

Editorial: The Problems and Prospects of Trafficking Prosecutions: Ending impunity and securing justice

Anne T Gallagher

Please cite this article as: A T Gallagher, 'Editorial: The Problems and Prospects of Trafficking Prosecutions: Ending impunity and securing justice', *Anti-Trafficking Review*, issue 6, 2016, pp. 1–11, www.antitraffickingreview.org

Having been guest editor of the very first issue of the *Anti-Trafficking Review*, it was with great pleasure that I accepted the invitation of the editorial board to oversee the production of its sixth issue. Back in 2012 I identified the emergence of the *Anti-Trafficking Review*, the first specialist journal on human trafficking, as a watershed moment, signalling the transformation of 'trafficking' from a niche (perhaps even a fringe) academic sub-discipline into a legitimate, substantial and discrete area of study.¹ The past four years since its launch have vindicated that assessment. New specialist journals on trafficking and its variants have been launched,² and the range and depth of research being undertaken in this field has significantly expanded. While law, sociology and human rights continue to be the dominant lenses through which trafficking is studied, analysed and explained, there is no denying the expanding and enriching influence of other disciplines: from geography to anthropology; from health sciences to migration studies. These changes in research and writing around trafficking have brought tangible benefits: helping improve our understanding of what is happening and why, as well as strengthening the evidence base on which credible, effective responses can be built.

In 2012 I sounded a warning about the quality of research around trafficking as gaps in knowledge and understanding were too often being denied or ignored; contrary views were being rejected without adequate consideration; and policy preferences were visibly distorting research processes and outcomes. While these problems have not disappeared, an overall increase in depth, volume and quality of research, especially around *how* trafficking happens, has helped to sideline work that may, in the past, have received more attention than it deserved. For example, the sector-focussed or otherwise exceptionally specific research undertaken by organisations such as Verité³ has been invaluable in setting new and higher standards for those involved in investigating the pathways to exploitation. Increasingly, such research is being strategically coordinated to impact the political economy around exploitation.⁴ Anecdotes dressed up as research are no longer sufficient in a world where transparent and increasingly sophisticated research methodologies are utilised to document the health effects of trafficking⁵ or the lived reality of reintegration.⁶

Unsurprisingly, bright spots in some areas are offset by little or no progress in others. The problem of accurately documenting trafficking/slavery/forced labour prevalence and assessing the quality of governmental responses seems to be as intractable as ever, despite the expenditure of massive effort and resources.⁷ Reliance on vast pools of compromised data to 'prove' links (for example, between legalisation of prostitution and trafficking)⁸ confirms that the truism of 'garbage in, garbage out' is as applicable to this field as it is to any other. As explained further below, the experience of pulling together the present issue has made clear that many of the problems that have plagued research on trafficking for years remain. While sobering, this should not be cause for despair. Rather, it affirms the value of a resource such as the *Anti-Trafficking Review*—a publication committed to the onerous but essential task of

¹ See the full editorial at: A T Gallagher, 'Editorial', *Anti-Trafficking Review*, issue 1, 2012, pp. 2–9, <http://www.antitraffickingreview.org/index.php/atrjournal/article/view/75/86>

² *Journal of Human Trafficking* (2015); *Slavery Today Journal* (2014); *Journal of Trafficking and Human Exploitation* (first issue expected to be published 2016).

³ See, for example: Verité, *Forced Labour in the Production of Electronic Goods in Malaysia*, 2014 and Verité, *Labour Brokerage and the Trafficking of Nepali Migrant Workers*, 2012.

⁴ See, for example: S Murray, 'Casting a Tight Net', *Stanford Social Innovation Review*, 2015, documenting the research-based campaign orchestrated by Humanity United to expose forced labour in Thailand's seafood industry and the impact of that campaign on the Thai government, available at: http://ssir.org/articles/entry/casting_a_tight_net

⁵ See, for example: L Kiss et al, 'Health of Men, Women, and Children in Post-trafficking Services in Cambodia, Thailand, and Vietnam: An observational cross-sectional study', *Lancet Global Health*, vol. 3, 2015, p. 154.

⁶ See, for example: R Surtees, *After Trafficking: Experiences and Challenges in the (Re)integration of Trafficked Persons in the Greater Mekong Sub-region*, Nexus Institute/UNIAP, 2013.

⁷ See, for example: 8 *Forum on Crime and Society*, 2015 (Special issue on researching hidden populations: Approaches to and methodologies for generating data on trafficking in persons). Also see: A T Gallagher, 'The global slavery index is based on flawed data—why does no one say so?', *The Guardian*, 28 November 2014, retrieved 4 April 2016, <http://www.theguardian.com/global-development/poverty-matters/2014/nov/28/global-slavery-index-walk-free-human-trafficking-anne-gallagher> for my critique of the methodologies used by the authors of the *Global Slavery Index* to measure prevalence of 'slavery' and assess and rank the quality of government responses.

⁸ See, for example: S Y Cho, A Dreher and E Neumayer, 'Does Legalized Prostitution Increase Human Trafficking?', *World Development*, vol. 41, 2013, pp. 67–82 (which uncritically uses a 2006 United Nations report comprised entirely of self-reported data from states).

double-blind peer review—that encourages contributions from diverse voices; and that strives, at every turn, to bring rigour, criticism and a genuine spirit of enquiry into this important field of work.

This Issue

The decision of the *Anti-Trafficking Review* editorial board to devote an issue to consideration of prosecutions reflects an appreciation of the central importance of this aspect of the trafficking response, as well of its complexities and challenges.

International law requires states to prosecute trafficking in persons effectively and fairly. Along with prevention and protection, prosecution is widely seen as one of the main pillars of an effective national response to trafficking. For example, in the annual *Trafficking in Persons (TIP) Report*, the United States government considers: ‘whether the government vigorously investigates, prosecutes, and punishes trafficking’ to be a key indicator in assessing and ranking countries. That said, worldwide, the number of prosecutions for trafficking remains stubbornly low—especially when compared to the generally accepted size of the problem. Very few traffickers are ever brought to justice, and the criminal justice system rarely operates to benefit those who have been trafficked.

Government officials, criminal justice practitioners and others working in the anti-trafficking field assert that ending the current high levels of impunity enjoyed by traffickers, and securing justice for those who have been trafficked, requires vigorous prosecution of trafficking crimes. However, others have pointed out that pressures to prosecute, particularly when placed on underdeveloped criminal justice systems, have led to poor quality prosecutions that target lower level offenders; unfair and unsafe prosecutions that do not respect basic criminal justice standards; and disproportionate and politically motivated targeting of certain sectors, including the sex industry. Emphasis on prosecutions has also been identified as contributing to violations of the rights of persons who have been trafficked—for example, through laws and policies that compel trafficked persons’ cooperation with criminal justice agencies or make assistance conditional on such cooperation. More generally, concerns have been expressed that the focus on prosecutions has been at the expense of attention to victims’ rights including their right to protection, support and remedies.

The present issue of the *Anti-Trafficking Review* sought to take on the hard questions:

- Are prosecutions really an appropriate measure of an effective anti-trafficking response?
- What kinds of cases are being prosecuted?
- Why are there so few prosecutions, and even fewer convictions, for trafficking?
- How does the prioritisation of prosecutions (for example, over protection and prevention) frame our understanding of what trafficking actually is, why it happens, and what the solutions could or should be?
- What are the consequences of emphasising prosecutions in contexts of increased border security, criminalisation of migration, and imprisonment more generally?
- How can we ensure that the rights of trafficked persons are not further compromised by their participation in the prosecution of their exploiters?
- Can prosecutions *ever* deliver a genuinely positive result for trafficked persons?
- And perhaps most importantly, what do trafficked persons think (including in relation to their experiences in and outside the criminal justice system) about what works and what does not?

Our goal to address these questions proved to be an ambitious one—perhaps overly so. These are difficult topics, and satisfying, genuinely insightful answers are hard to come by. All articles selected for publication in the present volume address one or more of these questions, at least in part. But it is clear that for the present, many aspects of the prosecution part of the anti-trafficking equation remain unanswered.

A weak information base is certainly a part of the problem. The vast majority of countries have only been investigating and prosecuting trafficking offences for a short period of time. Cases are thin on the ground and, even when available,⁹ are rarely subject to expert analysis. Lack of detailed information along with differences between countries in relation to how offences of trafficking have been crafted makes comparative analysis of prosecutions, which could provide useful insight into what works well and what does not, all but impossible. Scope is another problem. Most of the available primary information on prosecutions (whether generated through court decisions,

⁹ Obtaining judgments and other documents related to trafficking cases is difficult in most countries. UNODC has set up a case law database covering all forms of transnational organised crime including trafficking. As at March 2016, the database contained brief, uneven information on 1,296 cases. Most of these are related to trafficking for sexual exploitation. See: https://www.unodc.org/cld/search-sherlock.jsp?f=en%23__el.caseLaw.crimeType_s%3aTrafficking%5c+in%5c+persons

other legal documentation or interviews with victims/practitioners/service providers) relates to trafficking of women for purposes of sexual exploitation. It should come as no surprise that the articles in this volume are heavily skewed towards this manifestation of trafficking. The limited perspective on prosecution of trafficking for purposes other than sexual exploitation distorts or, at best, provides only a partial response to the questions posed above. For example, the challenges facing victim-witnesses in prosecutions of trafficking for forced labour should not be readily extrapolated from what we know about the experiences of victim-witnesses in prosecutions of trafficking for sexual exploitation.

The shortage of available information is about much more than lack of cases and their narrow scope. While states are often eager to share what they are doing in relation to protection and prevention, they tend to be much more circumspect when it comes to criminal justice responses. The US *TIP Report's* focus on prosecution numbers has ensured that macro-level data (number of prosecutions/number of convictions) is regularly generated by states and made widely available at the international level, through both the annual *Trafficking in Persons Report* and the biennial United Nations *Global Report on Trafficking in Persons*. The United Nations Office on Drugs and Crime (UNODC) has worked with states and research institutions to produce a database of case summaries that provides a useful glimpse into the types of cases being prosecuted in some countries.¹⁰ However, more focussed and detailed information—on what actually happens, on the *process* and *quality* of prosecutions, for example—is much more difficult to come by. Some states do not publish or otherwise make available decisions or other case information. Others actively block researchers' access to victims, victim support workers and criminal justice practitioners, thereby ensuring that these valuable and unique experiences of the criminal justice process remain hidden. I have witnessed firsthand, on multiple occasions, research supported by bilateral donors and intergovernmental organisations being withheld or pre-emptively modified because it reveals information that could reflect badly on the state concerned and thereby compromise relationships. There is little doubt in my mind that sensitivities in this regard have been aggravated by the exposure and criticism many states have endured through the US *TIP Report* process. That makes the US State Department's persistent failure to pay due attention to the quality of the prosecutions it encourages (an aspect of the prosecution debate discussed further at the end of this editorial) especially egregious.

An absence of practitioners' voices in research is particularly relevant to the present issue. Since its inception, the *Anti-Trafficking Review* has sought to encourage contributions from those who are on the frontline of anti-trafficking responses. Such contributions were judged to be of special importance for an issue focussed on prosecutions because of the capacity of criminal justice officials to shed unique light on many of the questions raised above. To that end, the editors took the unusual step of soliciting submissions from individuals with direct experience investigating and prosecuting trafficking cases and working with victim-witnesses. Unfortunately, while practitioners feature heavily in the extended 'debate' section, only a few submitted full-length articles. It is worth noting however, that practitioners formed the bulk of our peer reviewers for this issue and in this capacity played an invaluable—and irreplaceable—role in ensuring its quality. The *Anti-Trafficking Review's* peer reviewers are the backbone of the journal, and it is appropriate to record the debt of gratitude that is owed to all those who have given so generously of their time and expertise for this issue.

Thematic Articles Section

More submissions were received for this issue than for any other. Quality was a problem however, and less than half were judged of sufficient merit to be referred for peer review. Another feature of the articles submitted and the group finally selected for publication was the overwhelming focus on trafficking for purposes of sexual exploitation. This may well be an accurate reflection of prosecution practice: it is evident that trafficking for sexual exploitation receives the lion's share of criminal justice attention and resources in most, if not all countries. However, it may also indicate the continued existence of a long-standing bias in scholarship and research towards this particular form of trafficking.

The final group of five articles is a strong one, addressing a broad range of issues from diverse perspectives. In the first article, Brunovskis (a sociologist) and Skilbrei (a criminologist) tackle conditionality in assistance, or the policy or practice of making a victim's entitlement or access to protection and support contingent on his or her cooperation with criminal justice authorities. Their research considers the situation of women victims of sexual exploitation in Norway, a country that offers the possibility of permanent residence to victim-witnesses who cooperate with authorities. In seeking to establish whose interests are being served by this conditionality, the authors also engage with the broader question of what may have been lost through the women's movement's embrace of criminal justice responses to sexual and sexualised violence.

¹⁰ Ibid.

The risks associated with an expansionist conception of what constitutes trafficking have been repeatedly noted. In her article, McCarthy (a lawyer and political scientist) addresses the prosecution of illegal (often non-exploitative) adoptions in Russia as trafficking. The importance of McCarthy's contribution lies not just in her data-rich exposure of these prosecutions, but also in her insights into how such prosecutions evolved and how they became such an important part of Russia's anti-trafficking response. Put simply, this phenomenon did not emerge in a vacuum; rather, it reflects cultural narratives surrounding adoption in Russia and has been cemented over time by legislation that prioritises the transactional element over any considerations of exploitative intent when it comes to identifying a situation as 'trafficking'.

As this editorial has already noted, there is a dearth of research into the *how* of trafficking prosecutions. In their article, Farrell, DeLateur, Owens and Fahy shed light on one important and under-researched aspect: the factors that come into play when prosecutors use their discretion to decide whether or not to pursue a case that has been investigated as human trafficking. Their research examines only a small sample of cases in US state courts, however. The findings point to concerns that have been regularly raised in the US and elsewhere: prosecutors are often unaware of the legal framework around trafficking or reluctant to use it; trafficking laws are used primarily—and sometimes even exclusively—to pursue trafficking for sexual exploitation and not other forms of trafficking; and even where there are strong indicators of trafficking, prosecutors may prefer to charge other, often lesser, offences that are more likely to result in conviction. The findings on victim-witness involvement were unclear and somewhat troubling in that securing or coercing victim involvement (for example, through threat of arrest) is a primary driver of prosecution. But charges may not be pursued if the victim's testimony is not supported by corroborative evidence. The authors highlight the need for more and deeper research into understanding the role played by victims in determining which trafficking cases end up in court.

A very different set of issues arises when a trafficking investigation does proceed to trial and judgment. In their article, Meshkovska, Mickovski, Bos and Siegel examine the impact of trafficking trials on victims. Their findings are based on interviews with victims of trafficking for sexual exploitation and service providers in five European countries. Once again, while the sample is very small and narrowly focussed, the findings are helpful in fleshing out long-established concerns about victim experiences of the criminal justice process. For example, while testifying is inevitably traumatic for the victim of any serious criminal offence, that trauma is often aggravated in trafficking trials because of lack of procedural safeguards for privacy and security; inadequately trained officials; and failure to provide victims with information. While it is to be expected that any criminal trial for a serious offence will be complex and drawn out, inefficiencies in the process cause additional, unnecessary delays. These delays can place an unendurable burden on victim-witnesses in trafficking cases, particularly if the state concerned has not put in place measures (such as residency options and access to compensation) that can allow them to plan for the future. As the authors conclude, criminal proceedings have a direct influence on victims, including on their recovery and reintegration. The potential for such proceedings to both harm and empower victims must be recognised and managed.

The question of whether definitions matter has been hotly debated within the international anti-trafficking community, not least in the *Anti-Trafficking Review*.¹¹ Within the context of prosecutions however, there is no room for discussion. The definition of the offence and the elements that make up that offence must be as clear as possible, not least to afford the accused his or her basic right to a fair trial. Unfortunately many countries are struggling. National laws inevitably reflect a version of the complex, somewhat ambiguous international legal definition of trafficking agreed in the 2000 UN Trafficking Protocol. As the final article shows, this provides considerable scope for judicial interpretation of the definition and thereby, of what conduct constitutes 'trafficking' under the national legal framework. In their examination of Dutch judicial practice, Esser and Dettmeijer-Vermeulen point to gatekeeper concepts such as 'abuse of a position of vulnerability' and 'exploitation' as being especially significant in this regard, underpinning an expanded conception of trafficking that some could argue to be contrary to the intentions of the Protocol. The article raises important questions about whether such differences matter and, if so, why. Should we be encouraging states towards a more consistent understanding of the parameters of the criminal offence of trafficking or should we view divergent interpretations as a positive reflection of the successful integration of 'trafficking' into national legal frameworks?

¹¹ See the 'debate' section in *Anti-Trafficking Review*, issue 5, and N Piper, M Segrave and R Napier-Moore, 'Editorial: What's in a Name? Distinguishing forced labour, trafficking and slavery', *Anti-Trafficking Review*, issue 5, 2015, pp. 1–9, retrieved 4 April 2016, <http://www.antitraffickingreview.org/index.php/atrjournal/article/view/133/133>

The Debate Section

Contributors to the ‘debate’ section of the *Anti-Trafficking Review* were invited to discuss this deliberately provocative proposition: *Prosecuting trafficking deflects attention from much more important responses and is anyway a waste of time and money.* Within the anti-trafficking community, there has been a longstanding and well-excavated schism between those who consider a strong criminal justice response to be central to any effective national response and those who view such a singular approach as distracting, damaging and / or counter-productive. By raising this debate, the editors sought to establish whether that schism still exists and, if so, the key points of both positions.

As with the general articles section, more submissions were received for this debate than any previous one and, once again, the focus was very strongly on trafficking for purposes of sexual exploitation. Since submissions to the debate section are not peer reviewed, it is up to the editors to make both the initial cut and the final selection. In addition to assessing relevance and quality, the editors sought to ensure that as broad a range of views and perspectives as possible were reflected in the final group of debate pieces chosen for publication. However, that range was not as great as expected. While contributors differed significantly in their assessment of the place that prosecutions should occupy within the national trafficking response, most were unprepared to reject outright the criminal justice aspect of that response. That said, even amongst firm advocates of the view that prosecutions are essential to ending impunity and securing justice for victims, national criminal justice responses to trafficking are widely recognised to be highly problematic. Contributors emphasised that a more effective prosecutorial response must be one that prioritises and facilitates restitution for victims (Vandenberg); that is adequately resourced (Richmond and Boutros); that is victim-centred and appropriately targeted (French and Liou, Levy); and that makes use of the full range of available laws (McAdam).

Several contributors (D’Adamo, Thukral, Thiemann, Swenstein and Mogulescu), while acknowledging a role for prosecutions, did indeed mount a spirited defence of the proposition, arguing that an overreliance on criminal justice responses negatively impacts victims and broader anti-trafficking efforts. They further argue that this approach is compromised because it simplifies the ‘problem’ of trafficking in a way that obstructs an honest interrogation of the complex social, cultural and political factors that create and sustain people’s vulnerability to exploitation.

Ultimately, most contributions to the debate coalesced around two central ideas. First: failure to prosecute trafficking effectively makes a mockery of criminalisation and ensures the cycle of exploitation will continue unchecked; and second: prosecutions that ignore the rights and needs of victims are hollow victories that will never deliver true justice.

A Final Word on Inappropriate and Wrongful Prosecutions

While McAdam noted the importance of measuring the quality of prosecutions, rather than quantity, none of the contributions directly addressed the problem of unfair or unjust prosecutions—meaning cases that are investigated, prosecuted and adjudicated on weak or non-existent evidence and/or without regard to the accused person’s right to a fair trial. The absence of discussion on this aspect is worrying, if unsurprising. Suspects in trafficking cases are much less interesting to researchers and advocates than victims and criminal justice actors. The geographical reach of current research is also highly relevant. Most research on trafficking prosecutions focusses on the United States, Western Europe and a handful of other similarly situated countries, such as Australia, where protections for defendants are relatively strong. We know very little about the thousands of prosecutions for trafficking that have been reported in other parts of the world, including in countries with weak or dysfunctional criminal justice systems. My own firsthand experience in Southeast Asia suggests that the drive for prosecutions (largely initiated and perpetuated by the US government through the *TIP Report* process) is contributing to miscarriages of justice on a significant scale as countries scramble to prove their commitment to anti-trafficking efforts in a way that will appeal to their assessors. Cases that are not trafficking (such as pimping and marriage brokering) are being prosecuted as such and convictions are leading to penalties that are grossly disproportionate to the seriousness of the underlying conduct. Accused persons are too often being denied the right to challenge their accusers, to benefit from a presumption of innocence and to secure assistance in their defence. Lengthy delays, lack of judicial independence and inappropriate sentencing—all operate to compound these injustices. For even the most committed advocates of an aggressive criminal justice response to trafficking, this situation should give cause for great concern. Any policy or programme that emphasises or rewards *more* prosecutions while failing to actively promote, support and monitor *better* prosecutions that respect the rights of all persons—victims and accused alike—is ethically compromised and strategically flawed.

Anne T Gallagher AO is a legal practitioner, adviser and independent scholar specialising in criminal justice, human trafficking and migrant smuggling. She is currently an adviser to United Nations, ASEAN and the Australia-Asia Trafficking in Persons Program. Her other roles include Co-Chair of the International Bar Association's Presidential Task Force on Trafficking; member of IOM's Migration Advisory Board; and Academic Adviser at Doughty St Chambers in London. Email: anne.therese.gallagher@gmail.com