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Ten Years After the Palermo Protocol: Where are Protections for Human Trafficking Victims?

by Kelly Hyland Heinrich*

INTRODUCTION

This year, we celebrate the 10-year anniversary of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol or Protocol),¹ which introduced the concept of the “3P” paradigm of prevention, victim protection, and prosecution efforts to combat modern slavery.² Anniversaries, including this one, afford us a moment to look back, celebrate accomplishments, and begin to chart a path forward. In 2001, in this publication, I predicted that without strong protection measures, the law enforcement efforts that the Protocol mandates for State Parties would suffer.³ The conclusion was that the ultimate measure of the Palermo Protocol’s impact would therefore be determined by the level of victim protections State Parties chose to incorporate into their domestic law. While ten years may be too soon to judge, an interim assessment is important to gauge our progress and point the way forward. This article aims to report on the current status of protections afforded to trafficked persons and how they are connected to the success of prosecution efforts, focusing on what appear to be the most egregious violations of victim protections — the lack of proactive identification, victim services, and alternatives to detention and deportation.

BACKGROUND

The U.S. Department of State’s Office to Monitor and Combat Trafficking in Persons leads the U.S. government’s diplomatic engagement on the issue of human trafficking. The Office is mandated by the U.S. Congress to produce the annual *Trafficking in Persons Report*,⁴ which is then used as a tool to encourage government progress from one year to the next. The *Report* is distinct in that it focuses on trafficking not only as a violation of human rights norms, but also as a crime to be con-

fronted by vigorous law enforcement action, victim protection, and prevention efforts.⁵ The *Report* places countries’ anti-trafficking efforts in four groupings or tiers from which sanctions and other actions can flow.⁶ Upon the release of each year’s *Report*, the United States works in partnership with governments worldwide to develop national action plans, support civil society efforts, and generally make advancements in the interwoven approaches of prosecution, protection, and prevention.

HUMAN TRAFFICKING IN 2010

A decade of actual victims’ accounts has greatly aided our understanding of human trafficking. Ten years ago, reports, studies, and programs focused primarily on women and girls and, to a large degree, they still do. Today, however, there is greater recog-

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nition that men and boys are also found in bondage in construction, food service, manufacturing, agriculture, begging, and commercial sex industries.⁷ Women are found trapped in commercial sexual exploitation and within various labor sectors including domestic work, garment manufacturing, and agriculture.⁸ Prosecutors, service providers, and trafficked persons themselves can also speak to the fact that the year 2000’s depiction of victims as naïve, uneducated, duped or kidnapped is an unhelpful and offen-

sive stereotype.⁹ The portrayal of the weak and easily duped victim ignores the impulse, necessity, and agency of many who seek a better life in the face of difficult circumstances, even at the risk of being in harm’s way. The reality today is that people seeking and accepting employment are finding themselves in coercive situations at the hands of their employers and pimps. The outdated focus on international or cross-border trafficking is diminishing as well, with more governments recognizing that the term “trafficking” as set forth in the Palermo Protocol does not connote movement, but is instead a crime of compelled service, and that a significant number of trafficking victims never travel any distance or cross a border; governments are recognizing that their own citizens are trafficking victims within their borders. We have also learned that traffickers are adap-

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tive, responsive and seek out zones of vulnerability that result from weak criminal penalties, lax law enforcement, unregulated labor recruitment and temporary worker programs, and changing migration patterns. It is unclear in the ten years since the Palermo Protocol whether trafficking itself has changed or whether our understanding of the phenomenon has aligned with the realities of modern slavery around the world.

VICTIM PROTECTION IN THE CONTEXT OF THE PROTOCOL'S MANDATORY PROSECUTION PROVISIONS

The Palermo Protocol's most observable result has been its rapid adoption by 141 countries as of October 2010.¹⁰ The achievement of consensus on an agreed upon definition of trafficking in persons rooted in exploitation, and the resulting criminal laws that countries have adopted to comply with the Protocol, cannot be understated. An enacted law, however, is only as good as its enforcement. Thousands of traffickers worldwide have been brought to justice over the decade.¹¹ Yet, the number of convictions both annually and in the aggregate is too low to reflect even the most conservative estimates of the problem. By the U.S. Department of State's calculation, from 2008 to 2009, State Parties collectively convicted 4,166 traffickers worldwide.¹² Many governments reported just one or two convictions. According to the United Nations Office on Drugs and Crime, 62 State Parties have never convicted a single trafficker.¹³ Moreover, just 335¹⁴ of the 4,166 convictions were for labor trafficking, despite millions of persons known to suffer in forced labor around the world. As I suggested in 2001, the Palermo Protocol represented an opportunity to improve law enforcement outcomes both quantitatively and qualitatively by protecting and assisting victims. However, in 2010, the most common anti-trafficking strategy remains enforcement-only, relegating victim protection to a secondary role rather than a complementary or necessary role. This undercuts not only victim assistance, but also hampers the very enforcement mandated by the Protocol. Clumsy responses that arrest, detain, or deport victims only serve to thwart identification and the opportunity to empower victims to testify against their trafficker. Additionally, programs that condition services on extensive cooperation or, even worse, a successful prosecution have the effect of shifting the burden to the victims, placing them in a situation where refusing services and going underground becomes an understandable response.¹⁵

Therefore, State Parties should not dismiss the Protocol's protection measures as discretionary. Instead, they should be understood as critical, integral components of the Protocol's mandatory law enforcement requirements that are in keeping with the tenets of the modern crime victims' rights movement that has emerged in many countries over the last thirty years. The Protocol outlines services that are meant to assist and protect trafficked persons. Article 6 requires that State Parties consider implementing services for trafficked persons' physical and psychological recovery, including medical care, housing, mental health counseling, job training, legal assistance, and physical safety.¹⁶ Article 7 requires State Parties to consider providing temporary or permanent residence for victims. Article 8 requires State Parties to facilitate the repatriation of citizens or nationals with due regard for the safety of the victim by providing necessary travel documentation and a return without unreasonable delay.

Programs that condition services on extensive cooperation or, even worse, a successful prosecution have the effect of shifting the burden to the victims, placing them in a situation where refusing services and going underground becomes an understandable response.

Taken as a whole, these measures, if implemented, would constitute a nascent international version of a crime victim's bill of rights and would guide a truly effective law enforcement response to modern slavery. These provisions recognize that trafficked persons require alternatives to systems in which repatriation or deportation is the default outcome, such as services, work authorization, and legal immigration status. Unfortunately, these core protection principles are sparsely applied by many State Parties and are wholly absent in too many countries. Victim protections are not in conflict with tough law enforcement. Implementation of proactive victim identification, funded victims services, and alter-

natives to detention and deportation would respect trafficked persons' human rights and yield better prosecution results.

VICTIM IDENTIFICATION – NOT JUST A LAW ENFORCEMENT RESPONSIBILITY

While attempts to estimate the magnitude and scope of human trafficking have often failed, adopting even the most conservative estimates puts the number of victims worldwide in the millions,¹⁷ yet governments only identified approximately 50,000 victims worldwide last year.¹⁸ This falls far short of reflecting the scope of the problem or the population that needs protections. Similarly hidden crimes such as sexual assault or domestic violence are vastly underreported and it is reasonable to assume comparable underreporting for human trafficking, especially as traffickers often convince their victims that the police are to be feared rather than thought of as potential rescu-

ers.¹⁹ As a result, some governments interpret the disparity between estimated and identified victims as a sign that there is not a significant trafficking problem in their country. Still others claim that their anti-trafficking efforts have been successful in reducing the number of identified victims. In both instances, NGOs simultaneously report large numbers of escaped victims who do not trust police enough to go to them for help. At this point in the modern anti-slavery effort, too few cases have been brought in total for a decrease in arrests or convictions to stand as an indicator of success. Successful governmental interventions should instead be marked by an increase in the number of traffickers brought to justice and a similar increase in the number of victims protected.

State Parties must use criminal law to vindicate the violation of trafficking victims' most basic human rights. Human trafficking is a crime and governments are being held accountable whether in the *Trafficking in Persons Report* or in international tribunals,²⁰ for using criminal law to vindicate the violation of the victims' most basic human rights. However, as stated above, criminal law enforcement likely uncovers only a small fraction of victims; fear of law enforcement makes them more likely to report to other trusted individuals and organizations. Therefore, State Parties should support nongovernmental organizations to identify trafficked persons in concert with protective law enforcement practices. If law enforcement does not demonstrate a capacity to treat victims with compassion, there is no incentive for NGO service providers to refer their clients to the police.

To improve victim identification, we need to move beyond an enforcement-only approach to an interdisciplinary whole-of-government approach. For example, labor ministries are in the position to be detecting a whole range of activities constituting labor exploitation, of which compelled service is the extreme manifestation. Increased identification could result from targeted, proactive enforcement efforts in industries where human trafficking has been found and where populations are most vulnerable, typically low wage employment sectors. Other ministries could also be involved. To provide further examples, to what extent are education ministries working to identify trafficked youth recruited within and away from schools? Are health ministries training emergency personnel and health care workers to identify trafficked persons? Are ministries for women and children screening for trafficking within sexual assault and domestic violence contexts as well as child protection systems? Are immigration authorities asking the right questions at the border and in detention centers? This is the essence of proactive identification – tailored strategies to find trafficked persons based on evidence of existing or suspected trafficking. NGOs are replete with examples of missed opportunities for victim identification in emergency rooms, immigration detention centers, at border entry points, and during labor inspections. NGO service providers and victims themselves have good information on how victims are identified and in whom they trusted to confide in and seek help. This is useful data, in addition to law enforcement characterizations of victim populations, on which to base proactive identification efforts.

SERVICES, SHELTER, AND IMMIGRATION STATUS VERSUS DETENTION AND DEPORTATION

Despite the Protocol's promotion of humanitarian treatment, which would correspond with status as a crime victim rather

than a criminal, many State Parties continue to arrest and detain trafficked persons. A staggering 104 countries do not have laws prohibiting the deportation of trafficked persons.²¹ Trafficked persons are misidentified most frequently as either unauthorized migrants or as criminals who have committed offenses that the trafficker forced them to perform, despite the Protocol's policy of non-culpability.²² Even recognized trafficked victims are knowingly jailed. This practice manifests in three ways. First, they are detained in preparation for deportation. In some countries, trafficked persons are detained alongside criminals, thereby equating the two and instilling the trafficked person with fear, shame, and a false sense of wrongdoing. Second, they are detained for a specified period of time during which they are required to meet with law enforcement prior to their eventual deportation, regardless of any cooperation. In some instances, law enforcement takes down a written statement, after which the witness is deported. Whether this is a way to hasten deportation or a misguided effort to ease the victim's burden is unknown. Such early statements can harm not only the victim, but also the prosecution. First accounts are often incomplete or inaccurate due to fear and psychological impairments and deportation may prevent a victim from being offered services. In other instances, a prosecutor may meet with a detained trafficked person for the first time shortly before trial, which does not allow enough time for the victim to trust the prosecutor, feel invested in the process, or be calmed about confronting their trafficker.²³ Third, victims are often detained in what the government dubs a "shelter" that is nothing but a secure detention facility.²⁴ They are not permitted to leave and there are no services. The time they spend in the facility is considered under the country's laws to be temporary residence during which time they should reflect on whether or not to cooperate with law enforcement. In these cases, the law masquerades as temporary residence, shelter, and return, but the reality is incarceration, detention, and deportation.

Ironically, these government practices validate traffickers' threats that law enforcement will arrest, detain, and deport them if they escape. In each of these scenarios, trafficked persons are devalued, used for the information they can provide, and treated as if they are criminals. These harmful practices send a message that the government does not care about the trafficked person, so why should the trafficked person feel compelled to assist the government? Not only is there no incentive for trafficked persons to cooperate, but these measures are punitive and re-traumatizing. Adding insult to injury, a response in which deportation is the default response means no assessment of danger upon return, no reintegration, serious risk of the traffickers' retaliation or re-trafficking, and potential criminal consequences.

Other State Parties may provide eligibility for limited services as outlined by the Protocol, but the burden and responsibility of funding victim services often falls to nongovernmental organizations. In countries where there is no civil society to speak of, victim services is a largely unmet need. With limited budgets, service-providing organizations are either unable to meet all of the vast needs of victims whom they assist, or they are unable to assist all of the victims that seek their help. Shelter, general health care, legal services, and mental health care, in particular, are expensive to provide and require financial support from State Parties.

Victim protections are not in conflict with tough law enforcement. Implementation of proactive victim identification, funded victims services, and alternatives to detention and deportation would respect trafficked persons' human rights and yield better prosecution results.

In some of these countries, even when services are offered, victims are not eligible for temporary work authorization. Trafficked persons often incur debts to achieve a work opportunity or they have family members relying on their remittances; the inability to work and pay down the debt or support the family therefore weighs significantly on a trafficked person even when services are being offered. For that reason alone, a trafficked person may choose not to report the crime or to continue assisting law enforcement. If the house used for collateral is about to be repossessed or loan sharks are threatening family members, the trafficked person will not want to reflect upon whether to assist law enforcement. To ignore this basic economic necessity is detrimental to the well-being of the trafficked person as well as the investigation and prosecution of the trafficker.

The majority of State Parties condition the provision of services on cooperation with law enforcement to varying degrees. The Protocol's protection provisions are silent on this practice, but overall encourage a compassionate and humanitarian response with due regard for the trafficked person's physical and mental recovery. NGOs have long advocated that providing services and helping to restore the victim aids in the victim's ability to cooperate with law enforcement and be a more effective victim-witness. However, few State Parties offer services to victims prior to their cooperation with law enforcement; some require extensive cooperation or even a successful prosecution before making services available. In these instances, the requirement of a decision to undertake extensive cooperation, forced upon the victim when they are recently liberated and still suffering from the physical and psychological ramifications, may serve as a disincentive for NGOs to recommend that their clients come forward. Where there are no meaningful victim protections or opportunities to stabilize the victim before making choices of such import, the voluntariness of the victim's decision is called into question. This is yet another example of undercutting victim

assistance, reducing identification, spoiling the opportunity to empower victims to testify against their traffickers, and impeding the enforcement mandated by the Protocol.

CONCLUSION

Human trafficking investigations and prosecutions are tremendously complex. Convictions often depend on the strength of victims' cooperation and their ability to confront their traffickers in court, which means law enforcement must spend countless hours working to gain victims' trust, obtain the full account of the crime, and prepare for trial. Who is more likely to be an effective victim-witness — the person awaiting deportation behind bars or the person receiving restorative support services? Prosecution and protection are therefore as inextricably intertwined in practice as they are in the Protocol.

Without the implementation of the fundamental concept of the interdependence between prosecution and protection that is set forth in the Palermo Protocol, State Parties will continue to misplace their resources and efforts. Adoption of protection measures — victim identification through a whole-of-government approach and comprehensive services to potential victims along with work authorization and legal immigration status — would respect trafficked persons' human rights and yield better prosecution results.

The promise of the Palermo Protocol was in its recognition that we will never prosecute trafficking away. We will never identify trafficked persons by waiting for them to come to us. We will never have a complete anti-trafficking response with a singular approach. In the next ten years, on the occasion of the Palermo Protocol's 20th anniversary, let us hope that we can point to a decade in which State Parties did not see victim protections as a luxury or a nuisance, but as an integral part of the interlocking paradigm of prevention, protection and prosecution that helps us deliver on the promise of freedom. **HRB**

ENDNOTES: Ten Years After the Palermo Protocol: Where are Protections for Human Trafficking Victims?

¹ 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/53/383 (2000) [hereinafter Palermo Protocol], available at http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf.

² While this article focuses on the Protocol's protection provisions

and their relationship to mandatory prosecution requirements, prevention is the third prong of this interdependent approach.

³ Kelly E. Hyland, *The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, HUMAN RIGHTS BRIEF, Winter 2001, at 38 (Center for Hum.