

## Looking Back, Looking Forward: The UN Trafficking Protocol at fifteen

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Anniversaries provide a pretext for reflection—celebration for national independence days, mourning for war-time massacres. For political reforms and legal innovations, anniversaries warrant a different set of reflections: less predictable or uniform, more sober stock taking and weighing of achievements and failures than affirmation of unequivocal success or defeat. This fourth special issue of the *Anti-Trafficking Review* embraces the occasion of the fifteenth anniversary of the 2000 United Nations (UN) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereafter Trafficking Protocol), and evaluates the impact of this landmark instrument of international law on the grave social, political and economic problems it targets. Among the many and varied constituencies concerned with issues of trafficking, from government bodies to international advocacy groups to sex worker collectives, the Trafficking Protocol has attracted considerable attention. It has been widely ratified, its definition of trafficking has been extensively invoked, its criminalisation mandates have been aggressively followed, its victim protection measures have been enthusiastically cited.

With this high-profile visibility have come controversy and disagreement. Inevitably, evaluation criteria for anti-trafficking success vary, opinions on the data evidenced by the empirical track record differ and assessments of intervention efficacy diverge. This divergence of views applies to the impact of the Protocol itself as much as it does to the broader domain of anti-trafficking work. The multifaceted social reality implicated in the phenomenon we label human trafficking is the product of a plethora of factors, among which international legal norms and their consequences (regional and domestic) constitute a small part.

Even the task of disentangling the 'consequences' of legal norms—the impact that ratification of any treaty or protocol has on a country—is anything but straightforward.<sup>1</sup> Nowhere is this truer than in the trafficking context. Do we have good pre-ratification baseline measures? Do we even agree on the criteria for deciding

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<sup>1</sup> For contributions to this discussion, see O Hathaway, 'Do Human Rights Treaties Make a Difference?', *Yale Law Journal*, vol. 111, 2002, pp. 1935–2042; J Goldsmith & E Posner, *The Limits of International Law*, Oxford University Press, New York, 2005, pp. 107–134; B Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, Cambridge University Press, New York, 2009.

what counts as success<sup>2</sup>—are we counting the instances of human exploitation related to trafficking, or the numbers of people who have been trafficked? Are we determining the size of trafficking networks or the profits derived from trafficking, the numbers of arrests, of prosecutions, or of convictions of traffickers? Are we tracking the numbers of people who have been rescued, empowered or protected from the ravages of trafficking, or the numbers of professionals trained to provide appropriate services, or the magnitude of resources available to protect or support trafficked persons? The list is extensive and open-ended.

For any of the evaluation criteria selected, what is the quality of the empirical data available to measure change over time? Is it comprehensive, reliable, up-to-date? If improvements along any relevant vector are detected, how does one ascertain whether they are caused by adoption of the Protocol as opposed to other factors? All these questions raise serious challenges for anyone confidently embarking on an assessment of the impact of the Protocol a decade and a half after its adoption. But they also highlight the importance of pausing for this moment of reflection. It is clearly imperative that, from our different vantage points, we do our best to dispassionately measure how far we have come, which elements of the Protocol's original intentions have been vindicated, which falsified, which trivialised, which qualified. For such stock taking has the potential to galvanise positive change among key actors. This, at least, is our hope.

When we launched the proposal for a special issue of the *Anti-Trafficking Review* focused on the fifteenth anniversary of the Trafficking Protocol, we encouraged contributors to reflect on issues related to anti-trafficking work that might usefully contribute to shaping its future. The topics we identified included evidence of harm or benefit resulting from the Protocol's implementation, analysis of the workability and usefulness of the Protocol definition of trafficking as a practical tool, and work on the immigration control impact of the Protocol. We also invited authors to consider the relationship between the anti-trafficking agenda and other human-rights-related agendas such as women, labour, refugee or migrant rights—for example did they think the emphasis on the former had enhanced or crowded out support for the latter? The overarching question—which we used to frame the Debate Section of the issue—was whether the Trafficking Protocol had advanced the global movement against human exploitation.

We are delighted with the response to our call for contributions. As the ensuing pages make clear, we have received a mixed set of offerings, both in terms of subject matter, disciplinary perspective, political stance and geographical location. This is exactly what we hoped for—and we hope our readership agrees that it makes for a rich and illuminating contribution to understanding the problems at hand.

Three common themes emerge from the articles. A central one is engagement with the nuanced stock taking we proposed. Several contributors carefully explore the impact of the Trafficking Protocol to offer a considered assessment. A few are unqualifiedly positive. Joy N Ezeilo, the former UN Special Rapporteur on trafficking in persons, especially women and children, celebrates a milestone international

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<sup>2</sup> A T Gallagher & R Surtees, 'Measuring the Success of Counter-Trafficking Interventions in the Criminal Justice Sector: Who decides—and how?', *Anti-Trafficking Review*, issue 1, 2012, retrieved 5 March 2015, <http://www.antitraffickingreview.org/index.php/atrjournal/article/view/17/19>

achievement that has, in her view, both accelerated the development of a workable anti-trafficking global framework and at the same time consolidated the international commitment to act on it. She notes the importance of definitional agreement in the Protocol as a basis for transnational cooperation and lauds the emphasis on protection of trafficked persons' human rights, a departure from the more punitive pre-Protocol approach. In a similar vein though from the narrower perspective of the United Kingdom's (UK) policy and practice, Caroline Parkes at The Trafficking Research Project notes the importance of the Trafficking Protocol's impact on modernising and broadening domestic understandings of human exploitation from the UK's archaic embedding within an outmoded slavery model. Though not perfect, she argues that the Protocol's flexible engagement with a range of trafficking situations has spurred States such as the UK to develop legislation (the UK Modern Slavery Bill) that appropriately targets 'the reality of contemporary exploitation, rather than some abstract approximation to it'.

Others are less sanguine in their assessment of the Trafficking Protocol's impact and legacy. Marjan Wijers, an expert who participated in the negotiations leading up to the Protocol, is critical of its focus and argues that it prioritises attention to the coercion involved in the recruitment and transportation aspects of trafficking instead of unconditionally addressing the central human rights violation caused by human trafficking, namely the abusive working conditions of trafficked persons—be they labour- or sex-sector related (a distinction Wijers is critical of)—irrespective of the initial induction circumstances. Torture, brutalisation, rape, coercion in the daily life of sex workers or undocumented migrants who chose to cross borders to improve their life prospects, she argues, are thus ignored or marginalised. This approach, she notes, diverts the primary preoccupation of anti-trafficking intervention from the protection of vulnerable workers to the policing of State borders. From a single country perspective, Grupo Davida, a conglomerate of academic researchers associated with the Davida prostitutes' rights association in Rio de Janeiro, articulate a similar opinion based on their experience of the Trafficking Protocol's impact on Brazil's anti-trafficking policies. Like Wijers, they note its impact on strengthening migration control policy and its concomitant neglect of some of the most vulnerable and exploited groups, including sex workers, coerced migrant labourers and lesbian, gay, bisexual and transgender individuals. Kathryn Baer at The Trafficking Research Project too from her vantage point in Singapore—a non-signatory country influenced by global anti-trafficking discourse—criticises the impact that growing government emphasis on sanctioning trafficking has had on victim protection. She argues that policies justified as anti-trafficking measures in fact generate and justify raids on irregular migrants and sex worker groups, increasing criminal convictions of vulnerable workers but ignoring issues of victim protection or trafficking prevention. She also notes that a key rights issue confronting vulnerable migrant workers—deceptive recruitment practices that trick them into accepting exploitative labour contracts on false premises—is ignored.

Yet another group of contributors strike a middle ground between these two contrasting perspectives, setting out both gains and detriments that the Protocol seems to have produced. Anne T Gallagher, a leading international expert on anti-trafficking law and policy, carefully sets out the conclusions of her balance sheet. Like Ezeilo, she commends the agenda-setting achievements of the Protocol, the fact that it has generated a road map for dealing with trafficking where none existed. She also

notes the beneficial impact of the Protocol's unitary (albeit unwieldy) definition of trafficking as a consensus-building breakthrough that provides a basis for global action. The Protocol's generative impact on domestic and regional anti-trafficking developments is also, in her view, a notable plus point, one that several of the country expert contributors in our volume comment on. On the other side of Gallagher's balance sheet are several serious weaknesses. The absence of an effective implementation and enforcement mechanism is perhaps, from a human rights perspective, the most serious. States are afforded great leeway and discretion in the way they implement their protection obligations, with the predictable result that trafficked persons have so far seen little concrete benefit. A related weakness in the Protocol is the extremely low conviction rate for traffickers that has followed its adoption. For a widely ratified instrument promoted as an important law enforcement tool, this is surprising. Expanding on this point, Kristiina Kangaspunta, a prominent expert on trafficking within the UN Office on Drugs and Crime, draws a telling contrast between the number of countries that do not have legislation against trafficking (only 9 out of 173 surveyed by her office), and the 41% of countries with such legislation who recorded less than ten convictions (and in many cases none at all) in the two-year period between 2010 and 2012. The gap between lawmaking and law enforcement could not be clearer.

A third negative consequence of the Protocol, and one remarked upon by most contributors to this volume, is the collateral damage it has generated. In the process of enforcing anti-trafficking measures, whether through anti-sex worker raids or border checks for irregular migrants, many States have inflicted serious and deleterious human rights impacts on some of their most vulnerable populations. Grupo Davida note the pervasive criminalisation of prostitution migration among Brazilian migrants, a development, they argue, closely related to hasty implementation of the Protocol. Baer criticises the impact that aggressive anti-trafficking policies in Singapore has had on vulnerable migrant workers; in a similar vein Prabha Kotiswaran, Senior Lecturer at the King's College London, highlights the extent to which the prohibitionist emphasis of the Trafficking Protocol has spurred what she calls 'sexual humanitarianism', aggressively removing sex workers from their working environment whether they want this or not, while at the same time ignoring other coercive forms of labour exploitation. She notes critically that in countries such as India the Protocol has failed to challenge, let alone reverse, the underlying vulnerabilities of a broad constituency of marginal workers. It has not insulated these workers from the coercive and abusive pressures of traffickers. On the contrary, by equating sex work and trafficking, she argues, such countries have used the Protocol as an instrument of social control targeting some constituencies of very vulnerable workers. Finally, Synnøve Økland Jahnsen (PhD candidate, Norwegian Police University College) and May-Len Skilbrei (Professor, University of Oslo) examine the impact of anti-trafficking policies in Norway in the wake of implementation of the Trafficking Protocol and also offer a mixed balance sheet. They acknowledge that the diffusion of the 'trafficking label' has increased the protection opportunities for some vulnerable groups, including those whose vulnerability is related to engagement in sex work or to gender-based oppression. But, they argue, the opposite has been true for other exploited groups, for whom increased surveillance and anti-migration enforcement have exacerbated vulnerability. In this, they concur with other contributors who point critically to the Protocol's prioritisation of criminal justice responses to trafficking over a more

preventative and potentially empowering focus on the social and political determinants of vulnerability to trafficking.

I now turn briefly to two other themes in our volume. One centres on the impact of the Protocol's trafficking definition. One of the Protocol's most celebrated legacies, the establishment of a widely adopted unitary definition, has provoked a considerable amount of comment and discussion. Many claim that without this achievement, the energetic focus on anti-trafficking initiatives of the last decade would never have occurred. Wijers highlights the critical importance attached to formulation of a unitary definition by key constituencies working on trafficking-related issues. She describes the lively history of broad-based engagement with the process and gives an account of the contentious and adversarial negotiations during the drafting phase that preceded adoption of a final definition. She recalls the heated debate between two groups: one, led by the Coalition Against Trafficking in Women, that considered all prostitution to be a violation of women's human rights and therefore trafficking per se, and another, which included the Global Alliance Against Traffic in Women, that considered coercive and forced labour, rather than sex work per se, to be the target. Eventually, the latter perspective succeeded in excluding sex work per se from the scope of exploitation (except for children), and in embedding the notion that force, coercion or deceit were necessary means. Gallagher notes the powerful impact that adoption of a common definition had on the development of an anti-trafficking normative framework—she describes it as a breakthrough and a necessary precondition for the focused policy work that followed. At the same time she observes that the definition's ambiguity ('exploitation' is not defined; 'abuse of a position of vulnerability' is a murky phrase) has enabled increasingly careless and expansionist applications of the trafficking label. Examples she cites include the sloppy equation of trafficking and 'modern slavery', and the potential for 'mission creep' as actions such as surrogacy or transnational adoption are brought under an anti-trafficking rubric. Kotiswaran also argues that the appearance of a unitary definition has not translated into the reality of a consistent international field of intervention. She too discusses the trafficking definition's lack of clarity and its consequences for domestic anti-trafficking initiatives. Since both the terms 'coercion' and 'exploitation' can be (and have been) construed in very different ways, controversy continues to surround the appropriate scope for anti-trafficking intervention, with considerable variation in the 'legal mediations of the coercion-exploitation balance'. Because domestic anti-trafficking law is a critical site for conceptualising solutions and is the locus with the greatest potential for creative (or repressive) developments in the field of trafficking, Kotiswaran urges focus on domestic contexts as a crucial object of study. India, for example, she argues, has used the Protocol definition to focus on sex worker exceptionalism, neglecting the vast extent of bonded and other forms of forced labour that could well also be brought into an anti-trafficking rubric.

Finally, in line with Kotiswaran's plea, over half the authors delve deeply into the Trafficking Protocol's relevance to a particular country or region. This is a particularly important and valuable complement to the more theoretical and transnational discussion, given the critical role of national legislation and domestic enforcement and protection initiatives in the development of policy on the ground. Some contributors track the impact of the Trafficking Protocol on national debates, legislative priorities and funding allocations within their countries—Baer, for example, discusses the

development of policy in Singapore and notes the underdevelopment of resources for victim protection and primary protection. Ela Wiecko V. de Castilho (Vice Prosecutor of the Republic, Brazil and Professor at the University of Brasilia) and Grupo Davida present interesting information on the Brazilian case, highlighting the uses to which the Protocol has been applied, and the negative consequences of its 'too hasty' and externally imposed implementation on various vulnerable communities, including Brazilian sex workers migrating for work. These authors also note the persistent deficits in tackling domestic trafficking in Brazil. Laura K Hackney (Program Associate for the Freeman Spogli Institute for International Studies at Stanford University) presents a detailed case study of bride trafficking across the Sino-Burmese border. One of her most fascinating insights is that there is no clear or predictable distinction in many cases between consensual marriage and human trafficking. Rather, the complex continuum between the two and the changing balance between personal advantage and abusive exploitation as a result of the migration requires a much more nuanced and careful approach than a rigid consent/coercion dichotomy suggests. She concludes that a 'one-size-fits-all criminalisation strategy' is ill advised, and that consideration of economic development factors must feed into the human rights analysis of the brides' circumstances. Like Wijers, she is critical of the Trafficking Protocol's focus on the circumstances of entry rather than on the nature of the labour or marriage relationship.

Another fascinating case study is provided by Mogos O Brhane, former National Coordinator of Community Courts in Eritrea. He focuses on the new, burgeoning and terrifying phenomenon of trafficking for ransom that characterises much Eritrean, transnational forced migration. The purpose of this form of forced migration, unlike mainstream trafficking, is the securing of ransom monies rather than labour and/or sexual exploitation. Nevertheless, Brhane argues through a careful parsing of the Trafficking Protocol definition that the parallels to debt bondage and forced begging where third party pecuniary extraction is also a central element should persuade us to bring trafficking for ransom in the Horn of Africa firmly within the scope of trafficking definitions as nationally applied, if not within the scope of the Trafficking Protocol itself. Other important case studies are presented by Parkes (tracking the impact of different pieces of UK legislation on trafficking-related conduct) and Jahnsen and Skilbrei (showing how in Norway a prostitution abolitionist agenda has interacted with an anti-migrant agenda to produce both the Sex Purchase Act and the Procurement Act). Together these case studies demonstrate both the very extensive impact of the Trafficking Protocol but also the broad range of consequences and interpretations that it has generated—a far-reaching but mixed legacy.

This volume was conceived as a contribution to both history and advocacy. We hope our readers benefit from both perspectives and use them to deepen their own understandings of the challenges we face moving forward.

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