



HUMAN TRAFFICKING WORKING GROUP

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PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN — COMMENTARY

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1. Introduction

The United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*¹ (the '*Trafficking in Persons Protocol*'), opened for signature in 2004, marks the international community's most comprehensive effort to deal with human trafficking in its modern form. The *Trafficking in Persons Protocol* is one of three supplementary instruments to the *Convention against Transnational Organised Crime*.² The Convention entered into force on September 29, 2003. The Protocol entered into force on May 31, 2004.

The express purposes of the Protocol are to prevent and combat trafficking in persons, to protect and assist the victims of that trafficking, and to promote cooperation among state parties in order to achieve these objectives.³ To that end, the *Trafficking in Persons Protocol* takes a '3-Ps' approach to combating human trafficking, as its provisions can be broadly characterised as relating to the protection of victims, the prosecution of perpetrators or the prevention of human trafficking;⁴ — Parts I, II and III of the *Trafficking in Persons Protocol* are concerned with prosecution, protection and prevention respectively.

2. Background

During the early 1990s, the UN General Assembly became increasingly aware of the need for international cooperation to combat the growing threat posed by transnational organised crime. In December 1998, the General Assembly established an Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime (AC.154), which was also charged with the task of elaborating a new treaty dealing with the trafficking of women and children.⁵ The Ad Hoc Committee held eleven meetings in Vienna, Austria between January 1999 and October 2000, culminating in the opening of the Convention and Protocol for signature at the High Level Signing Convention in Palermo, Italy on December 12–15, 2000.⁶

The two major textual influences on the Protocol were draft documents submitted by the governments of the United States and Argentina. The United States proposal did not limit trafficking to women and children, but was narrower in scope than the Argentinean proposal, which also covered pornography, sex tourism, acts in connection with marriages and the extraction of body organs.⁷ A preference for the United States proposal became evident at the second meeting of the Ad Hoc Committee and the definition of 'trafficking in persons' adopted in the Protocol bears a strong resemblance to that submitted by the United States.⁸

¹ Opened for signature 15 Dec 2000, 2237 UNTS 319, Annex II.

² Opened for signature 15 Dec 2000, 2225 UNTS 209, (the '*Convention*').

³ See Article 2 *Trafficking in Persons Protocol*.

⁴ LeRoy G Potts, 'Global trafficking in human beings: Assessing the success of the United Nations Protocol to prevent trafficking in persons' (2003) 35 *George Washington International Law Review* 227; Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 121.

⁵ UN General Assembly, *Resolution on Transnational Organized Crime*, UN DOC A/RES/53/111 (1998).

⁶ Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (2008) 56.

⁷ David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (2007) 323.

⁸ See UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Revised draft Protocol to Prevent, Suppress, and Punish Trafficking in Women and Children, Supplementing the Convention against Transnational Organized Crime, Combined drafts of Argentina and the United States of America*, UN Doc A/AC.254/4Add.3/Rev.1

Since its inception, there have been doubts about how well adapted the Protocol is towards achieving its lofty ambitions.⁹ Whilst general criticism has been levelled at the *Trafficking in Persons Protocol*, the vast majority of academic commentary has limited itself to distinct parts or articles of the Trafficking in Persons Protocol.

3. Definition

The *Trafficking in Persons Protocol* represents the first international consensus on the definition of trafficking and is an important step towards a concerted global response to this problem.¹⁰ The definition of ‘trafficking in persons’ is set out in article 3 of the Protocol. It requires that three elements be fulfilled, which can be broadly classified as the acts involved, the means used, and the purpose of the actor.¹¹

Figure 1 Definition of ‘trafficking in persons’, Article 3 *Trafficking in Persons Protocol*

Act	<ul style="list-style-type: none"> • ‘[T]he recruitment, transportation, transfer, harbouring or receipt of persons’
Means	<p>‘The threat or use of:</p> <ul style="list-style-type: none"> • force or other forms of coercion; • abduction; • fraud or deception; • the abuse of a position of vulnerability; or • the giving or receiving of payments / benefits to achieve the consent of a person having control over another person.
Purpose	<p>Exploitation This includes at a minimum:</p> <ul style="list-style-type: none"> • 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 term ‘exploitation’ is only given a partial definition in article 3(a) and other purposes which are not listed may constitute exploitation in satisfaction of the definition of ‘trafficking in persons’.¹² Additionally, article 3(b) provides that the consent of the victim to exploitation is irrelevant where any of the means listed are used. As proof of one of the means is a necessary element for establishing that a person has been trafficked, the practical effect of article 3(b) is that the consent of the victim is wholly irrelevant.¹³

The definition has been adopted by 117 countries¹⁴ and has been credited with promoting consistency in international anti-trafficking efforts. It has assisted law enforcement agencies in numerous ways. Firstly, it has made trafficking a crime in countries which previously had limited

⁹ Elizabeth Defeis, ‘Protocol to prevent, suppress and punish trafficking in persons — a new approach’ (2003–04) 10 *ILSA Journal of International & Comparative Law* 485 at 488.

¹⁰ Kelly E Hyland, ‘The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children’ (2001) 8(2) *Human Rights Brief* 30 at 31.

¹¹ David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (2007) 323.

¹² David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (2007) 326-327.

¹³ David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (2007) 328. This interpretation is acknowledged in UNODC *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol thereto* (2004) 270 [37].

¹⁴ United Nations Office on Drugs and Crime (UNODC), *The United Nations Convention against Transnational Organized Crime and its Protocols* (2008), available at www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html (accessed 21 Oct 2009).

or non-existent offences. Secondly, it simplifies the process of extraditing suspected participants. Generally, extradition between states is dependent on the dual criminality requirement, which requires the offence to exist in both the prosecuting state and the state in which the offence occurred.¹⁵ A universal legal denominator such as an accepted definition facilitates extradition and mutual legal assistance between countries which would otherwise have to undertake time-consuming bilateral negotiations.¹⁶ Thirdly, it is hoped that a common definition will standardise research and allow for better comparisons of data on trafficking.

The actual content of the definition has received mixed reviews. Positive points include its consideration of more subtle forms of coercion as a means of facilitating trafficking. For example, the phrase 'abuse of a position of vulnerability' takes into account the fact that trafficking does not always occur by force, but often involves close family members pressuring or convincing the victim to partake in the activity.¹⁷ However, the definition has also been criticised on a practical level as unwieldy and ill-suited for use in domestic criminal codes.¹⁸ A major criticism is that it contains too many elements, which complicates prosecution efforts. Furthermore, ambiguity in some of the language could lead to legal challenges by defendants in appellate courts.¹⁹ Various modifications have been suggested. Of particular note is the proposal to eliminate the requirement to prove a means of trafficking, such as threats, force and coercion and to limit the 'purpose' element to internationally recognised crimes such as forced labour, slavery and servitude.²⁰ The rationale is that the 'means' utilised to traffic an individual are not significant, but the process of transporting people in order to hold them in forced labour or slavery is essential. However, the words 'force, threats and coercion' were expressly included in the definition to distinguish trafficking from smuggling. It is arguable that the removal of these means might further blur the distinction between the two offences.

Exploitation and Consent

A particularly controversial topic during the negotiations for the *Trafficking in Persons Protocol* related to the definition of 'exploitation'. During the meetings of the Ad Hoc Committee in Vienna, a group of NGOs led by the Coalition Against Trafficking in Women and Equality, proposed that the definition in the *Trafficking in Persons Protocol* encompassed all forms of prostitution. Their belief was that the distinction between forced and free prostitution was meaningless as prostitution was by its very nature exploitative.²¹ This position is underpinned by the conviction that a woman's consent to undertake sex work is meaningless²² and as such, sex work satisfies the exploitation element for the purpose of trafficking.²³ These NGOs were supported by nations such as Argentina and the Philippines. On the other side of the debate were NGOs such as the Human Rights Caucus, and countries including the United States. They argued that the *Trafficking in Persons Protocol* should only include prostitution which was

¹⁵ Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 113.

¹⁶ Anthony Destefano, *The War on Human Trafficking: US Policy Assessed* (2007), xx.

¹⁷ Ann D Jordan, *Annotated Guide to the complete UN Trafficking Protocol* (2002) 4, available at [www.globalrights.org/site/DocServer/Annotated_Protocol.pdf?docID=2723#search=""Annotated%20Guide%20to%20the%20Complete%20UN%20Trafficking%20Protocol](http://www.globalrights.org/site/DocServer/Annotated_Protocol.pdf?docID=2723#search=)" (accessed 21 Oct 2009).

¹⁸ Ann D Jordan, *Annotated Guide to the complete UN Trafficking Protocol* (2002) 3.

¹⁹ Ann D Jordan, *Annotated Guide to the complete UN Trafficking Protocol* (2002) 3.

²⁰ Ann D Jordan, *Annotated Guide to the complete UN Trafficking Protocol* (2002) 3.

²¹ Elizabeth Defeis, 'Protocol to Prevent, Suppress and Punish Trafficking in Persons – A New Approach' (2004) 10 *ILSA Journal of International and Comparative Law* 485 at 488.

²² J Doezema, 'Who gets to choose? Coercion, consent, and the UN Trafficking Protocol' (2002) 10(1) *Gender & Development* 20 at 21.

²³ Ann D Jordan, *Annotated Guide to the complete UN Trafficking Protocol* (2002) 4.

conducted under force or deception. In other words, voluntary adult sex work did not constitute exploitation for the purpose of trafficking.

The delegates compromised by leaving the term 'sexual exploitation' and 'exploitation for the prostitution of others' undefined. The Travaux Préparatoires explicitly state that these terms are 'without prejudice' as to how nations approach prostitution in their particular domestic laws.²⁴ In other words, the *Trafficking in Persons Protocol* defers to the discretion of individual nations, allowing each government to make a judgment on the legal treatment of voluntary sex work. This accommodates the seemingly irreconcilable views of countries with different regulatory schemes for prostitution. Those with liberal regimes, such as the Netherlands, are able to exclude voluntary prostitution from their national trafficking framework while countries with stricter prostitution laws are able to expand the scope of their offences.²⁵ While this compromise resolved a major stumbling block in negotiations, it has been seen by some commentators as having repressive consequences, particularly for migrant sex workers.²⁶

A secondary issue concerns the extent to which consent is offered and in particular, whether a person who consents to illegally enter a country and work also consents to working in conditions of forced labour. The weight of academic opinion suggests that consent must be continuous.²⁷ A victim may consent to migrating, but that consent is non-existent or defective if exploitation occurs.²⁸

4. Scope of Application

Article 4 provides for the Protocol to apply to the prevention, investigation, and prosecution of the offences established under article 5, where those offences are transnational in nature and involve an organised criminal group.²⁹ However, the *Legislative Guide* explains that 'the Protocol offences of trafficking in persons [...] must apply equally regardless of whether the case involves transnational elements or is purely domestic.'³⁰ Thus, the Protocol does not require State Parties to include a transnational component or the involvement of an organised criminal group as essential elements of any offences criminalising trafficking in persons. In the context of trafficking in persons this is quite important, as it ensures that persons trafficked internally within a country or without the involvement of an organised criminal group are entitled to protection under the Protocol, and their traffickers remain criminally liable.³¹ Article 4 of the *Trafficking in Persons Protocol* has attracted much criticism for limiting the definition of

²⁴ Robyn Emerton, 'Translating International and Regional Trafficking Norms into Domestic Reality: a Hong Kong Case Study' (2004) 10 *Buffalo Human Rights Law Review* 215 at 226.

²⁵ Interpretive Note 13 of the Protocol explains that the *Trafficking in Persons Protocol* takes no position on the treatment of non-coerced adult sex work and explicitly leaves its legal treatment to the discretion of individual governments.

²⁶ J Doezema, 'Who gets to choose? Coercion, consent, and the UN Trafficking Protocol' (2002) 10(1) *Gender & Development* 20 at 25.

²⁷ See for example, Natalia Ollus, *The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children: A Tool for Criminal Justice Personnel*, Resource Material Series No 62 (2008), available at www.ungift.org/docs/ungift/pdf/knowledge/unafei_analysis.pdf (accessed 21 Oct 2009); Mohamed Y Mattar, 'Incorporating the Five Basic Elements of Model Anti-trafficking In Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention' (2006) 14 *Tulane Journal of International & Comparative Law* 357 at 371.

²⁸ Mohamed Y Mattar, 'Incorporating the Five Basic Elements of Model Anti-trafficking In Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention' (2006) 14 *Tulane Journal of International & Comparative Law* 357 at 371.

²⁹ As defined in Article 2(a) of the Convention.

³⁰ UNODC *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocol thereto* (2004) 10-11 [18].

³¹ See Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (2008) 62.

trafficking to offences that are transnational in nature and involve an organised criminal group. These terms are to be read in conjunction with the Convention which defines an 'organised criminal group' as a 'structured group of three or more persons', and a transnational offence as one 'committed in more than one State'.³² The reference to an organised criminal group was seen as overlooking the widespread practice of two person (usually husband and wife) trafficking operations.³³ Likewise, restricting the operation of the Protocol to transnational crime was condemned for ignoring the wider phenomena of internal trafficking.³⁴ However, the publication of the Legislative Guide to the Protocol in 2004 provided some clarification. It stated that domestic offences should apply even where the crime was not transnational and the involvement of organised criminal groups does not exist.³⁵ More specifically, it affirmed that transnationality and organised crime must not be required to be proved in a domestic prosecution.³⁶ This hopefully increases the scope of the offence, and affords greater protection to victims that are trafficked within their own country.

5. Child Trafficking

During the negotiations for the *Trafficking in Persons Protocol*, a group of UN agencies³⁷ made a joint submission regarding the issue of child trafficking. They called for an explicit acknowledgment that children had special rights under international law and a focus on the special needs of child victims of trafficking, including rights to physical and psychological recovery and social integration and the provision of non-discretionary assistance and protection.³⁸ The drafters of the *Trafficking in Persons Protocol* responded with subsection (c) of Article 3 which reduces the standard formulation of a trafficking offence from the three elements of act, means and purpose, to a two pronged approach involving only act and purpose. That is, where a child has been recruited, transported, transferred, harboured or received for the purpose of exploitation, he or she will have been trafficked. The consent of a child to exploitation is irrelevant.³⁹ Further, to ensure consistency and uniformity among State Parties, article 3(d) of the Protocol defines a child as any person less than eighteen years of age.

The section has been both criticised as falling far short of the standard expected by UN agencies⁴⁰, and praised as a major step forward in the battle against child trafficking.⁴¹ Commentators have noted approvingly that the removal of 'means' takes into account the special vulnerability of children, especially in situations where they are obeying orders from

³² Articles 2, 3 *Trafficking in Persons Protocol*.

³³ Ann D Jordan, *Annotated Guide to the complete UN Trafficking Protocol* (2002) 9.

³⁴ N Ray, 'Looking at Trafficking through a New Lens' (2006) 12 *Cardozo Journal of Law & Gender* 909 at 916.

³⁵ United Nations, *Legislative guide for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (2004) 259 para 25.

³⁶ United Nations, *Legislative guide for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (2004) 275 para 45: 'The offences established in accordance with the protocol should apply equally, regardless of whether they were committed by individuals or by individuals associated with an organised criminal group'.

³⁷ Office of the High Commissioner for Human Rights (OHCHR), the International Organisation for Migration (IOM), the United Nations Children's Fund (UNICEF), and the United Nations High Commissioner for Refugees (UNHCR).

³⁸ Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 975 at 989.

³⁹ David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (2007) 329.

⁴⁰ Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 975 at 989.

⁴¹ L Kurbiel, 'Implementing the UN Trafficking Protocol to Protect Children: Promising Examples from East Asia' (2004) 24 *Children's Legal Rights Journal* 73 at 80.

parents or important figures in their community.⁴² This approach is based on the accepted assumption that children do not sufficiently understand their likely fate in order to give informed consent. Nonetheless, some commentators have noted that a plan to increase the scope of the offence was rejected.⁴³ It was proposed that the second element of child trafficking – purpose – be expanded to include the contents of the International Labour Organisation’s *Worst Forms of Child Labour Convention* (1999).⁴⁴ However, in the final version of the *Trafficking in Persons Protocol*, the definition of exploitation remains consistent throughout. A stand-alone instrument to specifically address the global issue of child-trafficking has been suggested.⁴⁵

6. Trafficking in persons offences

Article 5 of the Protocol requires State Parties to adopt legislative or other measures which establish that trafficking in persons (as defined in article 3) amounts to a criminal offence.

The language used is mandatory and imposes an obligation to prosecute trafficking offences.⁴⁶ However, the *Trafficking in Persons Protocol* does not address the issue of criminal sanctions, which is left at the discretion of individual nations. It has been suggested that the inclusion of minimum sanctions in the *Trafficking in Persons Protocol* would have rebutted the view that States are less interested in fighting human trafficking than other offences.⁴⁷ Compared to other forms of organised crime, human trafficking has historically had the lowest rates of detection, prosecution and penalties.⁴⁸ The *European Council Framework Convention of 2002* has been cited as a better model, authorising sentences of eight years imprisonment with an accompanying schedule for aggravating factors.⁴⁹ However, it is arguable that achieving consensus on criminal sanctions among European countries with similar political and judicial models is less demanding than a global agreement consisting of countries with vastly differing criminal justice systems.

In addition, State Parties are required to establish the following inchoate offences:

- Subject to the basic concepts of their legal system, attempting to commit an offence involving trafficking in persons;
- Participating as an accomplice in an offence involving trafficking in persons; and
- Organising or directing other persons to commit an offence involving trafficking in persons.

⁴² L Kurbiel, ‘Implementing the UN Trafficking Protocol to Protect Children: Promising Examples from East Asia’ (2004) 24 *Children’s Legal Rights Journal* 73 at 75.

⁴³ Anne Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’ (2001) 23 *Human Rights Quarterly* 975 at 989.

⁴⁴ Anne Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’ (2001) 23 *Human Rights Quarterly* 975 at 989.

⁴⁵ Natalia Ollus, *The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children: A Tool for Criminal Justice Personnel*, Resource Material Series No 62 (2008) 23 (noting the International Human Rights Network’s joint NGO submission to the Ad-Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime).

⁴⁶ This is in contrast to Articles 6-13, the protection, prevention and cooperation measures, which employ permissive language.

⁴⁷ Kalen Fredette, ‘Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation’ (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 121.

⁴⁸ Kalen Fredette, ‘Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation’ (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 121.

⁴⁹ Kalen Fredette, ‘Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation’ (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 121.

Whilst the *Trafficking in Persons Protocol* requires signatories to criminalise the offence of 'trafficking in persons' it does not impose any obligations with respect to related conduct.⁵⁰ Focusing on the act of trafficking and targeting individual offenders is seen as unnecessarily limiting the Protocol and ignoring the critical role of public officials in facilitating and tolerating the crime.⁵¹ The issue of corruption is significant as many trafficking networks are dependent on official collusion.⁵² It has been reported that a number of officials routinely accept bribes to ignore illicit activities and tip-off networks before police raids.⁵³ Individual states have explicitly addressed the problem on their own accord. An Indonesian draft law proposes the punishment of any state administrator who abuses his/her power resulting in the commission of trafficking in persons.⁵⁴ Others have listed public corruption as an aggravating factor in trafficking offences.⁵⁵ Furthermore, the Convention contains articles specifically criminalising corruption. However, the Legislative Notes state that in defining and criminalising trafficking, signatories are not bound by other international legal instruments. It is clear that many countries have exercised this option. Some commentators have gone further and called for sanctions against states whose officials assist trafficking.⁵⁶ The rationale is that official corruption is often tolerated by states, which benefit from lucrative industries that rely on the trafficking trade. However, such an approach is unlikely to succeed as States would not be signatories to an agreement that would result in their punishment. Indeed in its present incarnation, the *Trafficking in Persons Protocol* has not been signed by many states in regions heavily affected by trafficking.⁵⁷

7. Victim Protection

Part II, articles 6 to 8 of the Protocol mandates the adoption of measures and procedures for the protection of victims of trafficking in persons, though in rather vague terms which do not place strong obligations on State Parties.⁵⁸ These include:

- protecting the identity and safety (both physical and psychological) of victims;
- providing general welfare and support;
- ensuring access to compensation for damage suffered⁵⁹; and
- facilitating the residence of victims in the receiving country or safe return to their country of origin, at the victim's election.⁶⁰

⁵⁰ This is in contrast to the other two supplementary Protocols to the Convention. The *Migrant Smuggling Protocol* requires the criminalization of enabling illegal residence and certain conduct in relation to travel or identity documents; and the *Firearms Protocol* requires the criminalisation of multiple offences in relation to illicit manufacturing and trafficking, as well as a further offence of tampering with serial numbers or other markings of firearms.

⁵¹ E Bruch, 'Models Wanted: The Search for an Effective Response to Human Trafficking' (2004) 40 *Stanford Journal of International Law* 1 at 20.

⁵² E Bruch, 'Models Wanted: The Search for an Effective Response to Human Trafficking' (2004) 40 *Stanford Journal of International Law* 1 at 21.

⁵³ Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 121.

⁵⁴ Indonesian Combat Against the Crime of Trafficking in Persons Draft Law (Article 12): punishing "any state administrator who abuses his/her powers to force a person to commit, not commit, or allow something that results in the crime of trafficking persons".

⁵⁵ See for example, art 380 *Penal Code* (Burundi).

⁵⁶ United Nations, *Legislative guide for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (2004) 270, para 39; R Piotrowicz, 'The UNHCR's Guidelines on Human Trafficking' (2008) 20 *International Journal of Refugee Law* 242 at 247.

⁵⁷ Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 122.

⁵⁸ Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (2008) 64.

⁵⁹ Article 6 *Trafficking in Persons Protocol*.

⁶⁰ Article 8 *Trafficking in Persons Protocol*.

A major criticism of the *Trafficking in Persons Protocol* has been the emphasis it places on law enforcement (or prosecution) in lieu of prevention and protection. In particular, the protection and prevention obligations have been criticised for being too vague, and appropriate remedies too few.⁶¹ Clauses in Part II frequently begin with or contain permissive language, such as 'shall endeavour to',⁶² 'shall consider',⁶³ 'shall give appropriate consideration',⁶⁴ and '[i]n appropriate cases and to the extent possible under domestic law'.⁶⁵ This drafting approach obviously grants State Parties considerable flexibility to determine how and to what extent victim protection measures are established within that state, but also permits State parties to take no action in this respect. During negotiations for the *Trafficking in Persons Protocol*, there were discussions about creating mandatory protection and assistance provisions. This was decided against as a result of concern over the cost that would be imposed by mandatory requirements, particularly on developing countries.⁶⁶ Instead, it has been suggested that on a reasonable interpretation of the language of Article 6, an onus is placed on developed nations to provide assistance while developing nations must provide assistance to the best of their ability, having regard to the limited resources at their disposal.⁶⁷

Concerns were also raised about the relationship between victim assistance programs and the legal status of victims. Developed countries to which persons are often trafficked argued against trafficked persons having a legal right to remain since this would provide an incentive both for trafficking and illegal migration. Understandably, countries whose citizens were commonly trafficked sought as much protection as possible.⁶⁸

A further issue that follows from the vague approach taken to victim assistance and protection by the *Trafficking in Persons Protocol* is the lack of support measures directed specifically at problems that victims of trafficking suffer from. This has led one commentator to conclude that the '[Trafficking] Protocol is a lost opportunity to protect the rights of victims of trafficking.'⁶⁹ Apart from vagueness in the *Trafficking in Persons Protocol* this shortcoming has also been partially blamed on the treatment of trafficking as a subset of violence against women or other crimes, rather than as its own distinct issue. Trafficked victims have potentially been subjected to both physical and mental abuse, and are often unsure as to their legal status; the *Trafficking in Persons Protocol* arguably overlooks this and other specific needs.⁷⁰ For example, the *Trafficking in Persons Protocol* provides no basis for governments to treat trafficked persons differently to other undocumented migrants nor does it guarantee the confidentiality of victims.⁷¹

⁶¹ Kathryn Nelson, "Sex trafficking and forced prostitution: Comprehensive new legal approaches" (2001-02) 24 *Houston Journal of International Law* 551 at 578.

⁶² Article 6(5), *Trafficking in Persons Protocol*.

⁶³ Articles 6(3), 7(1), *Trafficking in Persons Protocol*.

⁶⁴ Article 7(2), *Trafficking in Persons Protocol*.

⁶⁵ Article 6(1), *Trafficking in Persons Protocol*.

⁶⁶ See Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Revised draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, Eleventh session (2-27 October 2000), fn 25, A/AC.254/4/Add.3/Rev.7 (2000); see also Kelly E Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children' (2001) 8(2) *Human Rights Brief* 30 at 37.

⁶⁷ Kelly E Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children' (2001) 8(2) *Human Rights Brief* 30 at 37.

⁶⁸ Elizabeth Defeis, 'Protocol to Prevent, Suppress and Punish Trafficking in Persons – A New Approach' (2004) 10 *ILSA Journal of International and Comparative Law* 485 at 489.

⁶⁹ Elizabeth Defeis, 'Protocol to Prevent, Suppress and Punish Trafficking in Persons – A New Approach' (2004) 10 *ILSA Journal of International and Comparative Law* 485 at 490.

⁷⁰ Sarah King, 'Human Trafficking: Addressing the International Criminal Industry in the Backyard' (2007-08) 15 *University of Miami International & Comparative Law Review* 369 at 377.

⁷¹ Sarah King, 'Human Trafficking: Addressing the International Criminal Industry in the Backyard'

Notably, neither of these measures would impose a significant financial or administrative burden on State Parties. Through a combination of vague wording and a generic approach to victim support, the *Trafficking in Persons Protocol* does not even imply that State parties should provide support services which are necessary for the unique issues faced by victims of trafficking in persons.

Linked closely with the general concept of victim assistance and protection is the legal status of victims in destination countries. Article 7 of the *Trafficking in Persons Protocol* requests that State Parties 'consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in [their] territory [...] in appropriate cases.' Article 8 covers the alternative situation by requiring cooperation between destination and source countries to ensure the safe repatriation of the trafficking victim at their request. Both these articles have attracted their share of criticism. Delegates were concerned that the Protocol would become an inadvertent means of illegal migration if the legal status of victims in receiving countries was strengthened i.e. through the creation of specific visa categories. As a result, no strong obligations were placed on receiving countries and the most common approach taken, in the absence of any mandatory Protocol provision, is for temporary visas to be extended to victims of trafficking who agree to testify or provide evidence in the prosecutions of traffickers.⁷² It has been suggested that at the very least, the Protocol should require that temporary residency be extended where deportation presents clear hazards to the trafficked person or where the person is a child.⁷³ This would help allay both protection and migration concerns (by maintaining a degree of state control over whom is granted residency) and also ameliorates the State's desire for reliable witnesses.⁷⁴

Some have criticised the protection measures provided by Part II of the Protocol as being overly-oriented toward maximising a victim's utility as a witness. This argument is given credibility by the drafting of the articles which de-emphasise the witness role, such as Article 6(3), which carry markedly diminished State obligations.⁷⁵ Arguably by failing to offer suitable incentives for victims to testify (i.e. temporary rather than semi-permanent or permanent residency), States are damaging their prospects of successfully prosecuting traffickers and if Australian prosecutions are any indication, the cooperation of victims at trial is a near-prerequisite for success.⁷⁶ This is a further example of the Protocol's emphasis on law enforcement at the expense of victim protection which, ironically and somewhat counter-intuitively, reduces the effectiveness of law enforcement measures.

Despite the existence of some academic support for the contrary view,⁷⁷ the weight of opinion suggests that the *Trafficking in Persons Protocol* does entrench the principle of non-

(2007-08) 15 *University of Miami International & Comparative Law Review* 369 at 377.

⁷² Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at at 129; Mohamed Y Mattar, 'Incorporating the Five Basic Elements of Model Anti-trafficking In Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention' (2006) 14 *Tulane Journal of International & Comparative Law* 357 at 362-363.

⁷³ Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 132.

⁷⁴ Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 132.

⁷⁵ Article 6(3) *Trafficking in Persons Protocol* requires only that State Parties 'consider implementing measures for the physical, psychological and social recovery of victims'.

⁷⁶ Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 130.

⁷⁷ Kelly E Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons

criminalisation of trafficking victims.⁷⁸ This principle guarantees that victims of trafficking will not be criminally liable for their unlawful entry into a State or for any acts that they were forced to commit while under the control of other persons. Whilst the Protocol does not explicitly provide for this, it does present trafficked persons as victims, and the legislative link between the Protocol and the United Nations *Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power* strongly indicates that the non-criminalisation principle applies.⁷⁹

The threshold for repatriation of victims of trafficking under the *Trafficking in Persons Protocol* is not particularly high; returns should be made with due regard for the safety of the person involved and 'shall preferably be voluntary.' In a similar fashion to the general victim support provision,⁸⁰ Article 8 does not appear to address the particular issues faced by trafficking victims (though Article 9 does broadly address re-victimisation). Victims who are returned to their countries of origin face persecution as a result of the stigma attached to working in prostitution and fear of HIV/AIDS.⁸¹ Similarly, beyond having 'due regard for the safety of that person' there is nothing to prevent victims from being delivered back into the same conditions, and same pattern of poverty-driven exploitation, from which they were trafficked.⁸² This is even more likely where the families of victims are complicit in the trafficking activities.⁸³ Despite the genuine risk of re-victimisation, courts and tribunals in Australia have been hesitant to classify victims of trafficking as refugees.⁸⁴ This creates an even greater need for a settled legal status to be granted to trafficked victims, which the Protocol at present fails to provide. Instead, the Protocol's principal concerns in relation to repatriation are that States respond sensitively to prosecutorial proceedings, and that repatriation efforts are both timely and documented.⁸⁵

8. Prevention, Cooperation and other Measures

Part III contains articles aimed at preventing trafficking and promoting cooperation between parties to the *Trafficking in Persons Protocol*. Article 9 requires State Parties to establish comprehensive policies, programmes and other measures to prevent trafficking and protect victims. Articles 10, 11 and 13 promote cooperation between State Parties through the exchange of information, mutual control of State borders and verification of travel documents respectively. Finally, Article 12 calls for States to take measures to ensure the integrity and security of travel documents, and to ensure that these documents cannot be easily replicated. It was agreed by delegates that any prevention and cooperation measures should be included in

Especially Women and Children' (2001) 8(2) *Human Rights Brief* 30 at 37.

⁷⁸ Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 129.

⁷⁹ See *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, GA/Res 55/25, Annex II at 35. UN Doc A/RES/55/25 (Jan 8, 2001); see also Sarah King, "Human Trafficking: Addressing the International Criminal Industry in the Backyard" (2007-08) 15 *University of Miami International & Comparative Law Review* 369; Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 129.

⁸⁰ See Article 6 *Trafficking in Persons Protocol*.

⁸¹ Elizabeth Defeis, 'Protocol to Prevent, Suppress and Punish Trafficking in Persons – A New Approach' (2004) 10 *ILSA Journal of International and Comparative Law* 485 at 491.

⁸² Kelly E Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children' (2001) 8(2) *Human Rights Brief* 30 at 38.

⁸³ Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 133.

⁸⁴ See, for example, *VXAJ v MIMIA* [2006] FMCA 234.

⁸⁵ Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 133.

the final Protocol only insofar as they go beyond those measures contained in the Convention;⁸⁶ this explains why this part of the Protocol is not more comprehensive in this respect.

There has been a positive reaction to a number of the measures introduced in Part III of the *Trafficking in Persons Protocol*. Support has been found for the victim-focussed approach to prevention detailed in Article 9 which is directed at constricting the supply side of ‘an illicit market stoked by chronic poverty.’⁸⁷ Specifically, the ‘revolving door’ problem — where rescued victims who return home to vulnerable situations are cycled back into trafficking — is addressed by Article 9(1)(a), which will hopefully motivate source countries to develop effective programs for the reintegration of victims. Similarly, Article 9 recommends that the implementation of social and economic initiatives to prevent trafficking in persons and alleviate the factors that make persons vulnerable, such as underdevelopment and lack of opportunity.⁸⁸ Example initiatives include microcredit lending, social advancement of women, job training, or tax incentives to start small businesses.⁸⁹

Article 10 of the Protocol specifies that governments and NGOs should cooperate using social methods for research and prevention of the situations that encourage trafficking. This suggests that the international community is open to examining the issues behind trafficking rather than simply obvious (surface) effects of the problem.⁹⁰

Part III of the *Trafficking in Persons Protocol* has been subject to much the same criticism as has been levelled at Part II, namely that these victim-focussed prevention articles carry diminished, soft obligations in contrast to the mandatory obligations expressed in Part I.⁹¹ The practical effect of this approach to drafting the prevention articles is that most victim-based programs have been shelved. Where programs are instituted, they are almost uniformly in the form of mass media education programs. Ultimately, these programs are unlikely to result in systemic change to the volume or nature of trafficking in persons. Instead other measures aimed at counteracting the root causes of trafficking must be implemented.⁹² A final issue noted in relation to the cooperation articles is that while States that have ratified the *Trafficking in Persons Protocol* have a duty to cooperate with each other, cooperation between other non-party States is simply encouraged.⁹³ Whilst this is understandable, this will probably diminish the utility of the cooperation articles.

⁸⁶ UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Revised draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, UN Doc A/AC.254/4/Add.3/Rev.2 (1999).

⁸⁷ Kalen Fredette, ‘Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation’ (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 127-128.

⁸⁸ See Article 9(2), (4) *Trafficking in Persons Protocol*.

⁸⁹ Kelly E Hyland, ‘The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children’ (2001) 8(2) *Human Rights Brief* 30 at 37.

⁹⁰ Sarah King, ‘Human Trafficking: Addressing the International Criminal Industry in the Backyard’ (2007-08) 15 *University of Miami International & Comparative Law Review* 369 at 379.

⁹¹ Kalen Fredette, ‘Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation’ (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 128.

⁹² Kalen Fredette, ‘Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation’ (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 128.

⁹³ Sarah King, ‘Human Trafficking: Addressing the International Criminal Industry in the Backyard’ (2007-08) 15 *University of Miami International & Comparative Law Review* 369 at 379.

9. Addressing the Protocol's flaws

The *Trafficking in Persons Protocol* contains significant flaws which have been exposed by numerous of academic commentators. In relation to Part I, the benefits of having a settled definition of trafficking in persons outweigh any inadequacies and ambiguities identified. Similarly, the issue of consent inherent within the definition of trafficking in persons was arguably dealt with intelligently and discreetly; it would have been disappointing if religious and political opinions had derailed attempts to define what all present states fundamentally consider to be a social issue of great concern. The scope of application clause (Article 4) is drafted in a somewhat confusing manner but the Legislative Guide produced at the same time as the Protocol entered into force explains its intended operation sufficiently. The inclusion of specific offences to criminalise the involvement of public officials in trafficking in persons is readily justifiable and should be considered by signatories to the *Trafficking in Persons Protocol* when enacting domestic legislation. However, delegates understandably had more obvious general concerns when negotiating and drafting the Protocol.

A number of the problems with the protection provisions in Part II of the Protocol could be quite easily remedied through the introduction of mandatory language. However, fears that this would increase the financial burden on developing nations are arguably well-founded and unless an assistance program is developed to alleviate some of the burden, it is unlikely that any victim support programs will become mandatory. Also, given the complaints that have been made about Part II's treatment of the specific needs of trafficking victims, it is perhaps fortunate that ill-directed mandatory requirements for victim protection were not introduced. Similar comments can be made in relation to Part III and its general clauses aimed at the prevention of trafficking in persons. For the time being, it is important that State parties recognise that the focus of the *Trafficking in Persons Protocol* is on law enforcement rather than victim support.⁹⁴ As a result, the Protocol should at best be viewed as establishing minimum standards for victim support and protection that State parties are free to supplement and augment through their own domestic law and policy.⁹⁵

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⁹⁴ Suzanne Egan, 'Protecting the victims of trafficking: problems and prospects' (2008) 1 *European Human Rights Law Review* 106 at 109-110.

⁹⁵ Kelly E Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children' (2001) 8(2) *Human Rights Brief* 30 at 38