

Human trafficking and legal culture

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Can we do justice in an unjust world? The obvious reply is that it is only because of injustice that we need to seek justice. But what about the way patterns of injustice can also condition the results of our interventions? My attempt here to say something useful about this difficult question will focus on the progress achieved so far by the Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons. Is the use of such Human Rights instruments in the fight against human trafficking a way of moving towards more global justice? Or is this another example of how many struggles against injustice are undone by continuing social, economic and political inequalities which, at best, this sort of approach is unable to tackle, and, at worst, actually help to reinforce?

The Palermo protocol was agreed to in 2000 as an amendment to the convention against transnational organised crime. Its aim was to safeguard the rights of victims of trafficking and see them as just as much victims of this criminal behaviour as are the citizens of countries or places to which they were trafficked.<sup>1</sup>In 2009 The Rome

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<sup>1</sup> The drafting of this Protocol was completed in Palermo December 2000. and has been signed so far by 117 countries. It commits ratifying states to prevent and combat trafficking in persons, protect and assist victims of trafficking and promote cooperation among states in order to meet those objectives. Articles 6-8 of the UN Protocol on Trafficking outline a comprehensive framework for the protection of victims of trafficking, which guides State Parties to provide for victims' physical, psychological and social recovery with appropriate housing, counselling and information regarding their legal rights, medical and material assistance, employment

office of the International Organization for Migration (IOM) convened a meeting to discuss what had been achieved by the protocol arguing that there was still a long way to go in terms of making its provisions effective. It was particularly concerned about what happens to a 'one -size-fits- all' type of international standard in different places. In the 'concept note', that was sent in advance to participants, the aim was said to be to 'elaborate recommendations on the applicability of the Palermo Protocol and other provisions directly related to trafficking in persons, to the diversity of national legal contexts and cultures' (Albano, 2009). It suggested that, in particular, differences in legal culture could provide some clues about how to overcome shortfalls in implementation and bring about more convergence and collaboration amongst the different countries and agencies involved in tackling the problem (or problems) of trafficking.

In this paper I argue that it is certainly helpful to learn more about legal culture as it applies to trafficking and anti- trafficking. But it is also essential to see how the issues involved go well beyond the illuminating power of any one concept. The first part of this paper offers a critical discussion of what is entailed by speaking of this problem as one of a shortfall of enforcement. The paper then go on to show that there are two competing narratives about this social problem and the way it is being responded to and explains why we need to learn more about the interests and values that condition the 'law in action'. In the last section I examine the potential relevance of the idea of the ' legal culture' for explaining the patterns of 'law in action' in

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and educational assistance and training, to ensure for the physical safety as well as privacy and confidentiality of victims, and to facilitate the possibility of obtaining compensation for damage suffered. In addition, the UN Protocol on Trafficking encourages States to consider adopting appropriate measures allowing victims of trafficking in persons to remain in their territory, either temporarily or permanently or to facilitate the safe and dignified repatriation of victims of trafficking should they desire to return to their place of origin.

different countries and different agencies. I conclude by showing how issues about legal culture must be contextualised in relation to the wider question of how far using human rights can produce global standards of justice.

## 1 Evaluating outcomes

The Palermo protocol is an example of an international agreement, reached after painstaking attempts to reach consensus that has been ratified by a very large number of countries. The protocol, as the whole convention against transnational crime of which it forms part, has been undeniably successful in gaining agreement on paper from countries in the North and South, from the First to the Third world, from demand, supply and transit countries. Many countries have passed their own domestic legislation related to human trafficking, even if not always exactly in the same terms. Places as different as Italy, Serbia or Norway have introduced 'reflection periods' for the trafficked person to consider his or her choices, and no longer linking the rights of trafficked victims solely to their willingness to give evidence against their captors. In the European human rights community efforts are being made to build on the protocol to reach even higher standards.

Nonetheless, many of those most closely involved with its implementation argue that it has not (yet) brought the results hoped for. It has, so far, only lead to relatively few cases being prosecuted- - and has not had a measurable effect on reducing the phenomenon it is supposed to deal with. Basically, there is a large shortfall in implementation and enforcement. According to the concept note, 'of the estimated 600,000 to 4 million trafficked persons, identified, assisted and protected<sup>1</sup>, on average only 6,000 perpetrators are successfully prosecuted every year ' (Albano, 2009). And many authors continue to put the numbers of trafficking victims even higher (see the introduction to Winterdyk and Reichel, 2010). What can explain these poor results?

There are a number of reasons why this question is harder to answer than might seem at first. As with all crimes, the numbers apprehended will be a function of the amount of enforcement effort put in - the number of those prosecuted never matches the actual number of victims. To explain how this happens in different places involves making sense of cross-cultural differences in criminal justice which can be very difficult (Nelken, 2000, 2010). Even when it comes to much more straightforward ordinary domestic street crimes such as burglary there is an enormous gulf between the estimated number of offences committed (as calculated for example on the basis of responses to a victimisation survey), and the actual numbers of offenders apprehended, prosecuted and sanctioned. In burglary the same offender may be responsible for many offences. But if the stereotype of transnational organised criminal groups controlling large flows of people is taken at face value, then we would also expect to find that there would be an especially high ratio of victims to criminals in these kinds of cases.

It is true of course that unlike a crime such as burglary, the victims of human trafficking usually do know who is exploiting them (or at least the middlemen or women whom they are in contact with). But, on the other hand, there are a number of special features of this crime to bear in mind. Victims may be physically or psychologically prevented from coming forward- this is indeed part of what is involved in this crime. They may be terrified, not only about what could happen to them, but also what could be done to their families back home. They often do not speak the language or know the local laws - or - on occasion even exactly where they are. Sometime they may suffer from the so-called 'Stockholm syndrome' in which captives identify with their captors. Given that they are illegal immigrants, victims will often be frightened of the police, and it is often rational for them to think that the police will not always have their interests at heart. They may have mixed feelings

about their situation or its possible improvement- and may consider it preferable to being sent home.<sup>2</sup>

Despite the existence of a large literature on trafficking we still lack basic knowledge of the gender, age, or backgrounds of potential and actual victims. Some agencies claim that it is not only poverty that places people at risk of being trafficked. It is certainly true that economic migrants are not necessarily those with least resources. But it seems reasonable to assume that trafficking victims are usually going to be those who are most vulnerable- especially as official attention is overwhelmingly given to those subject to sexual trafficking as compared to other kinds of exploitation. We also need to learn more about when numbers trafficked go up or down -and how and when trafficking routes shift -and how far this may be a result of economic and political changes or a response to counter-trafficking efforts.

Likewise, we have only a rough idea about the numbers in any one country compared to others, know less than we should about how cases are dealt with in different places and have few systematic studies of the results of such efforts. What determines changes in patterns of legal violation is probably more tied to changes in conditions of demand and supply than to the actions of law enforcement. Even in dealing with illegal drugs, where there is a much longer history of law enforcement, best estimates

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<sup>2</sup> My wife used to be a penal judge in Italy. She is normally very discrete in speaking about her court work. But one day she came home with quite a shocked look after dealing with a case of trafficking. It involved a Chinese worker, kept in a basement with no air, out of sight, and working an extravagant number of hours. Interrogating the victim to gain evidence against his employers she asked him questions such as what it was like, day by day, to live in those conditions, and he described what seemed like an impossible way of life. After hearing these horrors, she asked him: "How do you put up with it? How could you survive in those conditions?" But he replied: "It is still better than living in China".

are that no more than 10% of the supply is interrupted by the police and customs. So, in addition to criminal law, other levers of social and economic policy must also play a role in responding to trafficking so as to find ways to bring into alignment the different interests of supply, demand and transit countries.

What this means is that, despite the efforts to produce better 'indexes' of trafficking (Kangaspunta, 2010), no one really has a clear idea of how many potential cases there could be (and there can be ambiguity in the way the question of 'shortfall' is posed- as when the IOM speaks of those 'identified' 'assisted' and 'protected' as if these were necessarily the same). The main inter-governmental agencies that deal with this problem now generally try to avoid offering firm figures - though this does not stop others from doing so<sup>3</sup>. It is not just the considerable uncertainty in the estimate in the number of cases trafficked- even the lowest of the estimates would represent a massive quota of human misery. The problem rather is that there is no more definite evidence of the lower figure of 600,000 than of the larger figure of 4,000,000. In 2006, we are told by the United Nations, (only) 21, 400 victims were actually identified among the 111 countries who made reports, though 73 countries saw at least one conviction. A core of 47 countries reported making at least 10 convictions per year, with 15 making at least five times this number (UN, 2009). In these terms, 6000 actually sounds like a good number of prosecutions in relation to the number of victims identified. But then the new question becomes why are so few victims ever identified?

The fundamental problem here is how to identify what is meant by a trafficked person in the absence of official certification of this fact. Whose definitions count-

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<sup>3</sup> As seen for example in the following statement ' There are no official figures but the International Office for Migration (IOM) estimates there are 70,000 women living in Italy after being trafficked for sexual exploitation. And some local rights groups believe as many as half of them are Nigerian.' (JENDA, 2006)

and whose should count? Certainly, the low numbers of such cases could just reflect the difficulty in getting this crime into the open and the fact that most countries have not yet geared up to applying this protocol. And this is not the only type of crime where the low number of people apprehended may tell us little about the size of the problem. Consider violence against women- a crime that in fact overlaps with human trafficking, or the slowly emerging contours of so- called hate crime. The same is true for the relatively few people successfully prosecuted for crimes against humanity or genocide. Some leading criminologists argue that in these cases health and human rights organizations seriously underestimate the number of victims (Hagan and Wyland - Richmond, 2008).

One response to this difficulty is to seek to sensitise police and other enforcement agencies to the possibility that they are failing to notice victims of trafficking. In the USA those police forces that actually look for these sort of cases - and know what to look for- are much more likely to find them (Farell, McDevitt, and Fahy, 2010). Nonetheless, the record also shows that even where enforcement efforts have deliberately been stepped up the results are curiously disappointing. Again and again efforts to find trafficking victims in demand countries such as the USA, UK, Canada, the Netherlands or Ireland, have produced much lower numbers than expected (not to mention the way media claims that the 2006 world cup in Germany would attract forty thousand sex slaves to service the spectators, turned out to have no foundation). In the USA there were only 1362 official cases in the period from 2000-2007. Researchers trying to gather a useful sample of cases, frustrated by the lack of official cases, soemtimes fall back on counting cases of prostitutes treated very badly (Winterdyck and Reichel, 2010). Or they may claim that the low number of victims can be explained as police and even judges persisting on treating cases that could fit the definition of trafficking as cases of smuggling or prostitution *tout court* (Winterdyck and Reichel, 2010). On the other hand, what are called trafficking cases

can, in practice, often overlap with prosecutions of sex workers, pimps, brothel keepers, landlords- or even clients.

Some journalists who write about supply countries provide qualitative evidence that suggests that a large number of women are at risk of trafficking. But, according to these same authors, in these places even a high number of cases processed by police and courts can offer an unreliable measure of legally defined trafficking cases. In Moldova, for example, rather than tackle high- level collusion between officials and traffickers, police prefer to rack up large numbers of questionable cases in a bureaucratic way<sup>4</sup> so as to make up the statistics needed to justify the large disbursements for anti -trafficking received from the USA (Finnegan, 2008). Reports of the actual numbers of trafficking cases discovered by given countries are easy to 'manage' and massage politically in one direction or the other- whether the aim is to gain credit for combating the traffic or to avoid stigma by denying that the problem exists.

Is it safe to assume that trafficking is always run by organised criminals? We are repeatedly told in the literature that the gains from this commerce in human beings are third only to that from the arms and drugs trades. But we are as short of systematic information about types of offenders as about victims. Most of the discussion of human trafficking available is about trafficking for sexual purposes. But there are likely to be important differences between trafficking for sex, for work or for other purposes. The organisation of trafficking can also vary from place to place. Louise Shelly, for example, suggests that there are at least three models of trafficking, ranging from what she calls-'the primitive collection of raw materials locally', the 'natural resource model ' that produces short term profits through sending

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<sup>4</sup>Finnegan suggests that this reveals the 'formalistic' type of compliance that organisations learned in Communist times (which is another example of the relevance of legal culture).



on victims to intermediaries, to the 'trade and development model', based on continuing relationships with villagers who share in the profits (Shelly, 2008). Such differences, insofar as they are stable, could offer important clues for counter-trafficking by throwing light on the different ways that victims get trapped and are unable to break away.

The official characterisation of organised crime groups often tells us more about political and law-enforcement stereotypes than it does about the fluid and changing nature of the groups and networks involved. It is especially relevant that the smuggling of human beings -the much larger activity of which human trafficking forms a segment- usually involves specialised intermediaries rather than organised crime syndicates (Pastore, Monzini, and Sciortino, 2006). Even older-type slavery relied heavily on local middle men, small family firms and migrant runners. In the past some of the effort to defeat slavery was misdirected because this point was missed. There is even some danger that massive enforcement effort against trafficking could have the unintended result of increasing the size and sophistication of the professional groups involved so as to allow them to match or corrupt the forces aiming to control them. On the other hand, those powerful organisations who are involved, are able to change their *modus operandi* in a way that makes it very hard to prosecute according to the definition of trafficking- as in the recent use of so called -'happy trafficking' where they send previously trafficked persons back home to recruit new ones.

We also need to ask why and how prosecution numbers matter. Are they to be seen as a sign of taking victim protection seriously or can they also be an alternative to doing that. The expressed goals of the protocol are to protect and prevent, not only to prosecute. Prevention can and does require different activities to that of prosecution (including education, information campaigns, building institutional capacity, and raising public awareness). Rescue missions set out to save people from captivity.

Agencies produce booklets with pictures of 'at risk' young women in Nigeria being taught sewing in schools supported under anti- trafficking initiatives. These need to be evaluated in other ways than by looking at the numbers of offenders prosecuted<sup>5</sup>. In the American legal journals there is also much discussion of how to give victims of trafficking rights to compensation. These responses can sometimes mean investing less in prosecution. Other ways of dealing with the problem are still more controversial. Is the number of immigrants repatriated a fair criterion to be used to measure the effectiveness of the protocol?

Over and above the prosecution of those criminals involved in trafficking we also need to take into account the role of meta- sanctions- or sanctions about sanctions- used against States themselves. Measuring compliance or lack of compliance with such agreed standards is increasingly important as part of the processes of what has been called 'signalling conformity' (Nelken, 2006b); the stakes being continuing participation in trade and political networks. At the extreme, States may actually be

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<sup>5</sup> The concept note ' (Albano, 2009) rightly speaks of a variety of factors that help to explain the 'low levels of protection and prosecution'. 'These reasons' it says ' include, primarily, the lack of conceptual clarity, the relative “newness” of the Protocol, the disproportionate focus on combating irregular migration and on the irregular status of the victims rather than on the violation of their human rights; as well as the disproportionate focus on source countries and supply of potential migrants rather than on destination countries and the demand of low skilled migrant manpower.' It points out that ' while Prosecution refers openly to criminal law tools, Protection and Prevention explicitly employ the language of human rights, recalling some core challenges related to international migration management, human and social development, migrant workers' mobility and the protection of their rights. The overlooking of the human rights dimension in trafficking seems to have resulted in a distorted perception of the phenomenon and, consequently, an often limited process of implementation and application of the Protocol's provisions. '

in collusion with the criminals (Cirineo and Studnicka, 2010). But the usual aim of international agreements (as with other examples of 'global prescriptions ') is to put pressure on States to do more about prosecution and to bring regulatory bodies into existence or improve the functioning of those that exist. Sometimes one or more self-selected countries will take the lead in promoting compliance (subject to its own political agendas). The most obvious example here being the USA. Although itself hesitant about joining many international agreements on penal law, it is at the forefront of dealing with human trafficking and monitors compliance by other States by placing them in a three (or four) tier classification that has consequences for its foreign aid budgets and the tax levels it applies to foreign imports or investments.<sup>6</sup> Once again we face the vexed question of 'who guards the guardians'?

In sum, measuring the effects of human rights initiatives is a complex matter about which we still have too little experience. What are compliance indicators (good) for? Which outcomes matter? How do they matter? To whom do and should they matter? Measuring outcomes cannot just be reduced to number of prosecutions- it concerns much larger issues of 'good governance'<sup>7</sup>. It is difficult to evaluate prosecution numbers without also considering these alternative interventions. Low numbers prosecuted can mean failure to take action, or that the jurisdiction in question is taking a different approach to the problem. Thus they can be a sign of weak or of relatively successful efforts at prevention. And the meaning of these numbers

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<sup>6</sup> Israel is an example of a country that felt obliged to improve its performance after being classified as unsatisfactory in this way.

<sup>7</sup>Rosga and Satterthwaite (2008) argue that 'Rather than trusting in numbers' alone, those using human rights compliance indicators should embrace the opportunities presented by this new project, finding ways to utilize human rights indicators as a tool of global governance that allow the *governed* to form strategic political alliances with global bodies in the task of holding their governors to account.'

changes depending on the wider frame we are using. For example, those making the most use of the Palermo protocol are not necessarily those most successful at dealing with challenges of immigration. Arguably, those investing more in well organised inclusionary policies for immigrants will have less need and less inclination to provide what may seem to them a haphazard way of integrating immigrants (Solivetti, 2010).

## 2. De-constructing the problem of trafficking

All this suggests - or should suggest - that there are limits to the value of answers that can be provided by so called 'administrative criminology', the sort that takes a given definition of crime for granted and restricts itself to considering the operational difficulties of bringing it to book. In fact, many of those who are trying to deal with this multi- faceted phenomenon are the first to recognize that the 'problem' cannot be 'solved' when posed in these terms. We need rather to consider trafficking as an example of the making of a 'social problem' (Rubington and Weinberg, 1981; Spector and Kitsuse, 2001; Nelken, 2007b). The posited relationship between trafficking and transnational crime has as much if not more to do with national and international responses to the challenges of globalisation as it has to do with concerns for the human victims of this trade. The campaign against trafficking stands at the intersection of a number of controversial issues: the loss of sovereignty of the national State and the shift of power to higher and lower levels; the rise of the threat of transnational organized crime, the regulation of immigration and informal labour, the fight against violence and discrimination against women, the control of prostitution and sex- work., the patrolling of State boundaries and sharpening of the line between citizens and mere 'denizens' (Westmorland, 2010). In the broadest view the proscription of human trafficking can be seen as an aspect of changing boundaries (whether political, geographical or moral) and the struggle over such boundaries .

Without denying that a variety of extremely serious harms are committed by organised and other crime groups it is important to note that the opportunities that they exploit are often created or exacerbated by prohibition itself. In our case this is seen in the way globalisation promotes the free circulation of goods but not people. As long as this continues, criminals will continue to package people as goods. The desire to immigrate -even illegally- is stimulated by a situation of global 'anomie' in which increasing numbers of people are included culturally in messages of the good life but excluded socially from the possibility of fully enjoying it. The fight against transnational criminals is also not as straightforward as it is made to seem. After the fall of the iron curtain, such criminals took over the place previously occupied by communism as the pre-eminent global threat<sup>8</sup>. They offered a 'suitable enemy' for the reinforcement of State power -the construction of political alliances and larger units such as the European Union, as well as USA -led initiatives. Trafficking may be seen as just one illustration of the 'moral panic' (Cohen, 2004) connected to their activities - and it is interesting that the collapse of communism quickly led to concern about the arrival of prostitutes from former eastern bloc countries. The panic here also draws on a more long standing worries about the 'white slave trade'.

Too often scholars or activists concentrate on their 'own' crime issue to the exclusion of others. The fight against trafficking can also be usefully compared to that being waged against other forms of transnational organised crime, especially as it may be the same organised crime groups engaging in more than one of these activities. There are, in fact, surprisingly similar debates about the extent or characteristics of a variety of other transnational crimes (including those that overlap with trafficking). In the case of the supply and use of drugs, there are issues over how much the problem could be reduced by legalisation. Likewise, as regards to prostitution, there is a sophisticated body of literature about policy choices between prohibition, legalisation

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<sup>8</sup> Their place as the major threat is now shared with fundamentalist Islamic terrorism and the more diffuse dangers to the environment.

or regulation. When it comes to the trade in human body parts there is extensive debate about whether the crime in question really exists - or at least whether its prevalence is anything like what is claimed. Beneath the rhetoric of the war against crime there is often some level of collusion. Governments fight arms trafficking - except of course where they are themselves involved, directly or indirectly. The same applies to irregular immigration. Apart from the difficulties and costs of actually paying the real costs of expulsion, in many countries there is, at some level, an acceptance of the inevitability and even the utility of illegal immigration. Not only do such immigrants take on jobs which the locals no longer wish to do - the low wages they are paid has the function of depressing the pay of other workers- including regular immigrants (Calavita, 2005).

When it comes to explaining the struggle against transnational crime it often seems that we have to choose between two opposing narratives. One stresses the noble fight of the State, intergovernmental and nongovernmental agencies and others to defeat dangerous criminals and extend the scope and reach of human rights (Naim, 2005). The other points to the way those seeking to block illegal flows in fact often exploit the problems of given victims for their own interests (Nordstrom, 2007; Van Schindel and Abraham, 2005). The first repeats obsessively that criminal justice is territorial whereas organized crime is not confined by national boundaries and that therefore international 'collaboration' is the only solution. The alternative view insists that this claim often exaggerates the degree of coordination between organized crime groups and, conversely underplays the way 'governing through international crime' in fact serves as a way of maintaining order at national and local levels (Nelken, 1997b). For this approach, efforts to overcome organised crime can have effects on human rights that are in some ways as serious as those threatened by the criminals themselves.

The literature dealing specifically with human trafficking reproduces such contrasting narratives. The first story, told by those who created the Palermo protocol and who

belong to organisations that seek to have it implemented, describes how vulnerable people are forced or deceived (for example by being made to incur debts) into situations where they can be exploited. For them - and for most mainstream commentators - human trafficking is a terrible evil, a new form of slavery, part of the dark side of globalization. In fighting against it, we are contributing to a new emergent form of global solidarity. As the Durkheimian school of sociology would put it, economic interests alone cannot guarantee continuing social relations in conditions of uncertainty. If economic links and exchanges are now global, there must be a 'moral' basis that makes this worldwide interdependence possible and which it furthers (Durkheim, 1893/2008). Nation-states are not only responding to the challenge to the authority posed by transnational criminal enterprises. By helping victims of human trafficking -and also the victims of sex tourism abroad- they are increasingly extending protections to non- nationals. The fight for the human rights of trafficking victims is thus one part of a larger battle for human rights in general (Findlay, 2008).

But it is also possible to tell another story. Going back again to Durkheim, we can equally use his study of modern solidarity to argue that global 'coerced' division of labour' can never produce solidarity- and that the fight against human trafficking does little to produce a fairer global distribution of life chances. The fight against trafficking can be seen as a form of legitimization (the exception proving the rule) within the general tightening up border controls by developed countries - both in "fortress Europe" and elsewhere. The goal of law enforcement, especially in economically advanced countries, is overwhelmingly focused on ending illegal migration. Or else the issue is one of controlling sex workers so as to reduce prostitution (Augustin, 2007). In general, governments rarely send the police out looking for human rights' violations. Even though the crossing of national borders is not an essential part of the definition of exploitation little is done to tackle internal

trafficking inside poorer countries, especially if prostitutes are working from apartments and not on the streets.

Some authors even go as far as saying that politicians themselves should be seen as trafficking the women involved-or at least competing with criminals to make something of them for their own reasons. It is they after all - and not the organised criminals -who instruct the police to take them back to the places to which they usually do not wish to return, and from which they have often tried to get away (Davies and Davies, 2008).<sup>9</sup> Against the background of a politics shaped by 'border panic' and xeno- racism, trying to save some people who are particularly badly treated does nothing to stop the mass of irregular illegal immigrants from continuing to be treated as a threat- even if *de facto* both prostitutes and irregular immigrants continue to supply essential services.

Such overdrawn contrasts have practical implications for the law in action. The legal definitions of the protocol are framed in ways that do not easily fit the fuzzy situation on the ground, as in the artificial line drawn between those who choose to be smuggled and those who are trafficked against their will. Even those being smuggled can in fact also be exploited- women in particular stand a high risk of being raped at some point on their journey. Amongst those who are trafficked, on the other hand, it may be the women themselves, rather than their captors, who patrol compliance. The

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<sup>9</sup> 'In summary, trafficked women in the EEA have proved a useful boon to various political actors. The heady mix of sexual violence, erotic foreigners, and organised crime have offered the ready means by which to introduce legislation and programmes throughout Europe that conveniently serve various political agendas regarding irregular migration and paid sex. It is time that such uses of trafficked women are more openly acknowledged and appreciated by such political actors and that the role of political traffickers in sustaining trafficking is better researched' (Davies and Davies, 2008).



reluctance of such women to be 'saved' may be explained not only by their fears for themselves or their families back home, but also because returning to their countries of origin is seen by them and others as failure. In some circumstances they may even be able to make something useful out of the most difficult of situations, as where they are able to find clients to marry them (Davies 2009a, 2009b).

Because reliable information is lacking each of the competing narratives is able to produce or highlight different facts about trafficking - or at least offer different interpretation of the same facts. It could almost be said that the narratives produce the facts rather than vice versa. For those who are convinced that there is an enormous 'dark figure' of undetected human trafficking cases, the lack of evidence for this only shows that there has been insufficient effort at enforcement. Thus the finding that in Italy 'only 999 of these permits were granted to Nigerian women between 1998 and 2004' ( JENDA, 2006) becomes proof of the need to do more and better rather than indication of the true scale of the problem. By contrast, for those who are sceptical about the size of the problem, the discrepancy between alleged cases and actual cases discovered by the police is taken as clear proof that the problem has been blown up out of proportion by those with given political and moral agendas and interests (see e.g. Guardian /Nick Davies, 2009).<sup>10</sup>

On internet sites, campaigning groups try to disabuse people of 'myths' about trafficking. They spell out reasons why victims of trafficking are so often 'invisible', and why they are unable to escape from their captors. For their opponents the myths that need to be exposed are the claims that it is easy to hold on to 'sex slaves' against

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<sup>10</sup> In the UK a major debate followed the very few cases of sex trafficking uncovered in the politically driven police *Operation Pentameter*, which involved hundreds of raids on sex workers over a six month period. Those involved in the discussion did not take into account Munro's findings that the police tend to use a strict definition of trafficking which insists on proof of lack of consent (Munro, 2005, 2006).

their will without being discovered, or that those who are trafficked have no idea of what they will be asked to do. The scholars who are convinced that the problem is a serious and extensive one refer extensively to reports compiled by those seeking to defeat trafficking or to help victims. But, because victims themselves tend to be elusive, their interviews are mainly with officials, and those victims they do manage to talk to are usually people whose current protection depends on them confirming the official story of how trafficking takes place. Writers who question the official story, on the other hand, usually rely for their competing evidence on ethnographic investigations with small groups of prostitutes or workers who may or may not be representative of the many different kinds of situations and contexts covered by the phenomenon.

Different ways of responding to trafficking thus help constitute 'the problem'. While we may be looking for facts to help us explain the causes of alleged under-enforcement it is the politics of enforcement that shapes the 'facts' available to us. Intergovernmental agencies such as the International Labour Organisation propose their own criteria for deciding whether or not a case counts as one of trafficking (ILO, 2009). But other agencies implement the convention according to their own ideas of how trafficking takes place. For example, some police in the UK are sceptical about many traffickers' stories because they believe that it is the *passeurs* themselves who tell those that they smuggle in illegally to say if they are caught that they have been trafficked against their will. Whether or not there is substance to it, this belief itself then affects how many cases they treat as 'real' trafficking. On the other hand, the difficulty of credibly counting cases of trafficking does not stop the USA from evaluating countries in terms of their commitment to this struggle. But even where the facts are agreed, there is still room for debate on the merits. Imagine that a country uncovers 52 trafficking cases a year. Is this a large enough number to justify the investment that such a law enforcement effort requires at the expense of other priorities?

Understanding the contexts in which stories are produced and the purposes and publics for which they are tailored can tell us a great deal about which matters are emphasised and why (Nelken, 2003) Those charged with enforcing the law or implementing the protocol are obliged to assume that there is a problem and explain under-enforcement in terms of practical difficulties such as the limits of the legal and other instruments available or the shortage of resources, especially, but not only, in poorer countries. It will not 'pay' such agencies to admit to certain types of complications; those who have to live with given political constraints know better than to protest too loudly about them. On the other hand, in other contexts, as long as this does not threaten their specialised remit, the same social actors can be very radical in emphasising the part played by political and economic interests in shaping the problem. The International Labour Organisation, for example, forthrightly indicts the way globalisation has brought trade barriers down but made migration more difficult. As long as demand rests high for unreasonably cheap products, labour costs and services, it argues, there will be exploitation of unprotected, informal and often illegal labour and violations of the rights of migrant workers (ILO, 2009).

Many of those actually involved in fighting the problem of trafficking agree in principle with much of the second narrative about the relevance of the larger background of social, economic and political inequality. Some organisations involved in responding to trafficking are so little convinced by the 'official' assumption of a sharp contrast between legal and illegal immigration that they put the term 'criminal' in brackets when speaking of illegal migration (Albano, 2009)<sup>11</sup> - though,

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<sup>11</sup> '(T)he Palermo Trafficking and Smuggling Protocols are framed by the central dichotomy of coerced and consensual irregular migration. People who are trafficked are assumed not to have given their consent and are considered to be "victims or "survivors," whereas people who are smuggled are considered to have willingly engaged in a "criminal" enterprise; although both Protocols stipulate that the

interestingly, this is not done for the term 'trafficking' itself. In the same way, Italian judges specialised in drafting anti-trafficking law treat the problem very seriously. But they warn against the tendency to assume that it is always possible to protect 'perfect victims' (Giammarinaro, 2007)<sup>1</sup> and emphasise that applying this or any law is not enough by itself. For them a 'cultural revolution' is needed by which migrants are to be seen as human beings in need - not as offenders to be pursued as criminals. But these agencies argue that all change has to start somewhere and see their efforts to stop trafficking as a contribution to the larger effort to create a just world. Their opponents, on the other hand, point to the dangers that result from anti-trafficking itself.

The existence of competing claims about the 'problem' form an essential part of what it means to say that trafficking is a 'social problem'. The same applies to any proposed 'solution', since this too obviously depends on the definition of 'the problem'. What priority should be given to education, prevention, protection or prosecution? Is the proposal to create a new form of temporary work permit so as to facilitate circular migration opportunities part of the solution or part of the problem? Explaining alleged lack of 'success' must therefore go beyond the discussion of why the protocol is not yet fully implemented. Talking about success begs the question about what is meant by this. Success for whom? Who does or should decide? What one group will see as a loophole that enforcers need to close, others will see as a necessary limit beyond which it would be improper to proceed (Nelken, 1981). Improving the outcome of the Palermo protocol should not be treated as merely a technical question of social engineering because this means that we lose sight of the issue of who stands to benefit or lose from any given intervention.

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migrants themselves should not be subject to criminal prosecution on grounds of their irregular entry' (Albano, 2009).

Given that international agreements typically have to paper over differences between those promoting action (Merry, 2006) debates over the 'real meaning' of such agreements are likely to be frequent and ongoing. A large number of groups (with sometimes surprising alliances) have been involved in debating the problem of trafficking - and all of these need to be considered in trying to explain the difficulty of finding and implementing solutions. These include the different State signatories, politicians, civil servants, courts and law enforcers, social workers, women's rights groups, on one side or other of the debate over paid sex work, religious pressure groups, and religious or other charities, the media, and different sectors of the sex industry. Because the agencies involved in dealing with the problem of trafficking each have their own remits we need to ask who is constructing this problem, when, why and how? We also need to distinguish the different local, national and supernational levels where the construction of globalised problems takes place, as well as the different factors relevant in each local context. Many of those concerned with migration and labour rights, for example, complain that the approach usually taken to applying the protocol puts disproportionate focus on source countries and the supply of potential migrants, rather than admitting the strong demand for low skilled manpower in destination countries and the need to raise the standards of work conditions for these workers. Those concerned with women's rights can have different agendas. In the process of framing the protocol, as has been well documented, the CATW and GAATW women's groups had sharp differences (Warren, 2007). The first argued that all prostitution is violence (the so called 'structural' viewpoint), the rival group insisted on rights of sex workers needing to be kept separate from coerced sex (the so -called 'agency' view).

Attempts to apply the protocol also come up against competing national interests, for example amongst - and betwixt- demand, transit and supply States. If poor 'supply' countries have an (inconfessable) interest in the remittances sent home by even

illegal migrants, 'demand' countries may not be willing to accept that they have an interest in having women available for commercial sex or domestic service, foreign children readily available for adoption, or irregular immigrants to use as cheap labour. The pressure of such interests are particularly important in extreme situations, as when supply States undergoing a demographic surge of young people, or the dangers, misery and unemployment of a conflict or immediately post-conflict situation. But, even in more economically stable countries, it is often the clash of interests that helps provides the key to enforcement outcomes. The struggle against trafficking of seasonal workers in Turkey was interrupted when the government realised that this could compromise the functioning of its tourism industry. In Lebanon it was the Catholic Church which insisted that clubs change the dancers every six months for fear that parishioners might otherwise form liaisons with them<sup>12</sup>. On the other hand, the interests involved are not always easy to perceive, even for those involved. Irregular immigrants may help keep wages down-but also stimulate a political backlash. It is easy for outsiders to say that those who are trafficked are being exploited. But some victims may hold to the hope of one day themselves becoming employers, having their own shop, or a group of prostitutes to control.

What I have described as the differences between two narratives concerning the problem of trafficking will not easily be bridged. But there may be some possibility of finding common ground. Strengthening human rights may sometimes be a poor substitute for economic and political change. In an unjust world, however, harsh choices may sometime have to be made which require leaving on one side the larger issue of existing inequalities in order to tackle extreme cases of exploitation. At the same time it is important to recognise that law and policy responses that are geared to dealing with extreme cases of trafficking may not be well suited to handling the

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<sup>12</sup> Personal communication from professor Cindy Smith, an American researcher into trafficking.

more common and ambiguous types of cases. We should resist the temptation to achieve our aims by creating the illusion of clearer moral boundaries than actually exist.

### 3. Legal culture and the implementation of the Palermo protocol

It is important to emphasise the economic, political and ideological interests that have shaped, and continue to shape, the problem of human trafficking<sup>13</sup>. But we must also seek to show how far such pressures actually influence what goes on in the bureaucratic, administrative and legal spheres where the Palermo protocol is (or is not) applied. Paying more attention to differences in legal culture (Nelken, 1997)<sup>14</sup> may help us achieve this.

From one point of view such differences represent an obstacle to be overcome through harmonization and cooperation. One of the aims of the protocol was to bring about greater convergence of legal definitions on trafficking so as to harmonise its implementation in different jurisdictions<sup>15</sup>. Professionals with experience in advising in this field explain how to overcome the practical difficulties in realizing an

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<sup>13</sup> See, for example, the attempt to capture different outcomes in Holland and Sweden by treating them as illustrations of two opposing feminist stances towards trafficking (see Halley et. al. 2007.)

<sup>14</sup> For a discussion of why this term is to be preferred to others such as legal system, legal tradition, legal mentalities or legal ideology see Nelken, 2006a.

<sup>15</sup> Agreeing to standards such as those embodied in the protocol is itself intended to bring about more similarities, necessary to stop offenders ' taking advantage of differences between jurisdictions. On the other hand, it can be argued that implementation actually needs to be different if contexts and challenges are different. And there may be value in seeking to safeguard political legal and cultural diversity- this is indeed often the purported aim of other international legal conventions.

effective, internationally coordinated response (Gallagher and Holmes, 2008). No country, they say, can yet lay claim to genuine, extensive experience in dealing with trafficking as a criminal phenomenon. Most States are developing and adapting their criminal justice responses on the run, often under strong political pressure, and principally through trial and error. While communication between national criminal justice agencies on this issue is improving, they say, there is still very little cooperation or cross-fertilization of ideas across national borders. They go on to offer general advice on best practice - which is purportedly valid cross -culturally- about how to have an effective criminal justice response.

Arguably, however we first must understand the specificities of legal cultures before we can overcome them- especially as these differences also affect the way supposedly cross- cultural recommendations are actually interpreted and followed. Researchers regularly (re) discover that countries make use of international agreements according to national understandings, in local ways and, often, for predominately local rather than collaborative purposes. Munro for example, tells us, that police in New South Wales searching for trafficking victims take the opportunity to increase their surveillance of legally recognized sex workers while, in Germany, local administrators continue to work with 'folk knowledge' and resist 'professional ' definitions of the trafficking problem (Munro, 2005, 2006).

Trying to grasp ' local knowledge' is not just something that may pique the curiosity of the scholarly observer. It also forms part of the everyday task of agencies, police, prosecutors, social workers or others who have to predict what others will do and explain their own practices to them as they seek to cooperate with other jurisdictions (Ross, 2004, 2007). Anyone working as part of a State administration or non-State organisation who has sought to collaborate with another jurisdiction knows that what actually happens can vary from locality to locality, and even from time to time. One issue will not necessarily be handled the same way as another apparently similar one,



the same matter will be treated differently in one or other legal role and by one person compared to another. 'Informal organization' rarely corresponds exactly to that prescribed by official rules and roles. In our case this is all the more important because the Palermo protocol allowed for considerable discretion in defining key terms like 'consent' or 'exploitation'.

The use made of such discretion is well evidenced by empirical research on law in action in different jurisdictions. At the outset, for example, Australia was the most restrictive of signatories as far as allowing irregular immigrants to stay on in the country (they attached an explicit get out clause to the protocol by which it insisted that it should lead to any increase in immigration). Italy in time, has become one of the less restrictive. The Netherlands lies in between; victims of trafficking there are allowed temporary residence but expected to cooperate with law enforcement (Munro, 2005, 2006). On the other hand, whatever the formal rules say, what the police actually do in their law enforcement role may be surprisingly similar across jurisdictions. Munro tells us that it is not only in the UK that the police require proof of (rather than the presumption of ) non- consent, Even in Italy, where the anti-trafficking rules also stipulate an exclusive emphasis on exploitation, there remains amongst officials an underlying reluctance to abandon reliance on consent altogether. Thus, one senior police officer in Rome she interviewed talked persistently about the need to discover the 'very trafficked victims', as opposed to those who, despite having been exploited, were acting with some degree of agency. He explained that you have to prove that you are trafficked—people coming in involuntarily and doing prostitution involuntarily, unwillingly, you are forced, you are under threat. (Munro, 2006)

Law in action is a complex combination of local differences in governing principles, rules and procedures of the 'law in books' as well as the patterns that actually exist in the way such differences are instantiated in, used as justifications and alibis, or 'got

round', in the 'working rules' of everyday practice. But it is also an aspect of legal culture more generally. (Nelken, 2004) We need to examine the relationship between different approaches to immigration (see e.g. Favell 1998), styles of migration controls and ways of implementing anti -trafficking? Why is it that demand countries that are most open to licensing and taxing prostitution such as Netherlands and Germany seem to be those least keen on helping trafficked victims to stay on in the country? In what way is the 'success' that has been achieved by Sweden's attack on the demand for prostitution related to its approach to the Palermo protocol? How are we to explain Italy's relative success in protecting trafficking victims? How far can and will the Italian model be copied in other places?

For those interested in using legal culture as an explanation it can be helpful to distinguish between 'internal' and 'external' legal culture- especially where the question concerns the relationship between law and social change (Friedman, 1997) . 'Internal legal culture' refers to the ideas and behaviour of those within the law such as policemen, lawyers, or judges. 'External legal culture', on the other hand, points to the pressures brought to bear on law from wider society, and includes what ordinary people expect of the law and whether or not they trust legal institutions. Differences in external legal culture, for example in the willingness to trust the police, clearly play an important role in explaining whether those trafficked call on help from legal institutions even in the country of arrival.

The term legal culture can point to a number of other contrasts that need to be considered if we are to understand differences in the enforcement of the protocol. It can be useful to know that in some places it is the police themselves who make policy and act as spokesman regarding the handing of transnational crime problems whereas elsewhere this is left rather to prosecutors, judges- or politicians. When it comes to interpreting the meaning of legal culture it can be important to note that 'enforcement' is not an easily translatable local term in all languages. The same cultural variability

applies to almost all the words mobilised explicitly or implicitly when writing about human trafficking, such as rights, security, victims, exploitation, consent, organised crime - or any other word in the Esperanto of international law and human rights organisations

In general, where State law is not well entrenched it may be common to sign on to international agreements whilst not doing much to implement them. But legal culture also characterises the details of enforcement and non-enforcement. Take for example Moldova - one of the poorest countries in Europe and highly dependent on US aid. Here difficulties in dealing with organised criminals are, in part, the result of absence of specific legislation to deal with these kinds of criminals and an approach to criminal procedure that include resistance to the use of informants and a reluctance to allow plea bargaining, seen as unethical behaviour. At the same time, however, it seems that policemen are often in league with traffickers, cases that are brought against offenders go on for years, judges are said to be often unsympathetic to such cases and traffickers, at worst, are given short prison sentences. Even important officials dealing with trafficking, given prizes for their work, may turn out to be in collusion with traffickers, and there is little internal pressure to bring such officials to book (Finnegan, 2008).

This said, the term legal culture does not offer any 'quick fix' by pointing us to the crucial intervening variable that will inevitably explain shortfalls of enforcement. Sometimes culture is no more than a name for what itself needs to be explained by other features of the social context in which such patterns of legally related attitudes behaviour are found (Nelken, 2004, 2005, 2007). If we are trying to use the term to explain what happens in a given country, agency or institution, we have to be careful not to say that they must act as they do because of their legal culture - and still more not to assume that they must continue to act in that way for the foreseeable future. As

with the term culture itself this can otherwise lead to a tautology of the sort that goes 'why do the Japanese (police) do what they do? Because they are Japanese!'

As anthropologists have increasingly insisted, culture is not determining, unitary or unchanging, nor do cultures have hermetic boundaries. Cultures are rarely as coherent as they claim to be. To some extent at least, social actors have a choice in how they draw on their culture(s) so we need to be cautious when we - or they- invoke culture - or legal culture -to explain or justify the action taken. Culture changes over time and sometimes change is actively sought. The making of laws, as well as the activity of policy makers, presupposes that social practices are not fixed. So called 'legal transplants' - involving processes of borrowing, imitation or imposition - have always played a large part in the development of legal systems. With globalisation, pressures to convergence and other transnational trends can more easily blur the differences between places. The question must always be why, and by whom, given patterns of attitudes and behaviour are produced - and reproduced. It is argued by legal theorists that 'coherence' and consistency is what law claims and needs to achieve. In trying to predict the outcome of anti -trafficking it can therefore be crucial to see how the interventions it inspires interact with other legal rights and obligations such as those that affect tenancy rules in red light districts, the bargaining powers of unionised sex workers, or the attempts to reduce the spread of AIDS (Halley, et. al., 2007).

We also need to relate legal culture to culture more generally. (The term 'external legal culture ' itself may be seen as one way of conceiving of a transmission belt from wider culture to legal culture). In the case of many proposed international norms there is considerable discussion of cultural differences, and the right to such differences- as in the idea of the alleged distinctiveness of 'Asian values'. But the struggle against human trafficking seems to have earned at least the formal endorsement of a very large number of countries with little attempt to treat this as a

specifically Western type of human right. Writers describing the situation in Africa are amongst those most outspoken on the human costs of trafficking (Falola and Afolabi, 2007). Leading experts on human trafficking who are also Muslims go to great lengths to show that the types of conduct involved in (almost<sup>16</sup>) all of the types of trafficking that international conventions currently seek to prevent are also strictly condemned by Islam (Mattar, 2004).

At the same time it is not difficult to point to a variety of more or less entrenched social or cultural practices -whether in supply, in transit or in demand countries -that provide some of the conditions in which such behaviour becomes possible. In some of the supply countries in Asia and Africa there are more or less institutionalised practices that can shade into trafficking. These include bonded labour in agriculture and elsewhere, enforced domestic labour, organised prostitution both for foreign tourists as for locals, gender violence and discrimination, employment of children, bride kidnapping, the marrying off of young brides, the sending away of young people ostensibly for education or work training purposes who are then obliged to earn their keep by begging or worse. In some places prayers are offered up for the success of emigrants including some who might be considered trafficked according to the Protocol. Such remittances as they manage to send back represent an important part of the local economy. In demand countries, by contrast, the practices that may be more relevant include the commodification of sex and labour, the willingness to import anything, from 'orphans' for adoption to body parts, and the assumption that anything can be had at a price - plus local cultural justifications for the creation of a class of 'non- persons'.

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<sup>16</sup> Mattar (2004) admits that there are important differences between Sunnis and Shiites over temporary marriage and child marriage before puberty. Some other widespread practices he considers to be a result of tribal law or a misinterpretation of Koranic principles.

General cultural differences also have their effects on enforcement. For example, more 'pragmatic' cultures, such as Anglo-American common law countries, will often have an approach to law and legal procedure that is more policy oriented or 'instrumental' than is found in less pragmatic countries.<sup>17</sup> But other types of societies, as well as inter-governmental organisations and NGOs', may all at various times choose to treat law in this way. And this approach to legal culture may be becoming more generally influential, as part of the spreading of Anglo-American (legal) culture. At all events, all this helps us appreciate that alleged shortfalls in enforcement are not accidental but are linked to the way the continuation of such practices are made possible within local articulations of law, religion and politics.

On the other hand, we should not assume that understanding the wider social context will always tell us the character of a given legal culture. Especially, but not only, in less industrially developed societies we need to be aware of the many situations of legal pluralism in which State law competes with rival normative orders, which often encapsulate a different approach to social order based on other loyalties and principles. But, even in relatively homogenous States, the task allocated to State law may be that of being distinctive or in contrast to ordinary culture, for example privileging written rather oral relationships, operating on different time schemes, or generally standing for ideas and ideals that are not (yet) strongly entrenched in everyday practice in wider society. In such societies- or parts of them- actors often speak of battles for the 'culture of legality'. The degree to which law is supposed to - or succeeds in being - relatively autonomous from economics and politics - is itself one of the legal cultural variables that needs to be better understood. In the common law world there may be more open and accepted links between law and the needs of the economy, but in the continental European world the more obvious coupling (though one often marked by boundary struggles) is between law and politics. In

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<sup>17</sup> Though pragmatic cultures may fail to appreciate that pragmatism itself may have its limits, and pragmatism cannot tell them when not to be pragmatic (Nelken, 2009)

other settings religious culture may be the most relevant factor to investigate and law no more than one manifestation of it.

Other problems with using the term legal culture also need to be born in mind (Nelken, 2007a). One of the most important of these has to do with how to decide the 'unit' or level of culture on which to focus. Larger cultural differences (in economic, religious, family, or sexual matters) inevitably shape what is considered harmful and what can and should be done about it. But such differences are not limited to- and do not always coincide with- the boundaries between national jurisdictions. The range of references for the term legal culture goes well beyond the single nation- State, as seen in the use of phrases like ' modern legal culture' , 'Western legal culture', Islamic legal culture(s) or 'local court cultures'. But it also relates to what goes on at a lower level. At the sub -State level of trafficking for example we need to consider action by regions and municipalities as in the role of zoning and other interventions (Carchedi, Stridbeck, and Tola, 2009). According to critics of the term, this promiscuity of references is what makes the term implausible and subject to circular argument (Cotterrell, 1997). But it could be argued- using the Palermo protocol as an example- that mapping such multiplicity at the transnational, national and local levels is exactly what is needed.

As these various units respond to the problem of trafficking they are themselves changed in the process. In seeking to understand the legal cultures at work in responding to trafficking it is not enough just to focus on a nation state- taken singly. When Italian ships intercept (or do not intercept) boats bringing in illegal migrants or when Italy makes reciprocal agreements with Libya or the countries of the Maghreb this has implications for other European countries. Conversely, what Italy can and cannot do depends on the actions of other countries or groupings of countries. There are for example, important overall contrasts between the way the US and the EU go about dealing with transnational crimes such as the trade in illegal drugs. In dealing

with drug supplying countries in Latin America the USA is much more likely to see the problem as an 'external' threat to its morals, to be dealt with by a military or military- style approach- even though this can create political instability. The European Community, on the other hand, takes a development -oriented approach geared at creating alternatives to the local need to rely on drug profits - but this approach can easily founder in situations of political and military instability (Fukumi, 2009). These differences may have parallels here. If we are to promote better collaboration between US and European countries in dealing with human trafficking it is essential to be aware of such contrasting approaches.

## Conclusions

This paper tries to answer the question of whether differences in legal culture may help explain the way the Palermo protocol on trafficking is being applied. In the first part of my discussion I accepted, for argument's sake, that what needed to be understood was the under-enforcement and limited application of the protocol and I considered what criminological explanations there could be for this. I then went on to question this starting point so as to examine trafficking as a social problem. In this perspective claims about the success or failure of anti -trafficking are to be understood as themselves part of the struggle for particular (and particularistic) readings of the protocol. In the last section I examined difficulties in using the concept of legal culture in seeking to understand different responses to the protocol and the difficulties this can cause for international collaboration.

Recognising that there are differences between legal cultures shows us why if we wish to ensure respect for international legal instruments we need to go beyond the stage of signing and perhaps ratifying them. On the other hand, whilst learning about legal culture can provide us with valuable insights we also need to be careful not to reify culture as a way of making outcomes seem predestined, nor should we assume



given choices only have their desired effects. What is felt to be a 'scandal' varies between places, but it also varies over time. The definitions of trafficking proposed by those working in pressure groups, international organisations or in roles of liaison between national administrations will often be different to those used on the ground by locally based politicians, policeman, social workers, or charities. But they can, under some circumstances, eventually serve to transform them.<sup>18</sup>

Showing that differences in legal culture play out as part of a larger struggle over interests and values is not an argument for inactivity in the face of injustice, but it does suggest that it is not enough to apply general prescriptions based on the goal of extending human rights for the outcomes to be automatically positive. As David Kennedy, a leading Harvard based 'progressive' international lawyer, reminds us, we must be alert to the possibility that even the pursuit of human rights can have negative effects (Kennedy, 2001). In some places, human rights implementation can make a repressive State more efficient, and co-opt sectors of civil society that might otherwise be opposed. Arguments from human rights have been used to strengthen, defend, legitimate a variety of repressive initiatives- to legitimate war, defend the death penalty, the entitlements of majorities, religious repression, access to (or restriction of) abortion, and so forth.

Of particular relevance for our purposes, Kennedy insists that, as currently deployed, the human rights movement may do a great deal to take questions of the distribution of life chances off the national and international development agendas. He claims that this movement often remains tone-deaf to the specific political consequences of its activity in particular locations, on the mistaken assumption that a bit more human rights can never make things worse. He admits, of course, that all interventions (not

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<sup>18</sup> It can be interesting to compare the success of other efforts to make criminal justice concepts 'travel well'. For an illuminating discussion of the different fortunes of prison rights and corruption see Twining (Twining, 2005).

just those inspired by the pursuit of human rights) have possible downsides and carry risks. We cannot always know in advance what will be their overall outcomes. But he urges caution.

Some feminist scholars and activists who use the anti -trafficking movement as an illustration of what they call Governance Feminism (GF) think that Kennedy's points do apply here. 'Our sense at the moment ' they argue, ' is that a preoccupation with normative achievements (message sending, making rape/sexual violence visible, changing hearts and minds among elites and across populations) and a legal imaginaire in which prohibition would “stop” or “end” conduct harmful to women—or decriminalize it in order to liberate them and give scope to their agency—animates the GF projects we are studying and detaches them from a certain pragmatic attitude and interest in complex distributional consequences that we seek to bring to the domain. '

Their case studies, in places as different as India and Israel, suggest that - 'the result, so far at least, is not to “end prostitution” in Israel and India, but to rearrange the micro-investments of power locally'. The authors argue that they are 'working, methodologically, for a new legal realism that would anticipate the complex ways in which legal entities meet complex societies' and complain that ' (t)he highly contingent and complex relationship between law in the books and law in action—and the multitudinous ways in which the legal system can be designed to shape but cannot control this relationship— seem to fall outside the scope of feminist concern. Feminist advocacy that imagines prohibition to involve “stopping” or “ending” sexual violence and/or commercial exploitation of sex workers brackets all the social contingency our legal realist and critical analysis would bring into focus. For example, the possible bad and unintended consequences of the resulting rules seem to fall outside the scope of feminist concern ' (Halley, et. al., 2007). All this reinforces

the need to consider carefully the likely effects of efforts to improve the application of the protocol.

The main claim of this paper is that, before referring to legal culture in accounting for how different places behave when applying the protocol, we first need to know more about the nature of the 'problem' being faced and the way the way the 'problem' is constructed. I will finish by saying something more about the Italian situation by way of illustration. Insofar as policy makers want to seek to learn from and encourage 'best practice' the Italian case may also be considered of particular interest. Many of the Italian representatives at the 2009 Palermo workshop- especially prosecutors with considerable experience in dealing with cases of organised crime, as well as judges working with international organisations, argued that Italy was in fact one of those countries that was most advanced in interpreting and applying the protocol. By contrast, they claimed that places with the reputation of being progressive in matters such as women's rights, such as Sweden or Netherlands, had a much poorer record in this matter.

But, as ever, the criteria for deciding what counts as success are contested ones. In a 2006 report, referred to in the Wikipedia entry on 'Human trafficking', the Future Group, a Canadian humanitarian organization dedicated to combating human trafficking and the child sex trade, ranked eight industrialized nations in terms of their performance. Canada received an F rating, the United Kingdom received a D, while the United States received a B+ and Australia, Norway, Sweden, Germany and Italy all received grades of B or B- (Future Group, 2006). The USA might get a different assessment if we were take into account the massive Mexican - or Chinese illegal immigration to the United States- and the thousands of Mexicans killed at the border.

Be this as it may, Italian legislation and judicial decisions do seem to be generous in their definition of trafficking, and provide protection to victims even when they are unwilling to provide evidence against their traffickers. The current legal provisions allow them to apply for permanent residence after 21 months if they have found employment. Compared to many other European countries a relatively high number of women ask for and receive protection. It seems reasonable to ask therefore what are the conditions that make possible Italy's (relative) success here, and what place legal culture plays in this? Could other places learn from Italy or even take it as a model to be imitated? These questions are all the more interesting given that what else we know about Italian legal culture would have predicted a quite different outcome. After all, other information tells us that Italy is one of the countries that takes the longest in Europe before coming into line with European Union or international directives. Coming more specifically to the kind of legal protection envisaged by the Protocol, Italy's criminal justice system is not very victim - oriented, and its victim- support movement is not anything like as well developed as in many other advanced western countries<sup>19</sup>.

One solution to this apparent puzzle could be to say that, whatever the protections offered by the 'law in the books' it is simply not true that Italy is in practice more active in applying the protocol than other countries. Because of the lack of comparable cross- national data on the number of cases dealt with in relation to the

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<sup>19</sup> In Italy, partly as a result of the influence of Catholic culture, victims are often expected 'to forgive' rather than ask for revenge. Relatedly, as a 'state society', punishing is considered something to be carried out for the ' general interest' by 'the state' (Nelken, 2005). In many Protestant countries, with a 'liberal' idea of the state, by contrast, victims are put on a pedestal as representatives of the 'community' for whose defence - as potential or actual victims- the state/ government justifies its existence.

number of potential cases of trafficking, we cannot be sure how Italy's figures compare with those elsewhere. There are a number of reasons why the number of people trafficked to Italy -itself a function of the number of illegal migrants- could be much larger than in many comparable countries. First of all there is the power exercised by four major entrenched organised crime groups. Then there is its geographical position, with an exposed coastline and proximity to Africa, and the large poorly regulated black economy and demand for illegal workers - in the agricultural, industrial sectors and sex trades. Enforcement of laws against the exploitation of prostitutes, for example, is characterised by a high level of *de facto* 'tolerance' which makes it difficult to know how many of these are trafficked.

If these factors mean that Italy has a relatively high number of cases of trafficked victims then it would be no surprise (and not a mark of merit) if Italy has more opportunity to apply the protocol. The relatively large number of protection orders could even be taken as evidence of difficulties of preventing such cases arriving there in the first place. If what we are measuring is activity more broadly geared to prevention and protection of immigrants or of those in the sex trade, then the small number of cases of trafficking victims protected in Sweden and the Netherlands is open to another interpretation. Sweden deals with few cases because it relies instead on prosecuting prostitutes' clients (an approach which England and Wales is now trying to copy by making it illegal to buy sex if the prostitute turns out to be held against her will). The Netherlands, by contrast, seeks to legalise and regulating the trade in sex so as to curb the demand for trafficked victims. By contrast, there is every reason to doubt that the Italian response to trafficked victims has done much if anything to help introduce more 'rational' ways of regulating immigration or sex work generally.

It would be wrong, however, just to 'explain away' claims that Italy is especially effective in dealing with trafficking cases. After all, the fact that the protocol was

signed in Palermo (as well as the presence of a number of relevant intergovernmental and NGO groups on its territory) may have given Italy some sense of 'ownership' of this struggle. Because there is more organised crime in Italy than in many other European countries this has also given the criminal justice system more experience in dealing with it. Concern for victims may have increasingly become the justification for the application of the criminal law in countries whose legal cultures are more influenced by liberal individualism, Protestantism and the common law. But the effects of this may be less straightforward when it comes to foreign victims of trafficking who are considered to some extent authors of their own plight. Italy, by contrast, may be a country with a relatively higher tolerance for ambiguity. Those handling organised crime cases have evolved a (sometimes controversial) approach to of collaborators from the ranks of organised crime - the so called *pentiti*. Because the victim in Italy is not the justification for punishment there may be more willingness to protect flawed victims. Strong input from the Catholic Church as well as lay groups working with marginal people, is also relevant to the help given to these kinds of victims even in the absence of a strong victim movement in mainstream criminal justice.

Other more general, debatable and debated features of Italian legal culture could also be relevant here. The degree of independence from government enjoyed by judges and prosecutors in Italy can cause problems in coordinating crime policy- and, according to their opponents, contributes to political instability. But because judges often find that they have to substitute for politicians in dealing with endemic social problems such as corruption (their so-called role of 'supplenza') this gives them more of a free hand than in some other jurisdictions. Thus judges and prosecutors can extend protection to these particular victims even if this may not be very popular with governments or public opinion- who are usually keener on cracking down on anything connected to illegal immigration. Because the Italian approach to law and procedure is relatively more rights- based than pragmatic this may also explain why

laws based on human rights are taken more seriously than more pragmatic countries (though we should not forget that Italian judges can also be very 'pragmatic' in the way that they actually use law to pursue their ideas and ideals). If Italian legal procedures are afflicted by delays this may make it all the easier to allow for decent 'cooling off periods' so that victims of trafficking can overcome their trauma and decide what they want to do next. What is a disadvantage in one setting can be a plus in another. The main reason to seek to learn more about culture - and legal culture- and not merely focus on economics and politics is because of the way in can help us make sense of such apparent paradoxes.

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