

THE PALERMO PROTOCOL: AN INEFFECTIVE TREATY FOR HOLDING HUMAN TRAFFICKERS CRIMINALLY ACCOUNTABLE AND PROTECTING VICTIMS OF HUMAN TRAFFICKING

Henna J. Shah*

TABLE OF CONTENTS

I. INTRODUCTION.....	439
II. THE PURPOSE OF THE PALERMO PROTOCOL IS NOT CLEAR ON ITS FACE.....	445
III. THE TEXT OF THE PALERMO PROTOCOL IS INEFFECTIVE AT HOLDING HUMAN TRAFFICKERS CRIMINALLY ACCOUNTABLE AND PROTECTING VICTIMS OF HUMAN TRAFFICKING	448
A. The Definition of Human Trafficking in the Palermo Protocol is Not Specific Enough for Domestic Legislatures to Criminalize It.....	449
B. The Failure of the Palermo Protocol to Define Exploitation Creates a Power Imbalance Between Those that Create and Implement the Law and Those Affected by Exploitation.....	452
C. Since the Palermo Protocol’s Language is Broad, Vague, and Undefined, States Parties Violate the Legality Principle	454
IV. VICTIMS ARE NOT ADEQUATELY PROTECTED UNDER THE PALERMO PROTOCOL	456
A. Protections for Victims are Not Mandatory	456
B. The Watchdogs to Ensure that Victims are Protected are the States Themselves	457
V. RECOMMENDATIONS FOR MAKING THE PALERMO PROTOCOL AND ANTI-TRAFFICKING INITIATIVES MORE EFFECTIVE	459
A. Shift the Framework for Addressing Anti-Trafficking from a Criminal Law to a Human Rights and Development Law Approach.....	459
B. Develop Greater Accountability within the International Community....	460
C. Create a New Anti-Human Trafficking Instrument Using an International Human Rights Perspective.....	461

* Northwestern University Pritzker School of Law, Master of Laws in International Human Rights; Wake Forest University School of Law, Juris Doctor; University of Texas at Austin, Bachelor of Science and Arts in Biology. Henna J. Shah’s legal experience includes working for the United States Government, the United Nations, non-governmental organizations, and legal clinics. Her legal practice and scholarship focus on public international law, specifically international human rights law, international criminal law, international humanitarian law, international transportation law, and international outer space law. She would like to thank her parents, brother, mentors, and friends for their endless support in her pursuit to safeguard and protect the human rights of all.

VI. CONCLUSION.....	462
---------------------	-----

ABSTRACT

In 2003, the crime of human trafficking was defined for the first time in the “Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime,” commonly referred to as the “Palermo Protocol.” Touted as one of the international community’s greatest success stories, the Palermo Protocol created a “3Ps” framework that obligated States Parties to enact national legislation that prevents human trafficking, protects human trafficking victims, and prosecutes human traffickers. Yet, despite the international community’s attempt to end human trafficking via the enactment of the Palermo Protocol, every country remains affected by human trafficking as either a country of origin, transit, or destination. As evidenced by the increasing number of human traffickers and human trafficking victims worldwide, the Palermo Protocol has failed to realize all aspects of its 3Ps framework. The Palermo Protocol’s ineffectiveness can be attributed to its unclear purpose, unspecific definition of human trafficking, failure to define exploitation and creation of a power imbalance, and broad, vague, and undefined language that violates the legality principle. Moreover, the Palermo Protocol does not adequately protect human trafficking victims because its protection measures are not mandatory, and States are not held accountable for its domestic enforcement and implementation. To make the Palermo Protocol effective, its framework should shift from a criminal law to a human rights and development law approach, an international review and evaluation process should be implemented to foster greater accountability, and a new anti-human trafficking instrument based on international human rights law should be created.

I. INTRODUCTION

I think what we feared has happened. [The Palermo Protocol] has done very little to address actual human rights violations or the causes of the exploitation of people under forced labour or slavery-like conditions. – Marjan Wijers¹

¹ Marjan Wijers, *How we got here: the story of the Palermo protocol on trafficking*, OPEN DEMOCRACY (Feb. 11, 2021, 11:52 AM), <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/how-we-got-here-story-palermo-protocol-trafficking/>.

Throughout history, States² have grappled with how to address and define the crime of human trafficking. Beginning in the 1500s, humans were trafficked from Africa to the Americas by European nations seeking to make a profit from the transatlantic slave trade.³ From 1850 to 1900, after outlawing slavery practices, the focus of human trafficking transitioned from enslavement to labor exploitation.⁴ During this period, immigrants were trafficked as underpaid workers.⁵ For example, “many countries around the Americas began contracting ‘coolie’ labor from China as a source of low-wage workers.”⁶ Following the surge of labor trafficking, ending “white slavery” became the next priority for the international community.⁷ From 1900 to 1910, States became aware that European women were “ensnared in forced prostitution.”⁸ In response, international conferences against white slavery were held, and the first international agreement on human trafficking was created in 1904.⁹ This agreement—International Agreement for the Suppression of the “White Slave Traffic”—made white slave trafficking illegal.¹⁰

For the next 99 years, the international community struggled to adequately define human trafficking. During this time, States adopted four additional treaties that prohibited different forms of human trafficking: (1) International Convention for the Suppression of White Slave Traffic, (2) Convention on the Suppression of Traffic in Women and Children, (3) International Convention of the Suppression of

² In international law, an entity is considered a “State” if it possesses “(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.” Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19, U.S.T. 881. According to the Restatement (Third) of Foreign Relations Law of the United States, “[u]nder international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987).

³ Becky Giovagnoni & Amber Van Schooneveld, *The History of Human Trafficking*, THE EXODUS ROAD (Jan. 25, 2022), <https://theexodusroad.com/history-of-human-trafficking/#:~:text=1921%3A%20International%20Convention%20for%20the.at%20an%20all%2Dtime%20high.>

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* The term “international community” is used to refer to the countries of the world, international and regional bodies, and civil society. If a country is a member of the United Nations, it is referred to as a “Member State.” *Member States*, UNITED NATIONS, <https://www.un.org/en/about-us/member-states> (last visited Feb. 7, 2025). As well, examples of international and regional bodies include the European Union (EU), United Nations (UN), Council of Europe (COE), International Labour Organization (ILO), and the International Criminal Police Organization (INTERPOL). Additionally, civil society “refers to a wide array of organizations: community groups, non-governmental organizations [NGOs], labour unions, indigenous groups, charitable organizations, faith-based organizations, professional associations, and foundations.” *Who and what is ‘civil society?’*, WORLD ECONOMIC FORUM (Apr. 23, 2018), <https://www.weforum.org/stories/2018/04/what-is-civil-society/>.

⁸ Giovagnoni & Schooneveld, *supra* note 3.

⁹ *Id.*

¹⁰ *Id.*

the Traffic in Women of Full Age, and (4) Convention of the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others.¹¹ However, these conventions¹² were limited in scope and only addressed “the act of enticing or abducting women for prostitution abroad.”¹³ Moreover, these treaties neglected to define “human trafficking” explicitly.¹⁴

Since there was no internationally agreed-upon definition of human trafficking in the 1900s, it was commonly thought of as being either labor trafficking or sex trafficking.¹⁵ However, a distinction along these lines did not adequately account for the complexity of the trafficking industry and the situations of its victims.¹⁶ For example, many victims of labor trafficking are also subjected to sexual abuse or sex trafficking from their traffickers.¹⁷ Other forms of human trafficking exist as well, such as the trafficking of persons for organ removal, begging, and involuntary marriage.¹⁸

The lack of international consensus on what acts constitute human trafficking motivated the international community to create a treaty that would define the crime for the first time. In 1999, United Nations Member States,¹⁹ international and regional organizations,²⁰ and civil society²¹ began negotiations for creating a treaty that would end the “widespread enslavement of individuals through

¹¹ Kelly E. Hyland, *The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, 8 HUM. RTS. BRIEF 30, 30 (2001).

¹² In international law, the words “treaties” and “conventions” mean the same thing. *Definition of key terms used in the UN Treaty Collection*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml (last visited Feb. 7, 2025).

¹³ Hyland, *supra* note 11, at 30–31.

¹⁴ *Id.*

¹⁵ Laura L. Shoaps, *Room for Improvement: Palermo Protocol and the Trafficking Victims Protection Act*, 17:3 LEWIS & CLARK L. REV. 932, 934 (2013).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ “Member State” is a common term used in international law to describe “a country that belongs to a political, economic, or trade organization.” *Member State*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/member-state> (last visited Feb. 7, 2025). In the United Nations, a country belonging to its organization is called a “Member State.” When discussing more than one country belonging to the United Nations, the term “Member States” is used. *See Member States, supra* note 7.

²⁰ International and regional bodies include the European Union (EU), United Nations (UN), Council of Europe (COE), International Labour Organization (ILO), and the International Criminal Police Organization (INTERPOL). *See List of Public International Organizations*, USAID (Dec. 4, 2020), <https://2017-2020.usaid.gov/sites/default/files/documents/308maa.pdf>.

²¹ Civil society “refers to a wide array of organizations: community groups, non-governmental organizations [NGOs], labour unions, indigenous groups, charitable organizations, faith-based organizations, professional associations, and foundations.” *Who and what is ‘civil society?’*, *supra* note 7.

trafficking.”²² Enacted in 2003, the “Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime,” commonly referred to as the “Palermo Protocol,” is the first legally binding instrument to define human trafficking under international law.²³ As defined in Article 3 of the Palermo Protocol (“Convention”), “trafficking in persons,” or human trafficking, means:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. . . .²⁴

As trafficking extends further than sexual exploitation and consequently includes crimes such as forced labor in a broad range of contexts like agriculture, domestic servitude, sweatshops, maid service, begging, and marriage, the Palermo Protocol’s definition of human trafficking identifies the forms of exploitation and victims of many types of human trafficking.²⁵

Additionally, in its text, the Palermo Protocol creates the “3Ps” framework.²⁶ Under this framework, States²⁷ that have ratified the Palermo Protocol are obligated to enact national legislation that *prevents* human trafficking, *protects* human trafficking victims, and *prosecutes* human traffickers.²⁸ Specifically, national prevention efforts should “address the tactics of human traffickers head

²² Shoaps, *supra* note 15, at 932; *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Organized Crime and the Protocols thereto*, UNITED NATIONS OFF. ON DRUGS & CRIME, <https://www.unodc.org/unodc/en/treaties/CTOC/travaux-preparatoires.html> (last visited Feb. 7, 2025).

²³ *The Protocol*, UNITED NATIONS OFF. ON DRUGS & CRIME, <https://www.unodc.org/unodc/en/human-trafficking/protocol.html> (last visited Feb. 7, 2025).

²⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime art. 3(a), Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Palermo Protocol].

²⁵ *The Protocol*, *supra* note 23.

²⁶ See Palermo Protocol, *supra* note 24, arts. 6–9.

²⁷ In international law, the word “States” is used to discuss countries that have ratified a treaty or other international agreement. *States in international law*, BRITANNICA, <https://www.britannica.com/topic/international-law/States-in-international-law> (last updated Jan. 29, 2025).

²⁸ Michael Gallo & Hannah Thinyane, *The Palermo Protocol Turns 20: Failures of the Past and Shifting Paradigms for the Future*, U.N.U. MACAU (Nov. 20, 2020), <https://cs.unu.edu/news/news/the-palermo-protocol-turns-20.html>.

on.”²⁹ These strategies include “the dissemination of accurate and targeted information” and strategic intervention programs for at-risk populations.³⁰ Likewise, “[e]ffective victim protection entails identifying victims, providing referrals for a comprehensive array of services, directly providing or funding [non-governmental organizations] to provide those services, and supporting these individuals as they rebuild their lives.”³¹ Furthermore, prosecution efforts must employ the national criminal justice system to hold human traffickers criminally accountable.³²

Despite the international community’s attempt to prohibit human trafficking via the Palermo Protocol,³³ it remains a problem today. In fact, every country of the world is affected by human trafficking as either a country of origin, transit, or destination.³⁴ Based on its 2006 and 2009 Global Reports on Trafficking in Persons, the United Nations Office on Drugs and Crime (UNODC) found that “[v]ictims from at least 127 countries have been found to be exploited in 137 States.”³⁵ Additionally, the majority of the 21 million human trafficking victims are women and girls,³⁶ and “[t]hese victims are frequently induced into slavery through false pretenses, family members who sell them into the trade, kidnapping, or debt bondage.”³⁷ Although some victims will voluntarily participate in the sex trade

²⁹ *3Ps: Prosecution, Protection, and Prevention*, U.S. DEP’T OF STATE, <https://www.state.gov/3ps-prosecution-protection-and-prevention/#:~:text=The%20%E2%80%9C3P%E2%80%9D%20paradigm%E2%80%94prosecution,world%20to%20combat%20human%20trafficking> (last visited Feb. 7, 2025).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ To date, there are 192 States Parties and 147 signatories to the Palermo Protocol. *UN Convention against Transnational Organized Crime and the Protocols thereto*, UNITED NATIONS OFF. ON DRUGS & CRIME, <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html> (last visited Feb. 7, 2025); *Chapter XVIII: Penal Matters: 12. a Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, U.N. TREATY COLLECTION, U.N. Doc. A/55/383 (Vol. 2237), at 319 (Dec. 25, 2003) [hereinafter *Penal Matters*].

³⁴ *Factsheet on Human Trafficking*, U.N. OFF. ON DRUGS & CRIME (June 15, 2010), https://www.unodc.org/documents/human-trafficking/UNVTF_fs_HT_EN.pdf.

³⁵ *Id.*

³⁶ Heather M. Smith, *Sex Trafficking: Trends, Challenges, and the Limitations of International Law*, 12 HUM. RTS. REV. 271, 274 (2011); see *New ILO Global Estimate of Forced Labour: 20.9 million victims*, INT’L LAB. ORG. (June 1, 2012), <https://www.ilo.org/resourse/news/new-ilo-global-estimate-forced-labour-209-million-victims#:~:text=Today%20sees%20the%20launch%20of%20a%20new%20ILO>.

³⁷ Christina A. Seideman, *The Palermo Protocol: Why It Has Been Ineffective in Reducing Human Sex Trafficking*, 9 GLOB. TIDES 1, 1 (2015) (citing Smith, *supra* note 36, at 272, 274; Jennifer W. Mandel, *Out of Sight, Out of Mind: The Lax and Underutilized Prosecution of Sex Trafficking in the United Kingdom and Israel*, 21 TUL. J. OF INT’L & COMPAR. L. 206, 209 (2012)).

industry, they often do so at the recommendation of another prostitute or to earn a greater income.³⁸

As evidenced by the increasing number of human trafficking victims worldwide,³⁹ anti-trafficking initiatives implemented after the enactment of the Palermo Protocol have failed to achieve their mission or sustain a long-term, positive impact.⁴⁰ For example, criminal justice approaches typically address only the downstream effects of human trafficking.⁴¹ These strategies merely provide marginal results when addressing the root causes and structural factors of how and why exploitation occurs.⁴² Additionally, of the 3Ps used to implement the Palermo Protocol—prevention, protection, and prosecution—prosecution is overemphasized and prevention is underemphasized.⁴³ Furthermore, the Palermo Protocol's purpose statement and ties to the United Nations Convention against Transnational and Organized Crime provide loopholes that make it ineffective for specific classes of traffickers and victims.⁴⁴

Although the Palermo Protocol has been touted as one of the international community's greatest success stories, the treaty is ineffective at holding human traffickers criminally accountable and protecting victims of human trafficking. Section II of this paper will discuss why the purpose of the Palermo Protocol is unclear on its face and how this lack of clarity contributes to its ineffectiveness. Next, Section III will analyze the text of the Palermo Protocol and discuss why the text is ineffective for holding human traffickers criminally accountable and protecting human trafficking victims. Specifically, this part will address why the Palermo Protocol's definition of human trafficking is not specific enough for domestic legislatures to adequately criminalize the act, how the Palermo Protocol's failure to define exploitation creates a power imbalance, and how the Palermo Protocol's broad, vague, and undefined language violates the legality principle. Then, Section IV will analyze why human trafficking victims are not adequately protected under the Palermo Protocol. Section V will provide recommendations for making the Palermo Protocol more effective. These recommendations include shifting the framework for addressing human trafficking from a criminal law to a human rights and development law approach; developing greater accountability within the international community through a review and evaluation process; and creating a new anti-human trafficking instrument based on an international human

³⁸ Seideman, *supra* note 37, at 1.

³⁹ Gallo & Thinyane, *supra* note 28; see Kate Hodal, *One in 200 people is a slave. Why?*, THE GUARDIAN (Feb. 25, 2019, 2:46 AM), <https://www.theguardian.com/news/2019/feb/25/modern-slavery-trafficking-persons-one-in-200>.

⁴⁰ Gallo & Thinyane, *supra* note 28.

⁴¹ *Id.*

⁴² *Id.*

⁴³ See *id.*; Kelly Hyland Heinrich, *Ten Years After the Palermo Protocol: Where are Protections for Human Trafficking?*, 18 HUM. RTS. BRIEF 2, 2 (2010).

⁴⁴ See *Toolkit to Combat Trafficking in Persons: Global Programme against Trafficking in Human Beings*, UNITED NATIONS OFF. ON DRUGS & CRIME (2008), https://www.unodc.org/documents/human-trafficking/Toolkit-files/07-89375_Ebook%5B1%5D.pdf; Shoaps, *supra* note 15.

rights perspective. Lastly, Section VI will summarize the previous discussions and offer a brief conclusion.

II. THE PURPOSE OF THE PALERMO PROTOCOL IS NOT CLEAR ON ITS FACE

Historically, human trafficking has been linked closely with slavery and was⁴⁵ “used to control women’s sexuality and mobility and to justify oppressive measures against sex workers and migrants.”⁴⁶ In light of history, during the negotiations of the Palermo Protocol, States and civil society participants (composed of pro-sex workers’ rights groups and anti-trafficking activists) were motivated by the desire to address and define human trafficking as a “modern form of slavery.”⁴⁷ The cooperation between the States, pro-sex workers’ rights advocates, and anti-trafficking activists was monumental because it was the first time that these three groups worked together in a joint campaign to further one cause—to end human trafficking.⁴⁸ Moreover, the collaboration between the pro-sex workers’ rights advocates and anti-trafficking activists was deemed “radical” at the time because these two opposing sides “bridged the historical gap⁴⁹ between the two movements caused by the persistent conflation of trafficking and sex work.”⁵⁰

The drafters of the Palermo Protocol had two main goals. First, the Palermo Protocol would define human trafficking to include all forms of trafficking, including forced labor, slavery, and servitude, irrespective of whether it occurred across or within a country’s borders.⁵¹ Second, the Palermo Protocol would recognize the rights and needs of human trafficking victims.⁵² Unfortunately, the final result was not an international treaty that comported to the drafters’ two goals. Rather, the Palermo Protocol emphasizes the distinction between “sexual exploitation”⁵³ and “labor exploitation,”⁵⁴ focuses on the recruitment and movement

⁴⁵ Maria Grazia Giammarinaro, *Are our laws cut out for addressing systemic exploitation?*, OPEN DEMOCRACY (Nov. 18, 2020, 12:06 AM), <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/are-our-laws-cut-out-addressing-systemic-exploitation/>.

⁴⁶ Wijers, *supra* note 1.

⁴⁷ Giammarinaro, *supra* note 45.

⁴⁸ Wijers, *supra* note 1.

⁴⁹ The historical gap refers to the two sides of the sex trafficking debate. On one side, the pro-sex workers’ rights groups proclaim that sex work is not a form of sex trafficking. On the other side, anti-trafficking groups believe that sex work is a form of human trafficking. *Id.*

⁵⁰ *Id.*

⁵¹ Elżbieta M. Goździak & Kathleen M. Vogel, *Palermo at 20: A Retrospective and Prospective*, 6 J. HUM. TRAFFICKING 109, 110–11 (2020).

⁵² *Id.* at 111.

⁵³ Palermo Protocol, *supra* note 24, art. 3(a).

⁵⁴ *Id.*

of human beings rather than working conditions,⁵⁵ and provides for strong law enforcement action and weak victims' assistance and human rights protections.⁵⁶

Yet, despite the Palermo Protocol being designed to supplement the United Nations Convention against Transnational and Organized Crime,⁵⁷ it does not mention criminal prosecution of human traffickers in its purpose statement.⁵⁸ Specifically, Article 2 of the Palermo Protocol states that the Convention was adopted for three purposes—“(a) To prevent and combat trafficking in persons, paying particular attention to women and children; (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and (c) To promote cooperation among States Parties⁵⁹ in order to meet those objectives.”⁶⁰

The Palermo Protocol was created with the intention “to facilitate convergence in national approaches with regard to the establishment of domestic criminal offences that would support efficient international cooperation in investigating and prosecuting trafficking in persons cases”⁶¹ and “to protect and assist the victims of trafficking in persons with full respect for their human rights.”⁶² Given these purposes, it is odd that prosecution is not mentioned explicitly in the Convention.

To ameliorate the discrepancy between the intention of the Palermo Protocol and its written purpose statement, the Palermo Protocol's commitment to “combat” trafficking should be interpreted to include prosecution.⁶³ As the Palermo Protocol arose from the goal of “creat[ing] a tool to combat the enormous growth of trans-national organized crime,”⁶⁴ the assumption of prosecution into the purpose statement allows the Palermo Protocol to address the three Ps articulated by the drafters—the *prevention* of human trafficking, the *protection* of human trafficking victims, and the *prosecution* of human traffickers.⁶⁵

⁵⁵ Wijers, *supra* note 1.

⁵⁶ Kristina Touzenis, *Trafficking in human beings: Human rights and transnational criminal law, developments in law and practices*, 3 UNESCO MIGRATION STUD. 1, 67 (2010).

⁵⁷ Shoaps, *supra* note 15, at 932–33.

⁵⁸ Goździak et al., *supra* note 51, at 110–51; *see* Palermo Protocol, *supra* note 24, art. 2.

⁵⁹ In international law, the term “States Parties” is used to describe all of the countries that have ratified a treaty. Here, “States Parties” is used to refer collectively to all of the countries that have ratified the Palermo Protocol. *Appendix 3: A Human Rights Glossary*, HUM. RTS. HERE & NOW, http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/part-5/6_glossary.htm#anchor-states-13820 (last visited Feb. 7, 2025).

⁶⁰ Palermo Protocol, *supra* note 24, art. 2.

⁶¹ *UN Convention against Transnational Organized Crime*, *supra* note 33.

⁶² *Id.*

⁶³ Goździak et al., *supra* note 51, at 110–51.

⁶⁴ Touzenis, *supra* note 56, at 67.

⁶⁵ Goździak et al., *supra* note 51, at 111–51.

In order to fulfill these purposes, States Parties⁶⁶ to the Palermo Protocol⁶⁷ must criminalize human trafficking domestically and create anti-trafficking laws that comport with the Protocol's legal provisions.⁶⁸ In fact, States Parties "must provide protection and assistance to victims of human trafficking and ensure that their rights are fully respected."⁶⁹ To ensure that the rights of human trafficking victims are fully respected, States Parties must penalize conduct set forth in Article 3⁷⁰ of the Palermo Protocol when the trafficking was committed intentionally.⁷¹ Likewise, States Parties must penalize those "attempting to commit, participating as an accomplice and organizing or directing other persons to commit an offence established in accordance with [Article 5(1) of the Palermo Protocol]."⁷² Despite its broad definition of human trafficking and its promising accountability provisions, the Palermo Protocol applies only to human trafficking offenses that involve a criminal group and are transnational in nature.⁷³ Thus, victims of human trafficking who are not trafficked transnationally and by an organized criminal group are not protected under the Palermo Protocol. However, non-transnational and non-organized human trafficking crime victims can be legally protected at the discretion

⁶⁶ According to the United Nations, the term States Parties is the official term to describe "countries that have ratified or acceded to the international treaty." *Convention on the Elimination of All Forms of Discrimination against Women Twentieth Century 1979–1999: CEDAW Information Note 4*, UNITED NATIONS DEP'T OF PUB. INFO., <https://www.un.org/womenwatch/daw/cedaw/cedaw20/list.htm#:~:text=States%20parties%20are%20countries%20that,by%20the%20treaty's%20provisions> (last visited Feb. 7, 2025).

⁶⁷ As of October 20, 2023, there are 192 States Parties that have ratified the Palermo Protocol. *UN Convention against Transnational Organized Crime*, *supra* note 33.

⁶⁸ *The Protocol*, *supra* note 23.

⁶⁹ *Id.*

⁷⁰ See Palermo Protocol, *supra* note 24, art. 3 (defining "trafficking in persons," commonly referred to as human trafficking).

⁷¹ Article 5(1) of the Palermo Protocol states that "[e]ach State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally." Palermo Protocol, *supra* note 24, art. 5(1).

⁷² Marjan Wijers, *Analysis of the definition of trafficking in human beings in the Palermo Protocol*, LA STRADA INT'L 1, 6 (2005), <https://documentation.lastradainternational.org/lsidocs/354%20Analysis%20def%20Palermo%20protocol.pdf>. Article 5(2) of the Palermo Protocol states: "Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences: (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article; (b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and (c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article." Palermo Protocol, *supra* note 24, art. 5(2).

⁷³ Article 4 of the Palermo Protocol states, "This protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences." Palermo Protocol, *supra* note 24, art. 4.

of the national legislature.⁷⁴ Since the Palermo Protocol only creates a minimum level of protection, States can provide more protection in their national laws.⁷⁵

By stating its purpose clearly and succinctly at the beginning of the treaty, the Palermo Protocol stands out amongst other international conventions because it intends to advance the global movement to end human exploitation through collective international action.⁷⁶ But, as noted by its purpose statement and its ties to the United Nations Convention against Transnational and Organized Crime, not all human trafficking victims are protected, and not all human traffickers can be held criminally accountable under the treaty or its implementing domestic legislation.⁷⁷ As such, the Palermo Protocol presents loopholes that make it ineffective for specific classes of traffickers and victims.

III. THE TEXT OF THE PALERMO PROTOCOL IS INEFFECTIVE AT HOLDING HUMAN TRAFFICKERS CRIMINALLY ACCOUNTABLE AND PROTECTING VICTIMS OF HUMAN TRAFFICKING

To date, there are 192 States Parties to the Palermo Protocol.⁷⁸ According to Article 5 of the Palermo Protocol,

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.
2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:
(a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article; (b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and (c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.⁷⁹

Under Article 5, every State Party must incorporate the Palermo Protocol's provisions into its national legislation and establish human trafficking as a criminal offense.⁸⁰ However, many States have enacted domestic legislation that differs from

⁷⁴ Wijers, *supra* note 72, at 19–20.

⁷⁵ *Id.*

⁷⁶ Joy N. Ezeilo, *Achievements of the Trafficking Protocol: Perspectives from the former UN Special Rapporteur on Trafficking in Persons*, 4 ANTI-TRAFFICKING REV. 144, 148 (2015).

⁷⁷ See Palermo Protocol, *supra* note 24, art. 2.

⁷⁸ *Penal Matters*, *supra* note 33.

⁷⁹ Palermo Protocol, *supra* note 24, art. 5.

⁸⁰ Jean Allain, *No Effective Trafficking Definition Exists: Domestic Implementation Of The Palermo Protocol*, 7 ALB. GOV'T L. REV. 111, 119 (2014).

the Palermo Protocol.⁸¹ This is because the text of the Palermo Protocol fails to define key terms in its definition of human trafficking, the definition of exploitation is an inexhaustive list, and its broad, vague, and undefined language violates the legality principle.

A. The Definition of Human Trafficking in the Palermo Protocol is Not Specific Enough for Domestic Legislatures to Criminalize It

While previous trafficking treaties acknowledged the problems of human trafficking,⁸² the Palermo Protocol was the first treaty to provide a definition of this crime.⁸³ The definition of human trafficking in the Palermo Protocol reflects “the first international consensus on the definition of trafficking.”⁸⁴ Likewise, its enactment was the first step for a concerted and unified international effort to combat and criminalize human trafficking.⁸⁵ As mentioned in Section I of this paper, Article 3 of the Palermo Protocol defines “trafficking in persons” or human trafficking as

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. . . .⁸⁶

Not only was the Palermo Protocol the first international convention to define human trafficking, it was also the first international instrument to recognize multiple types of trafficking.⁸⁷ As human trafficking “is no longer a term reserved

⁸¹ Seideman, *supra* note 37, at 6.

⁸² See Convention on the Rights of the Child art. 35, Nov. 20, 1989, 1577 U.N.T.S. 3 (“States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”). The protocols thereto address the sale of children, child prostitution, child pornography, and the involvement of children in armed conflict. *Id.* arts. 34, 38. See also Worst Forms of Child Labour Convention art. 3, Jun. 17, 1999, 2133 U.N.T.S. 161; Convention on the Elimination of All Forms of Discrimination Against Women art. 6, Dec. 18, 1979, 1249 U.N.T.S. 13; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery art. 3, Sep. 7, 1956, 266 U.N.T.S. 3.

⁸³ Shoaps, *supra* note 15, at 933.

⁸⁴ Hyland, *supra* note 11, at 31; Shoaps, *supra* note 15, at 933.

⁸⁵ Hyland, *supra* note 11, at 31.

⁸⁶ Palermo Protocol, *supra* note 24, art. 3(a).

⁸⁷ Shoaps, *supra* note 15, at 933.

only for women and girls forced into prostitution and forced labor is no longer a separate issue,⁸⁸ the modern concept of human trafficking is a combination of the traditional definitions of trafficking and slavery.⁸⁹ Human trafficking involves the elements of enticement and deception that are derived from traditional trafficking, as well as the exploitation and practices of slavery that are taken from traditional slavery and forced labor.⁹⁰ The emergence of this new definition was in response to the diverse forms of human trafficking practices worldwide.⁹¹ For example, in Dubai, United Arab Emirates, Pakistani boys were sold to be camel jockeys; in Mumbai, India, children were locked in dark and dank rooms and forced to make bangles all day; in Bangkok, Thailand, teenage Vietnamese girls were sold and forced to be prostitutes; in New York, United States of America, deaf and mute Mexicans were coerced and forced to beg and peddle trinkets on the streets and give all of their profits to their traffickers; in the Netherlands and Italy, Nigerian women were sold to brothels; and in the Commonwealth of the Northern Marina Islands, Thai men and women were forced to work in sweatshops and were held captive.⁹²

On its face, Article 3's definition of human trafficking creates three sets of categories: (1) "recruitment, transportation, transfer, [and] harbouring,"⁹³ (2) "of coercion, of abduction, of fraud, [and] of deception,"⁹⁴ and (3) "forced labour, slavery, servitude, [and] removal of organs."⁹⁵ At first glance, the definition appears to be specific because it contains many aspects of human trafficking, such as the act,⁹⁶ means,⁹⁷ and purpose.⁹⁸ Further, the definition seems to be comprehensive because it uses labels to describe a wide range of traffickers and trafficking activities.⁹⁹ Therefore, it can be assumed that the Palermo Protocol's definition of human trafficking would result in more prosecutions of this crime worldwide, especially in States that have ratified the agreement.¹⁰⁰

However, since the Palermo Protocol's entry into force,¹⁰¹ many States Parties have either adopted a definition of human trafficking that is different from

⁸⁸ Hyland, *supra* note 11, at 30.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Palermo Protocol, *supra* note 24, art. 3(a); Allain, *supra* note 80, at 119.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ The act of human trafficking takes the form of recruitment, transportation, transfer, harboring, or receipt of persons. Seideman, *supra* note 37, at 2.

⁹⁷ The means of human trafficking take the forms of "using threats, force, or coercion, abduction, fraud, deception, abuse of power or vulnerability, giving or receiving payments or benefits." Seideman, *supra* note 37, at 2.

⁹⁸ The purpose of human trafficking is exploitation. Seideman, *supra* note 37, at 2.

⁹⁹ Seideman, *supra* note 37, at 2.

¹⁰⁰ *Id.*

¹⁰¹ In international law, the term "entry into force" is used to describe the "[c]oming into legal effect of an international agreement, i.e. time at which an international agreement becomes legally binding for the States that have ratified it or acceded to it or otherwise

the one in Article 3 or have not enacted domestic legislation that criminalizes human trafficking.¹⁰² The incompliance can be attributed to the lack of definitions for the terms used to define human trafficking in Article 3.¹⁰³ Without a clear definition of the terms, the definition of human trafficking serves as “an unstated invitation to legislators around the world to modify its provisions [because] . . . [it] is a flawed piece of drafting.”¹⁰⁴ As a result, the international definition of human trafficking raises more questions than answers for legislatures around the world that are attempting to comply with their Article 5 obligations to implement domestic legislation criminalizing human trafficking.¹⁰⁵ Consequently, the international definition of human trafficking loses its global support and strength.¹⁰⁶ For example, in 2012, nine years after the Palermo Protocol’s entry into force, 157 of its States Parties had not implemented the requisite domestic legislation criminalizing human trafficking.¹⁰⁷ As well, the domestic laws criminalizing sex trafficking in various States have definitions that significantly differ from the Palermo Protocol’s definition of human trafficking.¹⁰⁸ Unfortunately, the United Nations lacks the enforcement power to require States Parties to the Palermo Protocol to adopt the human trafficking definition enshrined in Article 3.¹⁰⁹ This is largely attributable to the “anarchic nature of our international system [which] makes enforcing compliance almost impossible.”¹¹⁰

Nonetheless, it is well within a State Party’s right to adopt a definition of human trafficking that differs from Article 3’s definition.¹¹¹ According to the 2009 Model Law against Trafficking in Persons prepared by the United Nations, “the general provisions and the definitions . . . are not mandated by the Protocol per se.”¹¹² Thus, States Parties are given leeway on how they define human trafficking and, therefore, criminalize it domestically.

expressed their consent to be bound by the agreement.” *Entry Into Force*, INFORMEA, <https://www.informea.org/en/terms/entry-into-force> (last visited Feb. 7, 2025).

¹⁰² Seideman, *supra* note 37, at 2.

¹⁰³ See Palermo Protocol, *supra* note 24, art. 3; Allain, *supra* note 80, at 119–20.

¹⁰⁴ Allain, *supra* note 80, at 119.

¹⁰⁵ *Id.*; Palermo Protocol, *supra* note 24, art. 5.

¹⁰⁶ Seideman, *supra* note 37, at 2.

¹⁰⁷ *Id.* (citing *Global Report on Trafficking in Persons*, UNITED NATIONS OFF. ON DRUGS & CRIME 1, 1 (2012), https://www.unodc.org/documents/data-and-analysis/glotip/trafficking_in_persons_2012_web.pdf; Michelle M. Dempsey et al., *Defining Sex Trafficking in International and Domestic Law: Mind the Gaps*, 26 EMORY INT’L L. REV. 137, 137–38 (2012)).

¹⁰⁸ Seideman, *supra* note 37, at 2.

¹⁰⁹ *Id.* at 6–7.

¹¹⁰ *Id.*

¹¹¹ Allain, *supra* note 80, at 122.

¹¹² United Nations Off. on Drugs & Crime, Model Law against Trafficking in Persons, at 1, U.N. Doc. V.09-81990 (E) (2009).

B. The Failure of the Palermo Protocol to Define Exploitation Creates a Power Imbalance Between Those that Create and Implement the Law and Those Affected by Exploitation

At the heart of the Palermo Protocol's definition of human trafficking is the concept of exploitation.¹¹³ Yet, exploitation is not defined in the text.¹¹⁴ Rather, the definition provides a non-exhaustive list of examples of what exploitation can be.¹¹⁵ Specifically, Article 3 of the Palermo Protocol states that “[e]xploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. . . .”¹¹⁶

The concept of exploitation is the basis of international efforts to define decent work.¹¹⁷ The fight against exploitation “occupies a central position within the global legal architecture around extreme forms of abuse like ‘trafficking’, ‘forced labour’ and ‘modern slavery’” as emphasized by nearly all of the recent laws, policies, and campaigns that address human trafficking.¹¹⁸ Yet, exploitation is not defined in international law.¹¹⁹ Although the Palermo Protocol “establishes the internationally agreed upon definition of trafficking, [it] deliberately avoids offering anything concrete.”¹²⁰ While some believe that this omission is positive because it allows advocates and legislators to fill in the gaps with examples of “unacceptable” work, research and engagement with frontline vulnerable workers in the Global North and South indicate that the lack of clarity and definition of the term “exploitation” creates additional problems.¹²¹

The lack of a definition for the term “exploitation” is attributed to political compromise.¹²² As stated by Marjan Wijers, one of the delegates representing the Global Alliance Against Traffic in Women and the Dutch Foundation Against Trafficking in Women during the negotiations of the Palermo Protocol, the definition of exploitation could not be agreed upon.¹²³ She recounts:

[T]here were a number of states and international experts, like the UN High Commissioner on Human Rights, the Special Rapporteur on Violence Against Women, the International Labour Organisation, . . . who said don't use the word

¹¹³ Wijers, *supra* note 1.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Palermo Protocol, *supra* note 24, art. 3(a).

¹¹⁷ Neil Howard, *What Is Exploitation Anyway?*, OPEN DEMOCRACY (Nov. 15, 2020, 12:12 AM), <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/what-exploitation-anyway/>.

¹¹⁸ Howard, *supra* note 117.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Wijers, *supra* note 1.

¹²³ *Id.*

exploitation. Stick to forced labour, servitude, slavery-like practices, etc., which are accepted and defined concepts in international human rights law. They also advocated to delete the word ‘sexual exploitation’ because it is undefined, controversial, and unnecessary. The Special Rapporteur on Violence Against Women, for example, noted that the term ‘sexual exploitation’ could be interpreted in very different ways, depending on whether you believed that prostitution constituted ‘sexual exploitation’ per se, or whether it referred to situations of forced labour, servitude or slavery-like practices, which could happen in the sex industry but also in domestic labour or servile marriages.¹²⁴

According to Wijers, because of the disagreement, “[t]he terms ‘exploitation of the prostitution of others’ and ‘sexual exploitation’ were intentionally left undefined, so [S]tates could decide for themselves how they wanted to address prostitution in their domestic laws. It was a typical political compromise where both parties more or less got what they wanted.”¹²⁵

The key problem with not having an internationally agreed-upon definition for exploitation resides in the issue of power.¹²⁶ Simply, not everyone is allowed to define exploitation because the “[s]eats at the table are limited and exclusive.”¹²⁷ As a result, the activities that are defined as being exploitative are the ones that are deemed to be offensive by the people in power, namely legislators.¹²⁸ Consequently, the acts and remedies of what is understood to be exploitative tend to be decided by, and make sense to, those in power.¹²⁹

By allowing those in power to control the narrative of what is exploitative, the perspectives are not representative of those of the entire affected population.¹³⁰ The story is told by the “people at the top of vectors of inequality, such as race, class, gender, and generation, with perspectives that are seriously circumscribed by their privilege and the ideologies that underpin it.”¹³¹ This approach often leads to a “de-politicised, individualised, racialised, adult-centric, and patriarchal” definition and view of exploitation as being “something that only morally corrupt individuals . . . [and] unsuspecting innocents” ‘do’.¹³² As such, a binary is created that draws a distinction on race and gender lines, with perpetrators being assumed to be only black and brown males and victims presumed to be innocent women and children.¹³³

¹²⁴ Wijers, *supra* note 1.

¹²⁵ *Id.*

¹²⁶ Howard, *supra* note 117.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Howard, *supra* note 117.

¹³² *Id.*

¹³³ *Id.*

Aside from the problems associated with the definition of exploitation being created by those in power, the lack of a definition of exploitation in the Palermo Protocol has severe and damaging consequences. By naming certain activities as being exploitative and in need of eradication, other troubling acts are excluded from protection.¹³⁴ For example, regarding sex work, many States Parties “restrict force to refer only to forcing somebody into prostitution and not to forced working conditions.”¹³⁵

Likewise, when categories of work are deemed to be exploitative by default, livelihoods can be stigmatized even if they are not problematic for the worker.¹³⁶ For instance, non-governmental organizations and activists tried to morally “save” sex workers by banning prostitution and other forms of sex work.¹³⁷ As a result, the income of these workers was greatly affected since they could no longer perform sex work.¹³⁸ Yet, despite being the targeted population of the laws and policies that attempt to define exploitation, sex workers are rarely consulted on whether they view their work as being exploitative.¹³⁹

Additionally, by concentrating only on individual perpetrators or sectors that are deemed to be exploitative, “the underlying causal conditions of *all* problematic labour relations” are ignored.¹⁴⁰ As a result, the attention is drawn away from the central processes and structures that enable violence and abuse.¹⁴¹ This includes turning a blind eye to socio-legal systems that dehumanize some populations over others and private property regimes that deny some the means of sustenance.¹⁴²

C. Since the Palermo Protocol’s Language is Broad, Vague, and Undefined, States Parties Violate the Legality Principle

As with all international treaties, the Palermo Protocol is the product of political negotiations and political compromise.¹⁴³ During the negotiations, States’ representatives discussed “the relation between trafficking and prostitution; the issue of consent; the relation between trafficking and smuggling; the broadening of the definition of trafficking to include other purposes than (forced) prostitution; [and] the broadening of the definition to include the trafficking of men and boys.”¹⁴⁴ As a result of these compromises, some elements of the Palermo Protocol are not

¹³⁴ Howard, *supra* note 117.

¹³⁵ Wijers, *supra* note 1.

¹³⁶ Howard, *supra* note 117.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Howard, *supra* note 117.

¹⁴² *Id.*

¹⁴³ Wijers, *supra* note 72, at 7; Wijers, *supra* note 1.

¹⁴⁴ Wijers, *supra* note 72, at 7.

defined, like the concept of sexual exploitation.¹⁴⁵ Furthermore, one must refer to other international treaties to understand the definitions and meanings of other concepts such as forced labor.¹⁴⁶

Undefined terms are problematic when implementing the provisions of the Palermo Protocol into domestic criminal law. In particular, implementation may violate the principle of legality and its requirements of *lex certa*¹⁴⁷ and *praevia lege*.¹⁴⁸ To satisfy the principle of legality, crimes must be defined clearly, unequivocally, and in advance to determine which behaviors are punishable and which are not.¹⁴⁹ As the Palermo Protocol does not provide clear definitions of its prohibitions of forced labor, slavery, and other related human trafficking practices, States Parties must refer to other international human rights instruments to appropriately enact provisions of the Palermo Protocol into their domestic criminal laws.¹⁵⁰

To do so, Article 14 of the Palermo Protocol provides a saving clause.¹⁵¹ Under its saving clause, the Palermo Protocol notes the existence of and firmly incorporates all existing international instruments and standards that must be referred to in order to properly interpret the Protocol.¹⁵² Moreover, the saving clause reiterates the obligations of States Parties and the rights of individuals under the Palermo Protocol.¹⁵³ These rights include the right to non-discrimination on the basis that the individual is a victim of human trafficking.¹⁵⁴

However, whether a State Party consults other international instruments is not certain or enforceable. Many States whose definition of human trafficking differs from that of Article 3 of the Palermo Protocol falsely report compliance with the Convention.¹⁵⁵ As well, of the States that are compliant in their legislations' writing, 40 percent have not yet enforced their anti-trafficking laws or made a single conviction.¹⁵⁶ Furthermore, States may deliberately misrepresent the prevalence of sex trade and anti-trafficking legislation in order to receive foreign aid.¹⁵⁷

¹⁴⁵ Wijers, *supra* note 72, at 7.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* (defining *lex certa* as the clarity of the elements that comprise a crime).

¹⁴⁸ *Id.* (explaining *praevia lege* means non-retroactivity).

¹⁴⁹ *Id.*

¹⁵⁰ See *Combating Trafficking in Persons and Contemporary Forms of Slavery*, UNITED NATIONS MIGRATION AGENCY, https://www.iom.int/sites/default/files/our_work/ODG/GCM/IOM-Thematic-Paper-Trafficking-in-persons.pdf (last visited Feb. 7, 2025); *International Instruments Concerning Trafficking in Persons*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM'R (Aug. 2014), https://www.ohchr.org/Documents/Issues/Women/WRGS/OnePagers/IntInstrumentsconcerningTraffickingpersons_Aug2014.pdf#:~:text=The%20International%20Covenant%20on%20Civil%20and%20Political,the%20slave%20trade%2C%20se%20and%20forced%20labour.

¹⁵¹ Palermo Protocol, *supra* note 24, art. 14.

¹⁵² *Id.*; Ezeilo, *supra* note 76, at 145–46.

¹⁵³ Ezeilo, *supra* note 76, at 145–46.

¹⁵⁴ *Id.*

¹⁵⁵ Seideman, *supra* note 37, at 6.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 6–7.

IV. VICTIMS ARE NOT ADEQUATELY PROTECTED UNDER THE PALERMO PROTOCOL

Despite the concrete and specific terms of the Palermo Protocol's law enforcement measures, its victim protection provisions are weak.¹⁵⁸ Since the Convention focuses primarily on the act, method, and purpose of human trafficking, the plight of the victim is ignored, and the attention is drawn to the trafficker.¹⁵⁹ As anti-trafficking efforts are inherently political in nature, the question becomes: Are political responses required to protect and provide effective assistance to victims of human trafficking?¹⁶⁰

A. Protections for Victims are Not Mandatory

Even though one of the purposes of the Palermo Protocol is to protect victims of human trafficking, several provisions written for protecting victims and creating prevention initiatives are not obligatory.¹⁶¹ This is in stark contrast to the Palermo Protocol's law enforcement provisions, which make States Parties' compliance mandatory.¹⁶² Thus, victim protection is left to the discretion of States Parties.¹⁶³

States Parties should not dismiss the Palermo Protocol's victim protection measures as discretionary.¹⁶⁴ Rather, these measures should be interpreted and implemented as "critical, integral components of the Protocol's mandatory law enforcement requirements that [keep] with the tenets of the modern crime victims' rights movement that has emerged in many countries over the last thirty years."¹⁶⁵ In doing so, the services outlined in the Palermo Protocol should be read together as a "victim's bill of rights."¹⁶⁶

For example, Article 6 of the Palermo Protocol requires States Parties to consider creating services for the physical and psychological recovery of human trafficking victims.¹⁶⁷ These services include medical care, mental health counseling, housing, job training, physical safety, and legal assistance.¹⁶⁸ Likewise, Article 7 requires States Parties to consider providing either temporary or permanent residences for victims.¹⁶⁹ As well, Article 8 requires States Parties to

¹⁵⁸ See Palermo Protocol, *supra* note 24, art. 6–8.

¹⁵⁹ *Id.* art. 1–2.

¹⁶⁰ Helga Konrad, *Is Human Trafficking Truly an Intractable Problem?*, OPEN DEMOCRACY (Dec. 1, 2020, 11:03 AM), <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/human-trafficking-truly-intractable-problem/>.

¹⁶¹ Wijers, *supra* note 1; Goździak et al., *supra* note 51.

¹⁶² Wijers, *supra* note 1.

¹⁶³ *Id.*

¹⁶⁴ Heinrich, *supra* note 43, at 3.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Palermo Protocol, *supra* note 24, art. 6.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* art. 7.

facilitate the repatriation of citizens or nationals “with due regard” for the victim’s safety.¹⁷⁰ To do so, the victim must be provided the necessary travel documentation and a return without unreasonable delay.¹⁷¹ Taken together, these measures would create an international version of a “victim’s bill of rights” if they were implemented and guided by an effective law enforcement response.¹⁷² These provisions recognize that victims of human trafficking require alternatives in a criminal justice system where repatriation or deportation are the default outcomes.¹⁷³ Unfortunately, these provisions are seldomly applied by States Parties and are often completely absent in many countries.¹⁷⁴

B. The Watchdogs to Ensure that Victims are Protected are the States Themselves

Although the United Nations established an international definition for human trafficking in the Palermo Protocol, the mechanism meant to enforce the prohibition of human trafficking is transnational, rather than international, in nature.¹⁷⁵ Unlike the core international human rights treaties, the Palermo Protocol does not have its own human rights treaty body to monitor the implementation of the Protocol.¹⁷⁶ Composed of independent experts, human rights treaty bodies monitor the implementation of a specific international human rights treaty.¹⁷⁷ As each State Party to an international human rights treaty “has an obligation to take steps to ensure that everyone in the State can enjoy the rights set out in the treaty,”¹⁷⁸ each treaty body is tasked with ensuring States Parties comply with their commitments.¹⁷⁹ Specifically, treaty bodies “consider States [P]arties’ reports; consider individual complaints; conduct country inquiries; adopt general comments and organize thematic discussions to interpret the provisions of their treaty or treaties; attend the annual meeting of Chairpersons; and contribute to the treaty body strengthening process.”¹⁸⁰

¹⁷⁰ Palermo Protocol, *supra* note 24, art. 8.

¹⁷¹ *Id.*

¹⁷² Heinrich, *supra* note 43, at 3.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Allain, *supra* note 80, at 112.

¹⁷⁶ See *What are the Treaty Bodies?*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/en/treaty-bodies#:~:text=The%20human%20rights%20treaty%20bodies,set%20out%20in%20the%20treaty> (last visited Feb. 7, 2025); *Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, UNITED NATIONS OFF. ON DRUGS & CRIME, <https://www.unodc.org/unodc/en/organized-crime/intro/review-mechanism-untoc/home.html> (last visited Feb. 7, 2025).

¹⁷⁷ *What are the Treaty Bodies?*, *supra* note 176.

¹⁷⁸ *Id.*

¹⁷⁹ See *What the Treaty Bodies Do*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM’R, [ohchr.org/en/treaty-bodies/what-treaty-bodies-do](https://www.ohchr.org/en/treaty-bodies/what-treaty-bodies-do) (last visited Feb. 7, 2025).

¹⁸⁰ *Id.*

Since the Palermo Protocol does not have its own treaty body to monitor its implementation on the international level, States Parties have the primary responsibility of ensuring that the protections of the Palermo Protocol are implemented in their domestic legislation.¹⁸¹ For example, States Parties must “ensure that victims are not subject to criminal sanctions”¹⁸² and “refrain from expelling potential victims due to their unlawful migration or labour status.”¹⁸³ Despite the irony that a State Party to the Palermo Protocol is its own watchdog under international law—this responsibility is stipulated in international agreements—enforcement of the Protocol depends not on law, but on political will.¹⁸⁴

However, political will does not address all forms of human trafficking equally. For instance, many States Parties depend on migrant labor for their economy and goods production.¹⁸⁵ Addressing and remedying the abusive conditions of migrants and other low-paid workers would increase the cost of goods in a State.¹⁸⁶ As a result, States Parties are not likely to address issues like migrant labor conditions because their remedies have other negative downstream effects.¹⁸⁷ However, it is much easier for States Parties to focus on borders, prostitution, and the morality of women because it is a “better fit” for the State’s interests.¹⁸⁸

¹⁸¹ Konrad, *supra* note 160.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See *Combating Trafficking in Person and Contemporary Forms of Slavery*, INT’L ORG. FOR MIGRATION, https://www.iom.int/sites/default/files/our_work/odg/gcm/iom-thematic-paper-trafficking-in-persons.pdf (last visited Feb. 7, 2025); *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, INT’L LABOUR OFF. (2017), https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575479.pdf.

¹⁸⁶ See Daniel Costa & Philip Martin, *Temporary Labor Migration Programs*, ECON. POL’Y INST. (Aug. 1, 2018), <https://www.epi.org/publication/temporary-labor-migration-programs-governance-migrant-worker-rights-and-recommendations-for-the-u-n-global-compact-for-migration/#:~:text=Employers%20may%20make%20investment%20decisions,employ%20guestworkers%20to%20harvest%20them;MigrantWorkers>, UNITED NATIONS GLOB. COMPACT, <https://bhr-navigator.unglobalcompact.org/issues/migrant-workers/#:~:text=Operational%20risk:%20Changes%20to%20a,activities%20to%20lower%20risk%20locations> (last visited Feb. 7, 2025); *How Migrant Workers Have Contributed to Strong U.S. Job Growth*, PBS NEWS (Apr. 12, 2024, 4:42 PM), <https://www.pbs.org/newshour/economy/how-migrant-workers-have-contributed-to-strong-u-s-job-growth/#:~:text=More%20workers%20filling%20more%20jobs,higher%20prices%20that%20feed%20inflation>.

¹⁸⁷ See Wijers, *supra* note 1.

¹⁸⁸ *Id.*

V. RECOMMENDATIONS FOR MAKING THE PALERMO PROTOCOL AND ANTI-TRAFFICKING INITIATIVES MORE EFFECTIVE

Since the Palermo Protocol's adoption in 2000, most anti-trafficking initiatives have centered on strengthening law enforcement and prosecuting traffickers.¹⁸⁹ Although these initiatives are necessary, they have not addressed the causes of human trafficking and exploitation, nor sought to reduce the frequency at which victims are trafficked.¹⁹⁰ Thus, immediate action needs to be taken to make the Palermo Protocol more effective internationally and domestically.

A. Shift the Framework for Addressing Anti-Trafficking from a Criminal Law to a Human Rights and Development Law Approach

In a world where politics govern our law and negotiations determine what rights are considered fundamental, we often forget that at the core of most crimes is a human being. Rather than framing the discussion of human trafficking in a criminal law context, the international community should shift its focus to addressing the issue through a human rights and development law lens.¹⁹¹ For example, anti-trafficking programs should be viewed as components of anti-discrimination, anti-violence, and sustainable development.¹⁹² By framing anti-trafficking initiatives in this manner, programs could support long-term and comprehensive strategies and solutions.¹⁹³

Currently, the problem is that anti-trafficking efforts are seen as short-term solutions, and money has increasingly shifted the attention away from issues of development, equality, and human rights to concerns about national security and migration.¹⁹⁴ In addition to trying to control “problems” such as migration and prostitution, States should develop diverse and long-term policies that deal with the root causes of human trafficking, like unemployment and exploitation.¹⁹⁵ For example, joint programs between law enforcement and social services should be created and adequately funded to promote the reintegration of victims into society.¹⁹⁶

¹⁸⁹ Mike Dottridge, *The Palermo Protocols at 20: A Missed Opportunity for Ending Trafficking*, OPEN DEMOCRACY (Nov. 20, 2020, 12:17 AM), <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/palermo-protocols-20-missed-opportunity-ending-trafficking/>.

¹⁹⁰ *Id.*

¹⁹¹ See Dottridge, *supra* note 189; *About Trafficking in Persons and Human Rights*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/en/trafficking-in-persons/about-trafficking-persons-and-human-rights#:~:text=The%20human%20rights%20based%20approach,eliminating%20trafficking%20and%20related%20exploitation> (last visited Feb. 7, 2025).

¹⁹² Konrad, *supra* note 160.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

In the end, the only way to truly prevent human trafficking is to address its root causes. The current criminal law framework does not adequately address the underlying problems that fuel the human trafficking industry. By shifting the approach to combat human trafficking from a criminal to a human rights and development law lens, the core causes of human trafficking would be addressed. As international human rights law protects the civil, political, economic, social, and cultural rights of all individuals, human trafficking is likely to become obsolete once these basic human rights are fulfilled.¹⁹⁷

B. Develop Greater Accountability within the International Community

Given that the Palermo Protocol is an international instrument, there needs to be greater accountability by States Parties at the international level. It is irresponsible for the watchdogs of the Palermo Protocol to be the States Parties themselves. Although States and large institutional actors like the United Nations play a major role in the decisions regarding resource allocation for combatting human trafficking, they surprisingly know very little about the impact of the anti-trafficking initiatives they fund.¹⁹⁸

To develop greater accountability within the international community, States and anti-trafficking institutions should be subject to periodic evaluations. These evaluations should monitor the progress of each State Party in implementing and enforcing its obligations under the Palermo Protocol. Although a mechanism was created by the UNODC in 2020 to review the implementation of the United Nations Convention against Transnational Organized Crime and its protocols, that mechanism is inadequate because it depends on self-assessment and peer review from other States, not an evaluation by experts.¹⁹⁹ As well, unlike the current review mechanism which seeks to evaluate the implementation of four treaties, a review mechanism for just the Palermo Protocol is necessary to properly evaluate the compliance of States Parties with their obligations.²⁰⁰ Furthermore, the recommendations from the current mechanism are not obligatory.²⁰¹ As a result, States do not have to follow the recommendations of the review mechanism regarding compliance with their commitments under the Palermo Protocol.²⁰²

¹⁹⁷ See G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Dec. 16, 1966); International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (Dec. 19, 1966).

¹⁹⁸ Konrad, *supra* note 160.

¹⁹⁹ *Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, *supra* note 176.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

Similar to the Universal Periodic Review process, which reviews the human rights records of all 193 United Nations Member States,²⁰³ each State Party to the Palermo Protocol should submit to a periodic review process conducted by a body of experts appointed by the Convention's implementing organization—the UNODC. In this review process, briefs from civil society and States should be presented to describe how human traffickers are being held criminally accountable and determine whether victims are truly being protected. At the end of these sessions, the experts should issue a report providing mandatory provisions that must be implemented by the State if it is not fulfilling its obligations under the Palermo Protocol.

By making international evaluations an integral part of the anti-trafficking initiative, States Parties are more likely to comply with their obligations under the Palermo Protocol. Not only does a review process provide the chance for a State to show what progress it has made, but it also allows the international community to monitor and provide solutions on how to combat human trafficking from a global perspective. What is not likely to be addressed at a domestic level because of politics is likely to be highlighted by the world community.

C. Create a New Anti-Human Trafficking Instrument Using an International Human Rights Perspective

Although the Palermo Protocol was a good first step for addressing human trafficking at the international level, its current criminal law framework does not adequately address the root causes of the crime.²⁰⁴ Most, if not all, of the core reasons for human trafficking stem from the deprivation or exploitation of civil, political, economic, social, and cultural rights.²⁰⁵ As such, the global community needs to invest in a new international human rights instrument that focuses on the

²⁰³ *Basic Facts About the UPR*, UNITED NATIONS HUM. RTS. COUNCIL, [https://www.ohchr.org/en/hr-bodies/upr/basic-facts#:~:text=The%20Universal%20Periodic%20Review%20\(UPR,equal%20treatment%20for%20all%20countries](https://www.ohchr.org/en/hr-bodies/upr/basic-facts#:~:text=The%20Universal%20Periodic%20Review%20(UPR,equal%20treatment%20for%20all%20countries) (last visited Feb. 7, 2025).

²⁰⁴ See Shoaps, *supra* note 15, at 949.

²⁰⁵ See *Human Trafficking: A Human Rights Violation*, LAB. TO COMBAT HUM. TRAFFICKING, <https://combathumantrafficking.org/blog/human-trafficking-human-rights-violation-3/#:~:text=The%20human%20rights%20framework%20for,just%20and%20favorable%20working%20conditions> (Dec. 10, 2018); *Root causes*, UNODC, <https://www.unodc.org/e4j/zh/tip-and-som/module-7/key-issues/root-causes.html#:~:text=paragraphs%20that%20follow,-Poverty,67%2D68> (last visited Feb. 7, 2025); Hannah Gould, *What Fuels Human Trafficking?*, UNICEF (Jan. 13, 2017), [https://achievece.com/blog/how-socioeconomic-factors-contribute-to-human-trafficking#:~:text=Socioeconomic%20factors%20contribute%20to%20human%20trafficking%2C%20such%20as%20poverty%2C%20lack,lack%20of%20access%20to%20healthcare](https://www.unicefusa.org/stories/what-fuels-human-trafficking#:~:text=Mass%20displacement%2C%20conflict%2C%20extreme%20poverty%2C%20lack%20of,that%20push%20individuals%20into%20situations%20of%20trafficking.&text=Traffickers%20look%20for%20people%20living%20in%20poverty%2C,looking%20for%20a%20way%20to%20escape%20violence; Zack Janiel, <i>How Socioeconomic Factors Contribute To Human Trafficking</i>, ACHIEVECE (Jan. 31, 2023), <a href=).

broader notion of exploitation. Specifically, the new treaty should concentrate on the prevention of human trafficking, effective remedies for exploited victims, and early support services for human trafficking victims.²⁰⁶

First, the new treaty should focus on prevention strategies for all forms of human trafficking. This would require action by States and businesses to create both voluntary and mandatory provisions that impose specific obligations on individuals and companies to identify risks encountered by their employees and supply chains.²⁰⁷ After identifying the possible causes that could lead to human trafficking, companies should establish plans and create solutions for workers who lose their jobs and may be exploited in their current situations.²⁰⁸ Likewise, national legislation should be created to impose liability on corporations and businesses to comply with these obligations, especially in their recruitment and labor practices.²⁰⁹

Second, the new convention should have mandatory effective remedies for victims of human trafficking. All remedies for human rights violations should be available.²¹⁰ These include restitution, restoration, rehabilitation, compensation, satisfaction, and the guarantee of non-repetition.²¹¹ As well, there should be mandatory social remedies that will allow for the reintegration of victims into society. For example, adequate housing, medical treatment, and psychological counseling should be provided to the victim.

Lastly, the new treaty should provide early support for victims of human trafficking. By providing early support, the possibility of further exploitation will be reduced, and social re-integration and inclusion will be promoted.²¹² Likewise, early support services should be structured to help individuals before they formally identify themselves as a victim of crime in prosecutions.²¹³ As a result, these services will not be limited to only those who help the prosecution.²¹⁴ Examples of early support services include healthcare, counseling, and other assistance measures for vulnerable individuals.²¹⁵

VI. CONCLUSION

Although the Palermo Protocol is commonly thought to have revolutionized anti-human trafficking initiatives in the international forum, its implementation by States Parties all too often puts individuals in more vulnerable positions.²¹⁶ In its current form, the purpose of the Palermo Protocol is not clear on

²⁰⁶ Giammarinaro, *supra* note 45.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Giammarinaro, *supra* note 45.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Wijers, *supra* note 1.

its face, and its text is ineffective in holding human traffickers criminally accountable.²¹⁷ As well, the Palermo Protocol's provisions do not adequately protect human trafficking victims. In particular, the definition of human trafficking is not specific nor clear enough for domestic legislatures to adequately criminalize it; its failure to define exploitation creates a power imbalance; and the broad, vague, and undefined language used to define human trafficking violates the legality principle under international law.²¹⁸

As well, victims are not adequately protected under the Palermo Protocol because its protection provisions for victims are not mandatory. Per the Protocol, States are merely required to "consider" implementing the provisions that protect victims.²¹⁹ There is no language in the Convention that indicates that these measures are required. Moreover, States Parties serve as their own watchdogs to ensure that victims are protected. This is counterintuitive because a State that violates its obligations is unlikely to denounce itself or its practices that may harm individuals. Unfortunately, what has been touted as a "significant achievement [that] . . . reflect[s] the political will of the international community to combat the increased threat posed by organized crime"²²⁰ has done very little to improve the lives of human trafficking victims.²²¹

Criminal law is also not made for victims.²²² Criminal law is a device that is used between States and perpetrators.²²³ In the criminal justice system, victims are used as nothing more than evidence to show that the trafficker broke the law.²²⁴ Although it is possible that the Palermo Protocol did benefit a small class of victims, the plight of the majority of victims did not improve from its implementation.²²⁵

There is an immediate need to make the Palermo Protocol and its anti-trafficking initiatives more effective. In its current state, the Palermo Protocol pays lip service to human rights. For anti-trafficking measures to be effective, the framework for addressing human trafficking needs to shift from a criminal law to a human rights and development law framework. As well, there needs to be greater accountability for its implementation by the international community. This can be achieved by creating a separate review mechanism led by experts that focuses solely on the Palermo Protocol. Lastly, in the unfortunate event that the Palermo Protocol is unable to be revised to enhance its potential effectiveness, a new international human rights anti-human trafficking instrument should be created to address the gaps and deficiencies of the Palermo Protocol regarding its prevention methods, remedies, and early support measures.

²¹⁷ See *supra* sec. II.

²¹⁸ See *supra* sec. III.

²¹⁹ See *supra* sec. IV.

²²⁰ U.N. GAOR, 55th Sess., 62d plen. mtg. at 9, U.N. Doc. A/55/PV.62 (Nov. 15, 2000) (statement of Mr. Rydzkowski).

²²¹ Wijers, *supra* note 1.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*