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The Legal Nature of Trafficking in Human Beings

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I. Introduction

It is incorrect to say that people trafficking is a breach of human rights for the same reason that it is incorrect to say that 2+2=5: because it is wrong and there is an inherent good in getting things right.

This article assesses what, legally, is actually happening when trafficking in human beings (THB) takes place, and considers the practical ramifications arising from that assessment. What actually is THB? The most widely accepted definition is contained in the Palermo Protocol (the Protocol) to the United Nations Convention on Transnational Organised Crime (UNCTOC), which entered into force in December 2003. Article 3(a) provides:

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

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* Professor of Law, Aberystwyth University, Wales. This article develops arguments raised at the conference held at St. Thomas University School of Law in Miami on February 12, 2009: "Human Trafficking: Global and Local Perspectives." These issues were first raised briefly in my article *Trafficking of Human Beings and Their Human Rights in the Migration Context*, *in* INTERNATIONAL MIGRATION LAW. DEVELOPING PARADIGMS AND KEY CHALLENGES 275, 278-281 (Ryszard Cholewiński, Richard Perruchoud & Euan MacDonald eds., 2007). Thanks to my colleagues Prof. Chris Harding and Natalia Szablewska for their comments.

or the removal of organs. . . .[1]

While the definition relates to THB only across States frontiers (because of its adoption as part of UNCTOC) and therefore does not include THB within States, it has received widespread acceptance and the core elements are equally present in THB within States. From the definition, it is evident that THB consists of three elements: the act (recruitment etc), the method (force, etc.) and the purposes (exploitation). When THB occurs it is evident that a victim may be the object of severe exploitation as well as serious criminal offences.

Several areas of law may be relevant to THB. Let us consider what actually happens when a person is trafficked - deprivation of their freedom of movement, forced labor, sexual exploitation, sexual, physical and mental abuse, illegal entry to a State, breach of conditions of entry to a State - may all be involved. THB may therefore raise issues of criminal law, human rights, migration law, employment law and anti-vice laws.[2] It is a complex activity, thus a proper understanding of the legal issues requires awareness of the various rules, regulations and regimes that might apply. The principal issue discussed here is whether THB is fundamentally a matter of criminal law or human rights and why this matters. The argument put forward is that it is primarily a matter of criminal law, albeit with a human rights dimension.

II. THB as a Violation of Human Rights

THB is described as a serious violation of human rights in a variety of legal instruments of varying binding effect, as well as in numerous secondary sources. It is useful to set these out and see if they stand up to scrutiny. If we use the definition of THB from the Protocol, it is clear that the act of trafficking, including the

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[1] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention against Transnational Organized Crime, G.A. Res. 55/25, art. 3, U.N. Doc. A/RES/55/25 (Jan. 8, 2001). As of March 4th 2009, the Protocol had attracted 127 ratifications.

[2] Alice Edwards, *Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Immigration and Labor,* 36 DENV. J. INT'L L. & POL'Y 9, 10 (2007) (explaining and exploring the legal complexity).

exploitation of the labour of the victim, is a form of forced labour akin to slavery.[3] Slavery is defined in the Slavery Convention of 1926 as:

> (1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.
>
> (2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves. [4]

Under Article 2 of that treaty, parties undertook to prevent and suppress the slave trade, as well as to bring about its complete abolition as soon as possible. This obligation is relevant to the discussion because it is a private act that States must prevent. We shall return to it later. If we consider what actually happens when a person is trafficked, it is pretty clear that the practice may amount to slavery. This was recognised by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Kunarac* case.[5] The Tribunal referred to the Report of the Working Group on Contemporary Forms of Slavery which stated that "transborder trafficking of women and girls for sexual exploitation is a contemporary form of slavery and constitutes a serious violation of human rights."[6] In its conclusion with regard to the issue of enslavement, the Court said:

> [I]ndications of enslavement include elements of control and ownership; the restriction or control of a person's autonomy, freedom of choice or freedom of movement;

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[3] *See* CONNY RIJKEN, TRAFFICKING IN PERSONS: PROSECUTION FROM A EUROPEAN PERSPECTIVE 74-79 (2003).

[4] Slavery Convention art. 1, Sept. 25, 1926, 212 U.N.T.S. 17.

[5] Prosecutor v. Kunarac, Kovac, & Vukovic, Case No. IT-96-23-T & IT-96-23/1-A, Judgment, ¶ 118 (June 12, 2002) [hereinafter *Prosecutor v. Kunarac*].

[6] *Id.* at ¶536, note 1323.

> and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.[7]

Even without the explicit reference to THB, it is suggested that the acts outlined by the Court are readily recognisable as belonging to the pattern of behavior and acts involved in the recruitment, control and exploitation of people that occurs when they are trafficked. Furthermore, the link between, indeed the frequent equivalence of, slavery and THB is explicitly recognised in the Statute of the International Criminal Court (1998),[8] Article 7.2.c of which, defining enslavement as a crime against humanity, asserts that the practice means:

> [T]he exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.

Nor was this judgment the first judicial confrontation with a practice explicitly outlawed in the Slavery Convention. In the *Kunarac* case, the ICTY outlined the post-World War II history of the international community's attempts to punish the practice, including several cases arising out of offences committed by Nazi

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[7] *Id.* ¶ 542.

[8] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15- July 17, 1998, *Rome Statute of the International Criminal Court,* U.N. Doc. A/CONF.183/9 (July 17, 1998).

Germany during World War II.[9] While not all slavery involves THB, THB will almost always involve slavery or slavery-like practices and it is therefore appropriate to consider the legal regime with regard to slavery here. Even where THB is not specifically mentioned in human rights instruments, it may nevertheless often fall within the scope of slavery.[10]

The prohibition of slavery is reflected not only through the recognition of the practice as a serious crime. It is also widely considered a serious violation of human rights as noted by the ICTY in *Kunarac*. That said, the violation seems to be the failure of the State to prevent or address THB rather than the activity itself. This has been recognised recently by the ECOWAS Community Court of Justice in *Hadijatou Mani Koraou v. The Republic of Niger*, in which the court held that the action of Niger in "recognising the slave status of Mrs Hadijatou Mani Koraou without denouncing this situation is a form of acceptance, or at least, tolerance of this crime or offence."[11] Furthermore, said the court, "the defendant [i.e., Niger] becomes responsible under international as well as national law for any form of human rights violations of the applicant founded on slavery because of its tolerance, passivity, inaction and abstention with regard to this practice."[12] While the court seems to say here that the applicant's human rights were violated by being held in slavery, it is clear that the responsibility under human rights lies with the State, not with the slave owner, who is considered to be committing a crime. This interpretation is supported by the court's statement that "[w]hen failing to deal with a prohibited offence of its own volition and failing to take adequate measures to ensure punishment, the national judge did not assume its duty of protecting Hadijatou Mani Koraou's human rights and therefore, engaged the defendant's

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[9] *See* Prosecutor v. Kunarac, *supra* note 5, at ¶s 522-25.

[10] James C. Hathaway, *The Human Rights Quagmire of "Human Trafficking"*, 49 VA. J. INT'L L. 1, 4-5 (2008) (arguing that the intense focus on THB as a kind of slavery has been detrimental to attempts to address slavery as a whole.).

[11] Hadijatou Mani Koraou v. The Republic of Niger, ECW/CCJ/JUD/06/08, ¶ 84, (Economic Community of Western African States, Community Court of Justice, October 27, 2008) (unofficial translation).

[12] *Id.* at ¶ 85.

responsibility. . ."[13]

A wide range of human rights instruments addresses this matter. The Universal Declaration of Human Rights (UDHR)[14] provides, at Article 4: "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited *in all their forms*" (emphasis added). Furthermore Article 5 provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." There is little doubt that the practice of THB in itself can easily amount to inhuman and degrading treatment and may, on occasion, involve the torture of the victim. Of course the UDHR is not in itself binding but these provisions are widely reflected, sometimes duplicated, in a wide body of universal and regional instruments. The International Covenant on Civil and Political Rights[15] (ICCPR) contains the same prohibitions, as well as the same obligation to prohibit slavery and the slave trade in all their forms.[16] At the regional level we find similar commitments. Thus the European Convention for the Protection of Human Rights and Fundamental Freedoms[17] (ECHR) prohibits inhuman and degrading treatment, as well as "slavery and servitude."[18] The American Convention on Human Rights[19] (1969) repeats the prohibition on inhuman and degrading treatment[20] but actually goes further with its prohibition on slavery: "No one shall be subjected to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women."[21] The link between slavery

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[13] *Id.* at ¶ 86.

[14] Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter *UDHR*].

[15] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (Mar. 23, 1976).

[16] *See UDHR*, *supra* note 14, at arts. 7 and 8.

[17] Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, March 9, 1953, 213 U.N.T.S. 221.

[18] *See UDHR*, *supra* note 14, at arts. 3 and 4.

[19] American Convention on Human Rights, July 18, 1978, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

[20] *Id* at art. 5 ¶ 2.

[21] *Id.* at art. 6 ¶1.

and THB is here made explicit. Furthermore, it is not only the practice of holding and exploiting people in slavery or servitude that is condemned, but also the trade itself – recruiting, buying and selling the victims. The African Charter on Human and Peoples' Rights[22] (1981) arguably goes even further in that it specifically links the two, indicating the seriousness of slavery as a violation of human rights: "All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."[23]

We also find clear prohibitions of these THB and related practices in more specialised instruments. Thus the Convention on the Elimination of All Forms of Discrimination against Women[24] (CEDAW) provides: "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."[25] The Convention on the Rights of the Child[26] (1989) requires parties to "protect the child from all forms of sexual exploitation and sexual abuse", which includes taking the necessary measures to prevent the inducement or coercion of a child to engage in any unlawful sexual activity, the exploitative use of children in prostitution or other unlawful sexual practices and the exploitative use of children in pornographic performances and materials.[27] This is followed immediately by a specific obligation to take measures "to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."[28] Even this clear denunciation in general terms of the sexual exploitation of children, and the more specific attack on trafficking, has not been considered sufficient, legally, to address this mischief. Accordingly, in 2000, the Optional Protocol to the

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[22] Banjul Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58.

[23] *Id.* at art. 5.

[24] Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

[25] *Id.* at art 6.

[26] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

[27] *Id.* at art. 34.

[28] *Id.* at art. 35.

Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography was adopted.[29] The link with THB is clear from the Preamble which, inter alia, stresses that the parties are "[g]ravely concerned at the significant and increasing international traffic in children for the purpose of the sale of children, child prostitution and child pornography."

The regional legislative response to THB has been most marked in Europe, both at the Council of Europe and the European Union. Most significantly, in 2005, the Council of Europe adopted the Council of Europe Convention on Action Against Trafficking in Human Beings.[30] The Convention in its preamble describes THB as "a violation of human rights and an offence to the dignity and the integrity of the human being," while the protection of the human rights of the victims of THB is one of the three purposes of the convention.[31] The Convention entered into force on February 1, 2008 and, by the end of that year, had attracted 20 ratifications. The EU has adopted a number of instruments on HB, the most important perhaps being the Council Framework Decision of July 19, 2002 on combating trafficking in human beings.[32] This instrument is particularly interesting because, in its preamble, it defines THB as comprising both "serious violations of fundamental human rights and human dignity"[33] and a "serious criminal offence."[34]

This is not an exhaustive outline of international instruments addressing THB but those mentioned above are amongst the most

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[29] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, G.A. Res. 54/263, U.N. Doc. A/RES/54/263 (May 25, 2000), *available at* http://www.unhchr.ch/html/menu2/6/crc/ treaties/opsc.htm.

[30] The Council of Europe Convention on Action against Trafficking in Human Beings, C. Europ. T.S. No. 197 (May 16 2005), *available at* http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=197&CL=ENG [hereinafter *Europe Convention*].

[31] *Id.* at art 1(b).

[32] Council Framework Decision of 19 July 2002 on Combating Trafficking in Human Beings, 2002/629/JHA, 2002 O.J. (L 203) 1 [hereinafter *Council Framework*].

[33] *Id.* at ¶ 3.

[34] *Id.* at ¶ 7.

important and widely accepted. What comes through from all of these is a clear link between THB on the one hand, and slavery or slavery-related practices, on the other. Moreover, while THB is frequently described as a crime, it cannot be denied that it is also classified as a serious threat to, and violation of, human rights, sometimes in the same instrument. On the face of it, THB is a human rights violation and appears to enjoy widespread acceptance as such.

A similar tendency is found in soft-law instruments that address THB. In 2002, the United Nations High Commissioner for Human Rights published its *Recommended Principles and Guidelines on Human Rights and Human Trafficking*.[35] Interestingly, in the *Principles* section, it is stipulated that "[t]he human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims."[36] That is not the same as saying that THB is a breach of human rights; it is simply stressing that the human rights of victims must be taken into account, which would be the case anyway inasmuch as human rights are also State obligations and the States concerned are bound by the relevant human rights instruments in the same way with regard to all persons on their territory, whether their own citizens or aliens (with a few exceptions).[37] However, when we come to the *Guidelines*, a clearer assertion of the human rights aspect is to be found right at the beginning. Guideline 1 is entitled

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[35] U.N. Econ. & Soc. Council [ECOSOC], *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council*, U.N. Doc. E/2002/68/Add.1 (May 20, 2002).

[36] *Id.* at ¶ 1.

[37] International Covenant on Civil and Political Rights, art. 2 para. 1, Dec., 16, 1966, 99 U.N.T.S. 171; *see also* Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 with Protocol Nos. 1, 4, 6, 7, 12 and 13, art. 1, Dec., 4, 1950, ETS 5; *see also* American Convention on Human Rights, art. 1, Nov. 22, 1969. O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123; *see also* African Charter on Human and Peoples' Rights, art. 2, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5; *see also* David Weissbrodt, *The Protection of Non-Citizens in International Human Rights Law, in* INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES 221, 223-228 (Ryszard Cholewinksi, Richard Perruchoud & Euan MacDonald eds., 2007).

"Promotion and protection of human rights" and the introduction begins: "Violations of human rights are both a cause and a consequence of trafficking in persons." This asserts that human rights violations not only happen to people while they are being trafficked but may also be a cause of trafficking occurring in the first place. In other words, the conditions that promote trafficking, or expose people to the risk of being trafficked, may themselves be human rights violations. That is a very serious assertion: it suggests that the whole mixture of poverty, lack of education, dysfunctional families and ignorance that are frequently identified as being significant factors in creating the risk of trafficking are themselves human rights violations. A similar point has been made by Gregor Noll, who argues that the conditions that make people vulnerable to THB may be the consequence of human rights violations:

> The choice between different forms of misery raises the question what conditions make persons accept the offers of smugglers and traffickers. Those conditions could be described as violations of human rights, particularly in the economic and social domain. In such situations, individuals would be faced with the choice between two set-ups of human rights deprivations: that are caused directly and indirectly by trafficking, and that are caused by remaining in the country of origin.[38]

Noll is here suggesting that a State's failure to meet its obligations under, for example, the International Covenant on Economic, Social and Cultural Rights promotes the conditions that expose people to the risks of being trafficked. In fact one might say the same about the risk of being the victim of a breach of one's civil and political rights: the fear of torture or detention without trial could well be sufficient to persuade someone that their chances are better with a trafficker than if they remain in their own State. In this scenario, though, while the link with human rights seems relatively clear, it nevertheless remains the case that the State has not done the

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[38] Gregor Noll, *The Insecurity of Trafficking in International Law, in* GLOBALIZATION, MIGRATION AND HUMAN RIGHTS: INTERNATIONAL LAW UNDER REVIEW 343, 353 (Vincent Chetail ed., Bruylant, Bruxelles 2007).

trafficking. The fear of having one's social and economic rights violated might also suffice to make someone vulnerable to other threats but it is a big leap from there to the point where the State is responsible for the criminal acts of another. To take a tort analogy, is not the damage too remote?

The *Miami Declaration of Principles on Human Trafficking*,[39] adopted on February 10, 2005, states that THB "is a human rights violation that constitutes a contemporary form of slavery."[40] Para 2 then provides:

> Trafficking in persons also typically violates other basic human rights, especially the right of the victim to be free from slavery or servitude, the right of the victim to life, liberty and security of person, the right of the victim to be free from torture or cruel, inhuman or degrading treatment or punishment, the right of the victim to health, the right of the victim to freedom of movement and residence, and the right of the victim to free choice of employment. It also includes the commission of serious crimes against persons, in many cases rape, assault, and torture, as well as crimes against states, often including money laundering, tax evasion, and violations of immigration rules.

Within this one paragraph we see again the apparent dual character of THB: on the one hand the assertion of human rights violations, followed on the other by the recognition of the serious criminal offences that take place.

More recently, the Opinion of the Experts Group on Trafficking in Human Beings of the European Commission drafted and adopted an Opinion on the revision of the Council Framework Decision of 19 July 2002 on Combating Trafficking in Human Beings.[41] That Opinion maintains that THB is "a serious violation of human rights

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[39] *Miami Declaration of Principles on Human Trafficking*, 1 INTERCULTURAL HUM. RTS. L. REV. 11 (2006).

[40] *Id.* at ¶ 1.

[41] Opinion on the Revision of the Council Framework Decision of 19 July 2002 on 'Combating Trafficking in Human Beings,' 2008 O.J (C 14) 23.

and an offence to the dignity and integrity of the individual."[42]

III. The Problem

On the face of it there is not really much of an issue: THB is condemned as a serious crime that is also a violation of human rights, both universally and regionally, in treaties and in soft law instruments. However the reality is not quite so straightforward. THB is usually a private criminal act or enterprise – one or more private citizens are involved in the recruitment and transport of the victim, the trafficker (or somebody else) takes physical control over the activities and movement of the victim, and they (or somebody else) then exploit the labor of the victim for their own gain. In the absence of State involvement, for instance through complicity or neglect, it is hard to see why THB is anything more than a crime just like, say, murder, or theft.[43] This is in no way to belittle the seriousness of THB and the harm it causes to victims. Nevertheless, human rights obligations are owed by States, not traffickers, murderers and car thieves.

This issue has been addressed in the literature, yet the extent to which the human rights nature of THB is actually explained or justified is variable indeed. Helga Konrad, the then Special Representative on Combating Trafficking in Human Beings for the Organization for Security and Cooperation in Europe, has described THB as "first and foremost a violation of human rights."[44] But the author does not explain why it is so. There is certainly plenty of

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[42] *Id.* at ¶ 3.

[43] *See* Natalia Szablewska, *Non-State Actors and Human Rights in Non-International Armed Conflicts*, 32 S. AFR. Y.B. INT'L L. 346 (2007) (That is not to deny that there is an issue: the controversy over whether non-parties can be bound by human rights obligations is well known in international humanitarian law. Common Article 3 of the four Geneva Conventions on the protection of victims of armed conflicts, as well as its second additional Protocol, purports to impose duties relating to human rights protection upon insurgent forces opposing the government in non-international armed conflicts).

[44] Helga Konrad, *The OSCE and the Struggle Against Human Trafficking: The Argument for a Comprehensive, Multi-Pronged Approach*, 1 INTERCULTURAL HUM. RTS. L. REV. 79, 88 (2006).

discussion, well informed, about the threats to, and needs of, the victims. But that is not quite the same as demonstrating that THB actually violates human rights. In an article on THB and the right of trafficked people to human security, another author starts with the same assertion: THB "is a violation of human rights."[45] The author is dealing with the right to security of individuals, in particular trafficked persons, and argues that "[t]he right to safety of the trafficked person may be protected by defining trafficking in persons as a violent crime".[46] But what is the actual right at stake here? It is the right of the individual to some measure of security within the State. That is to be achieved through the use of the *criminal* law. The State has an obligation to ensure that level of security. But when a person is trafficked, the State has not necessarily failed to protect that right because the State cannot give an absolute guarantee of safety to all those within its jurisdiction. One might argue that the act of trafficking does not actually breach the victim's human rights – which are obligations assumed, and owed, by the State, unless the State is in some way responsible, for instance, through failure to have in place an effective legal regime to tackle THB.

There may be an element of wishful legal thinking[47] in this, as if THB is such a shocking thing (and it certainly is) that it must ipso facto be a breach of human rights; indeed that to suggest otherwise indicates a lack of sympathy for, and empathy towards, the victims. Thus Askola notes that:

> [t]he primary motivation behind (and effect of) the affirmation that trafficking is a violation of human rights is to make the victim of trafficking 'visible' as a subject, emphasising her dignity and integrity, despite her prima facie irregular status as an 'illegal' non-citizen. This formulation transforms the victim into a subject whose

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[45] Mohamed Y Mattar, *Human Security or State Security? The Overriding Threat in Trafficking in Persons,* 1 INTERCULTURAL HUM. RTS. L. REV. 249 (2006).

[46] *Id.* at 252.

[47] Kay Hailbronner, *Non-Refoulement and Humanitarian Refugees: Customary International Law or Wishful Legal Thinking,* 26 VA. J. INT'L L. 857, 872 (1986).

> basic rights have been violated by exploiters and whose rights can also be violated in the process of implementing anti-trafficking measures.[48]

But trafficked people *do* have human rights, not because they are trafficked by criminals, nor because they are "'illegal' non-citizen[s]," but because, illegal or otherwise, they have human rights entitlements by virtue of being human beings within the jurisdiction of the State. Their status as foreigners is not legally relevant in this sense. They do not, however, have human rights merely because having them might help them. Askola herself recognises that there are problems here.[49] However, the weakness identified by Askola is not so much the conceptual difficulty of treating a crime as a human rights violation (indeed, Askola appears to accept that, in this sense, THB can indeed violate human rights);[50] rather, she argues forcefully that existing human rights instruments for various reasons are not adequate to protect trafficked people because of their language and substance, as well as the failure to take due account of the reality of the situation of at least some trafficked people, which may have the effect of disempowering them.[51] In fact, Askola makes a very persuasive case, but does not appear to overcome the fundamental dilemma: why should a criminal act by a private individual perpetrated against another private individual be a breach of human rights?

It has also been suggested that the adoption of a variety of human rights instruments that may be more or less relevant to THB "illustrates recognition by the international community that trafficking is also a human rights issue."[52] What exactly is a human

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[48] HELI ASKOLA, LEGAL RESPONSES TO TRAFFICKING IN WOMEN FOR SEXUAL EXPLOITATION IN THE EUROPEAN UNION 133 (Hart Publishing 2007).

[49] *Id.* at 134.

[50] *Id.* at 138 (arguing "...as prostitution typically takes place in EU Member States today, it is fraught with what could be characterised as serious human rights problems. Typically these relate to violence and abuse of women in prostitution by their customers...").

[51] Askola, *supra* note 48, at 133.

[52] TOM OBOKATA, TRAFFICKING OF HUMAN BEINGS FROM A HUMAN RIGHTS PERSPECTIVE 34 (Martinus Nijhoff 2006).

rights "issue"? For sure, there is a human rights dimension to THB, as will be demonstrated below. The writer argues for the application of existing human rights norms to THB[53] and, on the face of it, that is legally quite justifiable. But the issue is: can human rights norms be applied in the typical trafficking scenario? Obokata argues that this approach enables us to see people who have been trafficked as "victims of human rights abuses rather than criminals who violate national immigration laws."[54] This is a mistake. It is not a matter of treating trafficked people *either* as victims of human rights breaches *or* as criminals only. There are other options. This widely accepted dichotomy has discouraged discourse on THB outside that narrow and inaccurate choice.

It is fair to say that there is widespread acceptance now that victims of THB should not be treated as criminals, even if they have prima facie breached immigration laws, but that does not make them victims of human rights abuses. Obokata recognises that there is a small problem: as he rightly notes, "non-State actors do not have legal obligations under international human rights law."[55] However, he then argues that human rights norms may be enforceable indirectly through criminal and civil proceedings.[56] This is not, however, the enforcement of a human rights norm; this is rather the conviction of an accused person for having committed a breach of the criminal law, or else the demand by an individual against another private citizen to be compensated for the commission of a civil wrong such as battery or false imprisonment. The logic of Obokata's argument is that just about anything that happens to you that is contrary to the civil or criminal law may be an indirect breach of your human rights. Maybe that would be a good thing, but it will entail a fundamental reappraisal of what we actually mean when we talk about human rights. Furthermore, on purely utilitarian principles it is hard to see how this will benefit victims (and we can all agree, one hopes, that we want, and that it is a good thing, to try to help the victims) since they will in principle have a remedy under

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[53] *Id.* at 35.
[54] *Id.*
[55] *Id.* at 121-22.
[56] *Id.*

tort (however difficult it may be to achieve an effective remedy under tort in reality), and there is a serious risk that calling these crimes and offences a breach of human rights (indirect or otherwise) may weaken the very high status rightly accorded to them. Obokata concedes that he is arguing *de lege ferenda.* He traces what he describes as a growing recognition that human rights abuses can be committed by non-State actors.[57] However, he also concedes a problem:

> In order to hold that international human rights law imposes direct obligations upon non-State actors and that they can be held directly accountable, it must be shown that international human rights law is directly enforceable against them. In other words, a horizontal application of international human rights law at the international level must be established. In examining the current status of international human rights law, it becomes apparent that a horizontal application is not possible.[58]

Quite so, but not because of the current status of international human rights law; rather it is because that is the way that human rights law works. This will be discussed further below. Of course, it is well recognised that non-State actors can be accountable under international criminal law. From Nuremberg to the International Criminal Court, we can trace the emergence of direct individual responsibility under international law for serious violations of the laws of armed conflict and, as crimes against humanity, certain offences that may be committed during peace time. The individuals may be held accountable irrespective of whether they were acting for the State or in a private capacity. However, that is not a human rights remedy; it is a punishment. The victim does not automatically gain some entitlement to compensation upon conviction; nor is he or she necessarily able to seek a remedy directly.

A comprehensive outline and analysis of human rights instruments relevant to THB is provided by Alice Edwards,[59] who

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[57] *Id.* at 127-29.

[58] *Id.* at 130.

[59] *See* Edwards, *supra* note 2, at 22-35.

assesses the anti-slavery and forced labor instruments, civil and political rights, economic, social and cultural rights, as well as women's rights and children's rights. It is submitted that Edwards is right throughout. She demonstrates how a rather diverse body of human rights law impinges upon the way that States should behave towards the practice of THB, both in preventing and stopping it. But that is precisely the point: yet again, we are dealing with obligations of States themselves to prevent and tackle THB through criminalization and other measures. In none of the hard law instruments cited does one find an obligation on private individuals not to engage in THB; it is the State that is bound: not to traffic, not to support trafficking, and to take measures to prevent and suppress it. Of course. trafficked people have human rights; they have human rights just like all the rest of us *vis-à-vis* the State in which they happen to find themselves at any particular time, not because they are trafficked people, but because they are people.

IV. The Purpose of Human Rights Law

Human rights, wrote Christian Tomuschat, "are designed to reconcile the effectiveness of state power with the protection against that same state power."[60] They are supposed to control and limit the State in its behaviour towards those within its jurisdiction or under its control.[61] As such we are dealing with a vertical relationship between the State and the individual.[62] It is nowadays increasingly

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[60] CHRISTIAN TOMUSCHAT, HUMAN RIGHTS. BETWEEN IDEALISM AND REALISM 7 (2003).

[61] This paper does not address the extra-territorial applicability of human rights obligations.

[62] MALCOLM N. SHAW, INTERNATIONAL LAW 268 (Cambridge University Press, 6th ed. 2008) ("The view adopted by the Western world with regard to international human rights law in general terms has tended to emphasise the basic civil and political rights of individuals, that is to say those rights that take the form of claims limiting the power of government over the governed." It is submitted that, in so far as we are dealing with the *nature* of the obligation, i.e. an obligation assumed by States with regard to those within their jurisdiction, this is not a matter of a Western perspective; it is a matter of basic legal methodology and as such transcends the ideological boundary.).

argued that human rights can, or should have, horizontal application, i.e., that individual A may owe human rights obligations to individual B.[63] This, it is suggested, is conceptually flawed but also unnecessary. It is conceptually flawed because it fails to take account of the history and purpose of human rights, so neatly expressed by Tomuschat above. The essence of human rights law is that it makes the State accountable for failing to protect rights which it has the power and obligation to protect, such as the prohibition on slavery: the State is accountable for the acts and omissions of its own agents, not for those of individuals acting in a private capacity. That apparently limited obligation, however, extends to a duty of protection, for instance by having in place appropriate laws designed to prevent practices such as slavery, laws that can be enforced.[64] This point has been addressed by the United Nations Human Rights Committee in its General Comment No.31:

> The . . . obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law . . . . However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.[65]

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[63] *See* Siobhan Mc Inerney, *The European Convention on Human Rights and the Evolution of Fundamental Rights in the Private Domain, in* RENEGOTIATING WESTPHALIA 277, 307-315 (Christopher Harding & C.L. Lim eds., 1999); *see also*, Szablewska, *supra* note 43, at 352-355; *see also* Tom Obokata, *Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law*, 17 INT'L J. REFUGEE L. 394, 403-405 (2005).

[64] MC v. Bulgaria, 15 Eur. Ct. H.R. 627 (2003) (holding that failure to discharge the duty to protect from slavery resulted in Bulgaria being found in breach of the ECHR, Articles 3 and 8).

[65] CCPR Human Rights Comm., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 24, 2006) [hereinafter *GC 31*].

Are such rights ever amenable to application between private persons and entities? If they are, then there is an element of horizontal effect. However, the Committee's statement suggests that this is not actually so; it sees the matter rather in terms of the duty of the State "to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities."[66] Accordingly, States must "take appropriate measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power."[67] In other words, torture (or trafficking) by the State, or failure to take appropriate measures to address it, is a violation of human rights; torture (or trafficking) committed by a private individual is a crime.

To argue that human rights obligations can exist horizontally becomes then meaningless, because individuals have neither the power nor the duty to respect and protect such rights. The consequences for breach of human rights lie with the State rather than the perpetrator, whose accountability remains confined to criminal law and, sometimes, to tort. Of course, an employer may have an obligation not to discriminate on grounds of race or sex against potential employees but that obligation derives from domestic legislation, and may only be enforced by the individual against the employer domestically. If the State fails to enforce the legislation it (the State) may be responsible for a human rights violation; not the employer.

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[66] *Id.* A similar assessment has been made by the Inter-American Court of Human Rights in the *Velasquez Rodriguez* case, Judgment of 29 July 1988, (1988) 9 HUM. RTS. L.J. 212, ¶ 172: "[A]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention". The point is that the State is responsible for a human rights violation because of its *own* failure to address the matter, not because of the original harm. Indeed it is debatable whether the court was correct even to refer to the illegal act as a human rights violation at all given that it is clearly addressing the fault of the State and not the individual perpetrator.

[67] *GC 31*, *supra* note 65, at ¶ 8.

THB then, in the absence of State complicity or active involvement (for instance, through corrupt border officials), is, like rape, murder and theft, fundamentally a private criminal enterprise, albeit with a human rights dimension. Nobody complains about a violation of their human rights when their car is stolen (although the right to private property is recognized as a human right at international law); how, conceptually, is THB any different? The challenge is not to confuse what might seem desirable, with what actually is.[68] Accountability for THB therefore must lie primarily with the individual. The State is not responsible because it is not at fault.

As already noted, the Council of Europe Convention on Action against Trafficking in Human Beings describes THB as "a violation of human rights."[69] The human rights dimension is addressed in the Explanatory Report accompanying the Convention.[70] The Report points out that the recognition of THB as a human rights violation is already apparent from a number of important instruments.[71] The explanation for so qualifying THB, and therefore for its treatment as such in the Convention, is that human rights obligations may be owed horizontally as well as vertically: that is, they may be owed by individuals towards each other, not just by the State. The Report considers horizontal application in the context of the European Convention on Human Rights, concluding:

> [T]he case law of the European Court of Human Rights contains clear indications in favour of the applicability of the ECHR to relations between private individuals in the sense that the Court has recognized the liability of contracting states for acts committed by individuals or group of individuals *when these States failed to take*

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[68] "[T]he philosophical ought must be distinguished from the legal ought." TOMUSCHAT, *supra* note 60, at 2.

[69] *Europe Convention*, *supra* note 30, at Preamble.

[70] Council of Europe Convention on Action against Trafficking In Human Beings, Explanatory Report, May 3, 2005, C.E.T.S. 197.

[71] *Id.* ¶ 42.

appropriate measures of protection.[72]

This is not horizontal application. In fact, the Report appears still to rely on vertical application by insisting on the responsibility of the State for failure to ensure protection. The issue is therefore the extent to which States have taken appropriate protection measures. It is nowhere expected that the State owes an absolute obligation of protection. However, there must be in place a system that allows for the State's obligations to be respected and fulfilled. With regard to THB, that would include the enactment of appropriate legislation, that is, legislation that effectively criminalizes THB and provides for necessary protections for the victims. As the Report states, "if a violation of one of these rights and freedoms [those contained in the European Convention on Human Rights] is the result of non-observance of . . .[an] obligation in the enactment of domestic legislation, the responsibility of the state for that violation is engaged."[73]

Horizontal application, in other words, does not necessarily

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[72] *Id.* ¶ 44 [emphasis added]; *see Z and others v. United Kingdom*, Judgment of 10 May 2001, Application No. 29392/95, at ¶ 73: "The Court reiterates that Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. *The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals.* These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge" (emphasis added). In other words, the breach, if any, by the State lies in the failure to provide effective protection. Whether protection is effective will depend on the circumstances but does not extend to an absolute obligation. More recently, in *M.C.* v. *Bulgaria*, the Court has held that the failure of Bulgaria to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse was a violation of its obligations under Articles 3 and 8: Judgment of 4 December 2003, Application No. 39272/98, at para. 185. Nevertheless the actual rape was not claimed by the applicant to be a breach.

[73] *Id.*

mean that the State is in breach just because a person has been trafficked. There must also be some failure on the part of the State to secure the rights and freedoms that are guaranteed. With THB, this might include the exposure of the victim to inhuman or degrading treatment or punishment by traffickers, where the state lacks legislation capable of addressing that threat, or elsewhere, even having such legislation in place, it is not in fact effectively implemented.

What can we conclude? Any claim that THB is a human rights violation will have to be made against the State allegedly responsible. Traffickers, as private individuals, by definition cannot be held to account before any human rights tribunal; only States can.[74] And States will only be held accountable if they have done something, or omitted to do something, that amounts to a failure to respect or ensure respect for the rights supposed to be guaranteed. That applies as much to THB as to any other practice. A person might be trafficked without any culpability on the part of the State (just as she might have her car stolen). For sure, a crime has been committed and the perpetrator(s) are accountable under criminal law. Article 4 of the Miami Declaration says:

> Victims of trafficking in persons are to be treated with dignity, fairness and respect for their human rights.

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[74] The problems attaching to the notion of human rights obligations of non-State actors are evident also in recent attempts to address possible duties of business enterprises with regard to the human rights of their employees. *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development* ("Ruggie Report"), written by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations, refers deliberately to human rights "responsibilities", rather than duties, of corporations. At ¶54, the report contrasts the "legal compliance" of a State with "the broader scope of the responsibility to respect", which is incumbent upon companies." The Report goes far in demonstrating how companies may have responsibilities for the welfare of their employees, responsibilities that may be related to issues that are also considered to be within the realm of human rights, but it shies away from any assertion of human rights obligations for companies equal to that of States. *See* Special Representative of the Secretary General, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie,* U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

> Among these rights are: the right to safety; the right to privacy, the right to information; the right to legal representation; the right to be heard in court; the right to compensation for damages; the right to medical assistance; the right to social assistance; the right to seek residence; and the right to return to their country of origin.[75]

Leaving aside potential ambiguities about the extent to which such obligations exist under positive international law, it is useful to consider with regard to whom these obligations are asserted: it can only be the State, and it is furthermore an assertion of an obligation to deal with the *consequences* of THB, not THB itself. Any trafficker who tried to respect the terms of Article 4 would not be trafficking. Clearly it can only refer to the obligations of the State, obligations to assist victims, within their capacity and competence. As for accountability for the trafficking itself, that remains with the perpetrators.

V. The Human Rights Dimension

Even if THB is not a violation of human rights, that does not mean that human rights law has no role to play. In fact it can have a significant impact on the welfare of those who have been trafficked or are at risk of being trafficked in the future.

Where States have assumed human rights obligations that create direct rights for trafficked people then, manifestly, they must abide by them. Freely assumed obligations to prevent discrimination, or to provide rights for migrant workers, for instance, will create corresponding obligations on the part of the State concerned because of the direct link between it and the individual. However, the State will only be responsible to the extent of its commitment. Indeed, one criticism of the Palermo Protocol is that it says virtually nothing about protecting those who have been trafficked or are at risk of it in future.

Nevertheless, human rights, it is suggested, have a crucial role

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[75] *Id.* at ¶ 39.

to play in protecting people from being trafficked where there is a clear and identifiable risk for the individual concerned. This is recognised in the Palermo Protocol itself, Article 14(1) of which provides:

> Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

The point is that people who are outside their own country may have an entitlement to remain in another State because of the risk of being trafficked should they return home. Article 14(1) acknowledges that such persons may sometimes be entitled to refugee status. This is primarily because there may be an entitlement to refugee status on the part of some potential victims of trafficking because of their membership of a particular social group.[76] This is highly problematic because it is difficult to say that potential victims of trafficking are a particular social group.[77] What connects them? There has been some recognition that in fact there may be a particular social group of people who have been trafficked from a particular region and fear returning there because of the risk of re-trafficking. The factor that connects them, beyond the fact of persecution or the risk of it in future, is that they possess a

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[76] On the entitlement to refugee status of those who fear being trafficked in their home State, see Ryszard Piotrowicz, *Victims of People Trafficking and Entitlement to International Protection*, 24 AUSTL. Y.B. INT'L L. 159, 162-71 (2005); *see also* Edwards, *supra* note 2, at 36-8; and Anna Dorevitch & Michelle Foster, *Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims Under Australia's Migration and Refugee Law*, 9 MELBOURNE J. INT'L L. 1, 15 (2008).

[77] *See, e.g.,* T. Alexander Aleinikoff, *Protected characteristics and social perceptions: an analysis of the meaning of 'membership of a particular social group,' in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 263 (Cambridge, Cambridge University Press 2003); *see also* GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 73-86 (3rd ed. 2007).

characteristic that cannot be changed (it could be that they are all left-handed, for instance; in this case it is that they have been trafficked in the past and, as such, this is a historical fact, one that cannot be changed, which exposes them to the risk of future trafficking.[78] The UNHCR has also recognised that the some people at risk of trafficking in future may qualify as refugees.[79] Of course, the threat here is almost certainly from non-State actors. The recognition of such a threat in this context might seem to contradict the general argument of this article as it suggests that human rights obligations (refugee status or, at least, protection from refoulement) may arise because of the actions of non-State actors. But it is suggested that this is not the case: first, we are dealing with an obligation of the State to prevent future exposure to a risk, which happens to come from non-State actors; second, it is now widely accepted that States may have international protection obligations because of certain threats posed by non-State actors where the individual's own State is unable or unwilling to offer effective protection.[80]

While the Palermo Protocol refers specifically to the Refugees Convention, there is also a wider protection obligation in play here. Indeed, Article 14 refers to obligations of States under international law, so clearly we can look elsewhere (though, in fact, even without Article 14 parties would of course be bound by their obligations

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[78] The arguments to justify such an assertion have been well explored elsewhere. *see* Piotrowicz, *supra* note 76, at 167-70; *see also* Dorevitch & Foster, *supra* note 76, at 28-36 (providing additional analysis of recent case law in several jurisdictions on the matter).

[79] Office of the UNHCR, *Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, U.N. Doc. HCR/GIP/06/07 (Apr. 7, 2006).

[80] *See, e.g.*, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, page 65, U.N. Doc. HCR/IP/4/Eng/REV.1 (January 1992); *see also* EU Council Directive 2004/83/EC, 2004 O.J. (L304) 12; *see also* ROZ GEMOV & FRANCESCO MOTTA, REFUGEE LAW IN AUSTRALIA 216-20 (Oxford University Press, 2003); *see also* Suzanne Egan, *Sanctuary in Strasbourg: the Implications of the European Convention on Human Rights on Irish Asylum Law and Policy, in* SANCTUARY IN IRELAND, PERSPECTIVES ON ASYLUM LAW AND POLICY 51 *et seq.* (Ursula Fraser & Colin Harvey ed., Institute of Public Administration 2003).

under treaty and customary international law). The scope of international protection has come a long way since the Refugees Convention was adopted in 1951. Most notably, the concept of subsidiary, or complementary, protection has become widely, though not universally, recognised. Subsidiary protection is the international protection accorded to individuals who, while they do not qualify for refugee status, cannot be obliged to return to their state of citizenship because of a real threat of a serious breach of their human rights in the home State. This has been recognized in the Council of Europe, the European Union and beyond. [81] In particular, it is now well accepted that a State may not oblige an alien to return to her home State where there is a real risk that she may be exposed to torture or inhuman or degrading treatment or punishment. Furthermore, it is accepted that this threat may exist not only at the hands of the home State but also at the hands of non-State actors within the home State. When one considers the types of harm that might happen to a person when being trafficked, including physical, sexual and psychological harms, it is apparent that THB could easily amount to inhuman and degrading treatment and even, in some cases, to torture. In this context it should be recalled that a person is being trafficked even before she has necessarily reached the intended destination: all those involved in the process of trafficking are considered to be traffickers – recognition of the fact that several actors may be involved in the recruitment, harboring and transport of people with the intention to exploit their labor.

So there is a human rights dimension to THB. States clearly have obligations to those who are vulnerable to trafficking in the future to grant them international protection. That obligation exists independently of the various instruments adopted in the last ten years with regard to THB. Even in this case, however, the human rights obligation is one of the State to act within its competence and power to protect; it is not an obligation on the traffickers themselves.

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[81] GOODWIN-GILL & MCADAM, *supra* note 77, at 285-354; Ryszard Piotrowicz & Carina van Eck, *Subsidiary Protection and Primary Rights*, 53 INT'L & COMP. L. Q. 107 (2004); Hugo Storey, *EU Refugee Qualification Directive: A Brave New World,* 20 INT'L J. REFUGEE L. 1 (2008).

VI. Why Does This Matter?

I suggest that there are two very good reasons why we should be as clear as possible about what, legally, is happening when THB occurs. The first is the conceptual one. It is undesirable to assert that a particular practice, however obnoxious and damaging to its victims, is a breach of human rights if it is not. Many writers argue vehemently and persuasively that THB breaches human rights but none appears to overcome the dilemma that we are dealing with a crime, just like murder, theft and speeding. I would suggest that that reason alone is sufficient justification for reconsidering how we, as lawyers, perceive THB. But there is another reason, a very pragmatic one, why we should treat THB primarily as a crime. By recognising what is going on, we can perhaps use existing law more effectively as well as focussing resources for, and efforts towards, law reform and development more successfully.

There currently exists a clear dichotomy in the way trafficked people are perceived, and the way the law is analyzed. The Palermo Protocol and other anti-THB instruments are criticised for focussing on THB as a crime as well as a threat to State security, particularly because of the perceived challenge to border security and migration control. On the other hand, goes the criticism, more emphasis should be placed on the victims, who should not be treated like criminals. There have been many calls for a holistic legal approach and response to THB. But such a holistic approach, to be effective, does not need to be predicated on the acceptance that THB is either a crime and, as such, a threat to the State, or else a violation of the victims' rights. States do have to stop treating trafficked people like criminals. But what is wrong with treating them as victims of crime, indeed victims of very serious crime? It does not require a reliance upon human rights law to make this leap.

Nor can, or should, we ignore human rights, and indeed other areas of law, where they are relevant.[82] Clearly with THB the

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[82] This appears to be the approach of Edwards: "Trafficking in human beings is undoubtedly a question of criminal law." Edwards, *supra* note 2, at 43; She then considers the relevance of human rights law, asylum/migration and labour law. *Id.* at 46-49; While she is correct to admit the *relevance* of the wider legal framework,

challenge for States is to ensure that they have in place a legal system that is able to address the threats posed by THB. That includes attaching sufficient resources to enforce these laws. Failure to do so may amount to a breach of the general obligation to ensure respect for human rights. Accordingly, States must have and use criminal laws that enable them to fulfil this duty under human rights law. Otherwise they may be in breach. Furthermore, the State's duty to treat all those within its jurisdiction in accordance with its human rights obligations can include a duty to take the plight of the victims of THB seriously, including taking appropriate measures to address the crime. This may extend to the immediate treatment of individual victims: the State's response (for instance, in the way it carries out the criminal process, including the treatment of victims) may cause it to breach its obligations towards the victim through breach of the prohibition on discrimination, for instance, and even the prohibition on inhuman and degrading treatment in some cases.

VII. Conclusion

Apart from a State's failure to act, which human rights obligations are breached when a person is trafficked? The answer, it seems, is none. The protection of fundamental human rights risks being weakened by the mis-focussing of attention on matters that can be addressed by other means. The prevention of THB, and the protection of victims and potential victims, can best be achieved by the adoption of effective criminal laws and adequate resources to enforce them, better cooperation amongst source, transit and destinations States where the THB is transnational, and the bringing to bear of effective pressure upon States to carry out their international protection obligations in good faith. This last part is crucial. States have an obligation not to pick and choose the rules

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it is my suggestion that it is necessary to acknowledge the fundamentally and primarily criminal nature of THB in order effectively to address THB. Some States may well prefer to focus on this to the detriment of other considerations, such as the welfare of the victims, but such an orientation is not a sufficient justification to ignore the reality; rather, it forces us to confront the legal challenge, which, it is suggested, is to call States to account rather than try to find human rights where they do not exist. *See generally*, Edwards, *supra* note 2.

that suit them, especially those that promote the kind of migration control they want. They are entitled to control access to their territories, but they are not entitled to ignore their own obligations towards trafficked people once they are there.