

The International Law of Human Trafficking

ANNE T. GALLAGHER

CAMBRIDGE
UNIVERSITY PRESS

Contents

<i>Preface</i>	page	xiii
<i>Table of Cases</i>		xv
<i>Table of Treaties and Other International Instruments</i>		xxiii
<i>Table of Common Abbreviations</i>		lvii
Introduction		
1. The International] Legal Definition		12
u. History of a Definition		13
1.2. The 2000 Definition of Trafficking		25
1.2.1. Key Issues During the Drafting Process		25
1.2.2. The "Action" Element		29
1.2.3. The "Means" Element		31
1.2.4. The "Purpose" Element		34
1.3. Post-2000 Developments		42
1.4. The Scope and Limits of the Definition		47
2. The International Legal Framework		54
2.1. A Brief History of Trafficking in International Human Rights Treaty Law		54
2.1.1. Trafficking and White Slavery		55
2.1.2. The 1949 Trafficking Convention		58
2.1.3. The CEDAW Convention		64
2.1.4. The Convention on the Rights of the Child and Its Optional Protocol		65
2.2. Trafficking in Transnational Criminal Law		68
2.2.1. The Organized Crime Convention		74
2.2.2. The Trafficking Protocol		77

2.2.3. The Migrant Smuggling Protocol	89
2.3. Regional Legal Agreements	95
2.3.1. European Union Instruments	96
2.3.1.1. EU Framework Decision on Combating Trafficking (2002)	96
2.3.1.2. EU Council Directive on Short-Term Residency Permits	100
2.3.1.3. Proposal for a Replacement to the 2002 Framework Decision (2009-2010)	103
2.3.2. The Council of Europe Convention against Trafficking	110
2.3.3. The SAARC Convention	127
2.4. Nontreaty Aspects of the International Legal Framework	132
2.4.1. Customary Law, <i>ius Cogens</i> , and Trafficking	132
2.4.2. Secondary and Subsidiary Sources of International Law	136
2.4.3. The "Soft" Law of Trafficking	138
3. Specific Legal Issues	144
3.1. Trafficked Persons as Noncitizens	144
3.1.1. Human Rights Protections for Noncitizens	145
3.1.2. A Note on Trafficking and Statelessness	158
3.2. Trafficked Persons as Migrants and Migrant Workers	159
3.2.1. Right to Leave and Return	160
3.2.2. Trafficked Persons as Migrant Workers	165
3.3. Trafficking and Slavery	177
3.3.1. The Definition and Indicia of Slavery	179
3.3.2. Trafficking as Slavery?	189
3.4. Trafficking as a Form of Discrimination and Violence against Women	191
3.5. Trafficking and Asylum	197
3.5.1. Trafficking and the Right to Seek and Receive Asylum	198
3.5.2. Trafficking as the Basis of a Claim for Refugee Status	199
3.5.3. Conclusion on Trafficking as a Basis for Asylum	205
3.5.4. A Note on Trafficking and Internal Displacement	208
3.6. Trafficking in International Humanitarian Law and International Criminal Law	209
3.6.1. Sexual Violence and Other International Crimes Related to Trafficking	210
3.6.2. Trafficking as a Crime Against Humanity	214
4. State Responsibility for Trafficking	218
4.1. A General Theory of International Responsibility	219
4.2. State Responsibility for Violations of International Law Associated with Trafficking	222

4.2.1. Requirement of Attribution	223
4.2.2. Requirement of a Breach of Obligation	230
4.3. State Responsibility for Trafficking-Related Breach of Obligations Originating in the Conduct of Private Persons or Entities	235
4.3.1. Implications of the General Rule of Nonattribution of Private Conduct	235
4.3.2. Moving Beyond the General Rule: State Responsibility to Prevent, Protect, and Respond	236
4.3.3. Identifying Violations Giving Rise to Responsibility: The Due Diligence Standard	241
4.3.4. Conclusion: The Primacy of the Primary Rules	248
4.4. Consequences of a Finding of State Responsibility	251
4.4.1. The Obligations of Cessation and Reparation	251
4.4.2. Consequences Attached to Serious Breaches of Peremptory Norms	256
4.5. Invocation of Responsibility	259
4.5.1. General Rules Governing Invocation of Responsibility	259
4.5.2. Rules Governing Invocation of Responsibility for Violations of Human Rights Norms	264
4.5.3. Countermeasures	266
4.6. A Note on Legal Responsibilities of International Organizations, Private Individuals, and Private Entities	269
4.7. Summary of the Key Principles of State Responsibility Relevant to Trafficking	272
Obligations of Protection and Support	276
5.1. Rapid and Accurate Victim Identification	278
5.1.1. The Importance of Identification	278
5.1.2. An Obligation to Identify Victims	280
5.2. No Prosecution or Detention of Victims	283
5.2.1. Prosecution for Status Offenses	284
5.2.2. Detention of Trafficked Persons	288
5.3. Protection and Support for Victims	297
5.3.1. Separating Protection and Support from Victim Cooperation	298
5.3.2. Protection from Further Harm	301
5.3.3. Privacy and Protection from Further Harm	303
5.3.4. Physical and Psychological Care and Support	305
5.3.5. Consular Access and Support	310
5.3.6. Noncoercion in the Provision of Care and Support	313
5.4. Legal Assistance, Participation, and the Right to Remain	315
5.4.1. Legal Information, Support, and Participation	315
5.4.2. Protection and Support for Victim-Witnesses	317

5.4.3. Right to Remain	320
5.5. The Rights and Needs of Child Victims	323
5.5.1. Identification of Child Victims	324
5.5.2. Applying the "Best Interests" Principle	327
5.5.3. Protection and Support for Trafficked Children	329
5.6. Conclusions on Obligations of Protection and Support	336
6. Obligations Related to Repatriation and Remedies	337
6.1. Repatriation of Victims	338
6.1.1. The Standard of Safe and Preferably Voluntary Return	339
6.1.2. Entitlement to Return	344
6.1.3. Expulsion, Due Process, and the Obligation of <i>Non-refoulement</i>	346
6.1.4. Repatriation and Legal Proceedings	349
6.1.5. Alternatives to Repatriation	351
6.1.6. Reintegration of Victims	352
6.2. Access to Remedies	354
6.2.1. Obligation to Remedy Violations of Human Rights Law	355
6.2.2. Right to a Remedy for Violence against Women	360
6.2.3. The Right to a Remedy in the Specific Context of Trafficking	362
6.2.4. Standards and Forms of Remedy	364
6.2.5. Information and Other Means of Accessing Remedies	368
7. Obligations of an Effective Criminal Justice Response	370
7.1. The Obligation of Criminalization	371
7.1.1. The Conduct to be Criminalized	373
7.1.2. Exercise of Criminal jurisdiction	379
7.2. Effective Investigation, Prosecution, and Adjudication	382
7.2.1. Practical Application of the Due Diligence Standard	382
7.2.2. Gender in the Investigation, Prosecution, and Adjudication of Trafficking Cases	389
7.2.3. Rights of Suspects and the Right to a Fair Trial	391
7.3. Effective and Proportionate Sanctions	392
7.3.1. Obligation to Impose Sanctions	392
7.3.2. The Standard: "Effective and Proportionate" Sanctions	395
7.3.3. Aggravated Offenses and Previous Convictions	396
7.4. Asset Confiscation and Use of Confiscated Assets	400
7.4.1. Obligation to Seize and Confiscate Proceeds of Trafficking	401
7.4.2. Using Confiscated Assets to Compensate or Support Victims	403
7.5. International Cooperation	404
7.5.1. Obligations Related to Extradition	404
7.5.2. Mutual Legal Assistance in Trafficking Cases	410
7.5.3. Informal Cooperation	412

8. Obligations to Prevent Trafficking and Respond Lawfully	414
8.1. Prevention through Addressing Vulnerability	415
8.1.1. A Legal Obligation to Address Vulnerability to Trafficking	416
8.1.2. Addressing Vulnerability Related to Inequality and to Poverty	418
8.1.3. Addressing Vulnerability Related to Discrimination and to Violence against Women	423
8.1.4. Addressing the Special Vulnerabilities of Children	427
8.1.5. Addressing Increases in Vulnerability in Conflict and Postconflict Situations	430
8.2. Prevention through Addressing Demand	432
8.2.1. Understanding Demand in the Context of Trafficking	432
8.2.2. Is There an International Legal Obligation to Address Demand for Trafficking?	434
8.3. Prevention through Addressing Corruption and Complicity	442
8.3.1. An Obligation to Address Trafficking-related Corruption	443
8.3.2. Practical Application of the Due Diligence Standard	447
8.3.3. Due Diligence in Preventing Trafficking-related Corruption by International Officials	449
8.4. Obligation to Respond Lawfully	453
8.4.1. Obligation to Avoid Violations of Established Rights When Responding to Trafficking	453
8.4.2. Obligation to Ensure Antitrafficking Measures Do Not Violate the Prohibition on Discrimination	456
9. Issues of Compliance, Implementation, and Effectiveness	461
9.1. Compliance Theories and Variables	461
9.2. Formal Compliance Mechanisms under the Specialist Treaties	466
9.2.1. The Organized Crime Convention and Trafficking Protocol	466
9.2.2. The European Trafficking Convention	473
9.3. Promoting Compliance through the International Human Rights System	477
9.4. Unilateral Compliance Machinery: The U.S. Evaluation and Reporting System	480
9.5. Transnational Compliance Networks	486
9.5.1. Criminal Justice Networks	489
9.5.2. Human Rights Networks	492
9.6. Improving Compliance: Issues and Prospects	496
 Epilogue	 499
<i>Select Bibliography</i>	505
<i>Index</i>	529