

Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*

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I. INTRODUCTION

In December 1998, the United Nations General Assembly established an intergovernmental, ad-hoc committee and charged it with developing a new international legal regime to fight transnational organized crime.¹ In October 2000, after eleven sessions involving participation from more than 120 states, the ad-hoc committee concluded its work.² The centerpiece of the new regime is the Convention Against Transnational Organized Crime.³ The convention is supplemented by three additional treaties (protocols),

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1. Transnational Organized Crime, G.A. Res. 53/111, U.N. GAOR, 53rd Sess., 85th plen. mtg., U.N. Doc. A/RES/53/111 (1998).
2. *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions*, U.N. GAOR 55th Sess., Agenda Item 105, at 1, U.N. Doc. A/55/383 (2000).
3. United Nations Convention Against Transnational Organized Crime, *opened for signature* 12 Dec. 2000, U.N. GAOR, 55th Sess., Annex 1, Agenda Item 105, at 25, U.N. Doc. A/55/383 (2000), [hereinafter *Organized Crime Convention*].

dealing respectively with *Smuggling of Migrants*,⁴ *Trafficking in Persons—Especially Women and Children*,⁵ and *Trafficking in Firearms*.⁶ The first three of these instruments were adopted by the General Assembly in November 2000⁷ and opened for signature at a high-level intergovernmental meeting convened in Palermo, Italy, in December 2000. They are expected to enter into force within the next two years.⁸

The significance of these developments should not be underestimated. The Vienna process,⁹ as it has come to be known, 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 additional agreements. 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. Wealthy states are increasingly concerned that the actions of traffickers and migrant smugglers interfere with orderly migration and facilitate the circumvention of national immigration restrictions. Opportunities for lawful migration to the preferred destina-

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4. Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime, Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, U.N. Doc. A/55/383 (2000), Annex III, [hereinafter Migrant Smuggling Protocol].
 5. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized crime on the work of its first to eleventh sessions, U.N. Doc. A/55/383 (2000), Annex II, [hereinafter Trafficking Protocol].
 6. Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention Against Transnational Organized Crime, U.N. Doc. A/Res./55/255 (2001). The Firearms Protocol was adopted by the General Assembly in its resolution 55/255 of 8 June 2001. The final version of the protocol appears as an annex to that resolution.
 7. G.A. Res. 55/25, of 15 Nov. 2000.
 8. UN General Assembly Official Records, 55th sess. 62nd plenary meeting, U.N. Doc. A/55/PV.62 (2000), statement of the Secretariat. This prediction was clearly based on the rapid rate of signature for all three instruments. As of 25 July 2001, a total of 116 states had signed the convention; seventy-six had signed the Trafficking Protocol and seventy-three the Smuggling Protocol. The overwhelming majority of these signatures were secured in December 2000, available at <http://undcp.org/crime_cicp_signatures.html> (visited 25 July 2001.)
 9. The convention and protocols were negotiated under the auspices of the Vienna-based United Nations Commission on Crime Prevention and Criminal Justice (a functional Commission of the Economic and Social Council). The United Nations Centre for International Crime Prevention (part of the UN Office for Drug Control and Crime Prevention), also based in Vienna, served as Secretariat to the Ad-Hoc Committee.

tions have dramatically diminished at the same time as individuals are moving further, faster, and in far greater numbers than ever before. A growing demand for third-party assistance in the migration process is a direct consequence of this reality. Evidence of organized criminal involvement in trafficking and migrant smuggling operations has provided affected states with additional incentives to lobby for a stronger international response.

Despite greatly increased attention, attempts to deal with trafficking, migrant smuggling, and related exploitation at the national, regional, and international levels have been largely ineffective. At both theoretical and practical levels, many fundamental questions have remained unanswered. What exactly is trafficking and how is it to be distinguished from migrant smuggling? How does the trafficking debate fit in with the current global tendency towards criminalization of all irregular migration? Do trafficked persons deserve greater protection than smuggled migrants? Can asylum seekers be smuggled and/or trafficked? Should trafficking and migrant smuggling be dealt with as human rights issues or, given their organized crime implications, are they best left to international criminal justice fora?

With the development of two new international legal instruments on trafficking and migrant smuggling, these questions are finally being addressed. This article provides an overview of the Vienna process and its major outcomes with particular reference to the issue of trafficking. It is divided into seven parts of which this introduction is the first. The following section summarizes the principal provisions of the Convention against Transnational Organized Crime and explains the connection between this instrument and its protocols. The origins of the two protocols are examined in section three. Section four contains a detailed description and analysis of the Trafficking Protocol. The Migrant Smuggling Protocol is considered in section five, and its relationship with the Trafficking Protocol explored in section six. The final section examines the protocol negotiation process and includes a number of the author's personal observations.

II. OVERVIEW OF THE CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME¹⁰

The Convention Against Transnational Organized Crime is referred to as the "parent" agreement. Its principle provisions apply, *mutatis mutandis*, to the

10. Proposals for a United Nations Convention Against Transnational Organized Crime were first tabled at the World Ministerial Conference on Organized Transnational Crime, which was held in Naples, Italy, in November 1994. For details on the

three additional protocols.¹¹ States must ratify the convention before ratifying one or any of its protocols.¹² The convention is essentially an instrument of international cooperation—its purpose being to promote interstate cooperation in order to combat transnational organized crime more effectively.¹³ The convention seeks to eliminate “safe havens” where organized criminal activities or the concealment of evidence or profits can take place by promoting the adoption of basic minimum measures.¹⁴ Five offenses, whether committed by individuals or corporate entities,¹⁵ are covered: participation in an organized criminal group, corruption, money laundering, obstruction of justice, and “serious crime.” There are, however, two principal prerequisites for application. First, the relevant offense must have some kind of transnational aspect. Second, it must involve an organized criminal group. Both elements are defined very broadly.¹⁶ “Serious crime” is defined in such a way as to include all significant

developments following this conference and leading up to the establishment of the Ad-Hoc Committee, see Dimitri Vlassis, *The United Nations Convention Against Transnational Organized Crime and its Three Protocols: Development and Outlook*, at 4–16, unpublished paper. (On file with author.) [Hereinafter Vlassis]. Vlassis’ paper also provides a useful history of the UN’s efforts to strengthen international cooperation against transnational organized crime. *Id.* at 2–4.

11. Trafficking Protocol, *supra* note 5, art. 1.2., Migrant Smuggling Protocol, *supra* note 4, art. 1.2. According to the Interpretative Notes for the official records of the negotiation process, the term “*mutatis mutandis*” as used in both protocols means: “with such modifications as circumstances require” or “with the necessary modifications.” Provisions of the convention that are applied to the protocols would consequently be modified or interpreted so as to have the same essential meaning or effect in the protocol as in the convention. Interpretative Notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the protocols thereto, U.N. Doc. A/55/383/Add.1, at ¶¶ 62, 87 [hereinafter Interpretative Notes]. See also, Organized Crime Convention, *supra* note 3, art. 37.4, “Any protocol to this Convention shall be interpreted together with this Convention, taking into account the purpose of that protocol.”
12. Organized Crime Convention, *supra* note 3, art. 37.2.
13. *Id.*, art. 1.
14. United Nations Office for Drug Control and Crime Prevention, *Summary of the United Nations Protocol Against Transnational Organized Crime and Protocols Thereto*, available at <<http://www.odccp.org/palermo/convensumm.htm>> (visited Jan. 2001).
15. Liability of legal persons is set out in Article 10.
16. The convention defines a transnational offense as one which is committed in more than one state; or committed in one state but substantially planned, directed or controlled in another state; or committed in one state but involving an organized criminal group operating in more than one state: or committed in one state but having substantial effects on another state, Organized Crime Convention, *supra* note 3, art. 3.2. An organized criminal group is defined as “a structured group of three or more persons existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences . . . in order to obtain, directly or indirectly, a financial or other material benefit.” *Id.* art. 2(a). Importantly, the convention’s *travaux préparatoires* will indicate that “financial or other benefit” is to be understood broadly to include, for example, personal or sexual gratification, Interpretative Notes, *supra* note 11, at ¶ 3.

criminal offenses.¹⁷ As a result, states will be able to use the convention to address a wide range of modern criminal activity including trafficking and related exploitation as well as migrant smuggling. This is especially important in view of the fact that states may become parties to the convention without having to ratify any or all of the protocols.¹⁸

In keeping with its nature as a transnational cooperation agreement, the convention actually contains very little in the way of hard obligation. This was clearly an important factor in its relatively speedy completion. States parties will, however, be required to *criminalize* 1) participation in an organized criminal group,¹⁹ 2) laundering of the proceeds of crime,²⁰ and 3) public sector corruption²¹ as defined under the convention.²² These offenses (along with “obstruction of justice”) are also to be made subject to appropriate sanctions.²³ The criminalization obligation addresses one of the key reasons for the existence of the convention—the lack of uniformity in national legislation and the resulting difficulty in cross-border cooperation.

One of the principle obstacles to effective action against transnational organized crime including both trafficking and migrant smuggling has been the lack of communication and cooperation between national law enforcement authorities. The convention sets out a range of measures to be adopted by states parties to enhance effective law enforcement in this area through, *inter alia*, improving information flows and enhancing coordination between relevant authorities.²⁴ The practical application of these provisions is likely to be enhanced by the inclusion of a detailed legal framework on mutual legal assistance in investigations, prosecutions, and judicial proceedings in relation to applicable offenses.²⁵ It will be possible for states

17. “Serious crime” refers to conduct constituting a criminal offense punishable by a maximum deprivation of liberty of at least four years or a more serious penalty. Organized Crime Convention, *supra* note 3, art. 2(b). This definition is based on the results of a study of legislation in UN member states contained in U.N. Doc. A/AC.254/22 and Corr.1 & Add.1.

18. Organized Crime Convention, *supra* note 3, art. 37.3.

19. *Id.*, art. 5.

20. *Id.*, art. 6. “Proceeds of crime” is defined in article 2(e).

21. Organized Crime Convention, *supra* note 3, art. 8. Corruption is not directly defined. Instead, states parties are required to criminalize a range of conduct when committed intentionally, specifically: “the promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her duties” and “[t]he solicitation or acceptance by a public official, directly or indirectly, of an undue advantage for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her duties.” *Id.*

22. *Id.*, art. 8.

23. *Id.*, art. 6(1).

24. *Id.*, art. 26.

25. *Id.*, art. 18.

parties to request mutual legal assistance for a range of purposes including the taking of evidence, effecting service of judicial documents, execution of searches, identification of the proceeds of crime, and production of information and documentation.²⁶ Requests for mutual legal assistance are to be channeled through a central authority designated for this purpose.²⁷ States parties are also encouraged to establish joint investigative bodies,²⁸ come to formal agreement on the use of special investigative techniques,²⁹ consider the transfer of criminal proceedings³⁰ and sentenced persons,³¹ and facilitate extradition procedures for applicable offenses.³² National law enforcement structures are also to be strengthened through education and training of relevant officials in order to prevent, detect, and control transnational organized crime.³³ States parties are also to endeavor to take certain legal and financial steps to *prevent* transnational organized crime.

The negotiation process made clear the fact that developing countries and countries with economies in transition would require economic and technical assistance in order to enable them to fully implement many of the key provisions—particularly those relating to information and data collection, training, and strengthening of techniques to deal with transnational organized crime.³⁴ The convention acknowledges this reality in a detailed article which sets out a range of international cooperation measures including the establishment of a dedicated UN funding mechanism.³⁵

The convention contains a brief but important provision on victims of transnational organized crime. States parties are to take “*appropriate measures within [their] means* to provide assistance and protection to victims”—particularly in cases of threat of retaliation or intimidation.³⁶ Appropriate procedures to provide access to compensation and restitution are to be established³⁷ and, subject to their domestic laws, states parties are to enable the views and concerns of victims to be presented and considered during criminal proceedings against offenders.³⁸ Appropriate measures are also to be taken to protect witnesses (including victims who are also

26. *Id.*, art. 14(2).

27. *Id.*, art. 18.13.

28. *Id.*, art. 19.

29. *Id.*, art. 15.

30. *Id.*, art. 21.

31. *Id.*, art. 17.

32. *Id.*, art. 16.

33. *Id.*, art. 29.

34. Vlassis, *supra* note 10, at 21.

35. Organized Crime Convention, *supra* note 3, art. 30.

36. *Id.*, art. 25.1.

37. *Id.*, art. 25.2.

38. *Id.*, art. 25.3.

witnesses) from potential retaliation or intimidation.³⁹ Training programs for law enforcement personnel are to specifically deal with methods used in the protection of victims and witnesses.⁴⁰ The only other provision touching upon victims relates to the requirement that states parties participate, as appropriate, in international projects to prevent transnational organized crime: “for example, by alleviating the circumstances that render socially marginalized groups vulnerable to the action of transnational organized crime.”⁴¹

The convention establishes a Conference of the Parties to promote and review its implementation as well as to more generally improve the capacity of states parties to combat transnational organized crime.⁴² The Conference of Parties will have a special role in facilitating several of the cooperative measures envisaged under the convention including: the provision of technical assistance; information exchange; and cooperation with international and nongovernmental organizations.⁴³ It will also be responsible for periodic examination of the implementation of the convention as well as making recommendations to improve the convention and its implementation.⁴⁴ The effect of the implementation provision is actually to establish a two-tier form of review. As is the case with many multilateral treaties negotiated under UN auspices, states parties will be required to provide regular reports on progress made in implementation. In addition, the Conference of Parties may itself establish additional review mechanisms. Dimitri Vlassis observes that this latter provision is an indirect reference to the system of “peer review” which has been recently developed in regional criminal justice instruments.⁴⁵ It is relevant to note that the Conference of Parties will be concerned solely with the convention and will not have any authority in respect to the protocols, except insofar as their respective subject matters can be brought within the provisions of the convention itself.

III. ORIGINS OF THE TRAFFICKING AND MIGRANT SMUGGLING PROTOCOLS

The idea of separate protocols was first mooted in 1998 at a meeting of an intergovernmental group of experts established by the General Assembly to

39. *Id.*, art. 24.

40. *Id.*, art. 21.1(i).

41. *Id.*, art. 31.7.

42. *Id.*, art. 32.1.

43. *Id.*, art. 32.3 (a–c).

44. *Id.*, art. 32.3.(d–e).

45. Vlassis, *supra* note 10, at 21.

develop a preliminary draft of the proposed convention against transnational organized crime. On the question of whether specific offenses should be included in the draft convention, the group concluded that the negotiating process would be simplified if such offenses were dealt with separately.⁴⁶

The origins of the Trafficking Protocol can be traced back to Argentina's interest in the issue of trafficking in minors and its dissatisfaction with the slow progress on negotiating an additional protocol to the Convention on the Rights of the Child (CRC) to address child prostitution and child pornography.⁴⁷ Argentina was also concerned that a purely human rights perspective to this issue would be insufficient and accordingly lobbied strongly for trafficking to be dealt with as part of the broader international attack on transnational organized crime.⁴⁸ Argentina's proposal for a new convention against trafficking in minors was discussed at the 1997 session of the UN Commission on Crime Prevention and Criminal Justice.⁴⁹ Its timing was fortuitous. The powerful European institutions had recently decided to take the issue of trafficking seriously and were in the midst of developing detailed policies and programs.⁵⁰ The president of the United States had just issued a detailed memorandum on measures to be taken by his own government to combat violence against women and trafficking in women and girls.⁵¹ A general awareness was also developing, amongst an influential group of states, of the need for a holistic approach where the crime control aspects of trafficking were addressed along with traditional human rights concerns.

46. Report of the meeting of the inter-sessional open-ended intergovernmental group of experts on the elaboration of a preliminary draft of a possible comprehensive international convention against organized transnational crime (Warsaw, 2–6 Feb. 1998), U.N. Doc. E/CN.15/1998/5 at ¶ 10(b).

47. Vlassis, *supra* note 10, at 14. The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography was recently adopted by the General Assembly (Resolution 54/263, Annex II). The negotiation process was protracted and difficult and the final text does not enjoy widespread support. Some states and NGOs have argued that certain of its provisions are, in fact, weaker than those of the convention. See, e.g., 5 *Focal Point on Sexual Exploitation of Children, NGO Group for the Convention on the Rights of the Child*, 13–14 (visited Apr. 2000).

48. Vlassis, *supra* note 10, at 14.

49. Measures to Prevent Trafficking in Children, Report of the Secretary General, U.N. Doc. E/CN.15/1997/12 (1997).

50. For more information on these initiatives see: *Trafficking in Women and Girls, Note prepared by the Office of the High Commissioner for Human Rights and the ECE Secretariat*, Regional Preparatory Meeting on the 2000 Review of Implementation of the Beijing Platform for Action, 19–21 Jan. 2000, U.N. Doc. E/ECE/RW.2/2000/3 (2000), esp. at ¶¶ 29–35.

51. William J. Clinton, *Memorandum for the Secretary of State, the Attorney General, the Administrator of the Agency for International Development, the Director of the United States Information Agency, March 11, 1998, Subject: Steps to Combat Violence Against Women and Trafficking in Women and Girls*, reprinted in 3 *TRANSN'L ORGANIZED CRIME* 214 (1997).

The initial proposal for a legal instrument to deal with the smuggling of migrants was presented to the Commission on Crime Prevention and Criminal Justice by the government of Austria in 1997.⁵² At the same time, the Italian government, in an attempt to deal with the growing problem of migrant smuggling from Albania, approached the International Maritime Organization (IMO) with a proposal for the issuance of directives regarding “trafficking” of migrants by sea.⁵³ The Assembly of the IMO transferred the matter to its Maritime Safety Commission with a note that trafficking was outside the scope of the Organization.⁵⁴ Italy subsequently decided to join forces with the Austrians in pushing for the development of a legal instrument against migrant smuggling within the context of the Commission’s work against transnational organized crime.⁵⁵

IV. OVERVIEW OF THE TRAFFICKING PROTOCOL

A. Scope and Purpose

The earliest drafts of the Trafficking Protocol limited its application to trafficking in women and children. At the very first negotiating session, states, intergovernmental organizations, and NGOs argued that this approach was unnecessarily restrictive and failed to take into account the fact that men were also trafficked. Following a recommendation of the Ad-Hoc Committee, the General Assembly subsequently agreed to modify the mandate of the Committee’s mandate so as to enable that the scope of the proposed protocol be expanded to cover trafficking in persons—especially women and children.⁵⁶

The stated purpose of the Trafficking Protocol is two-fold: first, to prevent and combat trafficking in persons, paying particular attention to the protection of women and children; and second, to promote and facilitate cooperation among states parties to this end.⁵⁷ Application of the protocol is limited to situations of international trafficking involving an organized

52. Letter from the Austrian Permanent Representative to the United Nations to the United Nations Secretary-General dated 16 Sept. 1997 accompanying the *Draft International Convention against the Smuggling of Illegal Migrants*, U.N. Doc. A/52/357 (1997).

53. Vlassis, *supra* note 10, at 15.

54. JOHN MORRISON, *THE TRAFFICKING AND SMUGGLING OF REFUGEES: THE END GAME IN EUROPEAN ASYLUM POLICY* 58 (July 2000)(report commissioned by the United Nations High Commissioner for Refugees).

55. Vlassis, *supra* note 10, at 15.

56. G.A. Res. 54/126 (1999). For additional details on this issue see U.N. Doc. A/AC.254/30 (2000), E/CN.15/2000/4 (2000), ¶ 34.

57. Trafficking Protocol, *supra* note 5, art. 2.

criminal group.⁵⁸ States parties are required to adopt legislative and other measures necessary to criminalize trafficking and related conduct.⁵⁹ Interestingly, the requirement that states parties impose appropriate penalties for trafficking, accepted throughout the negotiation process, was quietly omitted from the final text of the protocol.⁶⁰

B. The Definition of Trafficking

Given the absence of an agreed definition of trafficking and the link between trafficking and prostitution, it is not surprising that discussions around the definition to be included in the protocol proved to be the most controversial aspect of the negotiations. States, intergovernmental organizations and NGOs were quick to realize that the protocol negotiations represented the first chance in over half a century to revisit the prostitution debate within the context of an international legal drafting process.⁶¹

The first major stumbling block to agreement was the question of whether non-coerced, adult migrant prostitution should be included in the definition of trafficking. One group of states, supported by a coalition of NGOs, argued that any distinction between forced and voluntary prostitution is morally unacceptable and that a coercion requirement in the definition would lend legitimacy to prostitution.⁶² Those opposing this

58. *Id.* art. 4.

59. *Id.* art. 5.

60. Compare article 3.1. of the seventh draft of the protocol (E/AC.254/4/Add.3/Rev.7) with article 5.1. of the final text (A/55/383). The only remaining sanction is contained in article 12.5. which calls upon states parties to consider taking measures to deny or revoke visas of persons implicated in the commission of trafficking-related offenses.

61. The issue of prostitution in human rights law and practice is highly controversial. There exists a sharp division between those who consider all prostitution to be inherently coercive ("and thus forced") and those who argue that the right to privacy and sexual autonomy includes the freedom of an individual to decide to act as a prostitute and to allow another person to profit from his or her earnings. On this point, see Anne Gallagher, *Contemporary Forms of Female Slavery*, in *WOMEN'S INTERNATIONAL HUMAN RIGHTS A REFERENCE GUIDE*, vol. 2, (Kelly D. Askin & Doreen M. Koenig eds., 1999). The practical and theoretical link between prostitution and trafficking has encouraged both sides to use the trafficking debate to advance their respect views on the matter of prostitution.

62. This position was initially proposed by Argentina and subsequently taken up by the Philippine delegation with support from a strong NGO lobby. For a spirited defense of the Argentinean proposal, see Bennett & Colson, *The Clintons Shrug at Sex Trafficking*, *WALL STREET J.* 10 Jan. 2000, at A26; see also Philip Shenon, *Feminist Coalition Protests US Stance on Sex Trafficking Treaty*, *N.Y. TIMES*, at A5, 12 Jan. 2000; Hanna Rosin & Steve Mufson, *Bitter Issues in Crime Treaty Debate: What is Prostitution?* *WASH. POST*, at A-2, 15 Jan. 2000; Int'l Human Rights Network, *Definition of Trafficking: Transnational Crime Convention, Trafficking in Persons Protocol*, informal submission to the June 2000 session of the Ad Hoc Ad-Hoc Committee. (On file with author.)

position⁶³ pointed out that to include non-coerced adult migrant sex work would blur the distinction between trafficking and migrant smuggling. The debate quickly came down to a question of whether the offense of trafficking could occur “irrespective of the consent of the person.” On one side it was argued that inclusion of the phrase: “irrespective of the consent of the person” would ensure traffickers could not escape conviction by using the victim’s so-called consent as a defense. Those contesting this claim pointed out that issues of consent should not arise because according to the non-contested parts of the definition, trafficking necessarily involves the presence of some kind of consent-nullifying behavior (use of force, abduction, fraud, deception, etc.).⁶⁴

Another hotly debated aspect of the definition concerned the end-purposes of trafficking. The Ad-Hoc Committee reached an early consensus on the need to move beyond the traditional focus on prostitution and the sex industry in order to ensure the relevance of the protocol to contemporary trafficking situations including forced labor, debt bondage, and forced marriage. Divisions erupted, however, over whether “use in prostitution” should be included in the definition as a separate end-purpose. The battle lines in this debate were identical to those described above. States and others seeking to maintain the abolitionist thrust of the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others⁶⁵ argued strongly for a specific reference to prostitution. Such a reference would confirm international legal opposition to all prostitution while at the same time broadening the scope of the definition and its possible application. Opponents of this position argued that inclusion of “voluntary” prostitution as an end-purpose of trafficking would make the definition of trafficking *too* broad and lead to a diversion of

63. The United States initially led the move to reject the inclusion of non-coerced sex work into the trafficking definition although its support wavered occasionally, apparently in response to domestic pressures. NGOs supporting the US position organized themselves into a caucus and undertook a comprehensive campaign of lobbying. They were able to draw on supportive statements made by the UN Special Rapporteur on Violence against Women, OHCHR, UNHCR, UNICEF, and IOM.

64. For a more detailed explanation of this position, see Human Rights Caucus, Recommendations and Commentary, informal submission to the June 2000 session of the Ad-Hoc Committee, Women’s Rights Division, Human Rights Watch, Recommendations Regarding the Protocols on Trafficking in Persons and Smuggling of Migrants, informal submission to the June 2000 session of the Ad-Hoc Committee, 5 June 2000; International Human Rights Law Group, The proposed definition of “Trafficking,” Statement to the June 2000 session of the Ad-Hoc Ad-Hoc Committee, 7 June 2000. (On file with author.)

65. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 96 U.N.T.S. 271 (1949). The convention aims to prohibit and control the (undefined) practices of trafficking, procurement, and exploitation, irrespective of the victim’s age or consent.

attention and resources away from the real problem. For example, even minor fraud or deception on the part of an individual recruiting a person into prostitution would amount to trafficking.

After protracted debate, the Ad-Hoc Committee decided against including the phrase “irrespective of the consent of the person.” The final definition now includes an unwieldy note to the effect that consent to intended exploitation is to be irrelevant where any of the stated elements which actually define trafficking (coercion, fraud, abuse of power, etc.) have been used.⁶⁶ A similar compromise was made in respect to the prostitution issue. The proposal that “use in prostitution” be included as a separate end-purpose was discarded in favor of a more narrowly focused reference to “exploitation of the prostitution of others” (pimping). While the anti-prostitution lobby hailed these decisions as victories⁶⁷ (and their opponents lamented the outcome as a defeat),⁶⁸ it would be incorrect to view the final result as indicative of a majority sentiment on the issue of prostitution. As the debates made clear, states merely agreed to sacrifice their individual views on prostitution to the greater goal of maintaining the integrity of the distinction between trafficking and migrant smuggling. The *travaux préparatoires* will indicate that the protocol addresses the issue of prostitution only in the context of trafficking, and that these references are without prejudice as to how states address this issue in their respective domestic laws.⁶⁹

The final definition⁷⁰ contains three separate elements:

1. An action, consisting of:
 - Recruitment, transportation, transfer, harboring or receipt of persons;
2. By means of:
 - Threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability,⁷¹ giving or

66. Trafficking Protocol, *supra* note 5, art. 3(b).

67. Coalition against Trafficking in Women, *Victory in Vienna*, (report of the eleventh session of the Ad-Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, available at <<http://www.uri.edu/artsci/wms/hughes/catw/tocv.htm>> See also JANICE G. RAYMOND, GUIDE TO THE NEW UN TRAFFICKING PROTOCOL (2001).

68. Human Rights Caucus, UN Trafficking Protocol: Lost Opportunity to Protect the Rights of Trafficked Persons, 20 Oct. 2000, unpublished report. (On file with author.)

69. Interpretative Notes, *supra* note 11, ¶ 64.

70. Trafficking Protocol, *supra* note 5, art. 3(a).

71. The *travaux préparatoires* will indicate that the reference to the abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no

receiving payments or benefits to achieve consent of a person having control over another;

3. For the purpose of:

Exploitation (including, at a minimum,⁷² the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs).

All three elements must be present for the convention to become operational within a given fact-situation. The only exception is for children for whom the requirements relating to means are waived.⁷³ In its final version, the protocol does not define the terms slavery, forced labor, practices similar to slavery, or servitude. In relation to the first three of these, it may be assumed that accepted definitions contained in other international legal instruments (and present in various forms in earlier drafts)⁷⁴ will be applicable.⁷⁵ The concept of servitude has not been so

real and acceptable alternative but to submit to the abuse involved. Interpretative Notes, *supra* note 11, ¶ 63.

72. The words "at a minimum" were included in lieu of a listing of specific forms of exploitation and in order to ensure that unnamed or new forms of exploitation were not excluded by implication. U.N. Doc. A/AC.254/4/Add.3/Rev.7 (2000), *supra* note 14.
73. Trafficking Protocol, *supra* note 5, art. 3(c).
74. See, e.g., Revised draft Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, U.N. Doc. A/AC.254/4/Add.3/Rev.6 (2000), art. 2 bis, Option 2.
75. Article 1 of the 1927 Slavery Convention defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised." Convention on Slavery (1927), 60 U.N.T.S. 253, art. 1 (1927). The 1930 ILO Forced Labour Convention defines forced labour as "all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily." (ILO Convention No. 29 concerning Forced or Compulsory Labour (1930), INT'L LABOUR CONVENTIONS AND RECOMMENDATIONS, 1919–1995, vol. I, 115–24, art. 2 (1996). The 1957 Supplementary Convention on the Elaboration of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 266 U.N.T.S. 3 (1957) refers to the institutions and practices of debt bondage, serfdom, servile forms of marriage and exploitation of children which are all held to be *similar to slavery*. Debt bondage and servile forms of marriage are two practices of particular relevance in the trafficking context. The 1957 Convention defines debt bondage as "the status or condition arising from a pledge by a debtor of his personal services or those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined," (art. 1(a)). In relation to servile forms of marriage, the convention refers to "Any institution or practice, whereby: (i) a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or (ii) the husband of a woman, his family, or his clan has the right to transfer

defined⁷⁶ and the final text of the protocol inexplicably omits a definition negotiated by the Ad-Hoc Committee and included in the draft right up to October 2000.⁷⁷ A proposal to include organ removal as an end purpose of trafficking was made very late in the negotiations⁷⁸ and survived despite rather curious objections that the protocol was dealing with trafficking in persons, not organs.⁷⁹

C. Trafficking in Children

Despite the origins of the protocol in this issue, the matter of child trafficking did not especially occupy delegations during the negotiations. As early as June 1999, the High Commissioner for Human Rights (HCHR) urged the Ad-Hoc Committee to include special provisions to prevent trafficking in children and to protect its victims.⁸⁰ In February 2000, an informal group consisting of the Office of the UN High Commissioner for Human Rights (OHCHR), the International Organization for Migration

her to another person for value received or otherwise; or (iii) a woman on the death of her husband is liable to be inherited by another person. *Id.* art. 1(c). The protocol's *travaux préparatoires* will include a note to the effect that illegal adoption will be included as an end-purpose to the extent that it amounts to a practice similar to slavery as defined in article 1(d) of the 1957 Convention. Interpretative Notes, *supra* note 11, ¶ 66.

76. Both the Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. (Resolutions, pt. 1), at 71, art. 4, U.N. Doc. A/810 (1948), *reprinted in* 43 AM. J. INT'L L. 127 (Supp. 1949) and the International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, art. 8(2), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976) stipulate that no person shall be held in servitude. While not defined in either instrument, the term is generally seen to be broader than slavery, referring, according to Nowak, to "all conceivable forms of domination and degradation of human beings by human beings." MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 148 (1993). Nowak argues that debt bondage (discussed *supra*, at note 75) is included within the prohibition on servitude contained in the International Covenant on Civil and Political Rights, *id.*
77. According to the seventh revised draft of the protocol, the term "servitude," as used in the definition of trafficking: "shall mean the condition of a person who is unlawfully compelled or coerced by another to render any service to the same person or to others and who has no reasonable alternative but to perform the service, and shall include domestic service and debt bondage." Revised draft Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, U.N. Doc. A/AC.254/4/Add.3/Rev.7 (2000), art. 2 bis(c).
78. U.N. Doc. A/AC.254/4/Add.3/Rev.6 (2000), *supra* note 74.
79. U.N. Doc. A/AC.254/4/Add.3/Rev.7 (2000), *supra* note 77. It is widely accepted that trafficking in organs necessitates the trafficking of the organ's host.
80. Ad-Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, Informal Note by the United Nations High Commissioner for Human Rights, U.N. Doc. A/AC.254/16 (1999), ¶ 13, 14 [hereinafter HCHR Submission].

(IOM), the United Nations Children's Fund (UNICEF), and the United Nations High Commissioner for Refugees (UNHCR), in a joint submission to the Ad-Hoc Committee, made the following recommendation on this issue:

The Protocol should include an explicit acknowledgment of the fact that children have special rights under international law, and in particular in the light of the Convention on the Rights of the Child; that child victims of trafficking have special needs that must be recognized and met by States Parties; that States are obliged to take measures to prevent trafficking of children; and that in dealing with child victims of trafficking, the best interests of the child (including the specific right to physical and psychological recovery and social integration) are to be at all times paramount. Also important is clear recognition of the need to fight the impunity of those responsible for the trafficking, while at the same time ensuring that the child is not criminalized in any way. In that context, it should be noted that the overwhelming majority of States are already under such legal obligations through their ratification of the Convention on the Rights of the Child. Existing international law would also appear to require States to ensure, *inter alia*, that assistance and protection of child victims of trafficking is not made discretionary or otherwise dependent on the decision of national authorities. In accordance with article 2 of the Convention, child victims of trafficking are entitled to the same protection as nationals of the receiving State in all matters, including those relating to protection of their privacy and physical and moral integrity.⁸¹

While the final version of the protocol falls far short of this standard it does contain a number of provisions which will hopefully ensure relatively greater protection for trafficked persons under eighteen years of age.⁸² As noted above, a determination that trafficking has taken place will not require evidence of force or coercion if the individual involved is a child. However, a proposal to expand the list of end-purposes of trafficking to include what have recently been defined as the worst forms of child labor⁸³ was not taken up. In relation to application of the protocol's protection

81. Ad-Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, Note by the United Nations High Commissioner for Human Rights, the United Nations Children's Fund, the United Nations High Commissioner for Refugees, and the International Organization for Migration on the draft protocols concerning migrant smuggling and trafficking in persons, U.N. Doc. A/AC.254/27, at ¶ 6 & Corr.1, [hereinafter Inter-Agency Submission].

82. Trafficking Protocol, *supra* note 5, art. 3(d).

83. ILO Convention 182 identifies the worst forms of child labor as:

(a) all forms of slavery or practices similar to slavery such as the sale and trafficking of children, debt bondage and serfdom, and forced or compulsory labor, including forced or compulsory recruitment of children for use in armed conflict; (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for performances (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking in drugs as defined in the relevant international treaties; (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

provisions (see below), states parties are to take into account the special requirements of children, including appropriate housing, education, and care.⁸⁴

D. Protection of Trafficked Persons

Part Two of the protocol, dealing with protection of the trafficked person, contains very little in the way of hard obligation. States parties are instead enjoined to provide assistance for and protection of trafficked persons “in appropriate cases and to the extent possible under domestic law.”⁸⁵ Subject to either or both of these caveats, states parties are to: protect the privacy of trafficking victims and ensure that they are given information on legal proceedings and facilities to present their views and concerns during criminal procedures against offenders;⁸⁶ *consider* implementing a range of measures to provide for the physical and psychological recovery of victims of trafficking;⁸⁷ *endeavor* to provide for the physical safety of trafficking victims within their territory;⁸⁸ and *ensure* that domestic law provides victims with the possibility of obtaining compensation.⁸⁹ The optional tone to the issue of protection did not escape criticism. In their joint submission, the Inter-Agency Group pointed out that the discretionary nature of the protection provisions was:

[U]nnecessarily restrictive and not in accordance with international human rights law which clearly provides that victims of human rights violations such as trafficking should be provided with access to adequate and appropriate remedies. At a minimum, States Parties should be *obliged* to provide information to trafficking victims on the possibility of obtaining remedies, including compensation for trafficking and other criminal acts to which they have been subjected, and to render assistance to such victims, giving particular attention to the special needs of children, to enable them to obtain the remedies to which they are entitled.⁹⁰

Supported by NGOs, the Inter-Agency Group lobbied, ultimately unsuccessfully, for the inclusion of a provision protecting trafficked persons

84. Trafficking Protocol, *supra* note 5, art. 6(4).

85. Trafficking Protocol, *supra* note 5, art. 6(1).

86. Trafficking Protocol, *supra* note 5, arts. 6(1) & 6(2).

87. Trafficking Protocol, *supra* note 5, art. 6(3). The type of assistance set forth in this paragraph is applicable to both the receiving state and the state of origin but only as regards victims who are in their respective territory. Interpretative Notes, *supra* note 11, ¶ 71.

88. Trafficking Protocol, *supra* note 5, art. 6(5).

89. Trafficking Protocol, *supra* note 5, art. 6(6).

90. Inter-Agency Submission, *supra* note 81, ¶ 7 (emphasis added).

from prosecution for status-related offenses such as illegal migration, working without proper documentation, and prostitution. The reluctance of the Ad-Hoc Committee on this issue was no doubt due to a fear of unwarranted use of the “trafficking defense” and a resulting weakening of states’ ability to control both prostitution and migration flows through the application of criminal sanctions.

An earlier draft provision on the seizure, confiscation, and disposal of gains from trafficking was deleted following agreement that the relevant article of the convention would apply *mutatis mutandis*. However, the essence of the provision was lost in this move and states parties will now *not* be required to use the proceeds from seizure and confiscation to fund assistance and compensation for victims of trafficking.⁹¹

The weakness of the protocol’s protection provisions—particularly its failure to explicitly acknowledge the right of access to information and remedies—is likely to undermine its effectiveness as a law enforcement instrument. The identification and prosecution of traffickers relies heavily on the cooperation of trafficked persons. As noted recently by both Asbjørn Eide and Theo van Boven, the necessary cooperation will not be forthcoming in criminal justice systems which are harsh or insensitive to the needs of women and which do not facilitate redress for the wrongs done to victims of trafficking.⁹²

E. Status and Repatriation

The status of the victim in the receiving state was a critical issue in the negotiations. While NGOs and the Inter-Agency Group argued strongly for

91. The original provision stipulated that:

States parties shall take all necessary and appropriate measures to allow the seizure and confiscation of gains obtained by the criminal organizations from the offences covered by this protocol. The proceeds from such seizure and confiscation shall be used to defray the costs of providing due assistance to the victim, where deemed appropriate by States Parties and as agreed by them, in conformity with individual guarantees enshrined in their domestic legislation.

U.N. Doc. A/AC.254/4/Add.3/Rev.6, art. 5 *bis*.

92. Asbjørn Eide, Racial Discrimination Against Vulnerable Groups: An examination of Recourse Procedures of Non-Nationals, Migrants, Asylum Seekers, Refugees, Minorities and Indigenous people Victims of Racial Discrimination; Theo van Boven, Common Problems Linked to all Remedies Available to Victims of Racial Discrimination, background papers presented to the Expert Seminar on Remedies Available to the Victims of Acts of Racism, Racial Discrimination, Xenophobia and Related Intolerance and on Good National Practices in this Field, organized by the Office of the UN High Commissioner for Human Rights, Geneva, 16–18 Feb. 2000, cited in the Joint NGO Position Paper, submitted to the Eighth session of the Ad-Hoc Committee, at 2 [hereinafter Joint NGO Position Paper]. (On file with author.)

the inclusion of some kind of right of trafficked persons to remain in the receiving country, at least temporarily, this was never a serious option. Most delegations were concerned that the inclusion of such a right would further encourage illegal migration and actually benefit traffickers.⁹³ At the same time, it was recognized that there was, in some cases, a legitimate need for victims to remain in their country of destination “for humanitarian purposes and to protect them from being victimized again by traffickers.”⁹⁴ The final text provides that the state party is to consider adopting legislative or other measures permitting victims of trafficking to remain in their territories temporarily or permanently “in appropriate cases”⁹⁵ with “appropriate consideration” being given to humanitarian and compassionate factors.⁹⁶ It was noted that humanitarian factors, in this context, referred to “the rights established in the human rights instruments” and, as such, applied to all persons.⁹⁷

The related issue of repatriation, dealt with in a separate article, was also very sensitive. The Ad-Hoc Committee did not prove receptive to the view of the UN High Commissioner for Human Rights that: “safe and, as far as possible, voluntary return must be at the core of any credible protection strategy for trafficked persons.”⁹⁸ They also rejected the Inter-Agency proposal that identification of an individual as a trafficked person be sufficient to ensure that immediate expulsion which goes against the will of the victim does not occur and that the protection and assistance provisions of the protocol become immediately applicable.⁹⁹ The Ad-Hoc Committee did agree, however, that repatriation was a burden to be shared between states of origin and states of destination and, importantly, that the protocol’s repatriation provisions were to be understood as being without prejudice to existing obligations under customary international law regarding the return of migrants.¹⁰⁰ The final article provides that states parties of origin are to facilitate and accept, without undue or unreasonable delay, the return of their trafficked nationals and those who have a right of permanent residence within their territories “with due regard to the safety of those persons.”¹⁰¹ In order to facilitate repatriation, states parties shall communicate with each other in verifying nationalities as well as travel and identity documents.¹⁰² In

93. U.N. Doc. A/AC.254/4/Add.3/Rev.7, *supra* note 77.

94. *Id.* at 7 n. 28.

95. Trafficking Protocol, *supra* note 5, art. 7(1).

96. *Id.*, art. 7(2).

97. U.N. Doc. A/AC.254/4/Add.3/Rev.7, *supra* note 77.

98. Inter-Agency Submission, *supra* note 81, ¶ 8.

99. *Id.*, ¶ 9.

100. Interpretative Notes, *supra* note 11, ¶ 77.

101. Trafficking Protocol, *supra* note 5, art. 8.1.

102. *Id.*, arts. 8.3, 8.4.

returning a trafficking victim to another state party, the returning state party is similarly required to ensure that such return is with due regard both for the safety of the trafficked person *and* the status of any legal proceedings relating to the fact of that person being a victim of trafficking.¹⁰³ While the protocol notes that return “shall preferably be voluntary,”¹⁰⁴ the *travaux préparatoires* will effectively render this concession meaningless by indicating that these words are to be understood as not to be placing any obligation on the returning state party.¹⁰⁵

F. Law Enforcement and Border Control

Chapter III of the protocol, entitled “Prevention, cooperation and other measures” contains detailed provisions relating to law enforcement and border control.¹⁰⁶ In the area of law enforcement, states parties accept a general obligation to cooperate through information exchange aimed at identifying perpetrators or victims of trafficking, as well as methods and means employed by traffickers.¹⁰⁷ States parties are also to provide or strengthen training for law enforcement, immigration, and other relevant personnel aimed at preventing trafficking as well as prosecuting traffickers and protecting the rights of victims.¹⁰⁸ Training is to include a focus on methods to protect the rights of victims.¹⁰⁹ It should take into account the need to consider human rights, children, and gender-sensitive issues, while also encouraging cooperation with NGOs as well as other relevant organizations and elements of civil society.¹¹⁰

Border controls are to be strengthened as necessary to detect and prevent trafficking¹¹¹ and legislative or other appropriate measures taken to prevent commercial transport being used in the trafficking process and to

103. *Id.*, art. 8.2.

104. *Id.*

105. Interpretative Notes, *supra* note 11, ¶ 73. On the issue of repatriation in the absence of consent, the Ad-Hoc Committee agreed, during negotiations, that “bilateral and multilateral agreements should be encouraged.” U.N. Doc. A/AC.254/4/Add.3/Rev.6 (2000), *supra* note 74.

106. It is relevant to note that protocol’s border control, document control and law enforcement provisions are almost identical to those found in the Migrant Smuggling Protocol. *Compare*, Trafficking Protocol, arts. 10–13, with Migrant Smuggling Protocol, arts. 10–14.

107. Trafficking Protocol, *supra* note 5, art. 10.1.

108. *Id.*, art. 10.2.

109. *Id.*

110. *Id.*

111. *Id.*, art. 11.1.

penalize such involvement.¹¹² States parties are also to take steps to ensure the integrity of travel documents issued on their behalf and to prevent their fraudulent use.¹¹³ Border control is clearly at the heart of the protocol. Following concerns expressed by delegations and the Inter-Agency Group, several draft provisions were modified in order to ensure that measures taken under this part did not prejudice the free movement of persons or compromise other internationally recognized human rights. The end-result, however, is far from ideal. The principle emphasis of the protocol remains firmly on the interception of traffickers rather than the identification and protection of victims.¹¹⁴ Even more serious perhaps, is the potential for the protocol's border control measures to limit further the rights and opportunities of individuals to seek and enjoy asylum from persecution in other countries. After considerable debate, the Ad-Hoc Committee finally took up a suggestion by the High Commissioner for Human Rights and the Inter-Agency Group that specific reference be made to the basic international legal principle of *non-refoulement*.¹¹⁵ Discussions on the need to avoid any conflict with existing principles of international law produced a broad savings clause to the effect that nothing in the protocol is to affect the rights, obligations, and responsibilities of states under international law, including international humanitarian law, international human rights law, and in particular, refugee law and the principle of *non-refoulement*.¹¹⁶

One major weakness of the law enforcement/border control provisions of the protocol is their failure to address the issue of how victims of trafficking are to be identified. The obvious question has been asked by the Canadian Refugee Council: "If authorities have no means of determining among the intercepted or arrested who is being trafficked, how do they propose to grant them the measures of protection they are committing themselves to?"¹¹⁷ The regime created by the convention and its protocols,

112. *Id.*, art. 11(2), (3), (4). The *travaux préparatoires* will note that unlike smuggled migrants, trafficked persons may enter a country legally. Legislative and other measures taken in accordance with this paragraph should take into account the fact that it may be more difficult for common carriers to apply preventive measures in trafficking cases than in cases of migrant smuggling. Interpretative Notes, *supra* note 11, ¶ 79.

113. Trafficking Protocol, *supra* note 5, art. 12.

114. The use of obligatory (as opposed to discretionary) language in this Part (see arts. 11–13) underlines the fact that border control measures are to take precedence over protection measures.

115. HCHR Submission, *supra* note 80, ¶ 8; Inter-Agency Submission, *supra* note 81, ¶ 11. On the issue of smuggling/trafficking of asylum seekers and refugees, see *infra*, at notes 144–47 and accompanying text.

116. Trafficking Protocol, *supra* note 5, art. 14.1. Note that the *travaux préparatoires* will indicate that the protocol does not cover the status of refugees. Interpretative Notes, *supra* note 11, ¶ 84.

117. Canadian Council for Refugees, *Migrant Smuggling and Trafficking in Persons*, 20 Feb. 2000, available at <<http://www.web.net/~ccr/traffick.htm>> (visited Oct. 2000).

(whereby trafficked persons are accorded greater protection and therefore impose a greater financial and administrative burden than smuggled migrants) creates a clear incentive for national authorities to identify irregular migrants as smuggled rather than trafficked.¹¹⁸ The Ad-Hoc Committee declined to address the possibility of individuals being wrongly identified and thereby passed up the opportunity to include some kind of counter-incentive in the form of detailed guidance on the identification process. The resulting *lacuna* is likely to seriously compromise the practical value of the protocol's protection provisions.

G. Preventing Trafficking

The protocol contains a number of provisions aimed at preventing trafficking—all of which are phrased in the UN's best, programmatic, non-obligatory style. States parties are required to establish policies, programs, and other measures aimed at preventing trafficking and protecting trafficked persons from re-victimization.¹¹⁹ States parties are also to *endeavor* to undertake additional measures including information campaigns and social and economic initiatives to prevent trafficking.¹²⁰ These measures should include cooperation with NGOs, relevant organizations, and other elements of civil society.¹²¹ There is no reference to the acknowledged root causes of trafficking. Despite its attention being drawn to the issue,¹²² the Ad-Hoc Committee did not directly address the problem of national anti-trafficking measures being used to discriminate against women and other groups in a manner, by, for example, denying them the right to leave a country and migrate legally. This gap is, however, at least partly ameliorated by a provision that the application and interpretation of measures pursuant to the protocol: "shall be consistent with internationally recognized principles of non-discrimination."¹²³

V. OVERVIEW OF THE MIGRANT SMUGGLING PROTOCOL

The stated purpose of the Migrant Smuggling Protocol is to prevent and combat migrant smuggling, to promote international cooperation to that

118. See, Part 5, *infra*.

119. Trafficking Protocol, *supra* note 5, art. 9.1.

120. *Id.*, art. 9.2.

121. *Id.*, art. 9.3.

122. HCHR Submission, *supra* note 80, ¶ 25; Inter-Agency Submission, *supra* note 81, ¶ 13.

123. Trafficking Protocol, *supra* note 5, art. 19.2.

end, and to protect the rights of smuggled migrants.¹²⁴ “Smuggling of migrants” is defined 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 a permanent resident.”¹²⁵ The reference to “financial or other material benefit” was included as an element of the definition in order to ensure that the activities of those who provide support to migrants on humanitarian grounds or on the basis of close family ties do not come within the scope of the protocol.¹²⁶

The structure of this instrument is similar to the Trafficking Protocol. Application of the protocol is limited to situations of international migrant smuggling involving an organized criminal group.¹²⁷ States parties are required to criminalize the smuggling of migrants as well as related offenses including the production, provision, and possession of fraudulent travel or identity documents.¹²⁸ The protocol includes a detailed section on preventing and suppressing the smuggling of migrants by sea through, *inter alia*, empowering states to take appropriate action against ships which are or may be engaged in the smuggling of migrants.¹²⁹ Importantly, when taking such action, states parties are to “[e]nsure the safety and humane treatment of the persons on board.”¹³⁰ The involvement of commercial carriers in migrant smuggling is addressed by way of a requirement that states parties adopt appropriate legal and administrative measures to ensure the vigilance of commercial carriers and their liability in the event of complicity or negligence.¹³¹

The protocol requires the adoption of general measures to *prevent* migrant smuggling with a particular emphasis on prevention through improved law enforcement. Little attention is given to the root causes of migrant smuggling.¹³² A key preventive element is seen to be the dissemination of negative information aimed at discouraging potential migrants.¹³³ Information gathering and sharing on matters such as smuggling methods, routes, and investigative techniques is encouraged.¹³⁴ As with the Trafficking Protocol, great emphasis is given to the strengthening of border controls. States parties are required to strengthen border controls to the extent possible and necessary

124. Migrant Smuggling Protocol, *supra* note 4, art. 2.

125. *Id.*, art. 3(a).

126. Interpretative Notes, *supra* note 11, ¶ 88.

127. Migrant Smuggling Protocol, *supra* note 4, art. 4.

128. *Id.*, art. 6.

129. *Id.*, arts. 7–9.

130. *Id.*, art. 9.1.(a).

131. *Id.*, art. 11.2–4.

132. Root causes are referred to briefly in the protocol’s preamble as well as in article 15.3 in relation to development programs and cooperation.

133. *Id.*, art. 15.1.

134. *Id.*, art. 10.

to prevent and detect migrant smuggling.¹³⁵ They are also encouraged to establish and maintain direct channels of communication between each other as a way of intensifying cooperation among border control agencies.¹³⁶ States parties are to take steps to ensure the integrity of travel documents issued on their behalf and to cooperate in preventing their fraudulent use.¹³⁷ Specialized training aimed at preventing, combating, and eradicating migrant smuggling is to be provided or strengthened for immigration and other officials.¹³⁸ Training is also to focus on protecting the rights of victims of smuggling and the need to provide humane treatment to migrants.¹³⁹ Despite a recommendation from the Inter-Agency Group,¹⁴⁰ no reference is made to training in the *identification* of smuggled migrants or trafficked persons.

In contrast to the Trafficking Protocol, states parties to the Migrant Smuggling Protocol will not be required to consider the possibility of permitting victims to remain in their territories temporarily or permanently. Smuggled migrants also fare worse when it comes to repatriation. States parties of origin are to facilitate and accept, without delay, the return of their smuggled nationals and those who have a right of permanent abode within their territories¹⁴¹ once the nationality or right of permanent residence of the returnee is verified.¹⁴² There is no requirement for either the state of origin or the state of destination to take account of the safety of smuggled migrants in the repatriation process.¹⁴³ This is despite the fact that the involvement of organized crime (itself a prerequisite for application of the convention) is likely to pose a serious risk to returnees. Smuggled migrants will also not be entitled to any of the special protections which states parties may choose to afford trafficked persons in relation to their personal safety and physical and psychological well-being. No entitlements are envisaged with respect to legal proceedings or remedies against smugglers. The Ad-Hoc Committee did not take up a suggestion of the Inter-Agency Group that the protocol include special protective measures for smuggled children.¹⁴⁴

135. *Id.*, art. 11.1.

136. *Id.*, art. 11.6.

137. *Id.*, art. 12 & 13.

138. *Id.*, arts. 14.1 & 14.2.

139. *Id.*, art. 14.2.

140. Inter-Agency Submission, *supra* note 81, ¶ 22. On the identification issue, see *infra* at Part 5.

141. Migrant Smuggling Protocol, *supra* note 4, art. 18.1.

142. Interpretative Notes, *supra* note 11, ¶ 113.

143. Article 18(5) does require returning states parties to “carry out the return in an orderly manner and with due regard for the safety and dignity of the person.” It is evident from negotiations that this reference to safety and dignity refers only to the *process* of return and not to the eventual fate of the individual concerned.

144. Inter-Agency Submission, *supra* note 81, ¶ 19. The only reference to children is in article 16(4), which provides that the protection and assistance measures specified in that article, are to take into account the special needs of women and children.

The impact of the protocol on asylum seekers and refugees was a major point of discussion during negotiations. The High Commissioner for Human Rights and the Inter-Agency Group as a whole pointed out that increasing numbers of asylum seekers, including those with genuine claims to refugee status, are being transported by means covered in the protocol.¹⁴⁵ OHCHR, UNHCR, UNICEF, and IOM all argued together and separately for explicit reference to the principle of *non-refoulement* as well as the inclusion of a provision to the effect that illegality of entrance into a state will not adversely affect a person's claim for asylum.¹⁴⁶ They also recommended that in order to make such a provision effective, states parties should be required to ensure smuggled migrants are given full opportunity (including through the provision of adequate information), to make a claim for asylum or to present any other justification for remaining in the country.¹⁴⁷ Discussions in the Ad-Hoc Committee made clear that the issue of smuggling of asylum seekers was of considerable importance to the major destination countries and that full accommodation on this point was unlikely. The final text of the protocol does, however, include a reference to the Refugee Convention and the 1967 Protocols as well as the principle of *non-refoulement*.¹⁴⁸ Inclusion of the profit element in the protocol's definition of migrant smuggling also represents a concession by removing the possibility that those assisting asylum seekers could come within its provisions.

After intense lobbying on the part of some delegations and the Inter-Agency Group, the protocol does include a number of additional provisions aimed at protecting the basic rights of smuggled migrants and preventing the worst forms of exploitation which often accompany the smuggling process.¹⁴⁹ When criminalizing smuggling and related offenses, states parties

145. See, e.g., HCHR Submission, *supra* note 80, ¶ 8; Inter-Agency Submission, *supra* note 81, ¶ 18. For a detailed consideration of the issues of smuggling and trafficking as they relate to asylum seekers and refugees, see Morrison, *supra* note 54.

146. *Id.*

147. *Id.*

148. Migrant Smuggling Protocol, *supra* note 4, art. 19.

149. The Secretariat reported that at the seventh session of the Ad-Hoc Committee, the Group of Latin American and Caribbean states:

[W]ere of the view that it was important to develop a legal instrument that would effectively target smugglers while protecting the rights of migrants. Therefore the protocol must take into account the relevant United Nations instruments on protection of migrants in connection with correcting social and economic imbalances . . . it [is] important for the Migrants Protocol not to penalize migration . . . or to convey an ambiguous message to the international community that would stimulate xenophobia, intolerance and racism. The negotiation process should take into account the causes of migration and the reasons for the increasing vulnerability of migrants.

U.N. Doc. A/AC.254/30 (2000); E/CN.15/2000/4, ¶ 18. See also, HCHR Submission, *supra* note 80, ¶¶ 4–8; Inter-Agency Submission, *supra* note 81, ¶¶ 15–22. Protection of the rights of smuggled migrants was finally included as one of the purposes of the protocol. Migrant Smuggling Protocol, *supra* note 4, art. 2.

are required to establish, as aggravating circumstances, situations which endanger the lives or safety of migrants or entail inhuman or degrading treatment, including for exploitation.¹⁵⁰ Migrants themselves are not to become liable to criminal prosecution under the protocol for the fact of having been smuggled.¹⁵¹ However, it is important to note that the protective value of this provision is likely to be limited as it would not operate to prevent the prosecution of smuggled migrants for violation of national immigration laws.¹⁵² States parties are required to take all appropriate measures to preserve the internationally recognized rights of smuggled migrants, in particular, the right to life and the right not to be subjected to torture or other cruel, inhumane or degrading treatment or punishment.¹⁵³ They are also required to protect migrants from violence¹⁵⁴ and afford due assistance, as far as possible, to migrants whose life or safety has been endangered by reason of having being smuggled.¹⁵⁵ The special needs of women and children are to be taken into account in the application of the protocol's protection and assistance measures.¹⁵⁶ Following a recommendation of the Inter-Agency Group,¹⁵⁷ a savings clause, similar to that contained in the Trafficking Protocol was also included. This clause provides that nothing in the protocol is to affect the rights, obligations, and responsibilities of states and individuals under international law, including international humanitarian law, human rights law, and as noted above, refugee law.¹⁵⁸

150. Migrant Smuggling Protocol, *supra* note 4, art. 4.4.

151. *Id.*, art. 5.

152. Article 6.4. of the protocol states that: "Nothing in this protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law."

153. Migrant Smuggling Protocol, *supra* note 4, art. 16.1. The *travaux préparatoires* will indicate that this provision: "refers only to migrants who have been smuggled as set forth in article 6"; and that the intention in listing certain rights in this paragraph was to emphasize the need to protect those rights in the case of smuggled migrants but that the provision should not be interpreted as excluding or derogating from any other rights not listed. The *travaux préparatoires* will also indicate the paragraph should not be understood as imposing any new or additional obligations on states parties beyond those contained in existing international instruments and customary international law. Interpretative Notes, *supra* note 11, ¶¶ 107–109. In an earlier form, this provision included a reference to the principle of non-discrimination. This reference was moved to the general savings clause (art. 19.2) which now provides, *inter alia*, that the protocol is to be interpreted and applied in a way which is not discriminatory to persons on the grounds that they are smuggled migrants and that such interpretation and application is to be consistent with internationally recognized principles of non-discrimination.

154. Migrant Smuggling Protocol, *supra* note 4, art. 16.2.

155. *Id.*, art. 16.3.

156. *Id.*, art. 16.4.

157. Inter-Agency Submission, *supra* note 81, ¶ 17.

158. Migrant Smuggling Protocol, *supra* note 4, art. 19.1.

VI. THE RELATIONSHIP BETWEEN THE MIGRANT SMUGGLING PROTOCOL AND THE TRAFFICKING PROTOCOL

Surprisingly, and somewhat unfortunately, the relationship between the Migrant Smuggling Protocol and the Trafficking Protocol was not dealt with by the Ad-Hoc Committee in any great depth. This was despite a plea from the Inter-Agency Group to the eighth session:

While work has been done on identifying common provisions [between the two protocols], little or no discussion has taken place on the potential for conflict between them. The distinction that has been made between trafficked persons and smuggled migrants is evidently a useful one. However, the Office [of the High Commissioner for Human Rights], UNICEF, [UNHCR] and IOM are aware that such distinctions are less clear on the ground, where there is considerable movement and overlapping between the two categories. [It has been] determined that trafficked persons are to be granted protections additional to those accorded to smuggled migrants. However, there is little guidance in either instrument regarding how the identification process is to be made and by whom. The [Ad-Hoc Committee] may wish to consider the implications of the fact that . . . identifying an individual as a trafficked person carries different responsibilities for the State Party concerned than in the case when that same person is identified as a smuggled migrant. The [Ad-Hoc Committee] may also wish to consider the possible consequences of a State ratifying one but not both instruments.¹⁵⁹

Implementation of the new distinction between trafficked persons and smuggled migrants is likely to be both difficult and controversial. The failure of either protocol to provide guidance on the identification issue is a significant, and no doubt deliberate, weakness. The potential problems are as follows:

Under the terms of the two protocols, dealing with trafficked persons will be more costly and impose a greater administrative burden on states than dealing with smuggled migrants. States therefore have an *incentive* to ratify one and not both protocols. For the same reasons, border authorities and immigration officials responsible for identifying and categorizing irregular migrants also have an *incentive* to identify such persons as being smuggled rather than as trafficked.

The definition of migrant smuggling (illegal movement of persons across borders for profit) is sufficiently broad to apply to all irregular immigrants whose transport has been facilitated—trafficked persons and smuggled migrants alike. It is only the small number of trafficked persons who enter the destination country legally who would not be considered, *prima facie*,

159. Inter-Agency Submission, *supra* note 81, ¶ 2.

smuggled migrants. The additional elements separating trafficking from migrant smuggling (force/coercion for purposes of exploitation) may sometimes be obvious. However, in many cases, they will be difficult to prove without active investigation. Both protocols appear to place the burden of proof squarely on the individual seeking protection.

It is increasingly common for an individual to begin his or her journey as a smuggled migrant—only to be forced, at journey's end, into an exploitative situation falling squarely within the definition of trafficking as set out above. Nothing in either protocol acknowledges this operational link between smuggling and trafficking.

The failure of the Ad-Hoc Committee to discuss such obvious issues is clear evidence of an unwillingness, on the part of states, to relinquish any measure of control over the migrant identification process. Trafficked persons will indeed be accorded a greater level of protection than their smuggled counterparts under the new regime—but *only* if the destination country is able to decide who has been trafficked and who has been smuggled. While states parties retain full capacity to decide who is a smuggled migrant and who is a trafficked person, the additional protections granted to the latter group are likely to be of limited practical utility.

VII. A NOTE ON THE PROTOCOL NEGOTIATION PROCESS¹⁶⁰

The negotiation processes for both the Trafficking and Migrant Smuggling Protocols were unusual in a number of important respects. First, the level of NGO participation, particularly in the trafficking negotiations, was unprecedented. Unlike its human rights counterpart, the crime prevention system of the United Nations is not of great interest to the international nongovernmental community. The annual sessions of the Commission on Crime Prevention and Criminal Justice are almost devoid of NGO input and the deliberations of the Commission are very rarely exposed to civil society scrutiny. In the context of protocol negotiations, government delegations and the Secretariat were forced to deal with a swelling group of vocal and increasingly well-organized NGOs. While many of the organizations represented in Vienna had little international lobbying experience, the great number of submissions and interventions made by them suggest that this was not an obstacle to action. As a group, the NGOs focused almost exclusively on the Trafficking Protocol and only passing attention was paid to the issue of migrant smuggling.

160. The following comments are made on the basis of the author's personal observation of the drafting process during 1999 and the first part of 2000.

As is the case in almost any international forum discussing trafficking, a clear and savage rift developed between the various NGO participants. Unattached organizations very quickly found themselves pressured into joining one of two lobbying “coalitions”—both of which were composed almost exclusively of women. At the risk of oversimplification, it can be said that membership generally reflected the two sides of the prostitution debate with those opposing all forms of prostitution joining the “International Human Rights Network”¹⁶¹ and those seeking to protect and legitimize sex work joining the “Human Rights Caucus.” The Network advocated an approach to the Trafficking Protocol which would preserve the abolitionist nature of the only other international instrument to deal directly with the issue of trafficking in any depth: the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.¹⁶² The Network’s particular concern was to ensure that trafficking remain linked to “consensual” as well as “forced” or non-consensual prostitution. The Caucus, on the other hand, saw an opportunity to move away from the 1949 Convention and supported a definition of trafficking which could not be used to obstruct or penalize consensual migrant sex work. The Caucus also fought for the inclusion of mandatory human rights protections in the protocol and to this end developed a number of detailed submissions containing recommendations and commentary on the evolving draft text. At one stage of the negotiations, an attempt was made to forge a united NGO position.¹⁶³ The resulting consensus was, however, a fragile one and quickly broke down under the weight of controversy over the definition of trafficking.

Another very unusual aspect of the negotiations was the sustained involvement of an informal group of intergovernmental agencies and instrumentalities—the UN High Commissioner for Human Rights, the United Nations Children’s Fund, the International Organization for Migration, the UN High Commissioner for Refugees, and, on one occasion, the UN Special Rapporteur on Violence Against Women.¹⁶⁴ The aim of the Inter-Agency Group was to ensure that both protocols represented a net advance for the human rights of women, children, asylum seekers, refugees, and

161. The Network was led by the Coalition Against Trafficking in Women (United States). While the Network only ever had a handful of representatives present at the negotiations, its written submissions eventually included more than seventy NGOs.

162. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, *supra* note 65.

163. Joint NGO Position Paper, *supra* note 92. The Joint NGO Submission coordinated by the International Movement against all Forms of Racism and Racial Discrimination (IMADR) which convenes the Geneva-based NGO Caucus Against Trafficking.

164. Reported in U.N. Doc. E/CN.4/2000/68 (2000). The Submission was circulated to the members of the Ad-Hoc Committee but was not made an official document. (On file with author.)

migrants. The High Commissioner for Human Rights was particularly active, submitting, as an official document, a detailed examination of both protocols¹⁶⁵ making a number of oral interventions¹⁶⁶ and coordinating a joint intervention on behalf of the concerned international agencies.¹⁶⁷ While it is difficult to gauge the effect of these actions with any certainty, a close analysis of the negotiations does support several conclusions. First, the sustained and active IGO/NGO involvement had a strong educative effect on members of the Ad-Hoc Committee. A number of delegations freely admitted their lack of legal expertise on the trafficking issue and their unfamiliarity with trafficking fact patterns. IGOs and NGOs, through their submissions and informal lobbying efforts, went at least some way towards filling this gap; and their efforts certainly contributed to the rapid pace of negotiations. Second, the sustained pressure of the Inter-Agency Group and the NGOs clearly influenced the decision of states to include/adopt the following: (1) a coercion-based definition of trafficking which recognizes a number of end-purposes in addition to sexual exploitation; (2) specific references to international law including human rights law, refugee law, and humanitarian law (both protocols); (3) an anti-discrimination clause (both protocols); and (4) the protection of rights as a principal objective (both protocols).

VIII. CONCLUSION

In June 1999, the UN High Commissioner for Human Rights made the following appeal to the Ad-Hoc Committee:

[I am] aware that the [Trafficking Protocol and Migrant Smuggling Protocol] are not human rights treaties but more in the nature of transnational cooperation agreements with a particular focus on organized crime. However, Member States are reminded of their legal and moral obligation to ensure that new international instruments—irrespective of their scope or purpose—do not conflict with or otherwise undermine international human rights law. This obligation can be extended even further to preserving the purpose and spirit of that same body of law.

On balance, it can be said that the protocols on trafficking and migrant smuggling measure up to this rather generous standard. They do not break

165. HCHR Submission, *supra* note 80.

166. Message from the United Nations High Commissioner for Human Rights to the fourth session of the Ad-Hoc Ad-Hoc Committee on Transnational Organized Crime, 6 July 1999; Message from the United Nations High Commissioner for Human Rights to the ninth session of the Ad-Hoc Ad-Hoc Committee on Transnational Organized Crime, 6 June 2000. (On file with author.)

167. Inter-Agency Submission, *supra* note 81.

new ground or grant new rights. Existing rights have been confirmed and there is little in the final texts to suggest a significant dilution of the responsibility which states owe to trafficked persons and smuggled migrants. In a world characterized by a mounting fear of strangers and increasing public acceptance of a lesser standard of treatment for outsiders, this apparently modest result can be considered a real achievement.

The extent to which the two protocols actually contribute to eliminating trafficking and migrant smuggling remains to be seen. The above analysis has revealed a number of serious weaknesses in both instruments—not the least of which is the absence of mandatory protections and the failure to provide any guidance in the identification process. Both deficiencies are likely to compromise the organized crime prevention objectives of the protocols by ensuring that smuggled migrants and trafficked persons continue to have little incentive to cooperate with national law enforcement authorities. The lack of any kind of review or supervisory mechanism is also a substantive weakness which is likely to undermine political commitment to the protocols and, thereby, their eventual effectiveness.

On the positive side, the development of agreed definitions of trafficking and migrant smuggling is a true breakthrough. The final definitions may not be perfect but they are good enough. By incorporating a common understanding of trafficking and migrant smuggling into national legislation, states parties will be able to cooperate and collaborate more effectively than ever before. Common definitions will also assist in the much needed development of indicators and uniform data collection procedures. Trafficking and migrant smuggling are complicated processes involving multiple actors and implicating numerous causative factors. There will be no easy or quick solutions and it would be a mistake to view the two protocols as anything but a small step forward. Effective responses to this trade will require holistic, interdisciplinary, and long-term approaches which address each aspect of the trafficking or smuggling cycle and which explicitly recognize the links between trafficking, national migration policies, and transnational organized crime. Human rights are not a separate consideration or an additional perspective. They are the common thread which should serve as a foundation and reference point for all undertakings in this area.