

Lessons from the Road: Ecuador, Jamaica, and Other Efforts to Combat Trafficking in Persons in the Americas

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Over the last decade, the phenomenon of human trafficking has become a well-known issue throughout the world. In the first ten years since the adoption of the Palermo Convention¹ and the Trafficking Protocol,² most countries in the world have signed the Protocol, ratified the Convention, and many adopted laws to implement their obligations.

Human trafficking is widely known as a multi-dimensional threat. It deprives people of their human rights and freedoms; it threatens global health, and it fuels the growth of organized crime. Human trafficking has a

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1. See United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209, *available at* <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCe-book-e.pdf> [hereinafter Palermo Convention].

2. See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, 2237 U.N.T.S. 319, *available at* <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCe-book-e.pdf> [hereinafter Trafficking Protocol] (supplementing the Palermo Convention, *supra* note 1).

destructive influence on society and a devastating impact on individual victims. The impact of human trafficking goes beyond individual victims; it undermines the health, safety, and security of all the nations it touches.

According to the U.S. Department of State, 600,000 to 800,000 people are trafficked across international borders annually.³ Estimates regarding the numbers of exploited human beings indicate that there are approximately 12.3 million people in forced labor, bonded labor, forced child labor, and sexual servitude at any given time.⁴ The range of profits generated by trafficking in persons (“TIP”)⁵ is estimated to range from seven to thirty-two billion dollars in annual business worldwide.⁶

Without a doubt, more and more countries devote increasing attention and resources to combating trafficking in persons. Nevertheless, most nations have incomplete laws that primarily address the law enforcement aspects of this crime. Thus, as prosecutions begin, witnesses become scarce and many of the victims are unable to fully reintegrate to healthy environments, where they can thrive and re-insert themselves into society at large.

In great part, this happens because most governments focus almost exclusively on the law enforcement aspects of this crime, but fail to address the deeper, more central questions surrounding the phenomenon of human trafficking: why does this happen in our society? What are the roots of the type of exploitation that we encounter in each individual country? How are these expressions of trafficking in persons a reflection of our society’s values? In a perfect world, how could we create a system to minimize this crime?⁷ In order to create effective answers, the right questions must first be asked.⁸

3. See, e.g., OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT, (2001, 2003, 2007), available at <http://www.state.gov/g/tip/rls/tiprpt/index.htm>.

4. See OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT, 10th ed., at 7 (2010), available at <http://www.state.gov/documents/organization/142979.pdf> [hereinafter 2010 TIP REPORT].

5. Trafficking in Persons, hereinafter referred to as “TIP.”

6. See POLARIS PROJECT, HUMAN TRAFFICKING STATISTICS, <http://www.dreamcenter.org/new/images/outreach/RescueProject/stats.pdf> (citing Int’l Labour Org. [ILO], *A Global Alliance Against Forced Labour*, Int’l Labour Conf. Rep. I (B), (93rd Sess. 2005)).

7. Certainly, in a perfect world, eradication would be possible. However, it is the author’s view that human trafficking should be viewed as an ongoing criminal activity that needs to be sought out in the context of organized crime, in the same manner that racketeering, money laundering, or sale of weapons would be.

8. The issue of asking the right questions is essential in determining the correct strategies, and it is a recurrent problem in various areas related to the rights of women. In a parallel context, professor Martha Nussbaum—while analyzing Radical Liberalism and Separation Thesis of U.S. feminism—argues in favor of asking these tough questions and

Every country faces different manifestations of trafficking in persons, with various degrees of intensity, within their own societies. For this reason, each country must identify the types of trafficking most commonly found in their territory and region in order to effectively focus their anti-trafficking strategies. The nations of the American Hemisphere have made a definitive commitment to the issue, but many have scarce resources, so it is of the utmost importance to prioritize enforcement efforts and maximize said limited resources.⁹ In many instances, authorities have the intention—and perhaps the true political will—necessary to carry on, but they often lack the precise direction to accomplish the task.¹⁰

“[g]etting the [r]ight [q]uestions on the [t]able” in order for issues (such as unequal nutrition, health care, and unequal access to education) affecting women to be properly addressed. *Id.* “When we put such questions on the table, our theoretical angle is altered . . . for we are more likely to focus closely on the career of each particular body in the world from its birth to its death.” Martha C. Nussbaum, *Robin West, Jurisprudence and Gender: Defending Radical Liberalism*, 75 U. CHI. L. REV. 3, 985 at 987 (2008). The same can be said for the development of policies that arise from the trafficking victim centered perspective: the system must be built around the knowledge of the needs of the victim, not only legal, but also as to physical and mental health, migratory status, job opportunities, social re-insertion, etc.

9. See, e.g., 2010 TIP REPORT, *supra* note 4, at 5 (indicating: “It is not enough to prosecute traffickers if we do not also provide assistance to the survivors and work to ensure that no one else is victimized. No country has yet attained a truly comprehensive response to this massive, ever increasing, ever changing crime. Ten years of focused efforts is the mere infancy of this modern movement; many countries are still learning about human trafficking and the best responses to it”).

10. See, e.g., Mohamed Y. Mattar, *Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention*, 14 TUL. J. INT’L & COMP. L. 357 (2006). Professor Mattar argues that

there are five basic elements that should be incorporated into any antitrafficking legislation. First, laws must recognize *all forms of trafficking as specific crimes* that are subject to *serious sanctions*. Second, these laws must identify *the trafficked person as a victim of a crime* who is entitled to basic human rights, while taking into consideration the victim, the derivative victim, the vulnerable victim, the potential victim, and the presumed victim. Third, countries should adopt a *comprehensive Five P’s approach* to combating trafficking in persons, including *prevention, protection, provision, prosecution, and participation*. Fourth, laws must *target all actors* in the trafficking enterprise, including the *natural person, the legal person, the private person, and the public person*. Finally, countries should acknowledge trafficking in persons as a transnational crime that warrants *transnational policies*, especially extraterritoriality, extradition, and the exchange of information.

The biggest hindrance in adopting comprehensive anti-trafficking laws is the fact that the Trafficking Protocol necessitates that passage of local legislation, and thus every country adopts laws that are different, typifying the TIP conduct in a plethora of different types of crimes. While in one country TIP crimes are punishable with long jail sentences, in the country next door, the same conduct may not be punishable at all.

This essay intends to identify obstacles encountered in the hemisphere and provide practical examples in order to assist countries in adopting laws that are not only consistent with their international obligations, but more importantly help them better serve their citizenry. This essay explores the various ideas and lessons learned over the last five years throughout the hemisphere, drawing heavily from the author's experience in Ecuador and in the course of training throughout the American continent for consular, immigration, law enforcement officers, and United Nations' peace keeping forces. A brief comment is made of various laws adopted in the region, and analysis centers on the existing Jamaican anti-trafficking law as a best practice law, proposing its use as a model law in Latin America and the Caribbean.

I. HUMAN RIGHTS AND TRAFFICKING IN PERSONS

The exploitation and enslavement of human beings is without a doubt intrinsically linked to a violation of our most basic rights and needs as humans. However, when we speak of human rights, people generally see them as an abstract concept, not something palpable, part of our everyday life. Nevertheless, one should understand that human rights are omnipresent in our daily lives; something as simple as being able to fight a traffic ticket—having access to a fair system of justice—is an exercise of basic, human rights.

Human Rights have been generally categorized into “generations.”¹¹ The first generation are considered the most basic and among these are the right to life; right to freedom; right to security; right to identity; right to intimacy; right to property; right to due process; and right to presumption of innocence.¹²

There are those who may argue that not all these rights are the same; that, for example, the right to due process cannot be in equal footing with the right to life. But a practical application of these rights shows otherwise:

Id. at 359 (*emphasis added*). The Jamaican Law discussed herein includes most of these elements. See generally Mohamed Y. Mattar, *Trafficking in Persons, an Annotated Legal Bibliography*, 96 LAW LIBR. J. 669 (2004).

11. See generally Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948).

12. See *id.* for a complete list of first generation rights.

if one were faced with a wrongful accusation or conviction, the lack of due process directly inhibits the innocent person from enjoying other basic human rights, such as her right to freedom or her right to life.¹³

When you enslave people, you remove from them access to basic things. They lose their dignity and self-worth; they become physically ill. In essence, you strip them of their most basic human rights.

For this reason, the trafficking issue is often framed as an attempt to hinder people's exercise of their human rights. Although, as we discuss later, the TIP Convention is not a human rights treaty, but rather it arises out of a multilateral organized crime treaty, and yet the rights it is intended to protect are precisely those which contain the most essential needs of a human being. Furthermore, there are many prior International Human Rights Treaties that cover and expand the rights contained in the Palermo Convention and its Protocols.¹⁴

As stated, because the trafficking phenomena, in its different forms, strips people of these most basic human rights, it is often said that it is important to "empower" the victims of TIP. But understanding what this means in its practical applications is a complicated matter. How do you empower someone who has been in the sex trade since she was a child? How do you empower someone who has no family network of support?

As a result, when intervening in a trafficking case, one's goal is to understand all the legal sources available and their application in order to assist our nationals and citizens. As shown below, there is a wide array of Human Rights conventions that pre-date the Trafficking Protocol and that, in the absence of a complete anti-trafficking legal framework, may provide supplementary support for the victims of TIP. Given the state of the varied trafficking laws in our hemisphere, it is essential to approach the trafficking phenomena with a view of law as an *instrument* of our mission. In other words, in assisting victims and in prosecuting conducts associated with TIP, one should look at all the aggregate laws that exist, ranging from international human rights treaties, to any local laws guaranteeing people's human rights.

13. *Id.* Human Rights are universal, inviolable, indivisible, interdependent, not time-bound, and of extraterritorial application. *Id.*

14. Most Latin American and Caribbean nations have in fact ratified the most important Human Rights instruments, among them: The International Covenant on Civil and Political Rights (December 16, 1966); International Covenant on Economic, Social and Cultural Rights (December 16, 1966); The International Convention on the Elimination of All Forms of Racial Discrimination, (December 21, 1965); The Convention on the Elimination of All Forms of Discrimination against Women (December 18, 1979); The Convention on the Rights of the Child (November 20, 1989); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families(1990). See UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/Pages/ParticipationStatus.aspx> (last visited Mar. 24, 2011).

II. DEFINITION OF TRAFFICKING IN PERSONS UNDER INTERNATIONAL LAW

A. TRAFFICKING IN PERSONS DEFINED

As mentioned above, United Nations Convention against Transnational Organized Crime, commonly referred to as the “Palermo Convention,” is the instrument designed to combat TIP and related issues.¹⁵ The Palermo Convention has three accompanying Protocols: the “Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime;”¹⁶ the “Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime;”¹⁷ and the “Protocol against the Illicit Manufacturing, and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime.”¹⁸

The Trafficking Protocol¹⁹ defines trafficking in persons as “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.”²⁰

15. See Palermo Convention, *supra* note 1.

16. See Trafficking Protocol, *supra* note 2. Of special note is the denomination in the title “Women and Children.” *Id.* See also *infra* Part V (discussing in part vulnerable groups).

17. See Protocol against the Smuggling of Migrants by Land, Sea and Air, Nov. 15, 2000, C.T.I.A. No. 10318.002 [hereinafter Smuggling Protocol] (supplementing the United Nations Convention against Transactional Organized Crime).

18. See Protocol against the Illicit Manufacturing, and Trafficking in Firearms, Their Parts and Components and Ammunition, May 31, 2001, C.T.I.A. No. 10318.003 [hereinafter Protocol on Firearms and Ammunition] (supplementing the United Nations Convention against Transnational Organized Crime).

19. See Trafficking Protocol, *supra* note 2.

20. *Id.* The full text of article 3, reads:

(a) “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 or the removal of organs;

The exploitation referred to includes, “at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.”²¹ The consent of a TIP victim to the aforementioned intended exploitation is irrelevant.²² Lastly, “the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth” in the Trafficking Protocol.²³

In other words, TIP under the Trafficking Protocol is the act of recruiting, transporting, transferring, harboring or receiving people by means of the threat or use of force or other forms of coercion, abduction, fraud, deception, the abuse of power or a position of vulnerability or the giving or receiving of payments or benefits to obtain the consent of a person who has control over another person—for the purposes of exploitation. At a minimum, we refer to exploitation as the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs. The consent of the victim is irrelevant and any participation by any person under age eighteen is automatically considered trafficking.

Similarly, there are other criminal acts that are often confused with trafficking, the most notorious of these being prostitution and the illegal smuggling of migrants. These are discussed below.

B. TRAFFICKING IN HUMAN BEINGS VERSUS THE SMUGGLING OF MIGRANTS AND OTHER ACTS

Despite ten years of active advocacy, many people still confuse trafficking with smuggling. There are many similarities between smuggling and trafficking. Both involve similar activities of recruiting, transporting, etc., and in some instances, both may involve irregular migration. Particular criminal networks may traffic and smuggle people. As a result, trafficking in human beings—in its initial stages—many times resembles the smug-

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) “Child” shall mean any person under eighteen years of age.

Id.

21. *Id.*

22. *Id.*

23. *Id.*

gling of migrants (which is the subject of the Smuggling Protocol),²⁴ but there are several important differences.

As stated above, the Trafficking Protocol²⁵ defines trafficking in human beings in article 3. The Protocol against the Smuggling of Migrants by Land, Sea and Air (the “Smuggling Protocol”),²⁶ in article 3, defines smuggling and other related terms as:

(a) “Smuggling of migrants” shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;

(b) “Illegal entry” shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State

These definitions supplement each other, but clearly distinguish between the different criminal acts of smuggling and trafficking. Furthermore, migrants have in fact consented to the smuggling. Unlike trafficking, this constitutes criminal conduct. On the other hand, most trafficking victims have not consented, and if they initially consented at all, were thereafter held against their will through the use of coercive strategies.²⁷

While trafficking involves an ongoing exploitation of the victims, smuggling terminates upon the migrants’ arrival at their destination. Smuggling is always a transnational activity. Trafficking may occur irrespectively, within national boundaries, or internationally. It does not require the movement of people.

In addition, and as a practical matter, victims of trafficking tend to be psychologically and physically affected at a much deeper level than smuggled migrants.²⁸

Prostitution is also sometimes confused with trafficking, particularly because many TIP victims are sexually exploited. In many nations of the American Hemisphere, prostitution is a tolerated or even legal endeavor,

24. See Smuggling Protocol, *supra* note 17.

25. See article 3 of the Trafficking Protocol, *supra* note 2.

26. See Smuggling Protocol, *supra* note 17.

27. For a discussion on the differences and similarities between smuggling and trafficking, including the issue of consent, see generally Jacqueline Bhabha, *Trafficking, Smuggling, and Human Rights*, MIGRATION INFORMATION SOURCE (March 2005), <http://www.migrationinformation.org/feature/display.cfm?ID=294>.

28. See Office to Monitor & Combat Trafficking in Persons, U.S. Dep’t of State, *Trafficking in Persons Report* at 21 (June 2008) (on file with author), *available at* <http://www.state.gov/documents/organization/105501.pdf>.

which is monitored and regulated by health officials and police authorities. Of special note is the fact that prostitution or any other sexual exploitation of a minor always constitutes the crime of trafficking, regardless of consent, and even in cases where prostitution is a tolerated or regulated endeavor.²⁹ Also, a person may decide to engage in prostitution of their own free will, and thereafter be forced to be prostituted by another person, becoming a trafficking victim at that point.

III. THE CHALLENGE: THE TRAFFICKING PROTOCOL IS A NON SELF-EXECUTING TREATY

Generally, the procedure to adopt treaties is described in a country's constitution and typically involves the executive and legislative branches.³⁰ The temporal progression for adoption of a treaty most often involves the executive carrying out the negotiation and adoption of a treaty; then the legislative branch approves or rejects negotiated text, as adopted by the executive power. Finally, the executive communicates to counterparts or depository institutions that the country has fulfilled with internal or constitutional requirements for adoption of the treaty, and is therefore bound and ready to comply with the international agreement.³¹

29. See, e.g., *Ley Reformatoria al Código Penal que Tipifica los Delitos de Explotación Sexual de los Menores de Edad* (Quito, Ecuador, 23 Junio 2005) [hereinafter Ecuadorian TIP Law], which rose the age of legal prostitution from fourteen to eighteen years of age and created a criminal category for having sex with a minor.

30. See, e.g., U.S. CONST. art. II, § 2, which provides in pertinent part: "Clause 2: [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . ." *Id.* But note also that in the Parliamentary system, which is adopted in most Caribbean nations, Commonwealth rules typically require all treaties to be signed by the Prime Minister and then Presented to Parliament.

31. See, e.g., CONSTITUCION DE LA REPUBLICA ORIENTAL DEL URUGUAY, § 5 (Legislative Power) and § 4 (Executive Power), available at <http://www.rau.edu.uy/uruguay/const97-1.6.htm> sets out that in Uruguay the Executive Branch negotiates and signs treaties and thereafter these are ratified by the Legislature. The pertinent text in Spanish states

SECCION V DEL PODER LEGISLATIVO CAPITULO I

Artículo 83

El Poder Legislativo será ejercido por la Asamblea General.

Artículo 84.

Esta se compondrá de dos Cámaras; una de Representantes y otra de Senadores, las que actuarán separada o conjuntamente, según las distintas disposiciones de la presente Constitución.

Artículo 85.

A la Asamblea General compete: . . .
7°) Decretar la guerra y aprobar o reprobar por mayoría absoluta de votos del total de componentes de cada Cámara, *los tratados de paz, alianza, comercio y las convenciones o con-*

In addition, most countries' constitutions provide that the treaties made by the president and ratified by the senate (or legislature) are the supreme law of the land,³² and said ratified instrument usually trumps any law previously adopted that may be contrary to the obligations adopted in the treaty. This is the case, for example, in the Mexican Constitution,³³ the U.S. Constitution,³⁴ and the Ecuadorian Constitution.³⁵

tratos de cualquier naturaleza que celebre el Poder Ejecutivo con potencias extranjeras. . . .

SECCION IX DEL PODER EJECUTIVO CAPITULO III

Artículo 168.

Al Presidente de la República, actuando con el Ministro o Ministros respectivos, o con el Consejo de Ministros, corresponde: . . .

20) Concluir y suscribir *tratados, necesitando para ratificarlos la aprobación del Poder Legislativo. . . .*

Id. (emphasis added).

32. See U.S. CONST. art. VI, § 2, which in relevant part states

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;* and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding

Id. (emphasis added).

33. See Constitución Política de los Estados Unidos Mexicanos [C.P.], Ch. VII, Art. 133, Diario Oficial de la Federación [D.O.], 1917 (Mex.) available at <http://www.cddhcu.gob.mx/> [hereinafter MEX. CONST.]. MEX. CONST., which in its text in Spanish reads:

Artículo 133. Esta Constitución, las leyes del Congreso de la Unión que emanen de ella y todos *los Tratados que estén de acuerdo con la misma, celebrados y que se celebren por el Presidente de la República, con aprobación del Senado, serán la Ley Suprema de toda la Unión.* Los jueces de cada Estado se arreglarán a dicha Constitución, leyes y tratados, a pesar de las disposiciones en contrario que pueda haber en las Constituciones o leyes de los Estados.

Id. (emphasis added).

34. See U.S. CONST. art. XI, *supra* note 31.

35. See EDUCADOR CONST., Ch. IX, art. 424 and art. 425, which in its text in Spanish reads:

Art. 424.- *La Constitución es la norma suprema y prevalece sobre cualquier otra del ordenamiento jurídico* Art. 425.- El orden jerárquico de aplicación de las normas será el siguiente: La Constitución; *los tratados y convenios internacionales;* las leyes orgánicas; las leyes ordinarias; las normas regionales y las ordenanzas distritales; los decretos y reglamentos; las ordenanzas; los acuerdos y las resoluciones; y los demás actos y decisiones de los poderes públicos. . . .

Id. (emphasis added).

This process seems straight forward enough. However, complications arise when the country has to implement internal legislation to give validity to a non self-executing treaty.³⁶

Both the Palermo Convention³⁷ and Trafficking Protocol are “non self-executing treaties.”³⁸ As such, these international law instruments require a specific legislative act of the national congress or parliament to become effective.

36. See, e.g., *Re-Drafting the Grenada Constitution*, GOVERNMENT OF GRENADA DOCUMENT, available at http://www.gov.gd/egov/docs/legislations/constitution/re-drafting_grenada_constitution.pdf (addressing the current debate in the Caribbean as to how treaties gain the force of law in these nations). This issue is addressed as follows:

125. In Grenada and the rest of the Commonwealth Caribbean, following the Westminster model, it is the practice that the Government (the Cabinet) negotiates and concludes all treaty relations with other countries, sign international conventions and protocols, without the formal and legal approval of Parliament. However, it is also clearly understood that these treaties, conventions and protocols do not become part of the domestic law unless they are expressly enacted into local law by the Parliament. This has led, in some cases involving the international human rights conventions, that the State has denied certain obligations to its own citizens under a treaty or convention, to which it is a signatory, on the grounds that it has not yet enacted the instrument in question into its domestic law.

126. It is therefore fitting, that in this current exercise of re-drafting the Constitutional Text, we should give special regard to this issue . . . [to] help to remove all doubt as to the obligations that we have or have not undertaken.

Id.

37. See S. EXEC. REP. NO.91-9, at 2, 5 (1969) (appendix) (statement of Deputy Legal Adviser J. E. Lyster); 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. Q114 (1987), at 457.

38. See U.S. CONST. art. XI, *supra* note 31. Article XI, § 2 of the United States Constitution, commonly referred to as the “Supremacy Clause,” establishes federal law as “the supreme law of the land.” *Id.* The Supremacy Clause includes treaties signed by the executive and ratified by the senate, therefore superseding state law. See *Asakura v. City of Seattle*, 265 U.S. 332 (1924). The Constitution is nevertheless silent on the issue of self-execution. The “self-executing” or “non-self-executing” nature of a treaty is a question of interpretation for a Court of Law. A “self-executing treaty” is by definition one that does not require specific implementing legislation by a legislature and that may create rights flowing directly to individuals without such implementing legislation. The most important U. S. Constitutional law decision concerning the relationship between international law and municipal law is *Foster & Elam v. Neilson* 27 U.S. 253 (1829). In his discussion of *Foster & Elam*, Chief Justice Marshall introduces the concept of “self-executing treaties.” For further discussion on self-execution, treaty interpretation and application of self-executing. See also Howard S. Schiffman, *Breard and Beyond: Consular Notification and Access Under the Vienna Convention*, 8 CARDOZO J. INT’L & COMP. L. 27 (2000).

Although the TIP Protocol was written in a “check list” type fashion, few countries have adopted laws that closely mirror the Protocol in its efforts.³⁹

Despite the increased attention to TIP as a global phenomenon, there are still countries in our hemisphere that have not ratified the TIP Protocol.⁴⁰ Even so, there are many existing laws that have been, or can be used, to fight trafficking in persons. On the one hand, one must remember that even in cases where no law is adopted, such as a country that has ratified the treaty, this ratified instrument in turn creates an obligation on the part of the state to comply with the requirements to combat trafficking and protect the victims of trafficking.

Prior to the enactment of the anti-trafficking laws in the United States, prosecutors in Guam—a U.S. territory—used anti-slavery laws that were enacted in the *post-bellum* era. These laws, forgotten but still in the books, allowed prosecutors to put these traffickers behind bars. Similarly, beyond the internationally accepted concept that enslaving human beings is illegal,⁴¹ most nations in the American Hemisphere have constitutions that for-

39. See, e.g., Canada’s, St. Lucia’s, Jamaica’s and United States’ Anti-trafficking legislation.

40. Countries in the Americas that as of 2011 had signed, but not ratified the Protocol include: Barbados (Sept. 26, 2001); Haiti (Dec. 13, 2000); and Saint Vincent and the Grenadines (Nov. 20, 2002). Only two countries, Antigua and Barbuda, and Cuba, had neither signed, nor ratified the Protocol. See Trafficking Protocol *supra* note 2; see also generally *Anti-Trafficking in Persons Section*, ORGANIZATION OF AMERICAN STATES, (last visited Mar. 23, 2011) http://www.oas.org/dsp/atip_AbouUs.asp.

41. Certainly the conduct of enslaving or trafficking a human being is abhorring, but, when widespread, may become a crime against humanity. In 2002, the International Criminal Court (ICC) was established through the Rome Statute of the International Court. Rome Statute of the Int’l Crim. Ct. Part I, art. I, available at <http://untreaty.un.org/cod/icc/statute/romeFra.htm>. The definition of what is a “crime against humanity” (CAH) means certain acts (many of which could constitute trafficking in persons when committed against an individual), that when committed as part of a widespread or systematic attack directed against any civilian population, may be prosecuted by the ICC. The meaning of CAH has broadened from its original definition as contained in article 7 of the treaty, which stated that among these CAH were

1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) *Enslavement*;
- (d) Deportation or forcible transfer of population;
- (e) *Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law*;
- (f) Torture;

bid slavery.⁴² These constitutional provisions, coupled with international obligations, and existing laws, can fill the existing void while the legislators

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Rome Statute of the Int'l Crim. Ct. Part II, art. VII, (*emphasis added*) (*available at* <http://untreaty.un.org/cod/icc/statute/rome.htm>).

42. See, e.g., CONST. OF ANTIGUA AND BARBUDA, Ch. II, § 6, which provides in relevant part that:

Chapter II. Protection of Fundamental Rights and Freedoms of the Individual
Protection from slavery and forced labour.

6.-

1. No person shall be held in *slavery or servitude*.

2. No person shall be required to perform *forced labour*.

3. For the purposes of this section, the expression "forced labour" does not

include-

a. any labour required in consequence of the sentence or order of a court;

b. any labour required of any person while he is lawfully detained that, though not required in consequence of the sentence or order of a court, is reasonably necessary in the interests of hygiene or for the maintenance of the place at which he is detained;

c. any labour required of a member of a disciplined force in pursuance of his duties as such or, in the case of a person who has conscientious objections to service as a member of a naval, military or air force, any labour that person is required by law to perform in place of such service;

d. any labour required during any period of public emergency or, in the event of any other emergency or calamity that threatens the life and well-being of the community, to the extent that the requiring of such labour is reasonably justifiable in the circumstances of any situation arising or existing during that period or as a result of that other emergency or calamity, for the purpose of dealing with that situation.

Id. (*emphasis added*).

See also CONST. OF THE COMMONWEALTH OF DOMINICA OF 1978, art. 4, (updated through Act 22 of 1984) which provides that:

Article 4:

1. No person shall be held in *slavery or servitude*.

2. No person shall be required to perform *force labour*.

3. For the purposes of this section, the expression "forced labour" does not

include:

a. any labour required in consequence of the sentence or order of a court;

battle out the details of implementing their international obligations under the Trafficking Protocol.

This is why it is also incredibly important to frame the TIP issue in a practical, human rights oriented perspective. For example, in Ecuador, which still lacks an effective legal framework to protect victims,⁴³ there is an established history of civil society demanding respect for their human rights. Authorities are therefore attune with requests framed in this context. As a result, the National Police created a “Trafficking Module” in 2006 for their police academy. Henceforth, every single police officer has received training on the importance of assisting trafficking victims, whether or not the law requires it. Beyond any human rights implications, and from a much more practical perspective, the module teaches officers that, in order to have an effective prosecution, they must have a viable witness and the only way to achieve this is by assisting the victim to achieve a level of stability to become that viable witness. Similarly, in other countries where victim protection is specifically absent from their TIP laws, authorities have implemented policies for victim assistance to achieve similar results.⁴⁴

IV. THE JAMAICAN ANTI-TRAFFICKING LAW

As discussed above, the implementation of anti-trafficking laws in the Americas has been spotty and varied. The most typical approach, is to comply with the country’s international obligations by amending various existing codes, typically the Criminal and Labor Codes. One advantage of this approach is that it provides some continuity to existing regulations, as it

b. labour required of any person while he is lawfully detained that, though not required in consequence of the sentence or order of a court, is reasonably necessary in the interests of hygiene or for the maintenance of the place at which he is detained;

c. any labour of a member of a disciplined force in pursuance of his duties as such or, in the case of a person who has conscientious objections to service as a member of a naval, military or air force, any labour that person is required by law to perform in place of such service;

d. any labour required during any period of public emergency or in the event of any other emergency or calamity that threatens the life and well-being of the community, to the extent that the requiring of such labour is reasonably justifiable in the circumstances of any situation arising or existing during that period or as a result of that other emergency or calamity, for the purpose of dealing with that situation. (*Emphasis Added*).

Id.

43. See generally Ecuadorian TIP Law *supra* note 28.

44. See, e.g., The case of El Salvador which adopted a Witness Protection Law that has helped them with TIP victims. Decreto no 1029 - Ley especial para la protección de víctimas y testigos (Apr. 26, 2006).

incorporates and respects the longstanding legal traditions of countries. The disadvantage has shown to be that this approach has often lead to forgetting about the victim's rights, their protection and, perhaps most importantly, the prevention of trafficking in persons.

Another approach is to adopt an Act specifically mirroring the Palermo Protocol's obligations. This is the preferred approach and it has been successfully implemented in many places throughout the world, most recently in Jamaica and a few other Caribbean nations.

The Jamaican Law is known as the Trafficking in Persons (Prevention, Suppression and Punishment) Act of 2007 and it was enacted March 1, 2007.⁴⁵ The Jamaican TIP Law is perhaps the best organized law regarding trafficking in persons adopted in Latin America and the Caribbean. While it does not provide a fully comprehensive legal framework for victims, it goes a lot further than most recent laws adopted in the Latin American and the Caribbean regions.⁴⁶ It provides a good guide that ought to be emulated elsewhere. It is divided into four major sections.

Part I of the Jamaican TIP Law deals with definitions, setting the parameters under which the law is to be implemented. The law has clear definitions for the legal terms used in the Act.⁴⁷ Another good practice embo-

45. See generally the Trafficking in Persons (Prevention, Suppression and Punishment) Act (2007) [hereinafter Jamaican TIP Law].

46. Laws are always perfectible and the Jamaican TIP Law is no exception. They need to be updated constantly in order to keep up with developments in the world. However, it is the author's opinion that it fulfills an important first step toward creating a more unified and workable legal framework in the Caribbean as other countries, Saint Lucia and Saint Kitts, for example, have followed suit with very similar laws.

47. See Jamaican TIP Law at § 2, "Interpretation," *supra* note 44 which states in relevant part as follows:

2. In this Act, unless the context otherwise requires-
 - “child” means any person under eighteen years of age;
 - “child pornography” means
 - (a) audio or visual depiction of any kind, whether-
 - (i) made or produced by electronic, mechanical or other means; or
 - (ii) embodied in a disc, tape, film or other device, whether electronically or otherwise, so as to be capable of being retrieved or reproduced therefrom, of sexually explicit conduct involving a child; or
 - (b) any representation of the genitalia of a child, where such audio or visual depiction or representation lacks genuine literary, artistic, or scientific value;
 - “exploitation” includes-
 - (a) the exploitation of the prostitution of a person;
 - (b) compelling or causing a person to provide forced labour;
 - (c) keeping a person in a state of slavery or servitude;
 - (d) engaging in any form of sexual exploitation;
 - (e) illicit removal of organs;

died in the Jamaican TIP Law is the clearly stated purpose of the Act. This facilitates the prosecutorial task by preemptively stating the legislative intent in adopting the legislation.⁴⁸

-“exploitation of the prostitution of a person” means the deriving by one person of monetary or other benefit through the provision of sexual services for money or other benefit by another person;

-“forced labour” means any work or services exacted from a person by threat of penalty and for which the said person did not offer himself to provide such work or services voluntarily,

-“illicit removal of organs” means the unlawful removal of organs, tissue or body parts from a victim irrespective of whether the victim consented to such removal;

-“servitude” means a relationship of dependency in which the labour or service of a person is provided or obtained by threats of harm or death to that person or another person, or through any scheme, plan, or pattern intended to cause the person to believe that if he does not perform such labour or service he or another person will suffer harm or be killed;

-“sexual exploitation” means compelling the participation of a person in-

(a) prostitution;

(b) the production of child pornography or other pornographic material;

(c) any other sexual activity, as a result of being subjected to threat, coercion, abduction, the effects of narcotic drugs, force, abuse of authority or fraud;

-“sexually explicit conduct” includes actual or simulated sexual activity, such as sexual intercourse whether between persons of the same or opposite sex and whether involving genital, anal or oral sex, bestiality, masturbation, sadistic or masochistic abuse;

-“slavery” means the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised by another, and includes practices similar to slavery, such as bondage and serfdom;

-“travel document” means any document that can be used for travel between states such as-

(a) a passport;

(b) a visa;

(c) a tourist card;

(d) an airline ticket,

and any document used under the laws of a state to establish identity in that state;

-“victim” means a person against whom the offence of trafficking in persons has been committed.

48. *Id.* at § 3, “Object of the Act,” which states in relevant part as follows: 3. The object of this Act is to prescribe measures to prevent and combat trafficking in persons with particular regard being had to victims who are women and children, by-

(a) protecting and assisting victims of trafficking, having due regard to their human rights;

(b) facilitating the efficient investigation of cases of trafficking in persons;

The Act, in Part II, includes a very effective definition that closely mirrors the international definition of trafficking in persons.⁴⁹ Similarly, the

-
- (c) facilitating the just and effective punishment of individuals and organizations involved in trafficking in persons;
 - (d) promoting co-operation between Jamaica and other states in order to prevent and suppress trafficking in persons and to punish offenders.

49. *Id.* at § 4, which states in relevant part as follows:

4.-(1) A person commits the offence of trafficking in persons where, for the purpose of exploitation he-

- (a) recruits, transports, transfers, harbour or receives another person within Jamaica;
- (b) recruits, transports or transfers another person from Jamaica to another country; or
- (c) recruits, transports, transfers, or receives another person from another country into Jamaica, by any of the specified means in subsection (2).

(2) The means referred to in subsection (1) are-

- (a) threat or use of force or other form of coercion;
- (b) abduction;
- (c) deception or fraud;
- (d) the abuse of-
 - (i) power; or
 - (ii) a position of vulnerability;
- (e) the giving or receiving of a benefit in order to obtain the consent of a person who has control over another person.

(3) Notwithstanding the absence of the use of any of the means specified in paragraphs (a) to (e) of subsection (2), a person who recruits, transports, transfers, harbours or receives a child for the purpose of exploitation of that child commits the offence of trafficking in persons.

(4) It shall not be a defence for a person who commits the offence of trafficking in persons that the offence was committed with the victim's consent.

(5) A person who facilitates the offence of trafficking in persons commits an offence.

(6) A person who commits the offence of trafficking in persons or who facilitates that offence is liable on conviction on indictment before a Circuit Court to a fine or to imprisonment for a term not exceeding ten years or to both such fine and imprisonment.

(7) A person who, for the purpose of committing or facilitating an offence under subsection (1) conceals, removes withholds or destroys any-

- (a) travel document that belongs to another person; or
- (b) document that establishes or purports to establish another person's identity or immigration status, is liable on conviction on indictment before a Circuit Court to a fine or to imprisonment for a term not exceeding ten years or to both such fine and imprisonment.

(8) Every person who receives a financial, or other benefit knowing that it results from the offence of trafficking in persons commits an offence and is liable on conviction on indictment before a Circuit Court to a fine or to imprisonment for a term not exceeding ten years or to both such fine and imprisonment.

law creates categories of violations, not just by physical persons, but also by corporate bodies.⁵⁰ It also includes provisions for restitution⁵¹ to the victims and provides for the forfeiture of the traffickers' assets.⁵² These two

- (9) For the purposes of this section, an offence under subsection (1) is facilitated-
- (a) where the facilitator knows that such an offence is intended to be facilitated;
 - (b) whether or not the facilitator knows the specific nature of the offence that is intended to be facilitated; and
 - (c) whether or not the offence was actually committed.
50. *Id.* at § 5, "Offences by bodies Corporate," states:
- 5.-(1) Subject to subsection (2), where a body corporate commits an offence against this Act, every director, manager, secretary or other similar officer concerned with the offence is liable on conviction on indictment before a Circuit Court to a fine or to imprisonment for a term not exceeding ten years or to both such fine and imprisonment.
 - (2) A director, manager, secretary or other similar officer concerned with the management of a body corporate shall not be liable for an offence against this Act unless the court is satisfied
 - (a) that the offence was committed with his connivance; or
 - (b) he had not exercised all such diligence to prevent the commission, having regard to the nature of functions in that capacity and to all the circumstances.
 - (3) A body corporate which commits an offence against this Act is liable on conviction on indictment before a Circuit Court to a fine.
51. The Jamaican TIP Law at § 6, "Restitution," states:
- 6.-(1) Where a person is convicted of the offence of trafficking in persons the court may order that person to pay restitution to the victim.
 - (2) Restitution shall compensate, where applicable, for any of the following-
 - (a) costs of medical and psychological treatment;
 - (b) costs of physical and occupational therapy and rehabilitation;
 - (c) costs of necessary transportation, temporary housing and child care;
 - (d) lost income;
 - (e) attorney's fees and other legal costs;
 - (f) compensation for emotional distress, pain and suffering;
 - (g) any other losses suffered by the victim which the court considers applicable.
 - (3) Restitution shall be paid to the victim-
 - (a) upon the conviction of the accused;
 - (b) as far as possible, from any property forfeited under section 7 or the proceeds thereof.
 - (4) The absence of the victim from the proceedings shall not prejudice the victim's right to receive restitution.
52. *Id.* at § 7, "Forfeiture", states:
- 7.-(1) All property of persons convicted of the offence of trafficking in persons that was used or obtained in the course of the crime, or benefits gained from the proceeds of the crime shall be liable to be forfeited to the Crown in the manner specified in the Schedule.

provisions are perhaps the key to the successful implementation of the law and the expansion of services to victims. As assets are confiscated, shelters may be built and other social services may be funded through the use of these often sizeable amounts of money.

Another key ingredient of the Law is the provision regarding immunity of the trafficking victims from prosecution.⁵³ As it is further discussed below, it takes time for police officials to change their perspectives regarding victims, especially when these victims have actively participated in the commission of criminal acts, even if forced to do so.

PART III of the Jamaican Law is devoted to the Assistance and Protection of Victims.⁵⁴ The assistance, as required by the law, provides vic-

(2) Where any such property as described in subsection (1) is located in a foreign country it shall be subject to forfeiture to the extent that it can be retrieved by the Government of Jamaica.

53. *Id.* at § 8, “Immunity of victim from prosecution,” states: “8. Where a person provides evidence that he is a victim he shall not be liable to prosecution for any offence against the laws relating to immigration or prostitution, that is a direct result of the offence of trafficking in persons committed against him.”

54. *Id.* at § 9, “Protection of Victims” and § 10 “Assistance of Victims,” which respectively state:

9.-(1) The Government shall take all reasonable steps to identify victims in Jamaica.

(2) When victims are identified the appropriate authorities shall provide reasonable protection to the victims and to prevent their being recaptured, intimidated or becoming the object of reprisal by traffickers and their associates[...]

10.-(1) The Government shall take appropriate steps to assist victims where practicable and such assistance may include-

(a) assistance in understanding the laws of Jamaica and their rights as victims;

(b) assistance in obtaining any relevant documents and information to assist with legal proceedings;

(c) assistance in replacing or providing passports and other travel documents necessary for the victim to return to his country;

(d) assistance in language interpretation and translation where necessary;

(e) assistance in meeting expenses related to criminal proceedings against the traffickers;

(f) the provision of safe shelters and assistance to cover living expenses.

(2) The Government in consultation with approved nongovernmental organizations and agencies shall establish and carry out programmes and initiatives to support victims by assisting in the integration, reintegration or resettlement, as the case may be, of such persons.

(3) For the purposes of this section, an approved nongovernmental organization or agency refers to an organization or agency being a corporation or an association of persons whether or not resident in Jamaica, which is approved for the purposes of this section by order made by the Minister.

tims with secure shelter, with migratory status (if they are foreign)⁵⁵ and with economic assistance to live, reintegrate into society, and prosecute the cases against their traffickers. The law also provides for cooperation with non-governmental entities, in order to efficiently assist victims in their re-integration efforts.

The law achieves an efficient balance between the rights of the accused person to face their accuser and the victim's need for protection. It creates special protections for victims by providing that proceedings regarding the victim may be held *in camera*.⁵⁶ In certain cases, as in the cases of victims who are children, mentally or physically challenged victims, or highly traumatized victims, the *in camera* provision becomes mandatory.

Another important part of the Law is contained in the provisions regarding the victims' migratory situation. Often times, when the victim is foreign, there are no provisions to allow the victim to remain legally in the country.⁵⁷ This is particularly important because in many scenarios the victim can never return to their home country. Therefore, the Jamaican TIP Law first provides for the creation of a system for returning victims to their home country (or a country where they are residents), providing that the system ought to look firstly at the safety of the victim, should the return in fact occur. Thereafter it sets out an immigration regime for victims who are remaining in Jamaican territory.⁵⁸ Unfortunately the Law does not outright

55. See *infra* note 57 and accompanying text.

56. See Jamaican TIP Law at § 11, "Proceedings to be in camera," *supra* note 44, states:

In any proceedings involving a victim who-

- (a) is a child;
- (b) has been traumatized by the experience of exploitation;
- (c) is mentally or physically challenged; or
- (d) is a person against whom any of the offences set out in sections 44, 48, 50, 53, 55, 56, 57, 64 and 76 of the Offences Against the Person Act (being offences relating to indecent assault, carnal abuse, abduction, rape, buggery and prostitution) was committed, the court shall order that such proceedings be held in camera.

57. See *infra* discussion on the exercise of prosecutorial and law enforcement discretion in the absence of a comprehensive migratory law to protect victims.

58. See Jamaican TIP Law § 12, "return of victims to home country, etc.," and § 13, "immigration regime for victims," *supra* note 44, which in relevant part state:

12.-(1) The Minister shall establish a system to effect the return of victims to their country of citizenship or to a country in which the victim holds permanent residency.-

(2) The system under subsection (1) shall take into account the-

- (a) safety of the victim while in Jamaica;
- (b) safe return of the victim without undue delay;
- (c) wishes of the victim as to the choice of country to which he is to be sent.

....

provide victims the right to become permanent residents, but it does indicate that “[w]here the victim is a person who does not have the right to remain or reside in Jamaica” the government may engage in “activities necessary to find accommodation for and other assistance to the victim.”⁵⁹

Lastly, Part IV of the Jamaican Law deals with enhancement and rules of procedure to facilitate events that could otherwise be procedurally difficult.⁶⁰ It sets out rules regarding entry, search and seizure; threatening or

13.-(1) Where the victim is a person who does not have the right to remain or reside in Jamaica, an immigration officer shall, subject to the provisions of this section, grant the victim the appropriate visas or other required authorization to allow him to remain in Jamaica for the duration of time necessary to carry out, where feasible, the-

- (a) process of identifying the victim or verifying his identity and nationality;
- (b) activities necessary to find accommodation for and other assistance to the victim;
- (c) criminal prosecution against the persons who have committed or facilitated the commission of the offence of trafficking in persons;
- (d) investigations necessary to prosecute the offence of trafficking in persons or facilitating the offence and other legal and administrative activities.

(2) The Minister may, where he considers it justified in the circumstances appropriate to do so, cancel at any time the visas or other documents which permit the victim to remain in Jamaica.

59. *See id.* Certainly the best legal framework would be one similar to the Canadian or United States’ models, which provide victims of trafficking with legal status to remain in the country. Even the original anti-trafficking law in the United States had to be amended a number of times (the original Act did not cover, for example, local TIP victims). Of note is the fact that the law’s provisions regarding visas for TIP victims have been underutilized, as the visa caps for victims have never been met. *See, e.g.,* Trafficking Victims Protection Act of 2000, Pub. Law 106-386, 114 Stat. 1466 (2000); 22 U.S.C. § 7101 *et seq.*, amended by U.S. Trafficking Victims Protection Reauthorization Act of 2003, Pub. Law 108-193, 117 Stat. 2875 (2003).

60. The Jamaican TIP Law §§ 14-17, and “Schedule (section 7),” which state:

14.-(1) Subject to subsection (3), where a Judge is satisfied by information on oath that there are reasonable grounds for suspecting that evidence of or relating to an offence under this Act is to be found on any premises specified in the information, he may issue a warrant in accordance with subsection (2).

(2) A warrant issued under subsection (1) may authorize a constable named therein to enter the premises specified therein, with such assistance and by the use of such force as is necessary and reasonable to-

- (a) enter upon the premises;
- (b) search the premises for evidence of or relating to an offence under this Act;
- (c) seize property found in the course of the search that the constable believes, on reasonable grounds, to be evidence of or relating to an offence under this Act.

(3) A warrant shall not be issued under this section unless the informant or some other person has given the Judge, on oath, such further information as the Judge may require concerning the grounds on which the issue of the warrant is sought.

(4) A warrant issued under this section shall include

(a) a statement of the purpose for which the warrant is issued, and a reference to the nature of the trafficking offence;

(b) a description of the kind of property to be seized;

(c) the time, not being later than fourteen days, upon the expiration of which the warrant ceases to have effect; and

(d) a statement as to whether entry is authorized to be made at any time of the day or night, or during the specified hours of the day or night.

(5) For the purposes of this section "an offence under this Act" refers to an offence, which has been committed or is about to be committed

15. Any person who threatens, assaults, or obstructs a constable acting in the execution of his duty under this Act commits an offence and is liable on summary conviction in a Resident Magistrate's Court to a fine not exceeding two hundred and fifty thousand dollars or to imprisonment for a period not exceeding six months

16. The Minister may make regulations for carrying into effect the objects and purposes of this Act either generally or in relation to any particular case

17.-(1) The Minister may by Order published in the Gazette increase the fines provided under this Act.

(2) An Order under subsection (1) shall be subject to affirmative resolution.

SCHEDULE (Section 7)

1.-(1) Where a constable has reasonable cause to suspect that any article, vehicle or other property is being used or has been used in the commission of an offence against this Act, the constable may without warrant search the property, and if it appears that the property is being used or has been used for the commission of any offence as aforesaid, the constable may seize and detain the property.

(2) Where any property is seized pursuant to this paragraph and

(a) any person is convicted of an offence under this Act;

(b) the Court is satisfied that-

(i) the person owns the property used in the commission of the offence;

(ii) the owner permitted it to be used; or

(iii) the circumstances are otherwise such that it is just to do so, the Court shall, upon the application by the Director of Public Prosecutions, order the forfeiture of the property.

(3) On the application of the Director of Public Prosecutions before a Judge in Chambers, the Judge may make an order in accordance with subparagraph (4), notwithstanding that the conditions mentioned in subparagraph (2) have not been satisfied.

(4) The Judge may order the forfeiture of the property if the Judge is satisfied that

(a) the property has been abandoned;

(b) the circumstances in which the property was seized give reasonable cause to suspect that it was being used or has been used for the purpose

obstructing law enforcement officers; sets out other regulations regarding increased fines in trafficking cases; and, other rules regarding suspension of forfeiture orders.

The Jamaican TIP Law does not directly address the prevention aspect of trafficking in persons.

V. LESSONS FROM THE ROAD AND PROPOSALS

In the course of training throughout the hemisphere, the author has had an opportunity to observe many different approaches to combat trafficking. Certainly the United States' trafficking victims protection law⁶¹ is one of

of committing an offence against this Act, and it is otherwise just to do so.

2.-(1) Where the Director of Public Prosecutions intends to apply to the Court for an order of forfeiture under paragraph 1(3) he shall, subject to sub-paragraph (2) give to any person who, to his knowledge, was at the time of the seizure, the owner thereof, notice of the seizure and the intention to apply for forfeiture and grounds thereof.

(2) Notice shall not be required under sub-paragraph (1) if the seizure under paragraph (1) was made in the presence of the owner or his servant or agent.

(3) Where the Director of Public Prosecutions is unable to ascertain the owner of or any person having an interest in any property to which this section applies, he shall publish a notice in a daily newspaper circulating in Jamaica regarding the intention to apply to a Resident Magistrate for an order for forfeiture, not less than thirty days prior to the application

(4) Any person having a claim to any property seized under this Act may appear at the hearing of the application for forfeiture and show cause why such an order should not be made.

(5) Where, on the hearing of an application for forfeiture pursuant to paragraph 1(3), no person appears before the Court to show cause as mentioned in sub-paragraph (4), the Court shall presume that the property has been abandoned.

(6) If, upon the application of a person prejudiced by an order made under paragraph (1), (2) or (3), the Court is satisfied that it is just in the circumstances of the case to revoke the order, the Court may

(a) revoke such order upon such terms and conditions, if any, as it deems appropriate; and

(b) without prejudice to the generality of paragraph (a), require such person to pay in respect of storage, maintenance, administrative expenses, security and insurance of the property, such amount as may be charged by the person in whose custody the property was kept.

(7) An application to the Court under sub-paragraph (6) for the revocation of an order shall be made within thirty days of the date of the order or such longer period not exceeding six months after the date of the order as the Court may allow.

61. See generally Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2005); see also Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

the most comprehensive instruments adopted worldwide. Similarly, The Jamaican TIP Law provides a great guide for countries throughout the hemisphere. These, like all laws, are perfectible, and must be adjusted and updated as the dynamics surrounding the trafficking phenomena unfold in each particular country.

For this reason it is important for each country to develop its own body of research regarding the trafficking phenomena as manifested within its territory. Laws must also reflect the country's capabilities to respond to particular criminal conduct and take into account what resources will be devoted to investigation, prosecution of traffickers and to victim assistance, once the law has been adopted. A practice often observed in Latin America is that laws remain in the books for lengthy periods of time, without updating them to reflect changing trends in criminal or social behaviors. Many times, the negotiation of the law takes such a long time that, upon approval, authorities seem complacent with minimal implementation, as if the adoption of the Law is sufficient to comply with their international obligations.

Needless to say, it is most important to have a law that responds as practicably as possible to the manifestations of the trafficking phenomena in that country and region. For example, in Ecuador the law was successful in accomplishing important goals of the TIP Protocol, but it fell short due to lack of provisions regarding the rights of victims. On the one hand it provided that the age of prostitution should be raised from 14 years of age to 18, creating the necessary framework for the constitution of trafficking as an offense regarding minors.⁶² However, the Ecuadorian immigration laws remained untouched and foreign victims remain legally unprotected.⁶³ This lack of legal protection has been balanced through the exercise of prosecutorial discretion regarding foreign victims. That being said, this experience exemplifies why it would be important to create a legal framework that carefully reflects the needs of victims. If the legal framework flows from the victim perspective, it will encompass a wider array of areas that may not be immediately apparent to a legislator.

Similarly, even though there are not legal requirements of victim protection in Ecuador, shelters have undertaken *de motu proprio* their role in helping trafficking victims, and the police have implemented a *de facto* protection policy, when trafficking victims have been taken into protective custody and placed in said shelters. The need for this protective policy be-

62. See Ecuadorian TIP Law, *supra* note 42.

63. Between the years 2005-2007, most of the TIP victims identified during initial operatives in the sex industry were Ecuadorian nationals. However, most foreign victims found were Colombian and, to a lesser degree Peruvian (in the South). They were placed in shelters and assisted, but never given legal status in Ecuador.

came apparent after traffickers attempted to break-out victims rescued during one of the operatives in 2006.⁶⁴

Another important tool is the continued training of law enforcement in efficient investigative techniques, case building and other best practices. It is essential to strengthen the ability of police, immigration, customs and other law enforcement and quasi law enforcement agencies, in order to efficiently deter organized crime. Although most training focuses on the trafficking scenario, in reality many of these techniques can be efficient to assist in other types of cases.

Training emergency line operators has also proven to be a good strategy to identify TIP victims. In Colombia and Ecuador, the Organization for International Migration (IOM)⁶⁵ assisted in the creation of national call centers for trafficking cases. In Ecuador, the training was extended to all emergency call operators, in order to multiply the number of potential calls identified through this service, recognizing that a caller may rarely identify a certain conduct as trafficking, and that the service center staff was in the better position to correctly channel the call.

Similarly, in the Caribbean region, training has been held for non-law enforcement personnel, including social services workers and emergency room staff, because these staffers are most likely to identify potential victims of trafficking.

Latin America and the Caribbean are currently undergoing an incredibly fast integration. The Central American countries,⁶⁶ Andean Pact countries⁶⁷ and Caribbean Common Market (CARICOM)⁶⁸ members are all experiencing “growing pains” associated with the free movement of their citizens within their regions. As a result, it is essential that these countries create efficient methods of sharing information and facilitate each other’s investigations. Where possible, the homogenization of laws related to mul-

64. For details regarding operations in Ecuador, see documents and reports of the American Bar Association’s Project in Ecuador, Report to the Advisory Council available upon request; see also *Trafficking in Persons in Ecuador*, ASSESSMENT ONE (ABA/Latin American & Caribbean Law Initiative, Chi., Ill.), Sept.-Dec. 2004., available at http://apps.americanbar.org/rol/publications/ecuador_tips_assessment_final.pdf.

65. For information about this and other IOM anti-trafficking strategies, see *Counter-Trafficking*, INT’L ORG. FOR MIGRATION, <http://www.iom.int/jahia/Jahia/counter-trafficking/lang/en> (last visited Mar. 28, 2011).

66. Guatemala, Honduras, El Salvador, Nicaragua, Costa Rica and Panama.

67. Known in Spanish as “Pacto Andino,” the Andean Pact countries include Bolivia, Colombia, Ecuador and Peru. Formerly included Venezuela (until 2006) and Chile (1969-1976). Since 2003 the citizens of these countries transit freely (without a passport) within the region.

68. The current members of CARICOM are Antigua and Barbuda, Bahamas, Barbados, Beliza, Dominica, Grenada, Guyana, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Surinam, Trinidad and Tobago and Montserrat (UK).

ti-national phenomena, such as money laundering and trafficking in persons, will facilitate everyone's prosecution efforts. In the Caribbean, various countries, such as Jamaica, Saint Kitts and Nevis and Saint Lucia, have adopted vastly similar anti-trafficking dispositions, which, as they become effective, will allow law enforcement in these nations to have more effective regional strategies.

International cooperation, and especially international funding, should be devoted to regional meetings and cross training, in order to strengthen ties in the various regions.

A grossly underutilized tool in the TIP Protocol and the Palermo convention are the provisions regarding international cooperation. During the regional trainings that have taken place under the auspices of the Organization of American States (OAS), law enforcement authorities from the various governments have been able to meet and build more personal working relationships. These direct relationships supersede institutional channels and facilitate the flow of information which ultimately leads to effectively combating organized crime. Similarly, consular and immigration authorities are able to meet and thereafter cooperate in assisting nationals in repatriation and family reunification, where appropriate.⁶⁹

Cross training and special training for police and other law enforcement are also under-utilized tools. Victims of trafficking are often forced to commit criminal acts and are likely to have police contact. However, victims are unlikely to seek out the officers' assistance. As a result, it is up to the police to find and identify these victims.⁷⁰ On the law enforcement side, it is also challenging to train officers who have been dealing with crimes such as prostitution and other sex crimes, to look beyond what they know, and proactively seek trafficking victims. Changing one's long-held views is often difficult. It is therefore essential that, not only TIP laws be adopted and enforced, but that prosecutors, judges and police officers receive training in order to effectively implement the laws that have been created to fight TIP.

As expressed above, because most countries have focused legislative and enforcement efforts on the criminal aspects of TIP, there seems to be a

69. Between 2008 and 2011, the OAS has held a number of regional meetings for Central American and Caribbean authorities, which have facilitated these face-to-face meetings between immigration, law enforcement and consular authorities.

70. One of the first cases identified in Ecuador in the year 2006 involved two minor trafficking victims of Colombian nationality. The sixteen year old girls had been sent to a patron's house for the weekend and were being held captive without payment after "servicing" the client. They managed to escape and had taken a laptop as payment. They were thereafter arrested for theft. The police lieutenant in charge of the investigation had just undergone TIP training and quickly contacted the children's specialized police and civil society shelters to assist them. The patron was not prosecuted.

regional emphasizing of TIP cases in the prostitution and sexual exploitation context. As a result, there is little to no attention placed on other TIP dynamics such as labor-based trafficking.⁷¹ Domestic servitude has become a topic of increased interest, particularly in Latin America and the Caribbean, where there are deeply engrained customs regarding treatment of domestic servants.⁷² The same can be said for funding to provide victim assistance services such as medical, shelter, psychological assistance, and job re-training.

Complicating matters in the region is the lack of policies dealing with extremely vulnerable groups, such as women, children, the physically disabled, etc., which are at the greatest risk of being trafficked. Organized crime seeks out members of these vulnerable groups because they are often hidden from the mainstream, and do not have access or representation within the systems of justice.

For example in the Dominican Republic authorities rescued a man who was in a wheelchair and was routinely exploited. This man was “rented out” for \$20 USD by his own family and left in Santo Domingo street corners, without protection from the sun, to beg for money. All of the profits went to the “renter.”

There are certain groups, such as homosexual youth, which are at great risk of being trafficked and who face tremendously great odds throughout the world. Their plight remains a taboo topic, even within the trafficking discourse. These are particularly complicated cases, because there is little to no family support and little practical experience.⁷³

71. The International Labor Organization (ILO) has developed a wide array of anti-trafficking programs throughout the world. See Int'l Migration Programme, *Trafficking in Persons*, INT'L LABOR ORG. (May 1, 2009), <http://www.ilo.org/public/english/protection/migrant/areas/trafficking.htm>.

72. For example, in Mexico, which adopted anti-trafficking legislation in 2007, a diplomatic officer freely commented on her custom of having her maid living in a hallway closet while she was posted in the U.S. (she could only afford a two bedroom apartment for herself and her two kids). As per her account, the maid worked every day but Sundays, and was available 24/7, making \$800 dollars a month (a bit over half the minimum wage in the U.S., but double what she would make in Mexico). The maid eventually ran away, but this did not face the raconteur, because she had retained the maid's passport (which she had taken from her to ensure compliance).

73. In Chicago, during a presentation in 2007 at the Center on Halsted (Chicago's Gay Advocacy Center), a Mexican-American youth reported to the author that he was kicked out from his house for saying that he “thought” he was homosexual. He began in the streets, looking for a place to stay (none of his friends or family would take him in, once word spread out about his thoughts of homosexuality). He was picked up by an adult at a park and eventually was forced to make pornographic movies. He was able to escape with the help of another actor and taken to the Center for Assistance by the Chicago Police Department. No one ever reported this case as a trafficking case.

Similarly, immigrants often fall prey to traffickers.⁷⁴ One of the reasons criminal networks focus on immigrants is precisely their singular vulnerability. Although there is an ever increasing flow of people across international borders, immigration laws and policies generally provide very limited legal means for migration for people of lower social strata. Most immigrants have lower levels of education. Many are women. Upon arrival to the country of destination, immigrants have great dependence upon others for information. Given the various languages spoken, immigrants often have limited language skills. Although these are well known dynamics of the immigrant communities, as pointed out above, there are few nations that have adopted specific strategies to assist trafficking victims who are immigrants.

A practical issue in the region is that many small countries, like most island nations in the Caribbean, have very limited public resources and cannot devote new budgets and personnel every time a new issue is thrust at them by the international community. That being said, the issue of trafficking has been identified in every country in the hemisphere and as a result, even small countries have to face the realities that this phenomena is affecting them. The most practical solution is to transition existing units, such as specialized sexual crimes units, to add this as another branch of their duties. By creating those specialized units, training and resources are best invested and have a more permanent effect on the institutional infrastructure.

Many times international organizations providing aid to developing countries spend considerable amounts of energy training and re-training personnel, only to see the advancement of these intended strategies frustrated. By providing set agreements that make governments commit to keeping trained units together for set lengths of time, training has a more lasting effect.

For example, in Ecuador, a small sized country, the police and prosecuting attorneys have somewhat limited resources. One of the problems presented on the operations side was the fact that officers were transferred in and out of units on a regular basis (usually six month rotations). So all the training invested in these officers was lost on a regular basis. Following a big lesson learned from the anti-narcotics context, and replicated in the anti-trafficking efforts, was the creation of specialized units, where investigative teams of prosecuting attorneys and police officers worked together for at least one year. These cohesive groups have proven very effective and have accomplished the first convictions of traffickers in Ecuador.

74. See, e.g., Salvador A. Cicero-Domínguez, *Assessing the U.S.-Mexico Fight Against Human Trafficking and Smuggling: Unintended Results of U.S. Immigration Policy*, 4 Nw. U. J. Int'l Hum. Rts. 303 (2005).

Another lesson learned is the importance of involving civil society in the process of victim assistance. In the United States many non-governmental service providers routinely assist victims. Similarly, in Ecuador, universities took an early interest in the issue and became active stake holders in the national commission formed to address these issues. By involving students and academics in the process, the issue becomes more engrained in the daily agenda of society. Students create advocacy groups around the trafficking issue and academics generate much needed research in ever-evolving phenomena. Yet another lesson was the importance (and effectiveness) of engaging civil society and government authorities as partners in the fight against human trafficking.⁷⁵ Despite scarce public resources in Ecuador, civil society representatives have proven key in generating much needed political will to begin a serious effort against trafficking. Ecuador continues to effectively prosecute trafficking cases and civil society continues to be engaged in the effort.

Costa Rica, Nicaragua and Ecuador⁷⁶ all have implemented prevention programs at elementary school levels, in order to raise awareness of the ability that all of us have to prevent this phenomena from occurring. One thing we have observed throughout the hemisphere is that a lot of the sexual exploitation stems from the lack of education regarding gender equality and open sexual practices. Many societies in the Americas have a deeply engrained double morality that will be very difficult to eradicate. The central issue is the way that men view women, their role in society and their exploitation. Many men never question the age of the person they engage for prostitution or the repercussions of these actions.⁷⁷ It is simply not in their mindset.

In the area of trafficking one must understand the basic principle that the authorities create compartments to define different criminal behaviors.

75. In 2006, the American Bar Association's Project in Ecuador was named as an international best practice by both U.S. Department of State and the Organization of American States. One of the greatest lessons learned was the creation of a mixed advisory board for the Project. A considerable amount of time was spent identifying key players in the country—people with a proven track record both within and outside the government—in order to create a stake holder group that would endure beyond the life of the project (and foreign funding). As a result, Ecuador's Tier ranking moved from Tier Three, up to Second tier, skipping the Tier Two Watch. *See, e.g.*, US TIP REPORT 2006 Sect. on best practices, Sect. on Heroes, at 46 (Naming First Lady of Ecuador, Maria Beatriz Paret de Palacio), and US TIP REPORT 2007, naming Prosecutor Lucy Blasio (project graduate), Sect. on Heroes, at 40.

76. Save the Children International (STC) created and funded the distribution of materials for these Central American countries. Thereafter the ABA Ecuador Project, in cooperation with STC, brought a version of the materials to Ecuador. *See supra* note 74.

77. For a discussion on the issue of supply and demand in the trafficking context, *see* Meredith Flowe, Comment, *The International Market for Trafficking in Persons for the Purpose of Sexual Exploitation: Analyzing Current Treatment of Supply and Demand*, 35 N.C. J. INT'L L. & COM. REG. 669 (2010).

History and experience have shown that criminals do not think in these terms. They simply engage in behaviors that would naturally create more business opportunities. As a result, and as a counter-strategy, authorities ought to use the same approach in attacking organized crime, the same way that the infamous “Al Capone”⁷⁸ was ultimately prosecuted.

For example, in the United States, local authorities have encountered trafficking cases while servicing building code violations. If a police officer wants to enter someone’s abode, she would require a search warrant and prove that there is some reasonable basis for said search. Building and health inspectors, on the other hand, may enter into the premises without a warrant and simply by virtue of their authority to ensure the public safety. Their legal limitations fall under vastly different constitutional ground, so they may then report what they have observed to a police unit. Police authorities coordinate their efforts, not only with other government officials, but also with NGO’s ready to assist victims that may be rescued.⁷⁹

Similarly, the first efforts to prosecute traffickers in Ecuador came up empty handed. The reasons were varied, but among the most important were the fact that the potential witnesses did not feel secure, the police, the prosecutors and the judges were unfamiliar with the law and the traffickers used very effectively their well-tested legal defense strategies. Once these issues were identified, strategies were incorporated to make the law truly operational in Ecuador. Authorities would stake out the places identified and control information much more effectively. They would have not only police officers at the scene, but also business licensing, tax, health and fire department officials, etc. Hence once the operatives took place, the night clubs or brothel houses would be legally shut down for a series of other violations, unrelated to the trafficking investigation.

Another example of transitioning what limited resources are available to accommodate TIP victims can be found in shelters. In Ecuador, a first attempt to place trafficking victims into domestic and sexual abuse shelters was unsuccessful. The victims were feared by administrators and considered to be disruptive. There was no funding to create specific shelters,⁸⁰ so

78. The “Al Capone principle” refers to the fact that the infamous Al Capone was sought for a wide variety of crimes, including racketeering, murder, money laundering, etc. He was successfully prosecuted for tax evasion.

79. Civil society organizations play an intrinsic role in these strategies, working closely with local law enforcement to assist victims *See, e.g., About Human Trafficking*, FLA. COAL. AGAINST HUMAN TRAFFICKING, <http://www.stophumantrafficking.org/index.html> (last visited Mar. 28, 2011). *See also Human Trafficking is Modern Day Slavery*, NAT’L IMMIGRANT JUST. CTR., <http://www.immigrantjustice.org/resourcespolicy/trafficking/traffickingpolicyintro.html> (last visited Mar. 28, 2011).

80. Trafficking victims often find themselves in such a terrible state that a course of rehabilitative treatment can take many months. *See, e.g.,* Heather J. Clawson, Amy Salomon,

a key to success came when a shelter for teen mothers accepted to undergo training to transition into a TIP victim shelter. Thereafter, other shelters expanded services and funding for shelters began trickling into the country.

Lastly, a regional conference on the adoption of a Hemispheric Model Law would be the most ideal way to create a homogenized legal framework for the Americas. While immense political will would be needed to accomplish such a task successfully, a more practical approach could also make the case for such a law: regional resources to combat a regional phenomena are the most effective, not to mention, economically efficient way to tackle anti-trafficking efforts.

VI. CONCLUSION

Many authors have proposed the adoption of a Hemispheric Model Law. However, after a decade of work, the American continent sees a very disparate scenery of laws, many ineffective or underutilized, leaving victims of trafficking in persons vulnerable and unprotected.

Although the Protocol serves as a simple check list, local legislatures hide behind claims of protecting their “legal traditions” and refuse to make substantive changes to their laws. Many of these are based on fears that their countries will be overwhelmed by the needs of said victims’ rights to receive assistance. Resources must be devoted to develop and mainstream whatever capabilities each country has, in order to assist these victims, most of whom are their own nationals.

There are, however, many good examples throughout our continent, of people doing more with less. Organizations like the OAS, ILO and IOM can play key roles in assisting nations to learn about these best practices, so that they may be replicated elsewhere.

Lastly, in any hemispheric effort, whether training or the passage of legislation, victim prevention and assistance must take center stage. Beyond labor and criminal enforcement, provisions on victim prevention, victim immunity from prosecution, restitution, forfeiture of assets of traffickers, victim assistance, legal status for victims and, perhaps the most challenging, dealing with the demand aspect of the phenomena, are central elements of any successful TIP Law. The prosecution and education of people who act in furtherance of trafficking, *ergo* the consumers, must be accomplished, if any in-roads are to be made long-term in this issue.