child victims of trafficking states: “Ensuring that children who are victims of trafficking are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons.”

The Organization for Security and Cooperation in Europe Action Plan to Combat Trafficking in Persons recommends action at the level through its Recommendation 1.8; “Ensuring that victims of trafficking are not subjected to criminal proceedings solely as a direct result of them having been trafficked.”³³⁹ Paragraph 13 of General Assembly Resolution 55/67³⁴⁰ “... invites Governments to consider preventing, within the legal framework and in accordance with national policies, victims of trafficking, in particular women and girls, from being prosecuted for their illegal entry or residence, taking into account that they are victims of exploitation.”³⁴¹

CONCLUSION

Enforcement of human rights has generally been problematic due to backlogs, lack of resources, lack of political will or coordination within the UN. This does not mean however that a human rights approach to trafficking is without value. Trafficking of human beings can be found at the intersection of different branches of international law, including international human rights law, international criminal law and trans-national criminal law, and weaknesses in human rights law may very well be compensated by the other two. For instance a lack of political will on the part of states to observe and implement human rights obligations related to trafficking may be alleviated by international criminal law under which the act can be considered an international crime. This can put additional pressure on states to prohibit the practice, punish traffickers and protect victims.³⁴²

339 OSCE Action Plan to Combat Trafficking in Persons, Decision 557, Revision 1, 7 July 2005.

340 A/Res/55/67, 31 January 2001.

341 See The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper 023 Workshop: The Effectiveness of Legal Frameworks and Anti-Trafficking Legislation: UNMIK Regulation No. 2001/4 on the Prohibition of Trafficking in Persons in Kosovo “a person is not criminally responsible for prostitution or illegal entry, presence or work in Kosovo if that person provides evidence that supports a reasonable belief that he or she was the victim of trafficking.” The United States Trafficking Victims Protection Act acknowledges that victims of trafficking should not be “penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation.” Some countries have made the non-liability of victims conditional on their cooperation with criminal justice processes, however, this does not represent best practice as victims may become reluctant to report to authorities when this is the case.

342 Obokata, T.: *Trafficking of Human Beings from a Human Rights Perspective – towards a holistic approach*. p. 37.

The Trafficking Protocol is a criminal law instrument that includes some human rights provisions. It may be argued that some of these are weak – especially because of their wording “shall consider” and “where appropriate” and that a lot are not included such as compensation, witness protection, and other issues discussed above. All of this however should not be taken as too big a disadvantage from a human rights perspective. Areas not covered by the Protocol can be supplemented by international human rights law and the applicable human rights norms and principles can be enforced through the established mechanisms on the international and regional level. The Protocol can for its part promote cooperation and play a role in bridging two field of law and hopefully making one reinforce the other.

Violations of human rights and international criminal law are inter-linked.³⁴³ Trafficking falls under different branches of international law simultaneously. The existence of overlapping between international human rights law, international criminal law and trans-national criminal law does not mean that these branches are in conflict with one another, instead they are mutually reinforcing.³⁴⁴ The main purpose of human rights law is protection of the basic rights of the individual human beings; therefore obligations are imposed not in relation to other states but towards all individuals within a states jurisdiction. This means that international human rights law is not necessarily suited to promote international cooperation and mutual assistance since these are examples of obligations towards other states not individuals. This can be compensated by trans-national and international criminal law. On the other hand trans-national criminal law has difficulties in obtaining harmonisation of definitions and is not well equipped to deal with defendants’ rights. These weaknesses may be compensated by international human rights law.³⁴⁵

A human rights analysis of trafficking shows that the practice affects economic, social, cultural as well as civil and political rights, and also that respect for all of these influence trafficking. It also highlights how protection and respect for witnesses/victims are important not only from a human rights point of view but crucial for the criminal justice angle too. It shows the weaknesses of human rights enforcement, but shows how a human rights framework is necessary in all law enforcement to have an effective system and how the two systems may reinforce each other.

The clear obligation of states to have a penal law system which protects individuals from the criminal acts of other individuals – acts which if committed by the state would have been clear violations of human rights – also demonstrates how interlinked the two systems are. An effective implementation of criminal law may lead to more effective protection

343 Ibid. p. 133. See Cassese, A.: *International Criminal Law* (OUP, 2003), Merton, T.: *Human Rights and Humanitarian Norms as Customary International Law* (Clarendon, 1989), Sunga, L.S.: *Individual Responsibility in International law for Serious Human Rights Violations* (Martin Nijhoff, 1992), Ratner, S.R. and Abrams, J.A.: *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (OUP, 2001).

344 Ibid. p. 166.

345 Ibid. p. 169.

of human rights and may even in some cases lead to direct prosecution for human rights violations within a criminal law system – such as the Trafficking Protocol thus giving more “teeth” to prosecution for human rights violations, both directly related to e.g. the Trafficking Protocol but also, by creating precedence, establishing an environment in which it becomes more normal that human rights violations are prosecuted and perpetrators should expect to be held accountable.

Current Responses to Trafficking

UN High Commissioner on Human Rights Mary Robinson once emphasised to governments that anti-trafficking measures should not “adversely affect” human rights. She started with the principle that “the human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims”.³⁴⁶ Nevertheless, the priority for governments around the world in their efforts to stop human trafficking has been to arrest, prosecute and punish traffickers, rather than to protect the human rights of people who have been trafficked. In other words current practices often do not bridge a gap between human rights and criminal law, but very often fail on the criminal law side and in the worst cases endanger human rights.

This approach is consistent with the one adopted by governments over the past two centuries in the context of efforts to stamp out slavery, forced labour and slavery-like practices (of which trafficking is regarded as one): they have given higher priority, both in international agreements and national law, to declaring slavery and similar abuse illegal, than to spelling out how such forms of abuse are to be eradicated or how, when doing so, to safeguard the human rights of the individuals who have been subjected to abuse.³⁴⁷

346 Principle 1 of the UN High Commissioner’s *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, Addendum to the Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, UN document E/2002/68/Add.1, 20 May 2002.

347 Global Alliance Against Traffic in Women: Collateral Damage – The Impact of Anti-Trafficking Measures on Human Rights around the World. Global Alliance Against Traffic in Women. 2007. p. 2.

Current policy for counteracting human trafficking falls into three categories: (a) prevention and deterrence, (b) law enforcement and prosecution of traffickers, (c) protection of trafficked persons, 'rehabilitation' and assistance in social reintegration. However, these official actions unfortunately face many problems of circumvention such as fragmented evidence, judicial disharmony within and between national legislative systems, weak social institutions with logistic problems and inadequate professional capability to lend support to trafficked persons. Such circumvention indirectly serves to boost the impunity of perpetrators and maintain the opportunity for re-trafficking.

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In West and Central Africa the different perceptions of human trafficking combined with different socio-economic and political situations in the various countries have created a mixture of policy responses. Guided by knowledge derived from action-oriented research initiated by a number of international governmental and non-governmental organisations, responses have included a variety of measures. These are directed at: raising awareness among families, communities, local chiefs, government ministers and law enforcers; legislative changes to protect trafficked persons and prosecute traffickers; providing training for border patrol police and social workers, and providing direct support to trafficked persons and their families. Direct support has covered interception, rescue and socio-economic reintegration often using micro-credit as an instrument to alternative livelihood and economic self-sufficiency.

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When announcing that 'victims of trafficking have been rescued', governments have taken advantage of the term trafficking to imply that the individuals concerned have been brought to the country concerned against their wishes and consequently have no wish and no right to remain there. By using the word trafficking, government officials claim they are 'rescuing' and helping trafficked persons, while in fact they take no notice of their wishes and forcibly repatriate them.³⁴⁸

There can be no doubt that trying to pass off trafficking as smuggling and irregular migration – on purpose or due to ignorance – is simply playing into the hands of criminal networks, and not at all limiting irregular arrivals.

348 Ibid. p. 16.

MIGRATION POLICIES AND TRAFFICKING

The current regulatory frameworks are torn between different objectives with limited prospects for resolution: 1) *laissez-faire* (tolerating undocumented workers, without formal acknowledgement of their presence, so long as they contribute to the economy, remain invisible and pose no real challenges to human rights protection); 2) punitive (crackdown on undocumented migrants and criminalization of activities in their life-worlds); 3) instrumental (recognizing the value of their contribution both to the host society through their labour and to the society of origins through their remittances, and ensuring the protection of their rights by a variety of means).

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Trafficking must be squarely positioned within the context of migration and labour demand. Trafficking can be considered a consequence of what has been called the “commodification of migration”. Although there are real cases of abduction, in most cases the potential trafficking victim is already seeking a chance to migrate when he/she is approached by an acquaintance or lured through an advertisement. Traffickers are “fishing in the stream of migration”.³⁴⁹

Sociologists, criminologists and political scientists working on migration issues have pointed to the growth in regular, irregular and/or forced migratory movements in various regions, which in turn have been spurred on by economic crises, lack of sustainable livelihoods, political conflict, civil war, ethnic persecution, social inequalities, gender-blind macroeconomic policies, and wider processes of global social transformation. And various scholars have considered the migration-trafficking nexus, noting a continuum of facilitation in both regular and irregular flows of male and female labourers. There are economic, cultural, social and legal factors which are conducive to the exploitation and abuse of migrant workers, especially irregular migrants in unprotected, informal and/or unlawful labour markets. Seen in this context, promoting transparent legal channels of labour migration, preventing the use of trafficked labour by employers and protecting workers’ rights in the context of international migration may be crucial to tackle the trafficking trade.³⁵⁰

349 Cameron, S and Newman, E.: *Trafficking in humans: Structural factors*, p. 27.

350 Lee, M. (ed.): *Human Trafficking*, p. 8.

The contemporary regulation of human mobility has two opposing aspects. One is prohibitive, addressing human trafficking; the other allows for the principle of free movement. Both aspects are strongly related to issues of identity, social membership and citizenship, and neither has been able to address the grey area between free and forced movement. This inability may result from some institutions not accepting that the trafficking of people – and its embedded violence – is part of a process of globalisation which contains a central contradiction: the standards guiding economic transformation are at odds with those guiding social protection. The liberalisation of economies to facilitate the mobility of capital, goods and services has not been matched by a corresponding degree of freedom of movement for people. This contradiction has created three distinct classes of mobile persons, governed by differentiated rules: (a) highly-skilled professionals – associated with capital and technology, (b) low or semi-skilled contract labourers, and (c) undocumented workers, refugees and asylum seekers. Conflicting rules have created an enabling environment for the emergence of networks specialised in facilitating movement. In some instances such networks have created a new ethos by which the lack of security experienced by one person or group becomes a market opportunity for another. Thus, although the intersection between migration and human trafficking is context-specific, it is possible to discern particular corridors of movement beyond the purview of the state and where profit is derived from human vulnerability.

UNESCO: *Poverty, Gender and Human Trafficking in Sub-Saharan Africa: Rethinking Best Practices in Migration Management*, p. 59

Regionally driven demand is satisfied by the globally mobile labour force offered. Globalized mobility has not only meant mobility of labour to meet diverse demands, but also diversity of sources of that labour. When one source dries up, traffickers are able to find new victims.³⁵¹

Trafficking has long been identified as a migration issue. Like migrant smuggling, trafficking involves facilitated, and often illegal, migration. Both practices may involve similar routes and mechanisms, and both are generally organized by criminal groups. Moreover, immigration and consular officials may aid and abet illegal passage across borders. Approaches to prevention and suppression of trafficking necessarily raise important migration and freedom of movement issues, from control of borders to the consequences of immigration law and policies on law enforcement and protection of victims. In the context of preventing trafficking, the need to balance border control with freedom of movement – and to do so in a non-discriminatory way –

351 Cameron, S and Newman, E.: *Trafficking in humans: Structural factors*, p. 29.

is extremely important.³⁵² Another important issue to consider is the extent to which existing immigration laws and policies contribute to trafficking and its related abuses. Because of strict migration regimes in Western Europe and North America, for example, people seeking work or a better life increasingly turn to criminal networks and employment or marriage brokers to provide access to the West. Once in abusive situations, lack of papers and fear of arrest or deportation often prevent trafficked people from leaving or seeking help.³⁵³

A problem in hindering trafficking and in paying appropriate attention to the human rights dimension is the interwoven relationship between criminal law and migration law. With regard to the interests of the victims, law enforcement and migration authorities are not in line with each other and often even contradict one another. Because of this relationship, these differences may frustrate the interests of the various authorities, which is not to the advantage of the victim. The negative effects of the interwoven relationship between criminal law and migration law can be divided into two categories. The first is effects following the conflict of interests of the authorities involved, and the second is the consequence of decisions taken in criminal proceedings for the application and granting

352 United Nations High Commissioner For Human Rights Principles and Guidelines on Human Rights and Trafficking, E/2002/68/Add.1 (2002). Guideline 7: Preventing trafficking: Strategies aimed at preventing trafficking should take into account demand as a root cause. States and intergovernmental organizations should also take into account the factors that increase vulnerability to trafficking, including inequality, poverty and all forms of discrimination and prejudice. Effective prevention strategies should be based on existing experience and accurate information. States, in partnership with intergovernmental and non-governmental organizations and where appropriate, using development cooperation policies and programmes, should consider: 1. Analysing the factors that generate demand for exploitative commercial sexual services and exploitative labour and taking strong legislative, policy and other measures to address these issues. 2. Developing programmes that offer livelihood options, including basic education, skills training and literacy, especially for women and other traditionally disadvantaged groups. 3. Improving children's access to educational opportunities and increasing the level of school attendance, in particular by girl children. 4. Ensuring that potential migrants, especially women, are properly informed about the risks of migration (e.g. exploitation, debt bondage, and health and security issues including exposure to HIV/AIDS) as well as avenues available for legal, non-exploitative migration. 5. Developing information campaigns for the general public aimed at promoting awareness of the dangers associated with trafficking. Such campaigns should be informed by an understanding of the complexities surrounding trafficking and of the reasons why individuals may make potentially dangerous migration decisions. 6. Reviewing and modifying policies that may compel people to resort to irregular and vulnerable labour migration. This process should include examining the effect on women of repressive and/or discriminatory nationality, property, immigration, emigration and migrant labour laws. 7. Examining ways of increasing opportunities for legal, gainful and non-exploitative labour migration. The promotion of labour migration by the State should be dependent on the existence of regulatory and supervisory mechanisms to protect the rights of migrant workers. 8. Strengthening the capacity of law enforcement agencies to arrest and prosecute those involved in trafficking as a preventive measure. This includes ensuring that law enforcement agencies comply with their legal obligations. 9. Adopting measures to reduce vulnerability by ensuring that appropriate legal documentation for birth, citizenship and marriage is provided and made available to all persons.

353 Trafficking in Human Beings: implications for the OSCE. Organization for Security and Co-operation in Europe review conference, September 1999, ODIHR background paper 1999/3.

of a residence permit and the right to make use of assisting and protective measures. The effects of the lack of inter-agency cooperation are clearly felt in criminal proceedings when expulsions on the basis of migration law are executed without taking into account the position of the person who is expelled and without taking into consideration his or her relevance for criminal proceedings. Too often, governments respond to trafficking as a migration problem rather than a human rights challenge, using trafficking as a justification for tighter border controls. The effect of an exclusive and narrow criminal law perspective in fighting trafficking is that victims lose their residence permit and the right to make use of the assistance and protection mechanisms once the case is decided or dismissed, regardless of whether the victims are in need of this protection or not.³⁵⁴

354 Rijken, C.; Koster, D.: *A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice*, p. 11-12.

One analytical perspective on the intersection between migration and trafficking may be offered by combining insights derived from studies on migration which use the livelihood framework, with those gained from investigations into trafficking. One study offers a perspective on migration in the Sahelian region tracing the behaviour of two kinds of institutions which have a strong impact on migration and in turn are structured by the migration experience. These are (a) networks through which migrants obtain access to resources and (b) the structure of the household and its management. They point out that the decision-making process to enter migration networks in order to improve livelihood (or to prevent its erosion) is based on a careful assessment of household resources. Calculations are made of assets, gains and losses within a particular livelihood system and temporal frame. The growing body of literature on human trafficking singles out the lack of access to reliable information channels regarding labour markets and living conditions as an important factor which fosters a symbiotic relationship between the trafficker and the trafficked. Control over information – or the provision of false information – by third parties can render a (potential) migrant's careful assessment of gains totally unrealistic and enhance their susceptibility to dependency on crime networks. In addition to this, both the regulation of particular segments of the labour markets and the extant structure of opportunity in a recipient country can result in migrants being switched between a variety of occupations controlled by the same networks, and this may affect their coping strategies. This process of switching constitutes another junction where migration and trafficking intersect. At each junction in the migration process vulnerability is enhanced due to migrants being constantly on the move and thus less able to consolidate social ties.

UNESCO: *Poverty, Gender and Human Trafficking in Sub-Saharan Africa: Rethinking Best Practices in Migration Management*, p. 61

Disconnecting victim protection from migration law and criminal law may be a solution. To a certain extent, migration law and criminal law with regard to counter-trafficking measures are required for an adequate protection of victims. It cannot be denied that a vast number of victims do not have a valid residence permit and therefore run the risk of being expelled. The application of migration law should not be made dependent on whether a victim cooperates with the law enforcement authorities or not. To disconnect migration law from the criminal procedure has the advantage that the granting of a residence permit is not influenced by an outcome in the criminal proceedings and that its application is treated more in line with the other migration procedures. It is even of no importance at all whether criminal proceedings against the trafficker will be started before the victim can get the residence permit or can make use of assistance and protective

measures. The question of whether or not a residence permit should be granted must depend on migration law criteria only, including human rights considerations.³⁵⁵

Trafficked persons are among the most vulnerable migrant workers. They are generally poorer, have a lower socio-economic status, are less informed about their rights and existing legal opportunities for employment abroad, and often suffer gender, ethnic or racial discrimination in their place or country of origin. Immigration restrictions in many situations have inhibited regular labour migration to meet measurable labour demands. Given these demands, employers and migrants are willing to pay increasingly higher prices to meet each other in an internationalized labour market. Increased migration control and restrictions contribute to making trafficking and smuggling of migrant labour very profitable for criminal intermediaries. Market pressures are reflected in demand and push factors for migration. In agriculture, food processing, construction, domestic help, labour-intensive manufacturing, home health care, and other sectors that often involve dirty, dangerous and degrading jobs, the demand for cheap, low-skilled labour acts as pull factor. Push factors in countries of origin include decline of traditional industry, loss of agricultural competitiveness, elimination of jobs and subsidies by structural adjustment. ILO research has shown that access to financial capital in order to pay for the journey as well as access to reliable information can make a big difference in the way people migrate. Improving migration management in order to make migration safe through legal channels is therefore an integral part of programmes that aim at the reduction of trafficking in human beings.³⁵⁶

The link and overlap between trafficking and other forms of migration is so important that they must be analysed together.³⁵⁷ Economic considerations are central and it should be noted that the growth in trafficking has taken place during a period in which there has been an increasing international demand for migrant workers.³⁵⁸ People are not forcibly relocated without a significant profit motive. That profit motive occurs in the gains to be made from providing low or no-wage labour in a competitive and globalised market economy: Migration is a fact of a globalized economy.³⁵⁹ If trafficking is viewed from such a perspective, then, the dominant representations of helpless ‘victims’ kidnapped and forcibly relocated is only a partial picture. Recent qualitative research has already made strides in challenging the ‘victim’ paradigm and, in doing so, has both reclaimed a degree of agency for (forced) migrants and once again re-focused some anti-trafficking attention on structural conditions. Trafficked persons are shown, very often, to have wished to

355 Ibid. p. 11-12.

356 ILO Actions Against Trafficking, ILO 2008. p. 17.

357 Kaye, M. and Anti Slavery International (ASI), *The Migration-Trafficking Nexus: Combatting Trafficking Through the Protection of Migrants' Human Rights* (London: ASI, 2003).

358 Ibid p. 4.

359 Kapur, R.: Cross-border Movements and the Law: Renegotiating the Boundaries of Difference, in Kempadoo, et al. *Trafficking and Prostitution Reconsidered*. p. 28; Howard, N. and Lalani, M.: “Editorial Introduction: The Politics of Human Trafficking”. *St. Anthony's International Review. Oxford* 4:1 (2008): 5-15.

migrate in the first place,³⁶⁰ the recent impetus for trans-border trafficking, as well as smuggling or other clandestine forms of labour recruitment, is connected to imbalances between the increasing supply of unskilled, indigent jobseekers on the one hand and the

360 The case of child migrants is an example of how very often migrant groups may be considered victims of trafficking even when they are not necessarily so – sort of the opposite from when very often trafficking victims are not discovered and simply considered irregular migrants and thus not offered protection. Both situations shows exactly how difficult it may be to determine whether a case is trafficking or not and also how detriment it can be to groups of people and individuals if they are automatically categorised as one or the other. People, including children, migrate for many reasons: to find work; to improve their personal situations; or to explore the world and new places. Despite the fact that research suggests that children are very much involved with these diverse migration processes, policy-makers have paid little attention to broad questions about the factors prompting children to migrate, their experience as migrants, the effects of immigration policies on children, or the consequences of adult migration for children who are left at home. National and international focus has instead been on certain phenomena such as child trafficking and asylum-seeking and refugee children. Migration has been until recently discussed mainly in terms of adult, male movement. Women and children have been viewed as migrating only as dependents, as following their male relatives. This has led child migrants to be considered as passive, vulnerable and necessarily exploited within the migration process. Obviously children can be passive, vulnerable or exploited, but they are not necessarily so. Viewing child migrants exclusively in this way ignores the fact that some children do make a decision to migrate, and do so in much the same way as adults do. Assuming that children can only ever be forced or colluded into migrating is a falsehood that overlooks the reality of many children's lives. Further having this view may actually push children into the exploitive situation they should be protected from when they find no alternative, which respect their migration plan. Generally, the ability to migrate or travel legally without an adult is quite limited for children, especially internationally. This means that children are more likely to travel irregularly and actually risk exploitation or abuse. Research into independent child migration suggests that it is usually older children who are involved in this phenomenon; that child migration is usually at it's highest in regions where adult migration is also high; that independent child migration can be, and often is, a positive decision taken by the child with the aim of improving their life opportunities; and that child migrants, like adults, rely on their social and financial resource networks when migrating. International child protection campaigns are exceedingly important in visibilising the harmful situations of many child migrants and they have also been very important in raising awareness of the extent to which children in the developing world are living away from their parents and home communities. However, as they bring some children into focus, they also in-visibilise child migrants who do not fall into these categories and make it difficult to estimate how many other children are moving and for what reasons. A central motivation for children to migrate that is generally underplayed is their need or desire for income. There are a number of reasons why children have such need. Many come from rural economies in which children start earning their own independent incomes quite early, as well as making a contribution to family income. Children may be encouraged to earn income for aspects of their own consumption, such as clothes, or school fees. Children may also perceive a need to generate savings that can improve their livelihoods or prospects. This does not mean, however, that the dangers especially independent migrant children face are irrelevant. There are inherent insecurities, risks and dangers attached to the process of migration itself, to which children are especially vulnerable. Adult migrants—particularly those who are poor, inexperienced, or undocumented—and even more so child migrants, are targets for violence, theft, and exploitation. In many situations they will not even be able to avail themselves of the assistance from local authorities. A child migrant may also be the subject of adult decision making by members of her family or others which not only places her or him in the complexities of the immigration system but which also exposes her or him to such significant harm which in any other context would trigger powerful child protection mechanisms. See Touzenis, K.: *Migrant Children's Human Rights*. IOM *International Migration Law Series N 15*. IOM 2008.

availability of legal and sustainable work in places where the jobseekers have legal rights to residence or citizenship on the other.³⁶¹ As such, therefore, to attempt to stop the flow of trafficked people with tighter border controls and more restrictive policies is, wholly counterproductive. One positive step that states could therefore take to combat the illicit flow of people would be to allow for regulated movements of labour migration. A promotion of 'circular migration' to fill labour gaps and provide opportunities for willing migrants could be important. The promotion of regular and managed migration based on demand, including the need for unskilled labour' is essential and, as such, 'trafficking would not occur with a well-managed migration policy where migrant workers do not have to resort to illegal methods of seeking employment.'³⁶²

While national borders may have become increasingly open to trans-national flows of goods and money, governments have increasingly and forcefully asserted their sovereign right to control the movement across borders. In recent years such stepped-up border control efforts have very often been described as anti-trafficking measures. National immigration control efforts have been accompanied by a range of bilateral and regional agreements designed to enhance migration management in which countries of origin often accept returnees in exchange for financial aid and other assistance. But these efforts do not prevent all undocumented migration; in fact an increased flow of irregular migrants is an inevitable result of restrictive immigration policies in the context of a constant migration pressure. Europe saw an increase in irregular flows in the 1990s at a time of dramatic increase in migration flows.³⁶³ The European Union and many destination countries in general put the emphasis on preventing irregular migration and fighting asylum abuse. Concentration of border controls, deterrence and immediate repatriation is often the beginning of a vicious circle. Studies confirm that up to 50% of those immediately deported are reintroduced into the criminal circle or recycled. Instead of realising that such measures are short sighted it is maintained that they are effective means of self-protection serving the interests of state security. But it has also been established that not even 30% of trafficked persons are discovered because they are prevented from seeking help from fear of deportation and of being caught in the machinery of law and order in a foreign country.³⁶⁴

It is true that the movement of people, voluntarily or forced, presents multiple aspects, implications and dilemmas for states. Prior to 9/11 the discussion on migrants focused on issues such as adjusting the number to labour market requirements, the integration

361 Howard, N. and Lalani, M.: "Editorial Introduction: The Politics of Human Trafficking". *St. Anthony's International Review*. Oxford 4:1 (2008). p. 12.

362 Ibid.

363 Dinan, K.A.: Globalization and national sovereignty: From Migration to trafficking, in Cameron, S. and Newman, M (Eds.): *Trafficking in Human Beings – social, cultural and political dimensions*, p. 68.

364 Konrad, H.: the Fight against Trafficking in Human Beings from the European Perspective, in Cameron, S. and Newman, E. (Eds.): *Trafficking in Human – social, cultural and political dimensions*, p. 162.

of migrants and multiculturalism. Since then, the focus has been increasingly on security and migration is linked to crime and terrorism.³⁶⁵

Destination country legislation and policy is often centred on giving effect to classifications of wanted and unwanted migrants. The objective of classification is to regulate immigration, to manage it so that the advantages can be gained for receiving countries and the perceived pressures of influxes of unpopular kinds of migrants can be avoided. In e.g. the EU there has been a race to the bottom as the toughest policies have been generalized throughout the Member States, rather than the more generous.

The use of terminology is crucial in shaping the debate on migration, particularly when sensitive political issues relating to immigration at the national level are concerned. For example, the failure to explain the legal distinction between persons seeking asylum and economic migrants in debates at the national level is often at the heart of negative public and media perceptions of these groups, with the result that the political response to address this discontent is invariably a disproportionate one. The perception of irregular migrants is also shaped by the current terminology in use at the EU level. While most organisations with a mandate on migration have now adopted a more neutral terminology by referring to migrants with no legal status in the country as ‘irregular’,³⁶⁶ the EU institutions and the measures that have been adopted under Title IV of the EC Treaty and Title VI of the EU Treaty persist in using the terms ‘illegal migrants’ or ‘illegal immigration’. Moreover, the more pejorative term ‘illegals’, often slang usage among officials and practitioners, has also made its way into official EU texts.³⁶⁷ Presumably, this is not necessarily deliberate,

365 The juxtaposition of migration with criminal matters and policing in the broader EU context has a relatively long history. Indeed, the ‘TREV’ group, established in 1976 and considered to be the forerunner for inter-governmental co-operation on asylum and immigration between the interior ministries of EU Member States, began operating in the context of the prevention of trans-border crime. Asylum and immigration, as matters that also transcended borders, were subsequently considered as suitable and logical additions to this portfolio. It is not surprising, therefore, that many of the measures adopted by European immigration ministers during the period of ad hoc inter-governmental co-operation were generally repressive in content and mainly concerned co-operation regarding expulsion, the prevention of illegal employment, etc. Parallel developments taking place among the Schengen states at this time also considered migration and criminal matters together. The Schengen Implementing Agreement (SIA), now partly incorporated into the Community pillar, is a clear example of this approach, although it is sub-divided into sections dealing with internal and external border controls, responsibility of states for determining asylum applications (now defunct in the light of the Dublin Convention and the subsequent ‘Dublin II’ Regulation) and police and criminal co-operation. However, the area where there is the closest relationship between migration and criminal matters is the Schengen Information System (SIS) containing alerts about objects (associated with criminal activity) and aliens (third country nationals), who are considered a threat to the public policy or national security of an EU Member State.

366 See International Labour Organisation (ILO), IOM, and the Council of Europe. With regard to the IOM, the International Migration Law *Glossary on Migration* (Geneva, IOM, 2004) uses the term ‘irregular migrant’ and ‘irregular migration’: at 34-5.

367 See Council Conclusions on the development of the Visa Information System (VIS), Council doc 6534/04, 20 Feb 2004, which state that one of the purposes of VIS is to ‘assist in the identification and documentation of undocumented *illegals* and simplify the administrative procedures for returning

but nonetheless reflects the kind of negative climate in which such texts are frequently discussed. Moreover, illegal immigration is to be ‘fought’ and ‘combated’.³⁶⁸ States are at war with irregular migrants and must gather all their forces to repel the attack. However, this is not merely negative language and the war on irregular migration has indeed resulted in military-type operations on the external borders of the EU, particularly in the Mediterranean and the Eastern Atlantic, with tragic consequences.³⁶⁹ The use of this military and negative terminology immediately raises imagery of an enemy, of repeat criminal offenders who habitually violate the law, of ‘non-persons’ with few, lesser or even no rights. Consequently, the association of migrants with criminality, in the case of irregular migrants in particular, is immediate and unrelenting. Such values transcend borders and the categorisation of persons into nationals and non-nationals or lawfully resident and irregular migrants.³⁷⁰

The distinction – or rather perhaps the lack of distinction – between trafficking and smuggling also extends to the state’s distinction between “deserving” and “undeserving” victims of human trade, with varying degrees of blame being attributed to various categories of irregular migrants. The current dominance of discourses that identify unauthorised, unwanted and forced migrants as lawbreakers, a public order risk, a menace to national sovereignty, an existential threat to our way of life, or a combination of all is by now well documented.³⁷¹

Recently intergovernmental cooperation in the field of migration management has focused primarily on concluding readmission agreements. Furthermore many destination regions have created zones of exclusion – the EU, North America and Australia. Each zone has its own local characteristics, but they reflect that controlling the physical and legal routes to which forced or unauthorized migrants can acquire some form of legitimacy is a dominant imperative of border policies. The most fundamental feature of the exclusion zone is the externalisation of border controls through three levels of enforcement. Internally it rests on measures such as detention: at the border, exclusion measures range from restrictive visas through to full-scale military mobilisation. Externally it provides a virtual border – outposts of asylum and immigration services processing visa applications in countries of transit and departure, carrier liability measures and the maintenance of camps and

citizens of third countries’: Annex to the Annex, point 1(f), emphasis added. For more on the VIS see below.

368 See e.g. Proposal for a Comprehensive Plan to Combat Illegal Immigration and Trafficking of Human Beings in the European Union [2002] OJ C 142/23 and Draft Council Conclusions on the establishment of a monitoring and evaluation mechanism of the third countries in the field of the fight against illegal immigration, Council doc 15292/03, 25 Nov 2003.

369 See Fekete, L.: “Canary Island Tragedy: Did the RAF Put Border Security before Human Safety?”, *Institute of Race Relations (IRR) News*, Oct 2003, Available at <http://www.irr.org.uk/index.html>.

370 Cholewinski, R.: “The Criminalisation of Migration in EU Law and Policy” in A. Baldaccini, E. Guild and H. Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Oxford: Hart Publishing, 2007) 301-336.

371 Lee, M. (ed.): *Human Trafficking*, p. 12.

buffer zones.³⁷² This is all part of the war against smuggling/trafficking, but may have dire consequences for individuals, including asylum seekers and victims of trafficking who may be put at considerable risk and may have their rights completely overlooked.³⁷³

The fact that migration is more and more linked to organised crime impacts on the attempt made to fight trafficking. It is known that trafficking victims left “voluntarily” to find work and often entered or stayed in the destination country irregularly. Instead of being offered assistance these people are then seen as irregular migrants – illegals – criminals. This point of view also affects the offer of temporary residence permits which may “attract” more migrants and be abused – just as the asylum system where an individual now has to “qualify” to obtain status. This view of state interests may very easily run contrary to the rights and interests of the victims – but also to the interests of the states themselves since it does not seem that restrictive immigration policies effectively diminish irregular flows – rather the contrary, and most certainly broadening the market for trans-national organised crime – traffickers – cannot be in the interest of the state.

372 Grewcock, M.: Shooting the passenger: Australia’s war on illicit migrants, in Lee, M.: *Human Trafficking*, p. 180

373 Ibid. p. 182.

Current Trends in Trafficking

The difficulties connected with researching human trafficking are related to the nature of the subject itself. Like in many other areas of criminal justice studies, research on the nature and scope of trafficking in persons is considered inherently difficult as it involves hidden populations. Trafficking in persons is often a hidden criminal activity, and, as a consequence, the number of victims that come to the attention of the general public at any one time is necessarily only a subset of the total population of trafficking victims. This leads to calls for estimating the “dark figure” of human trafficking statistics. There are various methodologies for estimating total trafficking cases but it is important to note that most methods to estimate the unknown part of cases are based on some form of “hard data” on known or reported cases. The same is true for detecting and interpreting trends in human trafficking. Thus, even for the estimation, detailed and accurate knowledge on identified cases of victims of human trafficking is indispensable.³⁷⁴

By its very nature trafficking is secret and dangerous, which helps explain the inadequacy of reliable information. Victims are afraid of retaliation from traffickers or recrimination within their families and villages - which have often provided funds for the journey they anticipate will take the woman to the job that will help support the family - and the stigma of prostitution. As a result few will bear witness against the traffickers. Fear and mistrust of police, the lack of documentation and fear of complicity also play a part in maintaining the victim's silence. Most victims are poor, illiterate, from marginalized populations and are ignorant of their rights. Traffickers exploit not only bodies but the deepest anxieties and disadvantageous life conditions of the victims.

UNESCO: *Human Trafficking in South Africa – root causes and recommendations*, p. 33

What is needed for the design of adequate policies, therefore, is a more credible information base on which to base research on trafficking in persons. The most direct way of generating this information base is to focus on the universe of known trafficking cases

374 UNGIFT: The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper 024 Workshop: Quantifying Human Trafficking, its Impact and the Responses to it.

that directly result from the criminal justice response to this crime. Gathering accurate criminal justice statistics, supplemented by information on the institutional and legal framework in which the crime of trafficking in persons is defined and pursued, as well as on services available to victims from governmental and nongovernmental actors alike, is necessary to understand where the major information gaps are, and how to improve national responses to trafficking.

The US Department of State Trafficking Reports from 2006 and 2008 estimate that

- 600,000 to 800,000 men, women and children trafficked across international borders each year
- 80% women and girls
- up to 50% are minors

ILO Global Alliance Against Forced Labour estimates that there is 2.5 million³⁷⁵ people who are victims of trafficking.³⁷⁶ The numbers are however extremely uncertain and sometimes the same is true for how they have been collected.

375 Numbers repeated in ILO Actions Against Trafficking from 2008.

376 Due to its clandestine nature, accurate statistics on the magnitude of the human trafficking problem at any level are elusive and unreliable. See UNODC: Global Patterns in Human Trafficking, 2006: Figures that are available range from the actual number of victims rescued or repatriated to estimates of the total number of trafficked victims in existence. The lack of reliable statistics can be attributed to a number of factors. Many countries lack anti-trafficking legislation. Even when legislation is in place, laws may only define human trafficking as applying to certain exploitative practices, such as sexual exploitation, and not other forms of exploitative behaviour. Moreover, in many countries, the definition of human trafficking applies only to the exploitation of women and children overlooking the exploitation of adult male victims. Further, if comprehensive laws do exist, they are not always enforced and victims may not be recognized as victims of crime but may be seen as smuggled migrants. Victims may be hesitant to provide information or cooperate with authorities often out of fear of harm to themselves or their families by either criminal networks or the legal authorities. Many countries lack a centralized agency or coordinated statistics system so that the collection of trafficking data, if done at all, is done on an ad hoc basis. While inter-governmental and non-governmental organizations assisting trafficked victims often maintain databases on those who have been assisted, repatriated and reintegrated, these figures represent a small number of human trafficking victims worldwide. Another problem faced in the collection of data on this topic is the tendency to, often unknowingly, mix data related to human trafficking, migrant-smuggling and irregular migration, which convolutes the true human trafficking picture. In addition, data is often collected only on cases of trans-border human trafficking and not on internal human trafficking. There is a large disparity between the number of known cases and estimates of trafficking in persons. The Dutch National Rapporteur Against Trafficking in Human Beings estimates that only 5% of victims report their victimization or come to the attention of government authorities - the number of documented cases reported in the Netherlands for the year 2002 was 201 (*Bureau NRM (2005), "Trafficking in Human Beings, Third report of the Dutch National Rapporteur", Den Haag: Bureau NRM*). The main criticism of human trafficking estimates is that the ranges are often excessively wide, sometimes as much as a high of 10 times that of the low estimate. In reports providing human trafficking estimates, the methodology for calculating any estimates used is rarely given. Reports also often fail to indicate whether estimates are annual figures or cover a period of several years.

There is still a lack of quantitative information or understanding regarding the scope and development of the crime of human trafficking around the world. Even basic criminal justice data on trafficking in persons offences is not publicly available for many countries and regions of the world, making the compilation of accurate statistics on human trafficking elusive and unreliable at any level. In the absence of systematic and reliable statistical time series, we do not even know with any degree of precision if the number of reported trafficking cases is increasing or decreasing and why this might be so. Compiling reliable and comprehensive statistical time series on the criminal justice response to human trafficking is thus a first step towards a more global understanding of the phenomenon.³⁷⁷ The major problem in studying and combating trafficking in persons is exactly the scarcity, unreliability, and non-comparability of existing international and national data. The absence of comparable statistics on reported crimes, indictments and court cases, the heterogenous criminalisation of the crime in national legislation, the characteristics of trafficking which results in a high dark number and makes trafficking hard to identify, the weak legal status of victims in national legislation, which contributes to their reluctance to report the crime and the inconsistent use of the concept of trafficking are all factors that contribute to inaccuracy of data.³⁷⁸

One of the major hurdles to undertaking a comparative analysis of trafficking data is the lack of specific legislation on the national level. This leads to absence of official criminal justice statistics on human trafficking cases. The trafficking Protocol has improved the situation with its agreed definition of the crime and when countries reform legislation in order to conform with this definition, data collection will be easier. The confusion between smuggling and trafficking is important when collecting data, because the police may prefer to categorise some trafficking cases as smuggling crimes, the collection of evidence in these last is easier than obtaining evidence on offences related to trafficking.³⁷⁹

The trade in human beings is not a uniform business and operates very differently in different cultural and political contexts. Human trafficking shares much with the trade in legitimate commodities from the region of origin. Traditional patterns of trade and investment shape the trade in human beings as they do trade in other “commodities”.³⁸⁰ Enormous differences exist in the trade of human beings from e.g. post-socialist countries. China uses trade in people to generate revenue for investment whereas the traffickers from the former USSR sell off human beings as if they were a natural resource like oil

377 UNGIFT: The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper 024 Workshop: Quantifying Human Trafficking, its Impact and the Responses to it.

378 Aroma, K.: Trafficking in Human Beings: Uniform Definitions for better Measuring and for Effective Counter Measures, in in Savona, E.U.; Stefanizzi, S.: *Measuring Human Trafficking, complexities and pitfalls*. p. 20.

379 Kangasputa, K.: Collecting Data on Human Trafficking: Availability, Reliability and Comparability of Trafficking Data, in in Savona, E.U.; Stefanizzi, S.: *Measuring Human Trafficking, complexities and pitfalls*. p. 28.

380 Shelley, L.: Human Trafficking as a Form of Trans-national Crime, in Lee, M.: *Human Trafficking*, p. 123.

or timber with no thought to the future. The Chinese model is based on family ties but Russia, with less historical reliance of the extended family, is more focused on the individual. Former Yugoslav groups, influenced by the Civil war and violent conflicts in the Balkans, are the most violent entrepreneurs, and they operate using traditional clan structures. This suggests that pre-revolutionary traditions of trade, family and historical factors may be more important in determining the business of human trafficking than the common features of the socialist system.³⁸¹

Likewise, human trafficking out of Latin America differs from that emanating from Africa. The volume of women moved for sexual exploitation from Latin America and men for labour exploitation is based on a wholesale market model. The emphasis is on numbers rather than quality of recruits. In the case of Africa the contemporary trade resembles historical slave transport with gross loss of life and very little return of capital to communities of origin.³⁸²

Violence is greatest in those criminal groups where the victims are not controlled by the traffickers from recruitment through to their ultimate destination. In trafficking businesses where victims are passed from one set of owners to others repeatedly there is greater abuse. Violence is more frequent and severe when the recruitment of future victims does not depend on the treatment of previous victims.³⁸³ Practices³⁸⁴ of human

381 Ibid. p. 124.

382 For a detailed overview of regional trends in Human Trafficking see UNODC Global Report on Trafficking in Persons 2008.

383 Shelley, L.: Human Trafficking as a Form of Trans-national Crime, in Lee, M.: Human Trafficking, p. 124.

384 Shelley, L. in "Trafficking in women: the business model approach", *Brown Journal of International Affairs*, vol. X, No. I (2003) makes a categorization of trafficking groups as different business types or criminal enterprises.

1. Natural resource model (prevailing in Eastern Europe and Central Asia): • The focus is on short-term profits. • Women are sold as if they were a readily available natural resource such as timber or furs. • The focus is on the recruitment of women and their sale to intermediaries who deliver them to the markets; most often the women are sold off to the nearest criminal group. • Profits are disposed of through conspicuous consumption or are some times used to purchase another commodity with a rapid sales turnover, such as rubber boots or cars. • Significant violations of human rights occur because the traffickers have no long-term interest in wresting long-term profits from the women and have no connections to their families. 2. Trade and development model (prevailing in East Asia): • This model operates as a business that is integrated from start to finish. • The control from recruitment to exploitation allows for long-term profits, which are very high and result in significant investment capital. • Assets are returned through a system of underground banking such as through gold shops and other similar techniques. • Less significant violations of human rights occur because the smugglers and traffickers have a long-term interest in wresting long-term profits from the victims, who often have connections to their families. 3. Supermarket model: low-cost and high-volume (prevailing in Central and North America): • This model is based on maximizing profits by moving large numbers of people and not charging significant sums for each individual. • Traffickers may exploit vulnerable individuals such as a group of deaf persons who are forced to peddle drugs or young girls who are forced into brothels. • Most of the "people movers" specialize in this type of trade, which is based on large-scale supply and existing demand. • The model requires significant profit-sharing with local border officials. • Millions of dollars in profits are returned and invested in land and farms. • Detection is

trafficking are embedded in social relations and are therefore diverse. It is difficult to generalise interpretations based on fragmented evidence. A number of international non-governmental organisations have noted peculiarities of human trafficking in Africa that do not entirely fit the international definition. The definition bases itself on the 'model' of trans-national trafficking, often attributed to the presence of large networks of organised crime. Trafficking in Africa is through small, family-related networks and does not always take place across national borders.³⁸⁵ It is obvious that the definition of trafficking will not clearly fit all possible cases – some cases will be borderline and such cases may occur more frequently in certain regions than in others. It is however very important to keep in mind that not all exploitation is trafficking and that in case exploitation occurs and cannot be prosecuted as a trafficking crime many elements of exploitation, if not exploitation itself, can be prosecuted separately and will be a breach of international human rights law. Not all transport and not all exploitation needs to fit into the trafficking definition in order to warrant attention and in order to be a human rights violation.

Factors influencing trafficking trends

In the process of implementing anti-trafficking practices, the significance of the social and cultural milieus conducive to human trafficking and re-trafficking emerged as a new subject requiring analytical attention. This analysis covers a variety of social structures such as gender, sexuality, age and ethnicity, as well as intra-household dynamics and attitudes of communities. The first wave of trafficking in adult women from West Africa to Western Europe began in the 1980s and continued through the 1990s. This was followed by the trafficking of minors involving both males and females. Where children are concerned, the specificities of their vulnerability deriving from local contexts (such as belonging to marginal ethnic groups, subservient castes, or dysfunctional families affected by war or disaster) have contributed to the creation of child-specific demand for wide-

difficult because trafficking is hidden within large-scale smuggling operations. • Significant violations of human rights and even fatalities occur because there is little profit to be gained from each individual. 4. Violent entrepreneur model (prevailing in the Balkans): • Large numbers of women are sold off by criminal groups. • Victims are controlled from recruitment to exploitation. • Opportunistic use is made of the instability and civil conflict in the countries of origin. • Groups take over existing markets by use of force against already established organized criminal groups. • There is significant use of corruption. • Very high levels of profits are used to finance other illicit activities or to invest in property and trade businesses. • Extreme violations of human rights and brutal violence against victims occur. 5. Traditional slavery with modern technology (prevailing in Western Africa): • Here there are multifaceted criminal groups, with trafficking in persons being one part of their criminal profile. • Psychological as well as physical pressure are used. • Modern transport links are combined with traditional practices. • Significant human rights violations involve victims who are exploited in the most physically dangerous conditions. • Significant financial resources are involved. • Small amounts of the profits are returned to the local operations of the criminal groups and occasionally to family members of the victims. • Most of the profits are believed to flow into other illicit activities and are laundered. UNGIFT: Trafficking an overview p. 25.

385 UNESCO: *Searching for Best Practices to Counter Human Trafficking in Africa: A Focus on Women and Children*, p. 18.

ranging types of work. Children are trafficked into a variety of exploitative situations including commercial sex, domestic service, armed conflict, service industries like bars and restaurants; or into hazardous forms of work in factories, mines, agriculture and fishing, construction; also begging. Exploitation of trafficked children can be progressive. Those trafficked to work in factories, domestic service or restaurants, may subsequently be forced into prostitution. Those trafficked for prostitution may be subject to re-sale more than once. The vulnerability of women and children to re-trafficking is due to a number of factors such as the forms of intra-household decision-making and tacit 'tolerance' of trafficking mechanisms among the wider public, but also to the mishandling of trafficked persons driven by social and cultural values that carry stigmatising effects. Reports have revealed many cases wherein the children and women who have been intercepted and/or later returned to their communities do not stay in their communities for long, being subject to re-trafficking.³⁸⁶

Three key clusters of factors can be identified:

- (1) socio-cultural factors such as the social acceptability of putting children to work, traditions of migrations that are centuries old in Africa, illiteracy or low education levels, preparations for marriage (sometimes having to engage in domestic work to pay for dowry),
- (2) economic factors such as the imbalance between rural and urban wealth levels and a desire to escape poverty,
- (3) juridical and political factors such as absence of legislation and the ignorance of parents and trafficked persons of their rights under the law, or mistrust of the law and open borders.³⁸⁷

Forms of trafficking reported

Human trafficking for sexual exploitation is reported more frequently than trafficking for forced labour at the global level. Reporting varies per (sub-) region, with sexual exploitation reported by many sources in relation to Central and South Eastern Europe and by relatively fewer to Africa. Where sources expressly report exploitation of boys, this tends to be in the labour market, while sexual exploitation is reported more frequently among female children. For several years, trafficking for sexual exploitation has dominated discussions concerning the purpose of human trafficking. Trafficking in persons for forced labour has not been viewed as a significant issue in many countries, and the identification of trafficking victims who are exploited through forced labour has been even less successful than in the case of sexual exploitation (this will be discussed

386 UNESCO: Searching for Best Practices to Counter Human Trafficking in Africa: A Focus on Women and Children, p. 11.

387 Ibid.

further below). Most identified human trafficking victims have been women and children who seem to be particularly vulnerable to sexual exploitation. Far fewer sources have identified either male victims or victims who have been subjected to forced labour, when the popular perception, at least, is that it is men especially who might be expected to be trafficked for forced labour purposes.³⁸⁸

Traffickers' characteristics

Two main types of trafficking groups can be identified: one is hierarchically structured, characterized by strong internal lines of control and discipline. In addition to human trafficking, these groups are heavily involved in the trans-national trafficking of various goods, including drugs and firearms, the smuggling of migrants, and kidnapping. Most of these groups have a single leadership structure, a strong social or ethnic identity and used violence as an essential means to carrying out their activities. The primary activity of the second type of groups is human trafficking, and they may be classified as 'core groups'. Such groups are characterized as consisting of a limited number of individuals forming a relatively tight and structured core group surrounded by a loose network of "associates", with the small size of the group helping to maintain internal discipline. Such groups seldom have a social or ethnic identity. 'Core groups' seem to be strictly profit-orientated and opportunistic, shifting between illegal activities on the basis of where the most profits can be generated. Groups of this type focusing on human trafficking operated across several borders and were extremely violent.³⁸⁹

Current research on trafficking in South Africa indicates an array of national players, some of them opportunists who combine their trafficking activities with other legitimate employment, (e.g. long distance truck drivers), many who are known to the trafficked person and their family, family members themselves (refugees), law enforcement officials, and others who belong to cross-border networks that may or not feed into large-scale regional operations. Much is speculation in this area, and it is not difficult to imagine a scenario of fluid, individual or group arrangements that form, mutate and develop according to shifting circumstance.

UNESCO: *Human Trafficking in South Africa: Root Causes and Recommendations*

Various typologies may help identify the most important actors: the opportunistic amateur, the most pervasive but least important group, composed of individuals or small groups of friends, generally small-time opportunists and confidence tricksters who are prompted by an economic crisis or simple greed. These often use the "boy-friend" approach to lure a woman into a position where she is powerless. These small scale entrepreneurs are the

388 UNODC: *Trafficking in Persons: Global Patterns*. 2006. p. 33.

389 *Ibid.* p. 35.

most present group in prosecutions.³⁹⁰ If successful, opportunists tend to get more adept and a small network will emerge. Other related actions are taken within the following contexts: trans-national criminal organisations with broad portfolios of activity; broad-based trans-national organizations with control over transportation resources; corruption of government officials and trans-national links in various criminal fields of activity; traditional criminal organisations such as the Italian Mafia;³⁹¹ ethnically based trafficking organisations such as Albanian and Kosovo-Albanian networks involved in trafficking of women, drugs and arms with an extended infrastructure and routes and methods which renders the “product” almost irrelevant – contraband of all kinds can be smuggled; criminal controlled business: and organised crime infiltration of and control over illicit business like import-export companies and criminal-controlled travel agencies. The latter have well-established trade links, affiliations and existing and seemingly legitimate cover for travel and established financial channels to move funds and process payments. These categories are not mutually exclusive. Various groups will work together.³⁹²

“SOFT TRAFFICKING”

Examples of exploitation of immigrants in Portugal³⁹³ show that they were victims of organised crime as well as targets for exploitation by employers. The former involved practices such as extortion and induced indebtedness, retention of documents, physical violence, and control of movement. But exploitation was also less “drastic”.

390 Shelley, L.: Human Trafficking as a Form of Trans-national Crime, in Lee, M.: *Human Trafficking*, p. 122.

391 An interesting factor not analysed here is the political-criminal context and the factors that are involved when politics and organised crime are very much linked and perhaps even co-dependent and where the criminal organisation works closely and sometimes more or less openly with high level politicians on various levels (local, regional and national). See Lodato, S. and Travaglio, M.: Intocabili. BUR 2005.

An example where the State condones trafficking is the situation of Moldova because the crisis makes it impossible for the state to take care of the population. See Williams, P.: Trafficking in Women: The Role of Trans-national Organised Crime, in Cameron, S. and Newman, E. (Eds.): *Trafficking in Human – social, cultural and political dimensions*, p. 146.

392 Williams, P.: Trafficking in Women: The Role of Trans-national Organised Crime, in Cameron, S. and Newman, E. (Eds.): *Trafficking in Human – social, cultural and political dimensions*, p. 137-38.

393 Example from Pereira, S. and Vasconcelos, J.: *Human Trafficking and Forced Labour – Case studies and responses from Portugal*, International Labour Office, Geneva, 2008.

In the construction sector: Exploitation by employers consisted of situations involving: Irregularities in payment of wages: non-payment (there are several cases in which sub-contractors filed for bankruptcy and failed to pay their workers); delayed payment (contractors often only pay their workers when the job has been finished which means that workers in remote locations have no means of leaving the place); unequal pay (e.g. in 2000/2001, an Eastern European immigrant, working 13-14 hours per day including weekends was paid €400 to €450 per month while a Portuguese worker earned around €1,000); Non-payment or only partial payment of social security contributions: in many cases employers trick their workers by saying that they are paying their contributions while paying only a few days per month (this also applies to Portuguese workers, but is worse for immigrants as it has implications for renewal of their visas); Provision of an employment contract only against payment or false promises about the terms and conditions of employment. An employment contract is essential for an immigrant worker to obtain or renew her/his visa or stay permit; Prolonged working hours without payment of overtime; Arbitrary dismissal without payment of compensation and outstanding wages – workers, including Portuguese workers, are sometimes fired when the job is almost finished and are not paid their wages or given any reason for their dismissal. In such cases, the recovery of wages and compensation owed is hampered by the absence of a contract. Non-compliance with health and safety regulations, including no industrial accident insurance. The occupational hazards to which immigrant workers, particularly Eastern Europeans, are exposed are greater because they are unfamiliar with construction work and the safety precautions that should be taken. Besides, they are often made to carry out the most dangerous tasks; There are reports of workers being physically assaulted or fearing physical assault. For instance, in the case of immigrants from Eastern Europe who were not familiar with the work, language difficulties gave rise to situations in which they were ill treated by their supervisor; Threats of being reported to the authorities (irregular status); Some employers confiscate employees' identity documents on the pretext of legalising their situation. As a result, employees are at the mercy of their employer.

Domestic sector: Non-payment of wages: In cases where the employer stops paying the wages of the household employee and refuses to allow her to enter the home, it is often hard to recover outstanding wages. There is no employment contract and wages are often paid in cash, making it very hard to prove the existence of an employment relationship; Absence of a contract: When domestic workers are employed by an agency they generally have a contract, but those employed in private homes often do not have one. There are cases in which women immigrants have signed employment contracts that they do not understand. These often stipulate wage rates that are below what has been agreed verbally, or even provide for non-payment of wages. In other cases, where there

is a valid contract it is not adhered to. In some urban cleaning firms, for example, there are collective contracts that provide for the transfer of workers from one firm to another, according to the needs of the firms. Despite this, employees are often dismissed when a contract with the client ends. Immigrant workers are usually given the worst working hours, those that no one else wants, but which they agree to because they have no other alternative. They work, for example, three hours in the morning, and possibly a further three hours in the afternoon, with a different contract for each period. These irregular working hours make life particularly complicated for single [women] because arranging childcare is not easy. The short hours also mean that they often earn less than €180 a month. In the case of live-in domestic employees, there are no fixed working hours and they can be on call almost 24-hours a day. Indeed the employer's family assumes that they should be available day and night, depriving them of freedom, privacy, or social life. Cases in which women, especially live-in domestic employees and those repressed by their husbands or partners, were working in situations that could be considered forced labour. These situations included such practices as retention of passports, often on the pretext that it was necessary for the legalisation process, confinement at the workplace, and control over contacts with the outside world. Long working hours of up to 60 to 70 hours per week, sometimes more: Workers often only have one day off a week, and have to work on national holidays without being paid overtime for doing so. This was one of the most common complaints of the immigrant workers interviewed; Payment of wages at a rate that is less than the rate stipulated in the collective bargaining agreement. There is, however, a difference of opinion regarding this practice. The absence of a written contract of employment for foreign workers is common, even if employers are making the required Social Security contributions.

In the face of increasing frustrations with the definition of trafficking, or perhaps more its representations, and the ensuing classification of people as trafficked victims as well as the implementation of trafficking legislation, it is important to identify the extent to which migrant domestic workers, who have entered a country legally and with contracts, can be considered as having been trafficked. It is also important to determine who are the traffickers involved. Recent surveys in Lebanon and in Cairo, Egypt have identified UN convention violations in terms of wages, conditions and treatment of migrant domestic workers that suggest a significant proportion may be classified as trafficked persons. For example, Articles 13, 23 and 24 of the 1948 Universal Declaration of Human Rights are being violated daily against foreign domestic workers in the Middle East. These relate to cruel, inhuman and degrading treatment; the freedom of movement; the right to free choice of employment; to just and favourable conditions of work; the right to equal pay for equal work; the right to form and join trade unions; the right to rest and leisure, including reasonable limitations of working hours and periodic holidays with pay.³⁹⁴

However, the question arises whether the harm done to workers on arrival at their place of work should be classified (and assisted) as victims of trafficking or as exploited workers. One could argue that not all harms done to migrants can be classified as trafficking

394 Jureidini, R.: *Trafficking and Contract Migrant Workers in the Middle East*.

harms. At the same time, if one avoids the use of the term “trafficking” altogether, in favour of using civil and criminal laws to address exploitations and abuses, is there a danger of ignoring the organized, systemic structures that exist (such as violence or the threat of violence, restrictions on the freedom of movement, as well as trans-national organized crime) and which are of concern?³⁹⁵

Those employees who are not allowed to leave the house – i.e. those whose right to freedom of movement is violated - are not necessarily classified as caught up in involuntary servitude. Just as it is difficult to prove in some circumstances that the giving up of a passport to the employer is not voluntary, so it is also unclear to what extent the restriction of migrant domestic workers inside the household (even being locked in) is involuntary. It may be objectively against her/his interests, but there are cases where it is not seen as a problem by the worker, as long as they are treated decently otherwise. And even then, they may well prefer to endure the hardship for the money and future prospects. On the other hand, the essence of [trafficking in human beings] is that the victim is removed from their home environment, “under the effective control of another, and exploited for the gain of others”. However, control is mainly maintained because of “some illegal activity of the victim such as breaking immigration laws, or local employment laws, that make them vulnerable to exploitation.”³⁹⁶

Now the question is if such cases constitute trafficking according to the Palermo Protocol and if this can provide an adequate answer to such cases. As has been examined above a major flaw in the Protocol is its silence on protection of victims who have themselves broken national laws in the course of the trafficking, which is part of why they are vulnerable. This does however not mean that the Protocol does not recognise such cases as cases of trafficking when the components of trafficking are present. And again it should not be forgotten that also non-slavery like situations can very well amount to exploitation in the sense of the definition. It should also be underlined that exploitation which does not amount to trafficking because e.g. the criminal organisation is absent – e.g. when a family is exploiting a domestic worker, can still be prosecuted according to national laws, and many human rights obligations would apply also to non-nationals which the State also has an obligation to protect so a number of international obligations would offer protection to such victims. It is always important to remember that the Palermo Protocol does not exist in a void – it is part of an international legal framework which consists of many instruments and many legal “systems” – criminal law, trans-national, national, international; labour law, national and international; human rights law.

395 Ibid.

396 Ibid. and Piotrowicz, R.: *Trafficking of Human Beings and their Human Rights in the Migration Context*.

Implementation

As the ratification of the Protocol by a State is usually followed by the adoption of relevant legislation and national action plans within a matter of years rather than months, the implementation of national anti-trafficking legislation that is in line with the Protocol is often a very lengthy process. Thus, many States (most of those who have not yet ratified the Protocol and many who have already ratified it) still use different definitions regarding the act of trafficking, the means of trafficking or the purpose thereof.³⁹⁷ For example, many national legislations do not include internal trafficking in their definition of trafficking in persons but instead refer to trans-national trafficking only, while the Protocol arguably, and other national and regional human rights instruments (such as the 2005 CoE Convention on Action Against Trafficking in Human Beings) cover also internal trafficking.³⁹⁸ In many other countries, it appears that internal trafficking in persons, even if covered by relevant national legislation, receives less attention by law enforcement authorities than trans-national trafficking across borders. One reason why trans-national trafficking may receive relatively more attention than internal trafficking is the stronger involvement of international organizations in anti-human trafficking activities and victim support services when it comes to cross-border trafficking, which is clearly related to the specific (international) mandates of these service providers. Another problem arises out of differences over the legal age of minors. Not all countries apply the definition of children contained in the Protocol as persons under 18 years of age but instead have different definitions of who is a child, including in national family and child

397 As of November 2008, 63% of the 155 countries and territories the 2008 UNODC Global Report on Trafficking in Persons covered had passed laws against trafficking in persons addressing the major forms of trafficking. These laws criminalize, at the very least, sexual exploitation and forced labour and have no restriction regarding the age or gender of the victim. Another 16% had passed anti-trafficking laws that cover only certain elements of the Protocol definition. For example, laws that are limited to sexual exploitation or only apply to female or child victims. In 2003, only one third of the countries covered by this report had legislation against human trafficking; at the end of 2008, four-fifths did. The number of countries having anti-trafficking legislation more than doubled between 2003 and 2008 in response to the passage of the Protocol. In addition, 54% of responding countries have established a special anti-human trafficking police unit, and more than half have developed a national action plan to deal with this issue. Given that this legislative framework is very new, it is remarkable that 91 countries (57% of the reporting countries) reported at least one human trafficking prosecution, and 73 countries reported at least one conviction. A core of 47 countries reported making at least 10 convictions per year, with 15 making at least five times this number.

398 UNGIFT: The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper 024 Workshop: Quantifying Human Trafficking, its Impact and the Responses to it. p. 9.

protection laws. Such differences become especially significant when trying to define and measure trafficking for sexual exploitation of children, trafficking for organ removal or when trying to decide whether the illicit recruitment or use of children in armed conflicts falls within the definition of child trafficking. As defined by the Protocol, the crime of child trafficking does not require the use of criminal means such as coercion or deception, as, for children, the existence of the victim's consent is irrelevant. The problem of child trafficking and child soldiers has received particular attention in Western and Central Africa. In many countries of the region, there are a number of laws on child protection that can be applied even if these are not necessarily specific anti-trafficking offences. However, in the absence of more general anti-trafficking laws in some countries, only children under 18 years of age are taken into consideration by the national legislation.³⁹⁹

There are also significant differences in various anti-trafficking laws when it comes to the purpose of exploitation. In many countries, the specific offence of trafficking in persons extends only to sexual exploitation while leaving trafficking for other forms of exploitation out. Where national legislation extends only to trafficking for sexual exploitation, trafficking for some other purposes may be prosecuted under national penal law, for example, under a more general offence of "reducing someone to a condition analogous to slavery" or similar offences. In countries where such provisions are not available under penal law, or where the application of penal law has proven to be too cumbersome in practice, the offence of trafficking for forced labour is sometimes also pursued under existing labour legislation rather than criminal law. This means that the resulting penalties are likely to be different than provided for in criminal or penal law (for example, they may be less severe for the perpetrators or consist of the payment of collective damages rather than incarceration for the same offence).⁴⁰⁰ Whatever the outcome, such cases would not be recorded in criminal justice statistics on human trafficking, as the prosecutions and convictions would fall under different categories. Though the implementation of the Trafficking Protocol varies from country to country,⁴⁰¹ the general picture shows that few

399 Ibid.

400 Ibid.

401 See in OSCE: Human Trafficking for Labour Exploitation/Forced and Bonded Labour: Prosecution of Offenders, Justice for Victims. Report of the 5th Alliance against Trafficking in Persons Conferences on Human Trafficking for:

Labour Exploitation/Forced and Bonded Labour Vienna, 16 and 17 November 2006: The experiences in the United States show a continuum in the workplace between forced labour and labour exploitation. One could speak of mixed workplaces in which people can find themselves in different positions. The United States has a broad spectrum of laws to address this variety of situations, a large part of which stems from the abolition of slavery two centuries ago. Moreover, in 2000 the Trafficking Victims Protection Act (TVPA) was adopted. The Act contains three important elements: It criminalises broader forms of coercion by including more subtle forms of psychological control. Such psychological coercion can be based on factors which include culture, threats of harm to family members, hopes for a better life or false promises. It offers a generous scheme of social welfare benefits to victims, along with residence in the form of visas that allow victims and their families to stay in the U.S. for a period of three years. It requires cooperation between law enforcement and social services. Law enforcement must write a letter for the visa procedure to start, of which the social service providers are dependent, so this forces both parties to co-operate. Apart from the TVPA, the federal laws contain provisions on

victims are identified and protected and few perpetrators prosecuted. Reasons include the newness of the legislation,⁴⁰² lack of conceptual clarity, resources as well as political will making the fight against this form of trafficking a priority, the disproportionate focus on combating irregular migration and on the irregular status of the victims rather than on the conditions to which they are subjected, and the lack of assistance and protection services for victims.⁴⁰³ Laws and administrative regulations may leave enforcement authorities with uncertainty as to where to draw the line between trafficking, smuggling, sub-standard working conditions and forced or illegal child labour. There has to be a clear political mandate assigned to different enforcement authorities, e.g. through the establishment of specialized police or labour inspection units. Law enforcement authorities are often inadequately equipped and trained to identify and prosecute forced labour. If police or labour inspectors seriously lack resources and recognition, they may become part of the problem through corruption rather than part of the solution. Furthermore, since trafficking involves the movement of people and is usually hidden from public view, special identification techniques are required. Law enforcement authorities, e.g. police, border

peonage, involuntary servitude, forced labour, trafficking into servitude, sex trafficking and document servitude (“holding the actual or purported identity documents in the course of committing or with intent to commit any trafficking crime”). Forced labour is defined as “providing or obtaining another person’s labour or services by threats of serious harm or physical constraint, by means of any scheme, plan or pattern intended to instil fear of serious harm or physical constraint; or by means of the abuse or threatened abuse of legal process”. The definition of coercion in the trafficking provisions matches the concept of coercion in the Forced Labour Statute. ‘Serious harm’ is subjectively defined: it must have led to the decision of the victim not to run away. Which type of coercion is necessary to achieve this depends on individual circumstances. Statutory examples include isolation, sexual abuse, starvation, threats, psychological harm and coercion. Moreover, abuse of legal process (e.g. threat of deportation or detention) or holding identity documents are separate offences. These are effective tools: if it is not possible to make a trafficking case because of problems with witnesses, it is possible to prosecute on these minor offences. Trafficking can also be prosecuted under violent crime offences (extortion, kidnapping, hostage taking), immigration offences and labour offences. Other relevant provisions include legal provisions on mandatory victim restitution and forfeiture of criminal property. Forfeited criminal assets and fines are used to fund victim provisions and to provide compensation to victims. Policy initiatives to overcome these problems include targeted messaging to migrant populations, training of local law enforcement, outreach to specific first responders like intake officers at hospitals, emergency room personnel, restaurant health inspectors, and people who install telephones in houses, and co-operation with the Department of Labour. The latter is important because labour inspectors can enter any workplace and report back to law enforcement in case of suspicions of trafficking or forced labour. Another initiative, in co-operation with the Mexican authorities, consists in providing Mexican workers with a card that asks them to call their own consulate in case of labour abuse. Particularly for undocumented workers this is a more comfortable route, which has led to a number of prosecutions. Currently half of the cases are reported by local officers, 40 % by NGOs, and only 10 % by federal officers.

402 UNODC: *Global Report on Trends in Trafficking in Persons 2008*, p. 22-24: One of the elements emerging from the collected data is that most legislative frameworks on trafficking in persons have been developed only within the last few years. The real impact of the Protocol appears through a time-analysis of the dates when countries first introduced trafficking in persons legislation.

403 OSCE: *Human Trafficking for Labour Exploitation/Forced and Bonded Labour: Prosecution of Offenders, Justice for Victims*. Report of the 5th Alliance against Trafficking in Persons Conferences on Human Trafficking for:

Labour Exploitation/Forced and Bonded Labour Vienna, 16 and 17 November 2006. p. 2.

guards, labour inspectors, immigration authorities, often lack cooperation agreements among themselves as well as with other actors that could come into contact with possible victims. Law enforcement has to blend with effective victim protection and rehabilitation programmes, applying a gender-sensitive approach in trafficking investigations. In most cases, law enforcement authorities will depend on the cooperation of the victim in order to prosecute the perpetrators. If victims have little to gain but a lot to lose (such as deportation) then they will be very reluctant to come forward and denounce their exploiters.⁴⁰⁴ Despite the lessons learned in combating trafficking for sexual exploitation, many States do not yet recognize the strong link between assistance and protection of the victims and an effective prosecution⁴⁰⁵ and conviction of the offenders.⁴⁰⁶

Notwithstanding difficulties the number of convictions is increasing, but not proportionately to the growing awareness (and probably, size) of the problem. Most convictions still take place in only a few countries. While these countries may have human trafficking problems more serious than others, they are doing something about them. On the other hand, as of 2007/08, two out of every five countries covered by the UNODC's Global Report on Trafficking had not recorded a single conviction. Either they are blind to the problem, or they are ill-equipped to deal with it.⁴⁰⁷

As of 2007, about 40% of the world had not recorded a single conviction for trafficking in persons.⁴⁰⁸ Not only are traffickers not convicted in many countries, but when convictions are recorded, the numbers seem low compared to the estimated number of victims. The bulk of convictions were recorded in a few regions, mainly Western and Central Europe, Eastern Europe and Central Asia, and South Asia.⁴⁰⁹

404 ILO Actions Against Trafficking, ILO 2008. p. 11.

405 UNODC encourages States to: Undertake measures to ensure that travel and identity documents cannot easily be misused, falsified, unlawfully altered, replicated or issued; and to ensure the integrity and security of travel and identity documents and to prevent their unlawful creation, issuance and use; To enact domestic laws making human trafficking a criminal offence. Such laws should also establish as criminal offences attempting to commit, participating as an accomplice, and organizing or directing other persons to commit human trafficking; Ensure such legislation applies to victims of all ages and both sexes; and clearly distinguish between trafficking in persons and other forms of irregular migration; Ensure that the system of penalties is adequate, given the severity of the crime; Protect the privacy and identity of victims in appropriate cases; Establish measures to protect victims from revictimization; Implement measures providing to victims information on proceedings, assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings; Implement measures that offer victims the possibility of obtaining compensation.

406 OSCE: Human Trafficking for Labour Exploitation/Forced and Bonded Labour: Prosecution of Offenders, Justice for Victims. Report of the 5th Alliance against Trafficking in Persons Conferences on Human Trafficking for:

Labour Exploitation/Forced and Bonded Labour Vienna, 16 and 17 November 2006. p. 2.

407 UNODC: *Global Report on Trafficking in Persons, 2008*, p. 6.

408 Detailed data and numbers regarding convictions divided by countries and regions can be found in UNODC: *Toolkit To Combat Trafficking In Persons, 2008*.

409 UNODC: *Toolkit To Combat Trafficking In Persons, 2008*, p. 42.

It should not be overlooked that the resources needed to reach traffickers are significant. An investigation into a network requires years of police work, the retention of translators to interview victims and analyses of confiscated records, and the use of sophisticated technology to map networks and victims. Without a complex analysis trafficking and also smuggling appear as individual and uncoordinated cells exploiting only a limited number of individuals.⁴¹⁰

One way of addressing trafficking in persons is to demolish the markets generating profits to the criminals. This might be attempted in a manner of ways including tackling the demand for cheap labour and exploitative services, or addressing the underlying poverty and lack of opportunities that creates a willing pool of potential victims. Another is to target the intermediaries who have built a criminal industry as the exploitative go-betweens who deal in human beings, and the profits they generate. To target the human trafficking industry would require identification of traffickers in order to be able to investigate trafficking in persons cases, and prosecute and convict offenders.⁴¹¹

“Trafficking is essentially about the acquisition and management of a labour force, with the purpose to lower labour costs to increase profits. Key questions become, who are the sellers and buyers of trafficked labour, who are the brokers, who is the highest beneficiary? To answer these questions it is imperative to gain insight in the labour market everywhere where large numbers of migrant workers are present. Second, trafficked labour is purchased to increase profit. This decision has risks. The labour force can run away or not perform, law enforcement may interfere. Those risks must be reduced or eliminated for the crime to be profitable. “Management tools” to control victims include debt bondage (victims cannot send money home), isolation (victims fear law enforcement and fail to recognize assistance), false hope (victims believe that if they comply things will get better), threat of exposure (victims feel that they have failed and are ashamed) and the use and threat of violence or of reprisals against loved ones (victims will tolerate the abuse to protect their family). The overall result is physical and psychological imprisonment and abuse. If we understand this, we also understand why so few victims escape, why they are so hard to identify and why it is so hard to find evidence of force, fraud or coercion.”⁴¹²

410 Shelley, L.: Human Trafficking as a Form of Trans-national Crime, in Lee, M.: *Human Trafficking*, p. 123.

411 UNODC: *Trafficking in Persons, Global Patterns*. 2006. p. 35.

412 T. March Bell, Counsel to the Assistant Attorney General, Civil Rights Division, U.S. in OSCE: *Human Trafficking for Labour Exploitation/Forced and Bonded Labour: Prosecution of Offenders, Justice for Victims*. Report of the 5th Alliance against Trafficking in Persons Conferences on Human

The fact that there are very few prosecuted cases of trafficking for labour exploitation in e.g. European destination states⁴¹³ is related to the difficulties in obtaining the right

Trafficking for Labour Exploitation/Forced and Bonded Labour Vienna, 16 and 17 November 2006. p. 6.

- 413 See e.g. In OSCE Human Trafficking for Labour Exploitation/Forced and Bonded Labour: Identification – Prevention – Prosecution Report of the 3rd Alliance against Trafficking in Persons Conferences on Human Trafficking for Labour Exploitation/Forced and Bonded Labour. Vienna, 7 and 8 November 2005 for country examples. Examples of successful prosecution include Belgium: In 2005, the Belgian Criminal Code was amended to meet the most recent international requirements. The new legislation makes a clear distinction between trafficking and smuggling and covers exploitation of both foreign and Belgian workers. Charging unreasonably high rents for housing by ‘slum landlords’ is defined as a separate offence. At the same time, a number of bodies have been established to ensure cooperation and co-ordination between the relevant agencies, such as police, the Public Prosecutors Office, the judiciary and specialized NGOs. Under the old law, prosecutions for both smuggling and trafficking were based on the article that prohibited helping a foreigner to obtain residence and thereby abusing his or her ‘position of vulnerability’. In practice the latter concept appeared to give rise to different interpretations by the court. In the case of a Guinean woman exploited as domestic worker, the Magistrate Court accepted abuse of a vulnerable position because at a certain point she found herself in Belgium without a valid residence and work permit. Her passport and other papers were taken from her so that she felt she could not move around freely without the risk of being arrested, and she lived and worked under ‘intolerable conditions’, notably without any form of social protection against accidents and illness. The judgement, however, was overruled by the Court of Appeal on the arguments that it was not established that she would not have been given her passport if she had asked for it, that the couple had undertaken steps to legalize her stay, that she enjoyed benefits in kind and received money for dental treatment, and, most notably, because, although she worked long hours, ‘this was in line with the usual domestic tasks of a housekeeper’. Moreover, the Court noted that she might have exaggerated her claims in order to obtain the right to stay in Belgium under the trafficking statute. This case was not presented before the European Court on Human Rights. Otherwise, the decision would probably have been different, as this case is very similar to the case of *Siliadin vs. France*. Another case concerned an Indian accused of forcing fellow compatriots to work for him as flower sellers. In this case, the Court of Appeal accepted abuse of a position of vulnerability in light of the illegal administrative status of the workers, the precarious situation with respect to accommodation, the complete subservience of the workers through the use of violence and the obligation of the workers to hand over all their earnings. The new law establishes behaviour ‘aimed at undermining human dignity’ as an offence, regardless of the means used. Abuse of a position of vulnerability is removed from the basic charge and classified as an aggravating circumstance. This leaves considerable discretion to the judge to decide whether or not a person has been put to work under conditions contrary to human dignity. This can, for example, include the performance of work without remuneration or for a remuneration which is disproportionate to the number of hours worked, or the presence of substandard working conditions without health and safety protections. The concept of trafficking in the area of labour exploitation is thus very extensive and is defined by its aim, i.e. exploitation through employment under conditions contrary to human dignity. It includes not only actual employment under these conditions but also the intention to do so, and the *modus operandi* (such as abuse of a position of vulnerability) only come into play as aggravating circumstances. Italy: The relevant articles in the Italian Criminal Code provide for different degrees of severity, ranging from the use of illegal immigrants and the exploitation of their illegal status for the purpose of labour, to incitement to illegal migration for the purpose of exploitation, to holding a person in slavery. In addition, the law provides for special protections for exploited workers (Article 18 Legislative Decree No. 286, 25 July 1998). Since 2000, there have been a number of illustrative cases. The ‘Kevin Cosmetics’ case concerned the exploitation of illegal Romanian men and women by a company led by an Italian businessman and located in a remote area. The workers were housed in the same building as they worked, and arbitrarily

paid sums equal to approximately half of the remuneration due in a regularized working situation. Before raiding the company, the police had arranged that the workers would immediately be taken care of by an NGO. The promise of care appeared to be a decisive factor. Through the prompt action of all involved, the workers could rapidly be granted a residence permit on social protection grounds (Article 18). Ultimately they were granted regular working permits and are now employed elsewhere in Italy. Interestingly enough, the case actually started as an investigation into business fraud and product safety. Article 18 was also applied to a case involving eight Romanian workers who had witnessed the murder of one of their colleagues by their employer, a building contractor, and had initially disappeared out of fear of threats made by the employer. A consistent feature of migrant workers employed illegally or held in slavery is their complete isolation: they do not speak the language; they live in accommodation provided for the employer; their identity papers are withheld, and they are afraid to turn to the authorities. Success factors in the Kevin case were the 'soft' initial contact with the authorities, the provision of language services, the rapid involvement of the various bodies, and the positive attitude of the police. This not only broke their isolation, but also showed the ability of the public authorities to offer an alternative to the exploiters. In general, effective prosecution calls for a proactive legal approach focusing on the protection of human labour and human dignity rather than on the undesirable social impact of migration, and concentrating on the prevention of these offences and the organized crime behind it, rather than the visible preservation of public order, along with the correct application of the social protection statute (Article 18). Based on the experiences of NGOs in the area of trafficking for sexual exploitation and the cases examined, a 'hospitality network' has been developed in the areas of Varese, Busto Arsizio and Malpensa, that between 2003 and 2004 offered protection to around 100 foreign workers during the course of investigations, leading to the arrest of 27 employers.

See UNODC: *Toolkit to Prevent Trafficking in Persons*. p. 99-107

Section 262 a of the Danish Penal Code explicitly criminalizes human trafficking. It reads: "a person who by an act of recruiting, transporting, transferring, housing or subsequently receiving another person shall be guilty of trafficking in human beings and shall be liable to a term of imprisonment of no more than eight years".

Federal Law No. 162-Φ3 "On introducing changes and additions to the Criminal Code of the Russian Federation" entered into effect in Russia on 16 December 2003. With the adoption of this law, the term "trafficking in persons" was given legal definition. According to the Criminal Code as amended by this Law, trafficking in persons is "the buying and selling of a person or other actions committed for the purpose of his exploitation in the form of recruitment, transportation, transfer, harbouring or receipt". The Law differentiates the criminal liability for trafficking in persons; depending on the gravity of the crime (committed with regard to two or more persons, with the use or threat of force, etc.), the punishment might be up to 15 years of imprisonment. The amended Criminal Code envisages criminal liability for trafficking in persons (art. 127-1), the use of slave labour (art. 127-2), the involvement of minors in engaging in prostitution (art. 240, para. 3), the organization of engaging in prostitution (art. 241) and the manufacture and distribution of materials or objects with pornographic depictions of minors (art. 242-1).

In 2006, Israel amended its trafficking legislation to cover all forms of trafficking. The Prohibition of Trafficking in Persons (Legislative Amendments) Law 5766-2006 of 29 October 2006 defines trafficking as "transaction in persons" and adds article 377A, Trafficking in persons, to the Penal Law: Anyone who carries on a transaction in a person for one of the following purposes or in so acting places the person in danger of one of the following, shall be liable to sixteen years' imprisonment: 1. Removing an organ from the person's body; 2. Giving birth to a child and taking the child away; 3. Subjecting the person to slavery; 4. Subjecting the person to forced labour; 5. Instigating the person to commit an act of prostitution; 6. Instigating the person to take part in an obscene publication or obscene display; 7. Committing a sexual offence against the person.

Colombian Law 985/2005 was drafted with the support of UNODC. Of particular importance is an amendment to article 188A of Law 599/2000 to harmonize the Criminal Code with the definition of

evidence to prove the crime and to identify and secure the arrest of suspects. The problems of building a case are exacerbated by several elements in trans-national cases including the procedural and logistical obstacles posed by the fact that the evidence and witnesses may only be available in another State's jurisdiction (usually the country of origin of the victim and/or the country to which the victim has been returned).

In order to effectively address trafficking, direct exchange and sharing of information on local, national, regional, and international levels is needed, without confusing trafficking with control of prostitution or illegal migration. Differences in legislation are among the greatest challenges in international co-operation.⁴¹⁴ Some countries have provisions that cover all elements of trafficking while others have separate provisions for the different elements that constitute trafficking. Again others have different provisions for the various forms of trafficking, for example trafficking for sexual exploitation and for labour exploitation. More unity is urgently needed in this respect. There are several reasons why there are so few trafficking cases identified.

The complex character of trafficking and its connection to other types of (organized) crime, the high levels of corruption, lack of co-operation between agencies and between law enforcement agencies and NGOs, poor intelligence systems, weak border controls,⁴¹⁵

human trafficking contained in article 3 of the Trafficking in Persons Protocol. Article 3 of Colombian Law No. 985/2005 reads: *Article 3. Human trafficking.* Article 188A of Law 599 of 2000, supplemented by Law 747 of 2002 and amended by Law 890 of 2004, will be as follows: *Article 188 A. Human Trafficking.* He who captures, transports, accommodates or receives a person, within the national territory or towards another country, for purposes of exploitation, will incur a prison sentence of thirteen (13) to twenty-three (23) years and a fine of eight hundred (800) to one thousand five hundred (1,500) current minimum monthly legal salaries. For the purposes of this article, by exploitation will be understood the obtainment of economic or any other type of benefit for oneself or others, through the exploitation of prostitution or other forms of sexual exploitation, forced work or service, slavery or practices similar to slavery, the exploitation of the begging of others, servile matrimony, the extraction of organs, sexual tourism or other forms of exploitation. The consent given by the victim to any form of exploitation defined in this article will not constitute a cause for exoneration from penal responsibility. Law 985/2005 also lays down provisions concerning the Inter-institutional Committee for the Fight against Trafficking in Persons and establishes the National Anti-trafficking Strategy as public policy. In addition, the law establishes administrative measures to implement the National Strategy (based on recommendations submitted by UNODC and the Ministry of the Interior and Justice) and introduces an amendment with regard to the crime of trafficking to make it easier to prosecute traffickers; as a result of this amendment it is no longer necessary to obtain consent from adult or child victims to proceed with penal action, prosecution and punishment. The law contains key sections on prevention, victim protection and assistance, strengthening actions against trafficking in persons, the Inter-institutional Committee for the Fight against Trafficking in Persons, as well as on a national information system to combat trafficking to assist with policy formation and the monitoring of its implementation.

414 United Nations High Commissioner For Human Rights Principles and Guidelines on Human Rights and Trafficking, E/2002/68/Add.1 (2002). Guideline 11: Cooperation and coordination between States and regions.

415 Porous borders, combined with civil and political unrest and a lack of economic opportunity, have ensured a consistent southward flow of both legal and irregular migrants in southern Africa. Trafficking victims are difficult to distinguish amid these flows. Police/ border officials are believed to be complicit

lack of equipment, inadequate legal structures and application of the law, lack of trained staff and expertise, and inadequate victim/witness support and protection are all factors contributing to a low rate of processes. However, until now no systematic research has been done on the reasons for the low rate of convictions. It is clear, however, that the most pressing problem is not so much lack of adequate laws, but lack of implementation of those laws.⁴¹⁶

Many National Action Plans⁴¹⁷ (NAP) still focus exclusively on women and children but there is an increasing trend also to address labour trafficking, which tends to affect men as well as women and children. Another trend relates to the strategy of NAPs. While most of the earlier NAPs emphasized prosecution and the role of law enforcement authorities, more recently adopted plans have a broader vision on prevention and demand reduction that includes improvement of migration management as an important tool.

with traffickers, accepting bribes for the passage of undocumented travellers. UNESCO: Human Trafficking in Mozambique, p. 34 and UNESCO: Human Trafficking in South Africa, p. 34.

416 OSCE: Human Trafficking for Labour Exploitation/Forced and Bonded Labour: Prosecution of Offenders, Justice for Victims. Report of the 5th Alliance against Trafficking in Persons Conferences on Human Trafficking for:

Labour Exploitation/Forced and Bonded Labour Vienna, 16 and 17 November 2006. p. 5

417 The Government of Norway issued the action plan for the period 2006-2009, to stop trafficking in persons, both nationally and internationally. The plan contains 37 measures aimed at facilitating coordinated, coherent efforts to stop trafficking and assist and protect victims. The measures include extending the reflection period so that presumed victims may be granted a temporary work permit for up to six months, expanding the free legal counsel scheme and increasing the provision of free legal aid for victims of trafficking, providing assistance to ensure safe repatriation and resettlement for victims who wish to return to their country of origin.

In March 2007, the Government of Myanmar, with the assistance of UNIAP, convened a national workshop of Government agencies, law enforcement officials, United Nations agencies, international and national non-governmental organizations and other anti-trafficking stakeholders to review the country's draft national plan of action. The proposed national plan of action (2007-2011), drafted in accordance with the Coordinated Mekong Ministerial Initiative against Trafficking (COMMIT) Subregional Plan of Action, requires Myanmar: 1. To implement effectively prevention, prosecution, protection and rehabilitation activities; 2. To strengthen activities among relevant ministries, organizations, national and international non-governmental organizations and the private sector; 3. To strengthen cooperation with regional and international agencies in combatting trans-national trafficking. In response to these requirements, the proposed national plan of action contains five substantive areas: policy and cooperation; prevention; prosecution; protection; and capacity-building. The highly collaborative approach to the drafting of the national plan of action hopefully signifies that a similarly collaborative approach will be taken towards its implementation.

In 2007, the State of Israel elaborated two national action plans against trafficking. One, dated August 2007, is entitled "National Plan regarding the Battle against Trafficking in Persons for the Purpose of Prostitution". The other, dated April 2007, is entitled "National Plan regarding the Battle against Slavery and Trafficking in Persons for the Purposes of Slavery or Forced Labour". The former (and more elaborated of the two) is based on recommendations of a subcommittee appointed by the Committee of Directors General regarding the Battle against Trafficking in Persons. This plan is commendable for addressing both cross-border and internal trafficking, and for its prioritization of specific goals. Its five highest priorities are strengthening of the border with Egypt, awareness-raising with regard to criminal activities, the creation of a victim identification toolkit, promotion of safe return of victims to their country of origin and provision of adequate medical treatment to victims with legal status in Israel.

Hence, migration departments and labour market institutions, such as labour ministries, labour inspectors, national employment services, and vocational training schools, have a key role to play in the implementation of such preventive measures. Despite growing recognition that human trafficking needs to be tackled through a holistic approach, anti-trafficking strategies still remain isolated from other national policies, for example policies on employment and vocational training, gender discrimination or poverty reduction and migration management.⁴¹⁸

Constructing a national plan to combat trafficking is a long and complex process, involving various actors. It requires the government to facilitate participation of civil society in the drafting process so that the product merges concerns of various social movements. It requires coordination momentum to ensure that political commitment at the state and municipal levels can give meaning to the plan, with integrated networks of various agencies (health, justice, security, women's policies and others) working cooperatively with civil society groups, international organizations and the private sector. One of the challenges posed by this process is the need for widespread understanding of the definition of trafficking and for that definition to be aligned with the Trafficking Protocol. This must then be reflected in national laws, which criminalize both internal and trans-national trafficking, address trafficking in men and children, as well as women, and acknowledge the various forms of exploitation. To give meaning to such law, law enforcement and judicial authorities must adequately understand it and be empowered to implement it while non-governmental organizations and civil society must be equipped to cooperate in preventing trafficking and assisting victims. Throughout the entire process of designing and implementing a national plan of action, public awareness must be raised with strong campaigns capable of reaching even the most vulnerable people.⁴¹⁹

In November 2008 a working group was established within the UN which was charged with improving implementation of the UNTOC and its two Protocols, recognising the problems hindering effective enforcement of the instruments. Again such a focus will not only benefit criminal law and law enforcement, but cannot but bring focus to States' obligations also in relation to protection – thus bringing focus to broader human rights issues as well.

The Government of Thailand has adopted a plan of action to prevent trafficking, protect and reintegrate victims and prosecute traffickers. The national policy calls for a total elimination of the involvement of children in commercial sex activities. The use of violence, threats, intimidation and exploitation in the sex industry is to be prohibited and all persons who take part in the prostitution of children should be punished. The policy also calls for the punishment of officials negligent in, or choosing to ignore, their duty to enforce compliance with relevant policies, law, rules and regulations. The comprehensive plan includes prevention measures, victim protection measures, measures for the repatriation and reintegration of victims, as well as measures for the criminalization and prosecution of offenders involved in human trafficking for the purpose of exploitative sex.

See UNODC: Toolkit to Combat Trafficking in Persons, 2008, p. 63.

418 *ILO Action Against Trafficking*, ILO 2008, p. 12-13.

419 UNGIFT: *Trafficking an overview*, p. 27.

MONITORING AND REPORTING MECHANISMS

The ultimate goal of monitoring and reporting on government policies and actions against trafficking in human beings is to create an effective mechanism to ensure that government promises materialise into action and that corresponding legal and administrative provisions are implemented.⁴²⁰ International law requires states to submit reports to the United Nations pursuant to relevant international conventions and to note in these reports actions taken against trafficking in persons. These conventions include the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),⁴²¹ the Convention on the Rights of the Child (CRC),⁴²² and the Trafficking Protocol. Further the UN Special Rapporteur on Trafficking in Persons monitors the status of trafficking in human beings worldwide. She or he has the power to investigate the scope of the problem, monitor and report on government actions, receive and inquire into complaints and make recommendations for policy change.⁴²³

The three main reporting mechanisms for monitoring and reporting on trafficking in human beings are a) national reporting (or self-assessment)⁴²⁴; b) state reports submitted to international bodies; and c) international reporting by international bodies. Reporting under the CEDAW and the CRC have to be submitted respectively every fourth and fifth year and must include information on factors and difficulties affecting the degree of fulfilment of obligations,⁴²⁵ for the CRC the report must also contain sufficient information to provide the Committee⁴²⁶ with a comprehensive understanding of the implementation of the Convention. The monitoring Committees tend to be thoroughly unconvinced if a report is submitted reporting that all is well and good, and request detailed information to ascertain themselves of the credibility of national reports. That said states tend to minimize the trafficking problem or to focus mainly on progress leaving out difficulties and obstacles.⁴²⁷

420 Mattar, M.: Comparative Models of Reporting Mechanisms on the Status of Trafficking in Human Beings, Vanderbilt Journal of Trans-national Law, Vol. 41. Number 5, November 2008. p. 1,358.

421 G.A. Resolution 34/180, UN DOC A/34/46 (Dec. 8, 1879).

422 G.A. Resolution 44/25, UN DOC A/44/49 (Nov. 20, 1989).

423 Mattar, M.: Comparative Models of Reporting Mechanisms on the Status of Trafficking in Human Beings, p. 1,359.

424 The United States does not only carry out self-assessment reports but also monitors the status of trafficking in foreign countries and assesses these countries' progress in combatting the phenomenon. The State Department's Trafficking in Persons report is having an impact on foreign governments and is often used as a reference.

425 The United Nations Manual on Human Rights Reporting Under Six Major International Human Rights Instruments of 1997: www.unhchr.ch/pdf/manual_hrr.pdf e.g. on the ICESCR: *All reports shall be submitted to the Secretary-General of the United Nations,, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.* Comment number 2 on Art 40 of the ICESCR The principles for reporting is mentioned regarding all the Six Conventions.

426 The Committee on the Rights of the Child – the Convention's monitoring body.

427 Mattar, M.: Comparative Models of Reporting Mechanisms on the Status of Trafficking in Human Beings, p. 1,395.

The Recommended Principles and Guidelines on Human Rights and Human Trafficking call upon states to promote and protect human rights by establishing mechanisms to monitor the human rights impact of anti-trafficking laws, policies, programmes and interventions.⁴²⁸

The UNTOC in its Article 32 establishes the Conference of the Parties to improve the capacity of states to combat trans-national organised crime.⁴²⁹ At these sessions the Conference of Parties discusses various issues including the basic adoption of national legislation in accordance with the Trafficking Protocol; the examination of criminal legislation and difficulties encountered in the implementation of Article 5 of the Protocol. Issues related to Articles 6 and 9 (protection and assistance and prevention) were not included in the first questionnaire.⁴³⁰ The report resulting from the sessions said that it was demonstrated that in most states action had been undertaken with a view to ensuring the availability of legislative tools to deal with the phenomenon, but went on to say that beyond the existence of a normative anti-trafficking framework at the national level, states must continue to work to promote the consistency of national legislative responses with the concepts and requirements of the Protocol.⁴³¹

The second Conference in 2005 included issues of assistance and prevention⁴³² and the third in 2006 focused on states' compliance with other provisions in the Protocol including assistance and protection of victims.⁴³³

The UN Rapporteur on Trafficking in Persons has published multiple reports and mission specific statements.⁴³⁴ These reports focus on specific issues, including

428 The United Nations High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking – Guideline 7-8.

429 The Conference of the Parties was established under article 32 of the Organized Crime Convention. It is mandated to review the implementation of the Convention and facilitate the exchange of information among States on combatting the crimes addressed by the Convention and the Protocols thereto. At the third session of the Conference of the Parties (Vienna, 9-18 October 2006), the Conference adopted decision 3/2 on the implementation of the provisions on international cooperation in the United Nations Convention against Trans-national Organized Crime, in which it emphasized that the Convention was being successfully used by a number of States as a basis for granting requests for extradition, mutual legal assistance and international cooperation for the purposes of confiscation, and encouraged States parties to make greater use of the Convention as a legal basis for international cooperation in extradition and mutual legal assistance, particularly where bilateral agreements and domestic laws did not provide for such cooperation.

430 www.unodc.org/pdf/ctoccop_2005/quest_1-5_e.pdf

431 UN DOC CTOC/COP/2004/6,
<http://www.unodc.org/documents/treaties/UNTOC/COP/session1/V0587363e.pdf>
and Mattar, M.: *Comparative Models of Reporting Mechanisms on the Status of Trafficking in Human Beings*, p. 1399.

432 UN DOC CTOC/COP/2005/1.

433 UN DOC CTOC/COP/2006/1.

434 e.g. UN DOC A/HRC/4/23 (Jan 24, 2007); UN DOC E/CN.4/2006/62/Add.1 (Mar. 27, 2006); UN DOC E/CN.4/2006/62 (Feb. 20, 2006); UN DOC E/CN.4/2006/62/Add.2 (Nov. 30, 2005); UN DOC E/CN.4/2005/71 (Dec. 22, 2004).

trafficking for the purpose of forced marriage, integration of human rights of women and the gender perspective in cases of trafficking of women and demand. The Special Rapporteur relies on country visits, participation in meetings, conferences and trainings, questionnaires, communications to governments and other actors and press statements and publications.⁴³⁵

The Special Rapporteur gives detailed and concrete recommendations based upon the belief that in spite of its overwhelming human rights dimension, trafficking continues to be treated as mainly a “law and order” problem and that the human rights of trafficked persons should be at the heart of policies and programmes to combat trafficking and that such policies and programmes should be respectful of the human rights of the persons concerned. Specific recommendations include measures to prevent and combat forced marriages, a prohibition against child marriages and criminalising demands for mail-order brides, the Rapporteur has also recommended implementing extra-territorial jurisdiction to prosecute child sex-tourism cases⁴³⁶ (in accordance with the idea that this may be considered a crime against humanity).

The reports must always cover the traditional three Ps: prevention, protection and prosecution.⁴³⁷ In order to be effective in all three – including the last – state policies must focus on the victim, including looking at areas such as witness protection, immigration status and legal and health assistance. Further reports must avoid focusing on only sexual exploitation or only women and children, but keep in focus all the forms of exploitation possible and include men and boys.

CROSS-BORDER COOPERATION³²⁷

Given that investigations of trafficking networks and prosecutions of traffickers can be complex processes cutting across jurisdictions, it is essential that effective cooperation between law enforcement agencies is an integrated part of any strategy to combat

435 Mattar, M.: *Comparative Models of Reporting Mechanisms on the Status of Trafficking in Human Beings*, p. 1402.

436 Ibid. p. 1403.

437 Ibid. p. 1413.

438 The research carried out by The Institute on Race and Justice Northeastern University Boston showed the different perceptions of difficulties in Europe and US/Canada. Whereas the Europe-based participants were able to rather easily list impediments to cooperation and to provide a rather rich list of techniques to promote cooperation, the North American participants seem to have given less thought to either challenges to, or strategies for, improving collaboration. This could be explained as a result of there being no challenges of note, and of the participants being sufficiently satisfied with current cross-national collaboration efforts between the U.S. and Canada. Of course that explanation is quickly dismissed upon noting the respondents did in fact express frustration with such things as lack of resources, having to work within a cumbersome legal system, and a general absence in effective techniques for combatting human trafficking. While the Europeans are commenting on such problems as corruption, competition among groups, difficulties in working with different legal systems, the

trafficking. Such cooperative mechanisms can take the form of direct bilateral or multilateral cooperation, information sharing (addressed in Article 10 of the Convention) and cooperation during investigations and criminal proceedings. Article 27 of the Convention is dedicated to the promotion and facilitation of stronger cooperation in these respects.⁴³⁹

Differences in legal systems across countries present problems ranging from conducting appropriate investigation to providing effective training. In many ways, the differences in legal frameworks across jurisdictions constitute the most fundamental impediment to an effective response to the ongoing crime of trafficking in persons.⁴⁴⁰ What constitutes legal investigation techniques in one country may not be acceptable in another. Examples can be made of surveillance procedures and the use of controlled deliveries. For the former, one country requires permission from a judge – even if the person is in a public place; whereas public surveillance in another country requires no judicial permission. For the latter, some countries allow prohibited substances to be imported to, pass through, and be exported from their territory in order to identify persons involved in the transaction. Other countries do not allow these controlled deliveries. Similarly, an example of being able to conduct mobile phone interceptions in some countries but in others such interceptions are either not allowed or not technologically possible. To avoid the frustration of police in one country asking police in another country to do something they are not allowed to do (or the embarrassment of asking them to do something they do not have the capacity to accomplish), training becomes an important ingredient of cross-national cooperation. But even these efforts have potential pitfalls. Not only do procedures differ among countries, but the roles of players do as well.⁴⁴¹

lack of adequate evaluation, and the importance of recognizing philosophical differences in approach, the North Americans limit their comments to concerns about resource and coordination problems, complex trafficking laws, insufficient staff. Based on the information collected, the results indicate that in North America staff are more concerned with the basic day-to-day operation of combatting THB while in Europe there appears a greater awareness and sensitivity to dealing with THB within a broader contextual framework. Similarly, the Europeans are aware of such effective techniques for cross-national collaboration as the need for identifying common ground and mutual benefit, establishing trust, and facilitating networking; but the North Americans do not think much beyond the need for training at the operational level. The findings reflect the broader cross-national need and effort of cooperation among the European respondents as opposed to a more provincial approach as expressed by the North American respondents. See Reichel, P.L.: *Cross-National Collaboration To Combat Human Trafficking Learning From The Experience Of Others*.

439 UNGIFT: Trafficking an overview. p. 32.

440 Ibid p. 34.

441 Reichel, P.L.: *Cross-National Collaboration To Combat Human Trafficking Learning From The Experience Of Others*. p. 21.

Conclusions

Trafficking in human beings as a crime has now been established in the texts of many national legislations as a consequence of international agreements and conventions. The path towards harmonisation of definitions has started even if it is not yet completed. If trafficking in human beings is a rewarding business for many organised crime groups it is also the vehicle for many desperate people to leave low social and economic conditions for something they believe to be better. The real issue today is to understand the phenomenon and its many angles to find proper remedies. It is a typical criminal intermediation that helps meet two illegal demands: the growing demand for irregular migration possibilities and the growing demand for prostitutes and manual work etc. Human smuggling and its violent appendix of trafficking in human beings is the result of opportunities provided to criminals by the difficulty/incapacity to regulate migration flows.⁴⁴²

Focusing on the dimension of human trafficking is not significant in itself – it is important to understand and measure for which purpose trafficking happens, i.e. in which specific market trafficked people are exploited. This will allow designing more focused and effective interventions. This means the implementation of policies oriented in detecting and deterring demands for prostitution, drugs, work, and organs, and in bringing these black markets to a legal dimension. It is necessary to understand that not all forms of exploitation are the same and to assess demands and supply in the different markets by separating the legal ones from the illegal ones, to develop criminal sanctions and regulatory disincentives in the labour market. Many of these are already in place in several legislation but they are lacking implementation.⁴⁴³

The Protocol is not perfect – but the fact that trafficking happens and that victims do not receive sufficient protection is not only because of flaws in the Protocol, but due to many and varied problems related to implementation. It may seem banal, but it may be opportune to recall that having a perfect law which criminalises murder or theft does not automatically mean that murder or theft will not occur. But the Protocol does give several possibilities to prosecute and prevent abuse and exploitation in countries of destination.⁴⁴⁴ Implementation is much more and has to be multifaceted. Training and

442 Savona, E.U.; Stefanizzi, S.: *Measuring Human Trafficking, complexities and pitfalls*. p. 125.

443 Kangaspunta, K.: *Collecting Data on Human Trafficking: Availability, Reliability and Comparability of Trafficking Data*, in Savona, E.U.; Stefanizzi, S.: *Measuring Human Trafficking, complexities and pitfalls*. p. 127.

444 Rossi, E.: *Intervention in the Conference: ten years after the institution of the ad hoc inter-governmental committee for the elaboration of the Palermo protocol*, Palermo: 21-22 May 2009.

prevention including respect for social economic rights are important parts of an effective fight against traffickers and protection of victims – aspects which are included in the Protocol, but not always easy to implement, also due to a certain cost. It is also true that the concept of “trafficking” does not exist in all legal systems and in some cases cannot even be properly translated linguistically. It is however hard to totally discharge the value of the Protocol on this basis. Exploitation is very hard both to eradicate and to justify. This means that justifying exploitation by saying that it is not a crime in national law, that it is part of traditional practices or the likes is not credible – the exploitee is, if given the possibility, rarely going to opt for staying in an exploitive situation for more than strictly “necessary”. It also means – and this must be underlined – that eradicating exploitation is as hard as eradicating poverty. But countries in which trafficking has not existed as a concept are also asking for help to adapt their national legislation and implement national action plans.⁴⁴⁵

In the above significant time was used to clarify the definition of trafficking.⁴⁴⁶ This is due to the simple, but unfortunately often underestimated, fact that considerable confusion exists when it comes to what trafficking is. And this confusion leads to difficulties in grasping not only what trafficking is but also what can be done to address it and in what – legal – forum this should be done. It is, unfortunately, not uncommon to hear trafficking equalled to slavery (without any specification that trafficking is not only slavery) or that once traffickers start to pay their victims a small sum for the “services” prosecution is no longer possible for the trafficking offence. This is blatantly false. Such perceptions create difficulties and confusion both in research and in implementation and weaken the Protocol’s potential effect both on prosecution of traffickers and protection of victims.

The confusion which to a certain degree has been created as to what trafficking is and whether the definition in the Protocol is at all useful or if it is overly complex is a serious risk for implementation. As has been seen above the Protocol is one field of law which actually bridges two systems of law: human rights law and criminal law, both by including human rights protection - admittedly with flaws – within a pure criminal law instrument, and also by recognition that human rights protection will enhance the possibilities for effective prosecution and vice versa. But the definition of trafficking is a criminal law concept and that must be kept in mind in order to make the protocol work. Granted there will be borderline cases which will be hard to define, but that is the case with almost all legal definitions. Notions such as intent, transport and exploitations are crucial – without these there cannot be a case of trafficking. There must be – according to a criminal law mind – intent to exploit and exploitation must be within the chain of trafficking. This being said, one should never forget that exploitation, slavery, bodily harm etc are criminal offences in themselves, so a regular migrant – or a national – ending up in such a situation should also have a possibility for redress and the perpetrators be prosecuted, but for a

445 See e.g. the work done by IDLO in Senegal: *Analyse et Plan National d'Action de lutte contre la traite des femmes et des enfants*. June 2008.

446 For an analysis of trafficking as a labour market problem Plant, R.: *the Labour Dimension of Human Trafficking*. Alliance against trafficking in persons, Vienna, ILO, 2004.

crime different than for that of trafficking in particular. That trafficking cannot be proved does not leave authorities without options, or victims without possibility of redress.

The Palermo Protocol is not perfect from a human rights point of view but it should not be considered isolated from other instruments, when protection is discussed, and this is underlined by the Protocol itself, when it is stated (in Art. 14) that States must take into consideration other international obligations when implementing the Protocol and that they are encouraged to go beyond in the measures taken (Art. 34 of the UNTOC).

Another interesting feature of having a criminal law instrument dealing with a phenomenon with a clear human rights component is the potential effect on human rights protection. The crime of trafficking is not directly a human rights crime since it is carried out by individuals against other individuals. But the State's obligation to protect – an obligation existent in relation to all human rights – may well be enforced in cases where there is a clear obligation to protect both by preventing, by prosecuting perpetrators and by protecting victims. Thus the criminal law instrument may well end up creating precedence which will influence not only human rights in trafficking cases, but which may reach farther.

In order to make the fight against trafficking effective co-operation between law enforcement and human rights agencies is necessary in order to enable a truly integrated response to the problem, covering all aspects from prevention to protection, and from law enforcement to rehabilitation and strengthening of institutional structures.

An interesting support for the functionality and relevance of the protocol comes from various studies carried out in African States, which in their recommendations mention the necessity to enact national legislation which follows the protocol.

The Government and State institutions are encouraged to:

Enact a specific national law on human trafficking making trafficking in human beings a serious criminal offence, in line with the UN Convention. The law should be comprehensive and address all aspects of trafficking and should provide inter alia: appropriate sanctions for offenders, protection of trafficked persons from prosecution, rehabilitation and where possible compensation for trafficked persons and confiscation by the state of proceeds earned from trafficking.

Pass into law, as soon as possible, the Children's Protection and Welfare Bill. The provisions of the Bill on trafficking are comprehensive and would compliment a national law on human trafficking. The Bill also has provisions to enforce compulsory registration of children born in the country. Setting up of mobile registration centres would facilitate implementation of this law.

To sign and ratify the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa. Many of the root causes of human trafficking are addressed in this legal document (gender inequality, HIV and AIDS)

Ratify the UN Convention on the Rights of Migrant Workers and Members of their Families.

Enter into extradition treaties with other countries in order to establish a smooth and swift system of prosecution and punishment of traffickers. An extradition agreement with South Africa is not sufficient, since women and children are trafficked to other countries in the region and beyond.

Establish bilateral and multilateral agreements to run joint actions against human trafficking and exploitation of women and children in transit and destination countries. Provide adequate training for all stakeholders: chief of communities, border officials, media, the judiciary and police officers to become sensitive towards trafficking offences, in particular with regard to the causes of trafficking, identifying cases of trafficking and the prevention methods.

UNESCO: Human Trafficking in Lesotho: Root Causes and Recommendations. *Policy Paper Poverty Series n° 14.6 (E)*. Paris 2007, p 53

National legislation on trafficking in persons should, at a minimum:

define precisely the crime of trafficking in accordance with international standards, and include expressly all exploitative practices covered by the international definition of trafficking such as debt bondage, forced labour, and forced prostitution;

ensure that definitions of trafficking reflect the need for special safeguards and care for children, including appropriate legal protection;

ensure that trafficked persons are not punished for any offences or activities related to their having been trafficked, such as prostitution and immigration violations;

ensure that victims of trafficking are protected from summary deportation, or return where there are reasonable grounds to suspect that such return would present a significant security risk to the trafficked person or to his/her family;

consider temporary or permanent residency in countries of transit or destination (reflection delay) for trafficking victims in exchange for testimony against alleged traffickers, or on humanitarian and compassionate grounds;

ensure that victims of trafficking are offered the possibility of obtaining compensation for damages suffered; provide for proportional criminal penalties to be applied to persons found guilty of trafficking, including offences involving trafficking in children or offences committed or involving complicity by State officials; and proceeds of trafficking, and related offences, to be used for the benefit of trafficked persons.

UNESCO: *Human Trafficking in Mozambique: Root Causes and Recommendations. Policy Paper Poverty Series, n° 14.1 (E)*. Paris 2006, p. 56

Having definitions in place and knowing how to operate with them is not only an academic exercise – it is crucial in order to fight the abuse and exploitation which takes place on a daily basis. It is also crucial to understand those definitions in view of changes in trafficking patterns. Traffickers adapt their practices as other criminals in order to avoid prosecution. That is one reason why legal definitions always must be sufficiently precise but at the same time not too rigid, in order to avoid creating the need for new laws to address new criminal practices. The definition of trafficking does not fail on this point. And knowing the definition will also help avoid mistakes such as prosecuting only when trafficking coincides with a slavery situation and not with a forced labour situation according to ILO definitions, where the victim is e.g. paid but not free to move. Misunderstandings and misrepresentations of what trafficking is can easily lead to the consideration that the Protocol fails to address such “new” forms of trafficking when this is not at all the case.

Knowing that the Protocol is a criminal law tool, addressing a crime with a human rights component, knowing that prosecution depends on the criminal law aspect and notion such as intent, and that the Protocol operates within a broader framework of international instruments, including human rights instruments and labour law instruments, and that a State has an obligation to protect against violence and prosecute perpetrators all help in the fight against abuse, exploitation and trafficking. Quite clearly the human rights approach is absolutely necessary in order to protect trafficked persons. Especially to make certain that they are treated suitably and not only as irregular non-nationals. A human rights approach is necessary to deal with all kinds of exploitation. Just as a criminal law approach ensures effective respect for the Rule of Law, which in turn is a guarantee for human right protection. Addressing “trafficking” means addressing migration – having dignified and regular migration channels, promoting fair work and fair pay, and cutting the livelihoods of organised crime, and obviously protecting those who fall victims of the crime. To ensure this a wide variety of remedies exist – in criminal law, in human rights law, in labour and social welfare law. These overlap, combine and sometimes clash. These remedies must be considered complimentary and cumulative and the compensation of

victims may be based on different fields of law. Likewise the State's obligation can be based on the different fields of law and should not be limited to either prosecution or prevention or labour law or assistance.

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Assessing Criminal Justice and Human Rights Models in the Fight against Sex Trafficking: A Case Study of the ASEAN Region. Essex Human Rights Review Vol. 3 No. 1, March 2006

Trafficking in human beings is an extremely grave offence against the individual. Not only the process of establishing control over the liberty, freedom of movement and earning capacity of vulnerable people, but also the ways in which such power is established then maintained, together result in serious violations of the physical and mental integrity of the victims.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Palermo Protocol) entered into force in December 2003. It requires State parties to criminalize the relevant conduct of traffickers or smugglers, to establish and implement domestic law enforcement mechanisms, and to cooperate with other states to strengthen international prevention and punishment of these activities.

Trafficking is widely regarded as a criminal justice issue. It affects territorial integrity because it may involve the facilitation of crossing of borders and remaining in a State in violation of national criminal and immigration laws. Trafficking also undermines the rule of law and political foundation of States, because traffickers resort to violence and corruption as a means to advance their business.

The usual response at the national level has been crime and immigration control in order to prosecute and punish traffickers/smugglers and reduce the flow of trafficked/smuggled people. But trafficking in human beings poses problems outside the scope of criminal law. Protection of victims and prevention of trafficking are not only questions of criminal law and responsibilities but overlaps with many human rights concerns.

The research is mainly legal analysis, focusing on both the development and creation of the Palermo Protocol and analysing how it creates a bridge between two legal systems: Human Rights and Criminal Law.



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