Michigan Journal of International Law

Volume 24 | Issue 4

2003

Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking

Joan Fitzpatrick
University of Washington

Follow this and additional works at: https://repository.law.umich.edu/mjil

Part of the Human Rights Law Commons, Immigration Law Commons, International Law Commons, and the Legislation Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjil/vol24/iss4/10

This Article is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
TRAFFICKING AS A HUMAN RIGHTS VIOLATION: THE COMPLEX INTERSECTION OF LEGAL FRAMEWORKS FOR CONCEPTUALIZING AND COMBATING TRAFFICKING

Joan Fitzpatrick*†

I. INTRODUCTION ........................................................................ 1143

II. THE TRAFFICKING PROTOCOL ............................................. 1148

III. HIGH COMMISSIONER’S PRINCIPLES AND GUIDELINES .... 1154

IV. NATIONAL LEGISLATION .................................................... 1159

V. THE T VISA ........................................................................ 1161

VI. STATE AND LOCAL GOVERNMENT AND NON-GOVERNMENTAL ORGANIZATIONS ........................................ 1163

VII. PREVENTING HUMAN RIGHTS VIOLATIONS AGAINST TRAFFICKING VICTIMS ........................................ 1164

VIII. CONCLUSION ..................................................................... 1165

I. INTRODUCTION

The earliest established international human rights norm was the prohibition of slavery and the slave trade. As Professor Harold K. Jacobson, to whom this volume is dedicated, observed:

Because it was so odious, and because it also had international aspects, slavery was the first area in which international involvement in social welfare and human rights issues occurred.

Jeffrey & Susan Brotman Professor of Law, University of Washington; Diploma in Law, Oxford University (1980); J.D., Harvard Law School (1975); B.A., Rice University (1972). Professor Fitzpatrick passed away unexpectedly on May 16, 2003.

* Editorial Note: Because Professor Fitzpatrick’s death occurred before final approval of the Article, the editors have allowed leeway, liberty, and flexibility by way of citation support and format. While Professor Fitzpatrick approved the major changes to her Article, some minor changes have been made subsequently.

An international nongovernmental organization, the British and Foreign Anti-Slavery Society... played an essential role in prompting governments to act.²

Nevertheless, the practice of human bondage persists into the twenty-first century, taking a variety of forms. Persons are forced into slavery-like conditions even in highly developed democracies, despite the existence of effective criminal justice systems, tight border controls, and entrenched legal protections for fundamental human rights. One of the most troubling contemporary forms of slavery and human servitude is the trafficking of women and children for purposes of sexual exploitation and other types of forced labor.

The trafficking of women and children has long concerned the international community. A series of treaties beginning in 1904 specifically addressed the problem, requiring states to criminalize trafficking and sexual exploitation and to cooperate with each other in prosecuting the perpetrators and rescuing the victims.³ Some of these early treaties focused on the so-called “white slave trade,” the use of deception or coercion to induce or force European or North American women or girls into the sex trade in developing countries or colonies. The image of trafficked women in these instruments is obviously anachronistic and culturally biased. However, as explained in Section II infra, the debate over appropriate international efforts to combat trafficking in women and children remains influenced by conflicting perceptions of coercion, consent, and the sex trade among state actors and non-governmental organizations (NGOs).

Despite the long-standing recognition that slavery and involuntary servitude violate fundamental human rights,⁴ the human rights dimension

⁴. The prohibition on slavery and servitude is a non-derogable right under contemporary major human rights treaties, including the International Covenant on Civil and Political Rights, Mar. 23, 1976, art. 8, 999 U.N.T.S. 172, 175; the European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, art. 4, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953); and the American Convention on Human Rights, July 18, 1978, art. 6, 1144 U.N.T.S. 123, 146–47. It is generally recognized that the prohibition on slavery and the slave trade is a peremptory norm of customary international law, or a norm jus cogens.
to the trafficking of women and children is only beginning to be effectively factored into anti-trafficking strategies. Trafficking has traditionally been viewed by the international community as a crime control and a migration issue, and solicitude for the victims has varied depending upon perceptions of their relative "innocence." 5

While recognizing that trafficked women and children are victims of human rights abuses, preventing and punishing trafficking requires a multi-level game of coordinated norm development, communication concerning activities of transnational criminal groups, mutual assistance in law enforcement, provision of social services to trafficking victims, economic development in source countries, and reforms in migration policy, involving both state and non-state actors at the international, national, and local levels. All players must cooperate to integrate human rights norms into national strategies concerning crime and migration. Governmental and non-governmental service providers must perform significant roles in the response to trafficking, in collaboration with law enforcement and migration officials, if the human rights of victims are to be respected.

I will focus on three legal instruments: (1) the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime (the Trafficking Protocol); 6 (2) the Victims of Trafficking and Violence Protection Act (VTVPA), enacted by the U.S. Congress in 2000; 7 and (3) the regulations issued in 2002 by the U.S. Department of Justice to implement the T visa for trafficking victims. 8 The U.S. response to trafficking illustrates the difficulties faced by human rights advocates in source, transit, and destination countries to insure that anti-trafficking and other migration control measures ameliorate rather than aggravate the human rights deprivations suffered by trafficking victims. Social movements working to combat violence

against women and to promote the welfare of children have strongly influenced recent policy developments concerning trafficking. However, primary influence over implementation of anti-trafficking measures remains with law enforcement and migration authorities, for whom security, rather than victim assistance, is of paramount importance.9

The United States has signed but not yet ratified the Trafficking Protocol. The United States has also signed but not yet ratified the Convention on the Elimination of All Forms of Discrimination Against Women10 and the Convention on the Rights of the Child,11 the major human rights treaties intended to protect women and children against violence, discrimination, and exploitation.12 In May 2000, the United Nations General Assembly adopted an Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, which the United States has also signed but not ratified.13 In June 1999, the International Labor Organization adopted the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (ILO Convention No. 182), which includes sale and trafficking of children and which the United States has both signed and ratified.14

Thus, although the United States can rightly be regarded as a leader in adopting a human rights approach to trafficking (as detailed infra in

9. Professor Jacobson describes ""pluralistic" security communities," of which the collaboration of law enforcement and migration authorities under the Trafficking Protocol could be regarded as an example. Intergovernmental organizations (IGOs), such as the crime control program of the United Nations, facilitate the establishment of ""pluralistic" security communities" without requiring states to cede supervision over a matter that is regarded as at the core of sovereignty (control of organized crime and entry of noncitizens into the national territory). JACOBSON, supra note 2, at 415. Professor Jacobson's work on relative influence in international organizations is also pertinent to understanding the obstacles to full implementation of a human rights-sensitive approach to trafficking. Significant asymmetries of power exist between state law enforcement and migration authorities, on the one hand, and IGO human rights bodies and NGOs concerned with trafficking on the other. See ROBERT W. COX & HAROLD K. JACOBSON, THE ANATOMY OF INFLUENCE: DECISION MAKING IN INTERNATIONAL ORGANIZATION 59–101, 175–215 (1973) (analyzing influence over the policies and institutions of the International Telecommunication Union and the World Health Organization).
12. The Senate Foreign Relations Committee's efforts to revive interest in the ratification of the Women's Convention, following the Bush Administration's highlighting of the repression of women in its anti-Taliban campaign in late 2001, have not yet resulted in U.S. ratification. In 1980, President Carter signed the Women's Convention and sent it to the Senate for ratification. The United States is one of only two nations that have not yet ratified the Convention on the Rights of the Child, although President Clinton signed it.
Sections IV and V), it remains resistant to adopting an international normative framework for combating the traffic. As Jose Alvarez observes, in some instances: "Multilateral conventions' lowest common denominator 'solutions' may prove less efficacious than a hegemon's concerted efforts to enforce extraterritorially its own domestic law to the same ends."

The monitoring, reporting, and sanctions provisions of the VTVPA establish an implementation regime that operates in parallel with the multilateral, cooperative framework of the Trafficking Protocol, creating a complex multi-level approach to compliance.

Sexual slavery has also been the subject of developments in international humanitarian law, as reflected in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and also in the definition of crimes against humanity and war crimes in the Statute of the International Criminal Tribunal (ICC). Gender-based violence or persecution directed against distinct social groups (such as street children) may also be addressed under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

Thus, trafficking of women and children may be addressed from a variety of legal angles—as a human rights issue under treaties intended to deal with the specific concerns of women or children, as a labor rights issue, as a matter of humanitarian law, as a problem of transnational crime, or as an aspect of international migration. The focus on human rights in these different regimes obviously varies. Through concerted efforts to cross regime boundaries, human rights IGOs and NGOs have made progress in harmonizing basic principles for protecting trafficking victims across various international instruments.

The Trafficking Protocol and its drafting history provide revealing insights into the challenges of devising anti-trafficking strategies that

---

target traffickers and customers, rather than inflicting additional harm on victims. Enlightened policy, as reflected in the annual U.S. Department of State Trafficking in Persons Report, requires the moderation of migration control objectives in order to promote crime control and human rights aims. However, granting relief from deportation to trafficking victims who cooperate with law enforcement is a palliative rather than a comprehensive strategy to prevent and redress trafficking abuses. The structural inequalities that drive women and children into the control of traffickers must also be addressed by social service and law enforcement officials as a fundamental problem in human rights protection and as a matter of international development.

II. THE TRAFFICKING PROTOCOL

The Trafficking Protocol to the UN Convention Against Transnational Organized Crime emerged from a drafting process into which human rights concerns were only belatedly inserted. The Convention was drafted as a framework convention to provide a concerted international response to the special dangers posed by transnational organized crime. While the United Nations has long had a program to combat the drug trade by means of mutual criminal assistance, no general treaty dealing with transnational organized crime existed prior to the Convention. Framework conventions are typically supplemented by specific agreements on topics of relevance, which spell out in greater detail the substantive scope of the obligations of each state party to the convention. Each substantive protocol is subject to separate ratification, so state consent can be carefully limited, if desired.

Reflecting the trend toward "securitizing international migration" and the high priority assigned by many receiving states to the involve-
ment of organized crime in irregular migration, the first transnational crimes to be tackled were trafficking and migrant smuggling, whose differences are explained below. As Anne Gallagher of the United Nations Office of the High Commissioner for Human Rights observed:

[The U.N. Organized Crime Convention] represents the first serious attempt by the international community to invoke the weapon of international law in its battle against transnational organized crime. Perhaps even more notable is the selection of trafficking and migrant smuggling as the subjects [of the first protocols to the Convention]. Both issues are now high on the international political agenda. While human rights concerns may have provided some impetus (or cover) for collective action, it is the sovereignty/security issues surrounding trafficking and migrant smuggling which are the true driving force behind such efforts.

The distinction between trafficking and smuggling essentially turns upon the presence or absence of the elements of deception, coercion, or abuse of power in the relationship between the perpetrator(s) and the migrant. The Trafficking Protocol defines trafficking in persons as:

The recruitment, transportation, transfer, harbouring or receipt of persons, 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 labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Thus, it should be noted that any person (not only women and children) might be trafficked. The end purposes of trafficking are not limited to the sex trade, but include other forms of forced labor and organ harvesting.


24. Gallagher, supra note 20, at 976.

25. Trafficking Protocol, supra note 6, art. 3(a).
Where any of the listed means of deception or coercion have been employed, the "consent of the victim to the intended exploitation . . . shall be irrelevant." Where the migrant is a child (a person under eighteen), trafficking occurs even where deception or coercion is not involved, as long as the child is used for one of the defined end purposes. Whether adult women who migrate knowingly to engage in the sex trade should be seen as trafficking victims is a highly divisive issue in the human rights community, which split the non-governmental groups participating in the drafting of the Trafficking Protocol. "Smuggling of migrants," in contrast, is defined simply as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident." Smuggled migrants may become trafficking victims if they are subjected to coercion and exploitation upon their arrival in the destination state. This scenario is not uncommon, as smugglers may confine or threaten migrants in an attempt to collect debts or to extort additional payments from migrants or their families.

The Trafficking Protocol was drafted by an Ad Hoc Committee composed of state delegates involved in the crime control program of the United Nations. The U.N. crime control arena is not one in which human rights groups or migration and refugee bodies have regularly participated. Indeed, very few NGOs of any type typically become involved in this work. Thus, it is remarkable the extent to which human rights NGOs and IGO bodies, including the United Nations High Commissioner for Refugees (UNHCR) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), were able to mobilize and to influence the drafting of the Trafficking Protocol toward the direction of protecting the human rights of trafficked persons. One "epistemic community" of human rights and women's rights activists managed to interact with and influence a quite different "epistemic community" of crime control and migration control officials and diplomats participating in the drafting process.

Constructivist theories of international relations provide insight into the dynamics of the drafting of the Trafficking Protocol and its human rights dimension. As Benedict Kingsbury explains:

---

26. Id. art. 3(b).
27. Id. art. 3(c)-(d).
28. See discussion infra notes 38-40.
Constructivist accounts of international relations give central significance to the social construction of identities and meanings among actors in the international system. . . . States are the principal units of analysis but . . . key structures in the state system are intersubjective rather than material, and . . . state identities and interests are in some way constructed by these intersubjective structures, and are thus in some significant respects endogenous rather than exogenous. . . . An approach to international law that shares much of the intellectual provenance of constructivism is an account of law not as a body of rules but as a system of legal relations, at once universalizing from individual particularities, patterns of interactive behavior, and particularizing society's universal purposes.30

The OHCHR and anti-trafficking NGOs made significant progress in constructing a new identity for trafficked persons as victims of severe human rights abuse, rather than as criminals and illegal migrants. Since implementation of the Trafficking Protocol remains in the hands of national law enforcement and migration authorities, however, this success may prove to be largely symbolic.31

The Trafficking Protocol is not to be mistaken for a human rights treaty, as states ratifying it assume few additional binding human rights obligations toward trafficked persons. The focus remains on crime control and deterrence of unlawful migration. Nevertheless, several provisions of the Trafficking Protocol recognize trafficked persons as victims of human rights abuse, explicitly preserve their rights under international law, and suggest (albeit weakly) that states should meet the needs of trafficking victims for care, support, and relief from deportation.

Strikingly, Article 2(a) defines as one of the three purposes of the Trafficking Protocol “to protect and assist the victims of such trafficking, with full respect for their human rights.”32 Article 6 addresses assistance and protection of victims, requiring appropriate protection of privacy, information on court and administrative proceedings, and opportunity to


31. Professor Jacobson distinguishes the symbolic work of IGOs from their representational, programmatic, operational, rule-creating, supervisory, and boundary decisions. Harold K. Jacobson, WHO: Medicine, Regionalism, and Managed Politics, in COX & JACOBSON, supra note 9, at 182–94.

32. Trafficking Protocol, supra note 6, art. 2(a). The other two purposes are to prevent and combat trafficking and to promote cooperation among states.
express concerns during prosecution of traffickers. States parties to the Protocol are to “ensure” that their domestic legal systems provide the possibility for victims to obtain compensation, and are to “endeavour” to provide for the physical safety of victims on their territory.\(^3\)

With respect to physical, psychological, and social recovery of victims (through provision of housing, health care, counseling, and employment), states party to the Protocol need only “consider” implementing measures in cooperation with non-governmental organizations.\(^3\) These states are also to “consider” adopting measures that permit trafficking victims to remain on their territory (in other words, to avoid deportation to their state of origin), either temporarily or permanently, with due regard to humanitarian or compassionate factors.\(^5\) These are relatively modest obligations, written either in precatory language or stating no more than what states would already be obliged to do under general legal principles.

Stated in mandatory terms is the obligation for states of origin to permit the return of trafficking victims who are either their nationals or persons with a right of permanent residence.\(^6\) The risk that repatriated victims or their families will fall prey to traffickers, against whom they had testified or whose costs had not been recouped through exploitation of the victim, is addressed only in Article 8(2), which provides that return “shall be with due regard for the safety” of the victim and “shall preferably be voluntary.”\(^3\)

However, at the urging of UNHCR and human rights advocates, a savings clause was added to Article 14, providing that nothing in the Protocol shall affect states’ pre-existing obligations under international humanitarian and human rights law, and specifically under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. This compromise disappointed some advocates, who hoped for a statement that the risks associated with trafficking might form the basis for a claim of persecution entitling victims to refugee protection. But Article 14 does clarify that the provisions on repatriation of trafficked persons must not be applied without regard for the victims’ entitlement to non-refoulement (non-return) under refugee law or other existing international standards.\(^3\)

33. Id. art. 6(5)–(6).
34. Id. art. 6(3).
35. Id. art. 7.
36. Id. art. 8.
37. Id. art. 8(2).
38. For discussion of the possibility of asylum claims for trafficking victims, see infra note 57.
Although a wide range of human rights groups participated in the drafting of the Trafficking Protocol, a sharp and deeply entrenched schism divided those who regard all prostitution as essentially forced (a viewpoint reflected in the 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others)\(^{39}\) from those who regard sex work as a legitimate occupational choice for some women and who wish to confine the definition of trafficking to situations of deception or coercion.\(^{40}\) These two groups confusingly designated themselves, respectively, as the "International Human Rights Network" and the "Human Rights Caucus."\(^{41}\)

The members of the Ad Hoc Committee, who had never encountered this long-standing divide in the women’s rights community, must have been mystified by the passionate disagreements between these two camps. The Trafficking Protocol, by including elements of deception and coercion in the definition of trafficking of adults, essentially adopts the approach of those who believe that sex work can, in a meaningful sense, be a voluntary choice.

However, because structural inequalities propel many women into the sex trade, this debate is far from over. The entire human rights community can agree on the need to address systematic denials of equality of opportunity and of economic and social rights to women, especially in developing states and transitional economies. It is precisely the problematic element of choice that distinguishes smuggled migrants from trafficking victims (who may be entitled to protection and services). Destination states thus have an incentive to classify foreign women in the transnational sex trade as smuggled migrants, rather than as trafficking victims. To the extent that deception and coercion are vague or contested concepts, this ambiguity may undermine trafficking victims’ access to the modest human rights protections provided in the Trafficking Protocol, which are absent in the Smuggling Protocol.

It is clear from the 2002 State Department Trafficking Report that few states are taking effective measures to combat trafficking of women and children,\(^{42}\) despite the adoption of the Trafficking Protocol. The Report, along with the work of human rights NGOs and IGOs, attempts to deploy the "mobilization of shame" to secure improved compliance with

---

40. Demleitner, supra note 5, at 267–68.
41. Gallagher, supra note 20, at 1002.
42. The State Department report is refreshingly candid with respect to states such as Russia (classified in Tier 3, indicating no significant efforts to combat trafficking), where some politicians regard women as export commodities. See Demleitner, supra note 5, at 283 n.8.
anti-trafficking norms. The natural tendency of migration and crime control officials is to target the least resistant and influential cohort in the trade—the victims of trafficking, rather than the traffickers (who may be dangerous and wealthy) or the customers (who are more likely to be citizens of the destination state). Thus, it is not unusual for foreign women and children who have been trafficked to be arrested, detained in immigration or criminal facilities, punished for engaging in prostitution or violations of immigration laws, and deported, without regard to the risks they may face from traffickers or the hardships they may face in their communities of origin. Trafficking victims are peculiarly vulnerable to multiple victimization—by virtue of their lack of legal status, language barriers, poverty, youth, trauma resulting from sexual exploitation or forced labor, and exposure to violence.

III. HIGH COMMISSIONER’S PRINCIPLES AND GUIDELINES

Because of the above-described trends, in 1999 the United Nations High Commissioner for Human Rights established a trafficking program to integrate human rights concerns “into international, regional, and national anti-trafficking initiatives through legal and policy development.” Following its collaborative efforts in 2000 to infuse human rights concerns into the drafting of the Trafficking Protocol, in May 2002 the High Commissioner’s program submitted Recommended Principles and Guidelines for Human Rights and Human Trafficking to the UN Economic and Social Council. These Principles and Guidelines are directed to policy makers at the international, national, and local levels, and they reflect careful analysis of the challenges of protecting the human rights of trafficking victims.

The Principles stress the “primacy” of human rights, which must “be at the centre of all efforts to prevent and combat trafficking” and to assist victims. This position challenges the common perception that trafficking is primarily a crime or migration matter. Principle 2 adopts the “due diligence” standard, which has been promoted with respect to other

43. Id. at 265–66, 268–76.
46. Id. Principle 1.
types of violence against women, to describe state obligations to prevent, investigate, and prosecute trafficking.

Principle 3 mandates that anti-trafficking measures shall not adversely affect the human rights of trafficked persons, or of migrants and refugees more generally. This point is developed further in Guideline 1, which notes that anti-trafficking measures should not apply in a gender-discriminatory manner, nor should they infringe freedom of movement or impede the right to seek and to enjoy asylum from persecution. Thus, selective denial of exit visas or foreign work permits to women should not be the anti-trafficking strategy of source countries. Nor should policies, such as Australia's blanket refusal to grant permanent protection visas to irregular arrivals who have valid refugee claims, be justified on anti-smuggling or anti-trafficking grounds.

The Department of State 2002 Trafficking Report discouragingly notes that anti-trafficking strategies in many states continue to target trafficking victims for enforcement measures, but extend virtual impunity to traffickers, corrupt officials who assist traffickers or exploit victims, and customers whose demand for exploitative sex and labor fuels the trade. The Principles and Guidelines forthrightly challenge this tendency to blame the victim, and require a significant alteration in traditional approaches to trafficking. Principle 7 forbids the punishment of trafficking victims for illegal entry or for other illegal conduct that is a direct consequence of their being trafficked. States are required to protect victims from further exploitation and to provide them physical and psychological care, which shall not be made contingent upon their cooperation in legal proceedings. Principle 6 requires states to eradicate public sector involvement in trafficking and to punish corrupt officials. Principle 4 asserts that anti-trafficking strategies "shall address demand as a root cause," tackling the most neglected dimension of the trafficking

47. Id. Guidelines 1.4–1.6.
49. Principles and Guidelines, supra note 45, Principle 8.
50. The State Department report likewise stresses the significance of official corruption in explaining the poor record of states placed in Tier 3, as having made no bona fide effort to combat trafficking, U.S. DEP’T OF STATE, supra note 19. The Tier 3 list in 2002 included a number of states that have been U.S. allies in the campaign against terrorism or otherwise are friendly to the United States (for example, Afghanistan, Bahrain, Bosnia & Herzegovina, Greece, Indonesia, the Kyrgyz Republic, Qatar, Russia, Saudi Arabia, Tajikistan, Turkey, and the United Arab Emirates). Other close allies, including Israel and Japan, are included in Tier 2, as states that do not comply with the minimum standards of the VTVPA, but which are making significant efforts to do so.
phenomenon. This point is further developed in Guideline 7. The special needs of trafficked children are addressed in Principle 10, which adopts the “best interests of the child” standard.

In stronger terms than were politically feasible in the binding treaty language of the Trafficking Protocol, Principle 11 provides that “[t]rafficked persons shall be offered legal alternatives to repatriation in cases where it is reasonable to conclude that such repatriation would pose a serious risk to their safety and/or to the safety of their families.” Guideline 2 stresses the importance of establishing reliable techniques to identify trafficking victims, and to distinguish them from smuggled migrants who may not be eligible to avoid forced repatriation to their states of origin.

Granting relief from deportation for trafficking victims is a policy choice embraced by the U.S. Congress, by other destination states, and by the European Union. However, this relief often is either explicitly or implicitly contingent upon the victim’s cooperation in the prosecution of traffickers.

A delicate balance must be struck between recognizing the real trauma of trafficking victims and fueling the pull factors that contribute to trafficking and smuggling flows. One of the most striking and frustrating characteristics of traffickers and smugglers is their amazing flexibility and capacity to adapt to shifting control measures. If freighters become an unsuccessful delivery method, smugglers switch to

51. Principles and Guidelines, supra note 45, Guideline 7.1 (calling on states to analyze “the factors that generate demand for exploitative commercial sexual services and exploitative labour” and to take measures to address these issues).

52. Id. Principle 11.

53. Id. Guideline 2. The Smuggling Protocol does not include even a soft suggestion that relief from deportation be extended to smuggled migrants, although Article 5 does provide that they should not be additionally penalized for having been smuggled. Their irregular status would nevertheless subject them to deportation under general immigration rules. Smuggling Protocol, supra note 29, art. 5.

54. See discussion infra Parts IV and V on the VTVPA and the T visa in the United States. See also Commission Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities, COM(2002)71 final. The European Commission proposal would provide renewable six-month residence permits to victims of both migrant smuggling and trafficking, while the T visa in the United States is limited to victims of severe trafficking.

55. Child victims may be exempted from the obligation to testify, as in the VTVPA. While the VTVPA itself does not limit relief to adult victims who cooperate (unlike the case of the S visa, which is designed for informants against serious criminals), the implementing regulations for the T visa suggest that support by law enforcement agencies for T visa applicants will be an influential factor in decision-making by U.S. immigration officials. See infra notes 71, 73.

56. See generally Perspectives on Trafficking of Migrants 38(3) INT’L MIGRATION (2000).
container ships, or to lorries loaded on trains and ferries. Geographical routes are constantly adjusted and may assume Byzantine complexity. Thus, even the most human-rights-minded observer of anti-trafficking policy must be concerned that the availability of special deportation relief for trafficking victims will be integrated into the “marketing strategy” of traffickers and smugglers, with the possible undesired consequence of an increase in rates of trafficking. It should be noted that family members (including parents of child victims) may obtain derivative immigration benefits through their relationship with trafficking victims under the T visa program. Enforcement officials thus may approach T visa applicants with a degree of suspicion that might distress victim advocates, but which reflects genuine concerns arising out of irregular migratory patterns.

An entirely different way of conceptualizing deportation relief for trafficking victims is as a form of asylum or human rights non-refoulement. The Principles and Guidelines assert that cooperation with law enforcement should not be made a condition for such relief, but that the focus should be on the danger and hardship facing the victim upon return to the state of origin. Formally, at least, the T visa does not require cooperation with law enforcement officials, but is extended to victims who would suffer “extreme hardship involving unusual and severe harm upon removal.” This approach is consistent with a conceptualization of such relief as a type of asylum or human rights non-refoulement.

Where a state of origin is unable or unwilling to control non-state entities who persecute asylum-seekers, many asylum states grant refugee status if the animus of the persecutor is the race, religion, nationality, political opinion, or social group membership of the victim. Gender-based asylum claims often involve harm threatened directly by non-state actors, against a backdrop of state indifference or ineffectuality in controlling the violence or protecting similarly situated victims. Thus, if trafficking victims—for example, because of their forced exposure to the

57. Khalid Koser describes smuggler strategies that involve shifting routes for Iranian asylum-seekers, in response to policy changes (such as visa requirements) in Western European states. Khalid Koser, Asylum Policies, Trafficking and Vulnerability, in 38(3) INT’L MIGRATION 91 (2000).

58. Immigration and Nationality Act, 8 U.S.C. § 1101 (2000) [hereinafter INA]. Adult T visa applicants must comply “with any reasonable request for assistance in the investigation or prosecution of acts of trafficking.” Id. § 1101(a)(15)(T)(i)(III)(aa). However, adult applicants are eligible even if no law enforcement agency has sought their cooperation. Evangeline Abriel criticizes the final INS regulations codified in 8 C.F.R. § 214.11(b)(3) for the “strong encouragement” to T visa applicants to obtain the formal endorsement of law enforcement agencies. Evangeline Abriel, Protecting the Victims: The T Non-Immigrant Visa, 7 BENDEK’S IMMIGR. BULL. 499, 501 (2002).

sex trade—comprise a distinct and violently disfavored social group in their state of origin, they may be able to claim asylum on this basis in the state to which they were trafficked.

States parties to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and general human rights treaties with anti-torture provisions may also be required to permit persons who face a substantial risk of torture, if returned to their states of origin, to remain on their territory. However, under the Torture Convention a significant degree of state involvement in the impending torture must be proven; dangers at the hands of criminal groups acting without state complicity do not suffice.

As noted in Guideline 1, “[v]iolations of human rights are both a cause and a consequence of trafficking in persons.” The causal violations include gender discrimination, neglect of the best interests of the child, and deprivation of economic and social rights in situations of extreme poverty. Guideline 7 on preventing trafficking thus calls upon states to adopt such prophylactic policies as developing livelihood options and literacy programs for women, improving school access for girls, reviewing discriminatory property and nationality laws that propel female migration, and seeking to provide legal and non-exploitative channels for labor migration.

Another preventive strategy suggested in the Guidelines is information campaigns directed at potential trafficking victims and other members of the public in source countries. To the extent that traffickers rely upon deception to recruit victims, such policies are logical. They may also appear to empower potential victims and to recognize them as agents of their own fate, rather than as passive and naïve pawns. However, a drawback of such “soft” approaches is that, while they are cheaper than vigorous law enforcement aimed at traffickers and corrupt officials, they may not be as effective as more aggressive and expensive strategies. They may displace the burden of prevention from the state to well-intentioned non-governmental groups who disseminate the warnings. Moreover, educational campaigns seem to place the onus of prevention upon the victims, potentially leading to another cycle of “blaming the victim” for credulity when trafficking nevertheless occurs.

---


61. See id. art. I ("by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"); In re S-V-, 22 I. & N. Dec. 1306 (B.I.A 2000).

A final point worth noting is the decision by the High Commissioner's program to address specifically in Guideline 10 the obligations of peacekeepers, civilian police, and humanitarian and diplomatic personnel to combat trafficking and to prevent their personnel from becoming complicit as profiteers or customers. The United Nations and other intergovernmental organizations must take more effective steps to insure that persons acting under their auspices do not themselves commit human rights violations against trafficking victims. States such as Bosnia-Herzegovina, in which large numbers of foreign peacekeeping and humanitarian personnel are stationed, have become transit and destination states for trafficking involving United Nations police and peacekeeping forces. Personnel operating refugee camps have also been known to engage in trafficking or sexual exploitation of refugee women and children; for example, by denying food to those who refuse demands for sex. Joint action by intergovernmental organizations, states contributing personnel to peacekeeping and humanitarian missions, and host states is urgently required to eradicate such practices.

IV. NATIONAL LEGISLATION

During a decade when most U.S. immigration legislation took a strongly restrictive approach, the VTVPA, in refreshing contrast, reflects (perhaps unconsciously) the progressive policies urged by the United Nations High Commissioner for Human Rights. NGOs concerned with violence against women and the protection of children have achieved remarkable influence in the U.S. Congress, in migration as well as other matters. They form a part of the transnational social movement that managed to reconceptualize trafficking as a human rights abuse in the Trafficking Protocol.

The VTVPA enhances criminal penalties for traffickers and increases funding for enforcement. The Act also mandates that the Department of State prepare an annual Trafficking Report, in order to increase


64. Daniel B. Schneider, World Briefing United Nations: Workers Cleared in Sex Abuse Inquiry, N.Y. TIMES, Oct. 23, 2002, at A6 (discussing report by United Nations Office of Internal Oversight into preliminary findings by Save the Children U.K. and UNHCR on sexual abuse of girl children in refugee camps in Guinea, Liberia, and Sierra Leone; the U.N. report finds that the abuse was attributable to non-U.N. personnel in the camps, and suggests preventive measures).

understanding of this underground traffic and to pressure other states to adopt policies that better respect the human rights of trafficking victims. Most strikingly, the VTVPA provides generous immigration benefits to victims of severe forms of trafficking—a three year temporary visa that permits adjustment to lawful permanent resident status. Trafficking victims are also made eligible for social benefits equivalent to those enjoyed by refugees.\footnote{66}{In 1996, federal social benefits for noncitizens were sharply restricted by Congress, but refugees and asylees were treated more generously than other lawful immigrants, in light of the greater need resulting from their forced migration.}

Aiko Joshi summarizes the concerns that led to adoption of the VTVPA as follows:

High profile trafficking cases revealed a lack of anti-trafficking laws, prompting national and international governmental and non-governmental organizations to call for broad legislative expansion. Slavery was considered a thing of the past, and the few reports that trickled in from aid workers or human rights activists were regarded as isolated cases. . . . The indictments, trials and convictions of defendants in the “Deaf Mexican case” and the “El Monte case,” forced state and federal law enforcement and prosecutors to realize that such crimes did indeed exist at the very door of the United States. Beginning in 1999, prompted by these two cases, Democratic Senator Paul Wellstone, Democratic Representatives Louise McIntosh Slaughter and Sam Gejdenson, and Republican Representative Christopher Smith, introduced several anti-trafficking bills in both the Senate and the House. These combined efforts merged to form the Victims of Trafficking and Violence Protection Act of 2000, signed into law by President Clinton on October 28, 2000. . . . As more trafficking cases came to light, law enforcement and prosecutors realized these cases did not always entail forced sweatshop or restaurant labor. Many of the trafficking cases also involved the forced prostitution of women and, to some extent, children.\footnote{67}{Aiko Joshi, The Face of Human Trafficking, 13 HASTINGS WOMEN’S L.J. 31, 39–40 (2002) (footnotes omitted). The “Deaf Mexican case” involved approximately 60 deaf and mute Mexicans who were smuggled and forced to sell trinkets in the streets and subways of New York. Eighteen traffickers were convicted. The “El Monte case” involved Thai women who were forced to work in a California garment sweatshop under armed guard. Eight traffickers were convicted. \textit{Id.} at 38–39.}

The terms of the VTVPA are a testament to the effective lobbying skills of domestic violence advocates and groups concerned with the special vulnerabilities of migrant women and children. These advocates have found dedicated counterparts in the relevant agencies of the federal
government, and strong anti-trafficking programs with a victim-sensitive perspective have been established in the Departments of State, Justice, and Labor.

One important factor that may contribute to the effective implementation of the VTVPA is that the prosecution of slavery and peonage crimes is assigned to the Criminal Section of the Civil Rights Division of the Department of Justice, rather than to the regular Criminal Division. The Civil Rights Division generally brings a greater human rights consciousness to its prosecutorial tasks and deterrence programs. The Criminal Section of the Civil Rights Division has been "an active and leading member of the [inter-agency Trafficking in Persons and Worker Exploitation Task Force (TPWETF)]," through which officials of the Departments of Justice and Labor (including the INS, the FBI, and Executive Office for United States Attorneys) collaborate to combat trafficking.

Nevertheless, insuring that traditional law enforcement personnel are fully committed to the progressive policies of the VTVPA is an on-going task. For example, the defense attorney appointed to represent five trafficked women detained in Seattle in October 2002 reported to me that the Assistant United States Attorney assigned to prosecute the trafficking case was unaware of the T visa authorized by the VTVPA. The Department of Justice must improve awareness of and training on the provisions of the VTVPA among those responsible for prosecuting traffickers, especially now that Congress has transferred the Immigration and Naturalization Service (INS) to the new Department of Homeland Security. Advocates must find new allies in the Department of Homeland Security, whose very name suggests suspicion of migrants, to insure that the T visa regulations are implemented in a generous spirit.

V. THE T VISA

The former INS adopted interim regulations to implement the T visa for victims of severe trafficking, effective March 4, 2002. T visa applicants must establish that they are victims of a "severe form of trafficking

68. Id. at 42.
69. Ultimately, the five women decided not to apply for T visas, because of restrictive interpretations of eligibility rules concerning cooperation with law enforcement. They are seeking U visas, which are available to certain crime victims. Interview with Anita Sinha, immigration lawyer for the five trafficked women, Northwest Immigrant Rights Project, in Seattle, Wash. (Apr. 9, 2003).
70. 8 C.F.R. § 214.11 (2002). For analyses of these regulations, see Abriel, supra note 58, and Lisa Raffonelli, INS Final Rule to Assist Victims of Trafficking, REFUGEE REPORTS, Apr. 2002, at 1.
in persons," that they have complied with "any reasonable request for assistance in the investigation or prosecution of acts of such trafficking in persons," and that they would "suffer extreme hardship involving unusual and severe harm upon removal." If the applicant entered the United States illegally or committed criminal acts related to his or her victimization, he or she must first apply for a waiver of inadmissibility. The immigration authorities may also waive inadmissibility grounds relating to health requirements and likelihood to become a public charge.

The "severe form of trafficking" criterion requires proof of two elements: (1) that force, fraud, or coercion was used, and (2) that the traffickers had a particular end in mind for the victim (sex trafficking, involuntary servitude, peonage, debt bondage, or slavery). Victims under the age of 18 need not prove force, fraud, or coercion; victims under age 15 need not comply with requests for cooperation with law enforcement. The application form is accompanied by a declaration to be filled out by a federal law enforcement agency (Form I-914, Supplement B). However, if the applicant cannot provide an endorsement from a federal law enforcement agency, the applicant may provide "credible secondary evidence" to support his or her claim to eligibility for a T visa. The regulations provide a broad list of factors potentially relevant to establishing a risk of "extreme hardship involving unusual or severe harm."

T visa applicants should not be detained in facilities inappropriate to their status as crime victims. Only 5,000 T visas may be granted per fiscal year. Successful applicants may adjust their status to lawful permanent residents after three years, upon proof of continuous physical presence, compliance with reasonable requests for assistance by law enforcement agencies, good moral character, and a significant possibility of retribution or hardship if returned to their state of origin. While in T visa status, trafficking victims may receive benefits equivalent to those for which refugees are eligible, including cash, medical assistance, and job counseling. T visa holders may also obtain work authorization. Under certain circumstances, derivative benefits may be available to immediate family members of T visa holders.

Agencies that provide assistance to trafficking victims indicate that finding safe housing remains a challenge, because of the danger that

72. Raffonelli, supra note 70, at 4.
73. 8 C.F.R. § 214.11(h)(2).
74. 8 C.F.R. § 214.11(i).
75. Raffonelli, supra note 70, at 6.
76. Id. at 8.
77. 8 C.F.R. § 214.11(o).
victims’ presence might entail for shelters and those already living there.\(^7\) Traffickers can be violent and dangerous, and they or their associates may pursue victims. Others may attempt to exploit trafficking victims who have received work authorization, because of their perceived vulnerability.\(^7\) And, as noted above, much work remains to be done to insure that trafficking victims are made aware of the availability of the T visa and that they receive appropriate assistance in obtaining this immigration benefit. The regulations require the victim to take the initiative to seek this protection, and place the burden of proving eligibility upon the applicant.

VI. STATE AND LOCAL GOVERNMENT AND NON-GOVERNMENTAL ORGANIZATIONS

Migration control in the United States is essentially a federal function, while crime control and social welfare are the shared responsibilities of federal, state, and local governments. Congress has exercised its plenary power over immigration to provide important relief to trafficking victims who would otherwise be subject to deportation, and the U.S. Department of Justice has prosecuted trafficking rings. But state and local governments, as well as non-governmental organizations, have important roles to play in insuring that the human rights of trafficking victims are protected.\(^8\)

For example, the U.S. Department of Health and Human Services Office of Refugee Resettlement (ORR) administers funds (appropriated at $1.25 million for fiscal year 2003) to implement the VTVPA. These funds are available to grant applicants who are public and private non-profit organizations; to state, local, and tribal organizations; and even to for-profit entities seeking to provide community outreach services. The program (entitled Services to Victims of a Severe Form of Trafficking) is designed to increase awareness about human trafficking and to support services for individuals determined to be victims of a severe form of trafficking.

One area of need is for legal services to trafficking victims. Applying for a T visa is a civil matter that involves filing an application with immigration authorities, and the U.S. Government does not provide

---

\(^7\) Raffonelli, supra note 70, at 9.

\(^7\) Id.

\(^8\) The State of Washington has taken vigorous action to confront traffickers, in the aftermath of several homicide cases involving “mail order” brides. See STATE OF WASHINGTON, DEP’T OF COMMUNITY, TRADE AND ECONOMIC DEVELOPMENT, WASHINGTON STATE TASK FORCE REPORT ON TRAFFICKING IN PERSONS (Nov. 2002).
assistance of counsel in such matters. Trafficking victims may also require assistance in applying for public benefits available to them under the VTVPA. Thus, a need exists in the legal community to create or support free legal services staffed by lawyers familiar with the immigration and benefits provisions of the VTVPA and to present continuing legal education programs for private attorneys willing to assist trafficking victims on a pro bono basis.

State and local law enforcement plays a vital role in the detection of trafficking. For example, officials of state labor agencies may discover the existence of sweatshops such as the one in El Monte, California.

Medical and law enforcement agencies may identify victims trafficked for sexual exploitation, as a result of their exposure to physical violence or sexually transmitted diseases, or their involvement in prostitution. Law enforcement and court authorities involved in domestic violence prosecutions and divorce proceedings may discover coercive practices related to the "mail order bride" industry. While relief from deportation pursuant to a grant of a T visa is an exclusively federal matter, affidavits of cooperation provided by local law enforcement agencies may assist victims in obtaining relief. Trafficking victims are eligible for federal financial assistance, but their ability to recover from trauma may depend on the availability of services at the local level for housing, job training, and medical assistance.

VII. PREVENTING HUMAN RIGHTS VIOLATIONS AGAINST TRAFFICKING VICTIMS

Waiting to implement preventative strategies until trafficking victims have arrived in the destination state is inadequate. Prevention must also occur in source and transit states. Poverty and discrimination against women and children contribute greatly to trafficking flows. Police corruption in source and transit states impedes law enforcement in destination states, which depends upon mutual enforcement assistance to put trafficking rings out of business.

From September 7–16, 2002, police from the United States and a number of states in Central and Eastern Europe conducted 20,558 raids designed to break up trafficking rings, arresting 293 suspected traffickers and identifying 237 potential trafficking victims. Although the operation had mixed success (for example, results in Bosnia were disappointing), it highlights the type of intensive cooperation required between wealthy destination states and source and transit states that must

81. See Joshi, supra note 67.
82. Binder, supra note 63.
occur if the Trafficking Protocol and the VTVPA are to be successfully implemented. The Southeast European Cooperative Initiative in Bucharest, Romania, responsible for this operation, involves cooperation by officials from Albania, Bosnia, Bulgaria, Croatia, Macedonia, Yugoslavia, Greece, Hungary, Moldova, Romania, Turkey, the Ukraine, and the United States.

However admirable, these efforts do not eradicate the traffic at its source. They do not supply alternate opportunities, either for lawful migration or for a decent standard of living in their state of origin, to the women and children funneled daily into the sex trade. Foreign assistance must involve more than exchanges among police agencies, and must entail development strategies that emphasize educational opportunities for girls and economic security for women. The gross human rights violations resulting from sexual slavery and forced labor are linked to systematic denials of equality and economic rights in source countries. Only when the comprehensive human rights background to trafficking is fully understood, and states commit themselves to tackle human rights violations occurring along the entire spectrum of the traffic, will we begin to see a diminution in this serious human rights problem.

VIII. CONCLUSION

Professor Jacobson’s pioneering study of the work of international organizations in the social welfare and human rights field provides a valuable framework within which to measure progress in the struggle to eliminate trafficking in women and children and to redress the severe human rights abuses they suffer. The Trafficking Protocol reflects the coordinated efforts of human rights IGOs and NGOs to cross regime boundaries and to infuse a crime control instrument with a human rights consciousness. Their success was modest, as the Trafficking Protocol essentially preserves existing human rights protections for trafficking victims and, in rather mild language, invites states parties voluntarily to provide deportation relief and rehabilitative services to trafficked persons. Nevertheless, the Trafficking Protocol represents a “symbolic” achievement for the United Nations bodies involved in its drafting, and an advance in reconceptualizing trafficking as a human rights concern, as well as a crime and migration control issue.

Combating trafficking is a multi-level game, and primary influence over implementation of anti-trafficking measures rests with national law

83. JACOBSON, supra note 2, at 313-89.
84. See generally COX & JACOBSON, supra note 9 (discussing symbolic activities of international organizations).
enforcement and migration control authorities. The thrust of the Trafficking Protocol is to increase information sharing and mutual criminal assistance among states, in order to identify and prosecute the organized crime groups engaged in trafficking. The fate of the victims largely remains in the hands of these same officials.

The Office of the High Commissioner for Human Rights has continued its efforts to redefine the identity of trafficked persons as human rights victims by issuing in 2002 the Recommended Principles and Guidelines for Human Rights and Human Trafficking. The OHCHR disseminated these Principles and Guidelines as a model for adoption by national authorities seeking to approach trafficking from a human rights perspective. In this work, a network of international and national NGOs concerned with violence against women, the protection of children, and the plight of migrants assists the OHCHR. These groups participated effectively in the drafting of the Trafficking Protocol, and are also vital partners in shaping national anti-trafficking strategies and in assisting victims.

The United States, while so far declining to ratify the Trafficking Protocol and thus to join in the formal multilateral campaign against trafficking, has adopted legislation and regulations that are largely consistent with the human rights orientation of the Trafficking Protocol and the OHCHR Principles and Guidelines. The VTVPA, enacted by Congress in 2000 and responsive to NGOs who urged that trafficking be understood as a serious human rights abuse, enhances law enforcement resources but also provides immigration relief and social services to victims of trafficking. Further, the VTVPA establishes a form of monitoring, reporting, and sanctions against states that have not adopted effective and progressive anti-trafficking strategies, through annual reports issued by the U.S. Department of State. These reports are critical of states, including close U.S. allies, which tolerate trafficking and corruption and treat trafficking victims harshly.

The VTVPA also provides funding for governmental and nongovernmental service providers at the local level, to ensure that victims of trafficking gain access to immigration and social welfare benefits and recover from their trauma. In this aspect of policy, NGOs become partners with law enforcement and migration control officials in combating trafficking in a manner that respects the human rights of trafficked persons.

However, a substantial challenge remains to eradicate trafficking at its source. Discrimination against women, children, and severe poverty

85. Principles and Guidelines, supra note 45.
86. VTVPA, supra note 7.
fuel the traffic, especially into the sex trade. International development agencies and national development officials must collaborate in creating employment opportunities and education for women and children in source countries. Law enforcement and migration control have proved ineffective against trafficking gangs, who demonstrate remarkable flexibility, influence, and ruthlessness. Deportation relief for trafficking victims, however desirable, is more a palliative than a solution for the human rights abuses associated with trafficking. Significant changes in social attitudes and economies in lesser-developed and transitional states must occur for the objectives of the Trafficking Protocol and the VTVPA to be achieved.