

PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS—A NEW APPROACH

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Trafficking in persons, the illegal and highly profitable recruitment, transport, or sale of human beings into all forms of forced labor and servitude is a tragic and complex human rights abuse. The U.S. State Department estimates that anywhere from 700,000 to four million persons are trafficked annually worldwide, and that approximately 50,000 women and children are trafficked annually for sexual exploitation into the United States.¹ Women and female children are particularly vulnerable to this slavery-like practice, due largely to the persistent inequalities they face in status and opportunity worldwide and the widespread business of prostitution.²

International agreements that address trafficking in women or trafficking in children date back to the 1904 International Agreement for the Suppression of White Slave Traffic.³ The goal of the Agreement was to halt the sale of women into prostitution in Europe at a time of adverse economic conditions. Several subsequent treaties were adopted under the auspices of the League of Nations and the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others⁴ consolidated all previous treaties on the subject. It characterized prostitution as “incompatible with the dignity and worth of the human person,” and obligated governments to punish any person who “exploits the prostitution of another person, even with the consent of that person.”⁵ The 1949 Convention also criminalized the action of any person who “(1) keeps or manages or knowingly finances or takes part in financing of a brothel (or) (2) knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others.”⁶ However the

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1. U.S. Department of State, *Office to Monitor and Combat Trafficking in Persons*, <http://www.state.gov/g/tip/> (Feb. 18, 2004).

2. *Id.*

3. http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/vii_boo/vii_8.html (last visited Mar. 18, 2004).

4. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, July 25, 1951, 96 U.N.T.S. 271, available at http://www.univie.ac.at/RI/KONTERM/intlaw/konterm/vrkon_en/html/doku/prostitu.htm#1.0 (last visited Mar. 18, 2004).

5. *Id.* at art. 1.

6. *Id.* at art. 2.

enforcement provisions of the Convention are extremely weak and the Convention has had very limited value.

The 1979 Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) prohibits the “exploitation of prostitution of women.”⁷ It also prohibits “all forms of traffic in women and obligates governments to “take all appropriate measures, including legislation to suppress all forms of traffic in women and exploitation of prostitution of women.”⁸ Whether the 1979 Convention intended to recognize a more comprehensive definition of trafficking, which includes all types of slavery practices, is not entirely clear, although a strict interpretation of the language used may support this conclusion.

However, like the previous treaties, the enforcement provisions are weak and are limited to reporting procedures by states parties although recently an optional Protocol that would allow for direct individual petition has been adopted.

More recently, efforts have been made to address trafficking of children and child prostitution. For example, the 1989 Convention on the Rights of the Child, which has been ratified by virtually every state but not the United States, requires State Parties to take all appropriate measures to prevent “the abduction of, sale of, or traffic in children for any purpose or in any form, “to prevent the inducement or coercion of a child to engage in any unlawful sexual activity.”⁹ However, once again enforcement is limited to self-reporting by states. Most recently, the 1999 Convention to Eliminate the Worst Forms of Child Labor adopted under the auspices of the International Labor Organization prohibits “the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances.”¹⁰

In the last 20 years, the rise in the volume of human trafficking has risen dramatically. The causes include the end of cold war with the concomitant opening of borders and increased movement of people, emergence of organized crime and the rise of the sex tourist industry. The number of illegal sex workers in the European Union ranges from 200,000 to half a million, with some two-thirds coming from Eastern Europe. Trafficking from this region, once minimal, now rivals traditional trafficking source regions, such as Asia, Africa and the Caribbean.¹¹

7. Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, 1249 U.N.T.S. 13, available at <http://www.safnet.com/cedaw/cedaw.html> (last visited Feb. 18, 2004).

8. *Id.* at pmbl.

9. Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448, available at <http://www.unhcr.ch/html/menu3/b/k2crc.htm> (last visited Feb. 22, 2004).

10. Worst Forms of Child Labour Convention, June 17, 1999 17, available at [www.http://www.ilo.org/public/english/standards/ipecc/ratification/convention/text.htm](http://www.ilo.org/public/english/standards/ipecc/ratification/convention/text.htm) (last visited Feb. 18, 2004).

11. United Nations Office on Drugs and Crime, Analysis and Statistics, at http://www.unodc.org/unodc/en/analysis_and_statistics.html (last visited Feb. 22, 2004).

Many national legal systems particularly those of the sending countries, that is, those states from which the victims come, are ill equipped to deal with the current massive increase in human trafficking. Adequate legislation, limited law enforcement capabilities, and corruption of local law enforcement personnel, have all combined to hamper cooperation on an international level.

At the Seventh Session of the Commission on Crime presentation and Criminal Justice in 1998, Argentina proposed the drafting of a new Convention against trafficking in minors, citing growing evidence of the involvement of organized criminal groups in this activity. This initiative was expanded to incorporate trafficking in all persons. It was decided by member States that the most appropriate way to deal with the issue was to elaborate a Protocol to the UN Convention against Transnational Organized Crime.

Negotiations on the Protocol were extensive and the Protocol was open to all states in Palermo, Italy in December 2000.¹² The fundamental concept adopted by the Member States in negotiating the Protocol was to maintain a carefully crafted balance between law enforcement and the protection of victims.

The Protocol sets forth three purposes:

- To prevent and combat trafficking in persons, paying particular attention to women and children;
- To protect and assist victims of trafficking, with full respect for their human rights; and
- To promote cooperation among States in order to meet these objectives.¹³

The Protocol is not a stand-alone instrument. Rather, it must be applied in conjunction with the parent Convention, and each state is required to become a party to the Convention in order to become party to the Protocol. Protocol offenses are deemed to be Convention offenses for the purposes of extradition and other forms of cooperation.¹⁴ The application of the Protocol is governed by the same rules as the application of the parent Convention. Both instruments apply in any case involving the investigation or prosecution of an offence that is suspected of being “transnational in nature” and involving an “organized criminal group”, as defined in the Convention.

12. United Nations Office on Drugs and Crime, Signatories to the UN Convention against Transnational Crime and its Protocols, at http://www.unodc.org/unodc/crime_cicp_signatures.html (last visited Feb. 22, 2004) [hereinafter U.N. Office].

13. The Protocol to Prevent, Suppress, and Punish Trafficking in Persons, G.A. Res. 55/25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001) [hereinafter Protocol].

14. *Id.* at pmb1.

Although victims and witnesses are also dealt with in the parent Convention, the protection of, and assistance to, a victim is specified as a core purpose of the Protocol.¹⁵ It considers victim assistance, both as an end in itself and as a means to support the investigation and prosecution of trafficking crimes.

Although there was strong support for a new international agreement to address trafficking, several issues required extensive negotiations and even today are unresolved.

Probably, the most contentious issue concerned the definition of trafficking. Some states, including initially the United States took the position that only trafficking that involved forced prostitution should be addressed by the Protocol and hence that a victim's consent would take the act outside of the ambit of the Protocol.¹⁶ Others, including many NGO's such as the Coalition Against Trafficking in Women and Equality took the position that all prostitution should be addressed since the distinction between forced and free prostitution was meaningless.¹⁷

On the other hand, it was agreed that requiring countries to make the consent of victims completely irrelevant could exclude valid defenses and raise constitutional or other legal issues. The compromise was to specify that, while the accused traffickers may initially raise consent as a defense, consent to initial recruitment is not the same as consent to the entire course of trafficking. Any alleged consent to exploitation must be deemed irrelevant if any of the means of trafficking listed in the definition have occurred. For example, means of trafficking include the threat or use of force, coercion, abduction, fraud, deception, the abuse of power or a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person such as a parent.¹⁸

What is noteworthy is that for the first time, the International Community has agreed on a definition of trafficking. Essentially, trafficking consists of actions in which offenders gain control of victims by coercive or deceptive means or by exploiting relationships, like those between parents and children, in which one party has relatively little power of influence and is therefore vulnerable to trafficking.

The Protocol defines trafficking as follows: Trafficking in persons shall mean "the recruitment, transportation, transfer, harboring or receipt of persons,

15. Protocol, *supra* note 13, at arts. 4-6.

16. William J. Bennett & Charles W. Colson, *The Clintons Shrug at Sex Trafficking*, WALL STREET JOURNAL, Jan. 10, 2000, at A26.

17. Equality NOW Prostitution Statement, at http://www.equalitynow.org/english/actions/action_2301_en.html (last visited Feb. 22, 2004).

18. U.N. Office on Drugs and Crime, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (Summary), at http://www.unodc.org/unodc/en/trafficking_convention.html (last visited Feb. 22, 2004).

by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, 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 labor or services, slavery or similar to slavery, servitude or the removal of organs.”¹⁹

The Protocol requires States to criminalize trafficking, by enacting laws to reach the prohibited activity. The law enforcement provisions of the Protocol are mandatory and require law enforcement agencies to cooperate in such matters as the identification of offenders and trafficked persons, sharing of information and the training of investigators and victim support personnel.

However, in addition to criminalizing trafficking, the Protocol requires States to take steps to protect and assist victims of trafficking. It recognizes that victims of trafficking are often in great danger and in need of assistance and support, particularly if repatriated to their countries of origin. Under the Protocol, trafficking victims would be entitled to some degree of confidentiality in legal proceedings involving traffickers and assistance in legal proceedings. Under both the parent Convention and the Protocol, countries must also endeavor to provide for the basic safety and security of victims, and the Protocol requires that victims be afforded, “...the possibility of obtaining compensation for damage suffered....”²⁰

The Protocol encourages social assistance to victims in areas such as counseling, housing, education and health care needs, although these are not obligatory. The obligations of States regarding victims fall upon whichever State the victim is in at a given time.

The legal status of trafficked persons and whether they would eventually be returned to their countries of origin was also the subject of extensive negotiations. Generally, the developed countries to which persons are often trafficked took the position that there should not be a legal right to remain since this would provide an incentive both for trafficking and illegal migration. Countries whose nationals were more likely to be trafficked sought as much protection and legal status for trafficked persons as possible.

The negotiations are still ongoing, but the text presently requires states “to consider” laws which would allow trafficked persons to remain, temporarily or permanently in “appropriate cases.” States also agree to “facilitate and accept” the return of victims who are their nationals or who had legal residency rights when they were trafficked into the destination country. The Protocol incorporates a series of safeguards to protect victims. Repatriation should be voluntary,

19. Protocol, *supra* note 13, at art. 3, par. (a).

20. *Id.* at art. 6.

if possible, and must take into consideration the safety of the victim and the status of any ongoing legal proceedings. Thus, reducing the likelihood that victim witnesses will be repatriated before they can testify enhances the viability of prosecutions.

However, human rights groups have criticized the Protocol. Even though the Protocol contains a strong law enforcement provision and a first-ever international definition of “trafficking in persons”, it was viewed as a lost opportunity to protect the rights of victims of trafficking. Shortly after the UN Crime Commission finished negotiations on the Protocol, the Human Rights Caucus, composed of twelve NGO’s, announced that, the new Protocol was inadequate as it did not in fact require governments to provide any services to victims of trafficking and it provided no basis for insisting that governments treat victims of trafficking different from undocumented migrants. They challenged the effectiveness of the Protocol on the grounds that does not require governments to provide emergency shelter, medical or psychological services or legal counseling or to cease arresting, imprisoning and summarily deporting victims. Further they argue that victims are not protected. For example, victims are not notified when traffickers are released from prison. The Protocol fails to protect the identity of victims or permit victims to remain in the country, even temporarily if it is unsafe for them to return home.²¹

According to a Human Rights Caucus press release, “[t]his serious gap in the Protocol is partly due to government reluctance to make any commitments to provide services and protection to undocumented persons even if they are victims of a horrific crime.”²² They note, “Governments were unwilling to distinguish between trafficking victims and undocumented migrants. This means local NGO’s will encounter tremendous obstacles in advocating the inclusion of mandatory protection in their domestic trafficking laws.”²³

The Protocol will enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification. Although the Protocol is a step towards the eradication of human trafficking, several problems remain that have yet to be addressed by any major international body. For example, there is a lack of systematic research and reliable data on the trafficking of human beings that would allow comparative analyses. The Global Program against Trafficking in Human Beings (GPAT) designed by the United Nations Office on Drugs and Crime has been developed to facilitate the gathering of data and the

21. Sutthida Malikaew, *U.N. Human Trafficking Protocol Endorsed*, PREDA Foundation, Inc., at <http://www.preda.org/research/link1100-0101.html> (last visited Feb. 22, 2004).

22. *Id.*

23. *Id.*

coordination of national efforts to curb trafficking. Further, the program is designed to raise awareness of human trafficking at a grassroots level.²⁴

There is a need to strengthen the criminal justice response to trafficking through legislative reform, awareness raising and training, as well as through national and international cooperation. Although many nations have adopted legislation that address human trafficking, these laws often do not have the bureaucratic support system to implement the laws.

Most importantly, the support and protection of victims who give evidence is a key to successful prosecution. This support, although addressed in the Protocol, is clearly inadequate.

Finally, the legal status of trafficked persons must be addressed. Often, because of the stigma attached to serving as a prostitute, or because of the fear of AIDS, many victims of trafficking cannot return or do not wish to return to their native countries despite the fact that they were taken against their will. Because the states parties could not agree, the Protocol only requires states "to consider adopting legislative or other appropriate measures that permit victims of trafficking to remain in its territory temporarily or permanently in appropriate cases."²⁵ Clearly, requiring such legislation would provide added protection to victims of trafficking.

While trafficking in persons has finally gained the attention of the world community, adequate resources and political will are necessary if this scourge is to be eradicated. While the Protocol is an important first step, its provisions must be strengthened to address the needs of the victim as well as law enforcement.

24. U.N. Office on Drugs and Crime, *Outline of the Programme*, at http://www.unodc.org/unodc/en/trafficking_programme_outline.html (last visited Feb. 22, 2004).

25. U.N. Office, *supra* note 12, at art. 4.