

Aberystwyth University

The UN Security Council and Human Trafficking

Piotrowicz, Ryszard

Published in:
Australian Law Journal

Publication date:
2017

Citation for published version (APA):
Piotrowicz, R. (2017). The UN Security Council and Human Trafficking. *Australian Law Journal*, 91(7), 532-538.

General rights

Copyright and moral rights for the publications made accessible in the Aberystwyth Research Portal (the Institutional Repository) are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the Aberystwyth Research Portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the Aberystwyth Research Portal

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

tel: +44 1970 62 2400
email: is@aber.ac.uk

‘The UN Security Council and Human Trafficking

Introduction

The crime of trafficking in human beings (THB) has attracted substantial attention at the national, regional and international levels since the adoption of the Palermo Protocol in 2000 (Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime). Every two years the United Nations Office on Drugs and Crime publishes a report setting out the state of play, as it sees it, with regard to THB throughout the world. Important instruments on THB have been adopted at the regional level by ASEAN (2015), the EU (2011) and the Council of Europe (2005). Australia has been active too. In December 2014, the federal government published the National Action Plan to Combat Human Trafficking and Slavery 2015-2019.¹

The US State Department produces its annual Trafficking in Persons Report. This is a bit like university league tables: countries, rather than higher education institutions, pull out all the stops to get a good report from the US regarding their anti-trafficking policies as well as the measures they have adopted for the protection of, and assistance, to victims of THB. They are especially keen to achieve a good report if they are not doing well, just like with the universities and the league tables. The report and consequent ranking sometimes is not so closely related to the reality, but as long as it looks good, who cares? But we should care; we should all care. Human trafficking entails some of the most egregious crimes that can be committed against another person. It can involve extended and mass rape and other sexual abuses, grievous bodily harm, forced administration of drugs, false imprisonment, torture, inhuman and degrading treatment, forced and dangerous labour, forced removal of human organs, forced criminality and identity theft.

These crimes and resulting exploitation happen throughout the world. They are happening in Australia, maybe less than 100 metres from where you are reading this. Trafficking is going on everywhere except, probably, Antarctica. But one particular manifestation of THB has prompted the United Nations Security Council to adopt a Resolution on the subject. In Resolution 2331 (2016), adopted on 20 December 2016, the Security Council focusses on THB and its incidence during armed conflicts and in post-conflict situations, as well as linked to the funding of terrorism. While the scope of the Resolution is therefore limited, it nevertheless is an important component of the legal regime on THB, and, while on closer inspection it adds little to that regime, it is welcome for the way in which it highlights the use of THB as an illegal means of conducting armed conflict in recent times. And while the Resolution is, for the most part, phrased in general terms, it specifically names particular examples of THB in armed conflict.

Trafficking and smuggling distinguished

Trafficking of people is not smuggling of people. Smuggling of people always involves movement of migrants across an international frontier (since the objective is to circumvent the State’s immigration rules) so that the smuggled person, who otherwise would probably not be able to get

¹ <https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Trafficking-NationalActionPlanToCombatHumanTraffickingAndSlavery2015-19.pdf>

into the destination country, does in fact get into that country. The smuggled person may well be exploited but he or she has consented to be smuggled. To that extent, the smuggled person is a willing participant. Human trafficking is different. While it has links to smuggling, trafficking does not have to be from one country to another, although it frequently is. THB is a process involving three elements: the act, the means and the purpose. The very widely recognised definition is to be found in Article 3 of the Palermo Protocol, which provides that THB is

- The recruitment, transportation, transfer, harbouring or receipt of persons (the act)
- 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 (the means)
- For the purpose of exploitation (the purpose).

From the various acts involved in THB, it should be evident that there may be many participants in the process of recruiting an innocent person through to their eventual exploitation; each person who does just one of these acts, knowing that the objective is to exploit the victim, is a trafficker. One cannot, legally, consent to be trafficked. Indeed Article 3 states explicitly that any apparent consent of the victim is irrelevant where any of the means listed has been used.

The Resolution: Preamble

The preamble of the resolution is long and amounts to about one third of the whole document. It notes that THB can be for various forms of exploitation, not only sexual. This is important: there remains in the minds of many the notion that THB is only for sexual exploitation; the evidence indicates much to the contrary.² Nevertheless the clear connection between THB and sexual violence linked to armed conflict is stressed. It then recognizes “the connection between trafficking in persons, sexual violence and terrorism and other transnational criminal activities”. It is asserted that THB is both an objective of certain terrorist groups and a means of financing their activities: THB is an instance of sexual and gender-based violence, which are “known to be part of the strategic objectives and ideology of certain terrorist groups” and is “used as a tactic of terrorism and an instrument to increase their finances and their power”. This linkage to terrorism and armed conflict distinguishes THB during from other instances of THB. Usually, THB is just a means of making money; the traffickers do not pick their victims because of their race or religion or nationality. They pick them because they can be exploited to make plenty of money. If the traffickers could make more money by selling fruit they would probably do so. However, there is a difference when it comes to terror, armed conflict or post-conflict situations: particular groups may be trafficked precisely because of their separate identity and vulnerability. The obvious example is the trafficking and sexual exploitation of Jazidi women by Islamic State, addressed later in the Resolution.

THB and human rights

The Resolution then repeats a mantra which, while it might make good rhetoric, is legally incorrect and potentially detrimental to the protection of trafficked people. It says that THB “entails the

² See, for example, the country reports of GRETA, the Council of Europe’s group of Experts on Action against Trafficking in Human Beings: <http://www.coe.int/en/web/anti-human-trafficking/country-reports>

violation or abuse of human rights". This is very similar to, although perhaps more nuanced than, the assertion in the preamble of the Council of Europe Convention on Action against Trafficking in Human Beings (2005), that "...trafficking in human beings constitutes a violation of human rights". Actually, it does not. THB is a serious crime, like murder or rape. In the absence of some State involvement, failure of due diligence or complicity, the State is not responsible when a person is trafficked (just as the State is not usually responsible when a person is raped or murdered). Human rights obligations are owed by States, not people traffickers. States do indeed have human rights obligations in the realm of THB. As made clear by the European Court of Human Rights in *Rantsev v Cyprus and Russia*,³ they have duties to take action to tackle THB and to provide protection and support for victims, and potential victims, of trafficking. It is that failure by the State, not the trafficking itself, that constitutes the human rights violation.

This analysis is supported by a recent decision of the Court of Appeal of England and Wales, which addresses the nature and scope of States' obligations under the European Convention on Human Rights.⁴ Giving the only judgment, with which his two co-judges concurred, Lord Justice Laws stated (with regard to Article 3 ECHR):

"The rights which the Convention guarantees are enjoyed against the State, and only the State. It is important to recognise that ill-treatment by a non-State agent, however grave, does not of itself constitute a breach of Article 3. This is sometimes glossed over in the language of the cases ... Likewise a killing does not of itself violate Article 2, nor an act of enslavement Article 4, if it is not perpetrated by an agent of the State. But it is surely inherent in the Convention's purpose that the State is to protect persons within its jurisdiction against such brutalities, whoever inflicts them..."⁵

To misunderstand where the human rights violation lies is potentially detrimental to the rights and interests of trafficked people: their advocates should be focussing on States' failures to tackle THB effectively and to protect and support the victims; it is there that one may find human rights violations. It might be argued that the Resolution is not so explicit as the Council of Europe Convention: whereas the latter is adamant that THB violates human rights, the Resolution says rather that it "*entails* the violation or abuse of human rights" (emphasis added). One might, at a stretch, suggest that the term "*entails*" could include the failures by States listed above, as well as the trafficking itself, since it could be construed widely enough to refer not only to the actual trafficking but also the failure of States to take appropriate action to prevent it and assist victims. But from the context this is very unlikely. The terms "*violation*" and "*abuse*" are clearly redolent of acts that deliberately breach the rights of the victim, rather than a failure of due diligence to provide protection to victims. Accordingly, the statement in the Resolution, that THB "*entails*" the violation of human rights, should be construed as a reference to the trafficking itself rather than the failure of the State. As such it is clearly incorrect.

³ Application No. 25965/04, Judgment of 7 January 2010. See also *Caso Trabajadores de la Hacienda Brasil Verde vs Brasil*, Inter-American Court of Human Rights, Judgment of 20 October 2016, para 320 (on the due diligence obligation).

⁴ *The Commissioner of Police of the Metropolis v DSD and NBV; Alio Koraou v The Chief Constable of Greater Manchester Police*, [2015] EWCA Civ 646. Case No: B2/2014/1643, A2/2014/2662 & A2/2014/2731.

⁵ Para 43 (emphasis added).

Assistance to victims

One criticism that levelled at the Palermo Protocol is that its focus is too much on tackling THB as a criminal offence, with not enough attention paid to the protection of the people who have been trafficked or who are at risk. It is true that the protocol focusses on the criminal aspect of THB (although it does contain some measures of protection). However that is not necessarily a fault, since the protocol was adopted in the wider context of the adoption of a treaty promoting cooperation in the fight against transnational organised crime. Nevertheless, it would be simplistic to try to tackle crime without any regard to the interests of the victims, who – apart from their intrinsic value as human beings – may possess evidence necessary to secure convictions.

The Resolution reflects this. It notes “the importance of assistance and services for the physical, psychological and social recovery, rehabilitation and reintegration”, as well as recognizing “the extreme trauma experienced by the victims of trafficking in persons in the context of armed conflict and sexual violence in conflict”, and calls upon humanitarian organisations to recognise this in their humanitarian planning. This sounds good, in principle. One can imagine a State that is not involved in an armed conflict adopting measures to address the special needs of trafficked people, but how will this work in Aleppo or any other bomb-ravaged city, where there is not enough food, medicine or shelter for the general population? In that situation, who is going to prioritise psychological counselling for a trafficked person? But these needs are real; the Resolution is right to acknowledge them. How this will be achieved in reality remains to be seen.

Finally, in the preamble, the criminal activities of the organisation Islamic State, including with regard to THB, are condemned. Referring to the abduction of women and children, the Resolution “expresses outrage at their exploitation and abuse, including rape and sexual violence, forced marriage, and enslavement”.

The Resolution: Operative Provisions

Paragraph 1, linking THB to other forms of transnational organised crime, states that THB “undermines the rule of law”. This may be so, but it is not stated how exactly this happens. Unless the idea is that *any* offence undermines the rule of law (in which case the assertion is virtually meaningless), it would have been helpful to have this clarified. Is it because of the threat it poses to the safety of vulnerable people, or the challenge to States’ control over their borders? Or indeed, something else altogether?

Call to action

Paragraph 2(b) calls upon States to take “decisive and immediate action” to prevent, criminalise, investigate, prosecute and ensure accountability of traffickers. This is nothing new. Many countries already have national legislation in place to enable this. At the regional level, the Council of Europe Convention also requires positive actions by States against traffickers. The ASEAN Convention requires the criminalisation of THB. However, the actual effectiveness of such action is not dependent only on having the right law in place; unless sufficient human and financial resources are allocated too, nothing much can be done.

Victim identification

In terms of protection measures, Paragraph 2(d) calls for “robust” victim identification mechanisms. This is crucial: trafficked people may have extensive and particular needs for treatment, counselling and support. They will not even be considered for this (if it is available) if they have not been identified as victims of trafficking in the first place. Accordingly, those who are most likely to come into contact with trafficked people need to be trained, first, to be aware that THB exists and what it

entails; and second, to be able to spot indicators or signs that a person may have been trafficked or may be at particular risk (such as unaccompanied minors).

International protection needs

It will also need to be considered whether such persons may need international protection of some kind, since it may be unsafe for them to return to their home country. This is noted in the Resolution, but it is unfortunate that, in this context, specific mention was not made of the possibility to refer to the UNHCR's guidelines on the possible entitlement to refugee status of trafficked persons and those at risk of being trafficked.⁶ While the definition of 'refugee' in the Refugees Convention is quite narrow, there is now little doubt that at least some trafficked people, or some of those at risk of being trafficked, would qualify for refugee status. The UNHCR's Guidelines are very helpful in clarifying this matter.

Non-penalization

Finally, in this section, there is welcome recognition that trafficked people are not criminals but rather the victims of a serious criminal offence. This matters because trafficked people may be forced to commit offences in the course, or as a consequence, of being trafficked – such as working without a permit, committing petty crimes, engaging in the cultivation of cannabis. These are all offences but if the trafficked person has been forced to commit them, there is a strong argument that they should not be held accountable because they are not free agents; they are acting under some form of compulsion or duress.

The principle that a trafficked person should not be punished for an offence they were compelled to commit is now widely recognised, although its precise scope may not be defined.⁷ Paragraph 2(d) provides that States should “ensure that victims are treated as victims of crime and in line with domestic legislation not penalized or stigmatized for their involvement in any unlawful activities in which they have been compelled to engage”. This is in some ways a wide interpretation: it suggests non-penalization for involvement in *any* unlawful activities. The question arises: what if a trafficked person was forced to kill another person (a not unthinkable possibility in the context of armed conflict – a trafficked child soldier could, for instance, be ordered to execute a prisoner)? Would they be exempt from punishment? This is a very hard case, but the logic of formulation adopted by the Security Council is that the trafficked person should not be punished.

There is, however, one qualification: the statement that non-penalization must be “in line with domestic legislation” leaves open the possibility that the scope of the non-punishment principle could be limited by national law (as, indeed, it is in reality in many countries), for example to exclude offences of a certain gravity. However the phrase can be construed in a different way: it could be understood that the scope of the non-punishment principle is indeed wide enough to include *all* offences that the trafficked person was compelled to commit, but the reference to domestic

⁶ Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked, 7 April 2006, HCR/GIP/06/07.

⁷ OSCE, Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking (2013), <http://www.osce.org/secretariat/101002>; Council of Europe Convention on Action against Trafficking in Human Beings (2005), Article 26; Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Article 8; ILO, Protocol to the Forced Labour Convention 1930 (2014), Article 4(2); ASEAN Convention Against Trafficking in Persons, especially Women and Children (2015), Article 14(7); Ryszard Piotrowicz and Liliana Sorrentino, 'Human Trafficking and the Non-Punishment Principle', (2016) 16 *Human Rights Law Review* 669.

legislation is there to allow States the necessary discretion as to *how in fact* they give effect to the principle. This issue remains open and much will depend on State practice in coming years.

Role of civil society

Paragraph 3(a) encourages States to develop “strong partnerships with the private sector and civil society” in order to enhance their anti-trafficking programmes. It is widely accepted that States do not have, and probably should not have, a monopoly on anti-trafficking activities. Private corporations have a major role to play, for instance, ensuring that they do not directly employ trafficked labour and, crucially, that where they sub-contract work, they ensure that the sub-contractors do not do so. Moreover corporations can make a significant contribution by promoting transparency of supply chains so as to reduce the risk of trafficked labour being used. Such measures are relatively ad hoc and sporadic and much more needs to be done to develop the role of the private sector in tackling THB.

Much more developed is the role of civil society, particularly NGOs, in the provision of assistance and support to victims of THB. Indeed in many countries such NGOs are actually paid by the State to provide such services, although of course responsibility for this remains with the State. In some countries NGOs may be providing particular services to victims of THB because the State lacks the resources to do so. Often, these activities are funded from external sources, the consequence being that the State is dependent upon external funding for the provision of essential services it is legally obliged to supply. This is problematic because there is no guarantee that such funding will continue. It also fosters dependency on other countries or organisations. But it should be stressed that the role of NGOs is wider: they have much expertise to offer also in wealthier countries which can afford more in the way of support and assistance. It should also not be forgotten that some trafficked people may be more ready to trust someone from a NGO than from a governmental agency.

Where civil society organisations are employed to provide essential services, the way they are funded can be problematic. Where they are dependent on state or foreign funding to carry on their programmes, that support must sometimes be sought on an annual basis, and decisions might be delayed. This can make it very difficult to make effective longer-term plans or draft programmes that might be beneficial for trafficked people.

Support for victims

A causal link is asserted between THB and sexual violence during armed conflict, on the one hand, and large movements of refugees and migrants, on the other (paragraph 3(b)). In that context, the Resolution urges refugee-receiving countries to provide information on services available to victims of THB and sexual violence, ensure “sustainable psychological support” and “provide survivors with the option to document their cases for future legal action to hold traffickers to accountable”. This last provision is interesting; the likelihood of prosecuting the traffickers may be small, especially where they have been operating in the chaos of a conflict or post-conflict zone; moreover those who have been trafficked may move on long before a prosecution case can be built. The documentation of such cases may be significant in mounting prosecutions with a realistic chance of a conviction.

THB and armed conflicts

The use of THB to achieve particular military objectives, and THB as an objective in itself, already alluded to in the preamble, is repeated in paragraphs 8-9. In particular, paragraph 8 includes a reference to groups using THB for “advancing ideology which includes the suppression of women’s rights and the use of religious justification to codify and institutionalize sexual slavery and exert control over women’s reproduction”. This form of THB is arguably a long way from the kinds of sexual and labour exploitation for which people are trafficked into and within Australia, but it does highlight just how extensive is the range of this crime.

THB as a terrorist offence

The idea of THB as a terrorist offence appears in paragraph 10: “victims of trafficking in persons in all its forms, and of sexual violence, committed by terrorist groups should be classified as victims of terrorism”. The purpose of this is said to be to make such persons eligible for the support available to all victims of terrorist offences, including national relief and reparations programmes. This lengthy paragraph then lists other types of practical support to which victims of THB committed by terrorist groups should be entitled. On the face of it this is a good thing and should the need arise it is to be hoped that the reality will match the apparently good intention. But the needs of the victim of THB should be paramount, and not limited by an assessment that the person is a victim of a terrorist act or not. There is a possibility that a trafficked person who is receiving assistance on the basis that they were the victim of a terrorist group might be placed in a category that receives less assistance and support than a “normal” trafficked person: in other words, it is important that the formal classification of the person does not result in that person being worse off in reality.

The next paragraph, 11, specifically condemns trafficking by Islamic State and names Jazidi people as victims. Also named are Boko Haram, Al-Shabaab and the Lord’s Resistance Army, implicated in trafficking for the purpose of sexual slavery, sexual exploitation and forced labour, and the importance of collecting evidence with a view to future prosecutions is noted.

Peacekeepers and THB

Few things have done more to damage the reputation of the United Nations than the involvement of UN forces, or national forces acting under a UN mandate, in crimes against the civilian populations they are supposed to be protecting. These crimes include sexual exploitation and tolerance of, perhaps even participation in, THB. The harm is exacerbated because the personnel involved are generally not subject to local criminal jurisdiction. The States supplying these forces have usually shown little interest in holding their citizens to account. The UN itself is not able to take action against these criminals in uniform. The result is impunity, or the occasional slap on the wrist, when a lengthy prison term would be more appropriate.

The Resolution acknowledges this to some extent. Paragraph 19

“encourages Member States to provide training to all peacekeeping personnel to be deployed in UN peace operations in conflict and post-conflict zones on responding to trafficking in persons in the context of armed conflict, gender expertise, sexual exploitation and abuse prevention and assessing sexual violence in conflict as a component of predeployment training, and to ensure that this consideration is integrated into the performance and operational readiness standards against which troops are assessed”.

This is good as far as it goes but it does not go nearly far enough. It is really about awareness-raising and there is nothing wrong with that, if it has the effect of alerting troops to the incidence of THB and discouraging them from exploiting those they are supposed to be helping. But it would have been much stronger had there also been a call to States to ensure that all reasonably possible steps would be taken to prosecute and punish those troops involved in THB or who knowingly use the services of a trafficked person, or who are in any other way engaged in the sexual exploitation of civilians. It is unfortunate that States are afraid to make public commitments to ensure that their troops act appropriately, or else to ensure punishment if they cannot keep their trousers on.

Conclusion

The Resolution is a welcome measure, not least for exposing how THB may contribute to the funding of terrorism, but also for how it may be both a tactic and an objective of armed conflict. However it

could have gone a lot further in calling upon States to do more, in specific terms, to prevent THB in the first place, as well as offering the support and assistance that trafficked people need.

THB remains on the Security Council's agenda. It states that it remains actively seized of the matter, while the Secretary-General has been requested to follow up on the implementation of the Resolution and report, by December 2017, on the strengthening of coordination within the UN system "to prevent and counter trafficking in persons in armed conflict in all its forms, and to protect those affected by armed conflict at risk of being trafficked, especially women and children". In particular the United Nations, and those countries contributing troops to UN missions, need to make sure that their own houses are in order. Nobody is suggesting for one minute that THB is only a problem in the countries concerned because of foreign troops operating under a UN mandate. But when those who are supposed to be helping and protecting the vulnerable turn to exploiting them, that is an even worse crime.

RP