

# Purity, Victimhood and Agency: Fifteen years of the UN Trafficking Protocol

Marjan Wijers

## Abstract

When the women's movement reverted back to the nineteenth-century Victorian concept of 'trafficking in women' to address abuses of migrant women in the sex industry, it unwittingly adopted not only a highly morally biased concept—dividing women into innocent victims in need of rescue and guilty ones who can be abused with impunity—but also one with racist and nationalistic overtones. Despite efforts to counter these flaws, this inheritance continues to define the debate on trafficking today, exemplified by the distinction made by the United Nations Trafficking Protocol between so-called 'sexual exploitation' and 'labour exploitation' and its focus on the aspects of recruitment and movement. As a result, its implementation in the last fifteen years has led to a range of oppressive measures against sex workers and migrants in the name of combating trafficking. The focus on the purity and victimhood of women, coupled with the protection of national borders, not only impedes any serious effort to address the exploitation of human beings under forced labour and slavery-like conditions, but actually causes harm. The call of the anti-trafficking movement for a human rights-based approach does not necessarily solve these fundamental problems, as it tends to restrict itself to protecting the rights of trafficked persons, while neglecting or even denying the human rights of sex workers and migrants.

**Keywords:** Trafficking Protocol, sex workers' rights, anti-trafficking, human rights, migrant women

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## Introduction

This article argues that from a human rights perspective the concept of trafficking, and consequently the anti-trafficking framework, is fundamentally problematic. It discusses the debate on the definition of trafficking during the negotiations on the United Nations (UN) Trafficking Protocol<sup>1</sup> and the position of the two main non-governmental organisation (NGO) lobby blocs. After placing this debate in its historical context, the paper evaluates the extent to which the Protocol has solved the old problems attached to the anti-trafficking framework. Major problems that remain fifteen years after the Protocol negotiations include the conflation of trafficking and sex work and the focus on (trans border) movement rather than on

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<sup>1</sup> In full: United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime.

the actual forced labour and slavery-like exploitation of human beings. The paper concludes with remarks on implications for the anti-trafficking movement.

### The Making of the UN Trafficking Protocol

One of the most hotly debated issues during negotiations on the Trafficking Protocol concerned the definition of trafficking. This is not surprising as, until then, one of the fundamental problems in combating ‘trafficking’ had been the lack of international consensus on a definition and thus on exactly which practices should be combated.

During the fifteen years preceding the Protocol, trafficking had been framed in several, sometimes conflicting, ways. Six main approaches can be distinguished. In the moral approach—based upon the traditional definition of trafficking wherein trafficking is inherently linked to prostitution—prostitution itself is seen as the problem. Women in prostitution are either victims who need to be rescued or deviants who must be reformed and/or punished. Corresponding strategies aim at the (further) criminalisation of prostitution. This approach was mainly put forward by States but also by some NGOs. Connected to the moral approach is the definition of trafficking as a threat to public health and order that should be controlled by strict regulation of prostitution through different forms of State control. However, two other approaches, primarily employed by States, had become increasingly dominant: trafficking as an issue of illegal or ‘unorderly’ migration demanding more restrictive immigration policies, and trafficking as a problem of (organised) crime to be solved with heavier punishments, better international police cooperation and more effective prosecution of perpetrators. Relatively new was a human rights approach, mostly advocated by NGOs and defining trafficking as a violation of women’s human rights for which States could be held accountable. However, within this approach two different currents existed: the first defining prostitution as such as a violation of women’s human rights, bringing us back to the moral approach. The second holding that not prostitution itself, but the conditions of coercion, abuse and deceit constitute a violation of human rights. Building on the latter type of human rights approach, sex workers’ rights organisations and a number of anti-trafficking organisations started to challenge the traditional approaches, advocating the decriminalisation of sex work and the sex industry as a preliminary condition for the protection of the human rights of the women involved. Within this labour approach the concept of trafficking is expanded to include the exploitation of women’s work in informal labour sectors, such as domestic work.<sup>2</sup>

The different approaches make clear that, depending on the conceptualisation of trafficking, different solutions are drafted, each with its own interests attached. This made the definition of trafficking a highly contested issue during the Protocol negotiations and a major lobbying goal for participating NGOs. Underlying the debates were (and are) two diametrically opposed views on sex work. As discussed above, one view sees all prostitution as trafficking, considering prostitution in and of itself a violation of women’s human rights and consequently seeking to include all sex work in the definition of trafficking. The other view sees sex work as legitimate work, holding that forced labour in all industries, including the sex industry, should be addressed. In this view, it is the conditions of abuse that

<sup>2</sup> M Wijers & L Lap-Chew, *Trafficking in Women, Forced Labour and Slavery-like Practices in Marriage, Domestic Labour and Prostitution*, Utrecht/Bangkok: Foundation Against Trafficking in Women/GAATW (revised edition), 1999, pp. 189-210; M Wijers, ‘European Union Policies on Trafficking in Women’ in M Rossilli (ed.), *Gender Policies in the European Union*, Peter Lang, New York, 2000, pp. 217-226.

violate human rights, no matter in which industry. It thus makes a clear distinction between sex work, defined as consensual sex between adults, and trafficking, defined by coercion and deceit.<sup>3</sup>

These two views were represented by two opposing NGO lobbying blocs: the International Human Rights Network and the Human Rights Caucus. The International Human Rights Network consisted of anti-trafficking and abolitionist<sup>4</sup> groups, led by the Coalition Against Trafficking in Women (CATW).<sup>5</sup> The Human Rights Caucus was made up of human rights, anti-trafficking and sex workers' rights organisations and activists, led by the International Human Rights Law Group (IHR LG) and the Global Alliance Against Traffic in Women (GAATW).<sup>6</sup> The latter alliance, for the first time, brought together human rights, anti-trafficking and sex workers' rights movements in a joint lobby. In particular, the combination of anti-trafficking and sex workers' rights groups was radical, bridging the historical gap between the two caused by the persistent conflation of 'trafficking' and 'prostitution' and the abuse of anti-trafficking measures to police and punish female (migrant) sex workers and restrict their freedom of movement.<sup>7</sup> As per the Global Network of Sex Work Projects statement on the Protocol in 1999:

Historically, anti-trafficking measures have been more concerned with protecting women's purity than with ensuring the human rights of those in the sex industry. This approach limits the protection afforded by these instruments to those who can prove that they did not consent to work in the sex industry. It also ignores the abusive conditions within the sex industry often facilitated by national laws that place (migrant) sex workers outside of the range of rights granted to others as citizens and workers.<sup>8</sup>

Feminist NGO networks and State delegations alike were deeply divided over the issue of prostitution. As noted by Doezema, many State delegations used the negotiations as an opportunity to denounce the evils of prostitution, while others (fewer in number) argued that focusing on prostitution detracted from efforts to come to an agreement on trafficking.<sup>9</sup> The lobbying efforts of the Human Rights Caucus focused on a broad and inclusive definition, addressing all trafficking into forced labour, slavery and servitude, irrespective of the nature of the work, the services provided or the gender of the trafficked person. This definition excluded voluntary, non-coercive sex work. Additionally, the Caucus worked to include human rights protections for trafficked persons, regardless of their willingness to act as witnesses in prosecutions of their traffickers. Finally, an important aim was

<sup>3</sup> M Dittmore & M Wijers, 'The Negotiations on the UN Protocol on Trafficking in Persons. Moving the focus from morality to actual conditions', *Nemesis*, 2003, p. 79.

<sup>4</sup> 'Abolitionist' in this context means the abolition of prostitution, referring to the historical movement for the abolishment of slavery. Abolitionist groups are also at times referred to as radical feminist groups.

<sup>5</sup> Members of the CATW-led network included CATW North America, Asia Pacific, Africa, Latin America and Australia, Equality Now (USA), the International Abolitionist Federation, Women's Front (Norway), and the European Women's Lobby.

<sup>6</sup> The following organisations were part of the Human Rights Caucus: International Human Rights Law Group (IHR LG, USA), Global Alliance Against Trafficking in Women (GAATW), Foundation Against Trafficking in Women (STV, the Netherlands), Asian Women's Human Rights Council (AWHRC, Philippines, India), La Strada (Poland, Ukraine, Czech Republic), Fundación Esperanza (Colombia, Netherlands, Spain), Ban-Ying (Germany), Foundation for Women (Thailand), KOK-NGO Network Against Trafficking in Women (Germany), Women's Consortium of Nigeria, Women, Law and Development in Africa (Nigeria), and sex workers' rights activists from the Global Network of Sex Work Projects (NSWP).

<sup>7</sup> M Dittmore & M Wijers, pp. 80-81.

<sup>8</sup> NSWP, 'Commentary on the Draft Protocol To Combat International Trafficking In Women And Children Supplementary To The Draft Convention On Transnational Organized Crime', (A/AC.254/4/add.3), NSWP, retrieved 28 February 2015, <http://nswp.gn.apc.org/es/node/505>

<sup>9</sup> J Doezema, 'Now you see her, now you don't: Sex workers at the UN Trafficking Protocol Negotiation', *Social and Legal Studies*, vol. 14, issue 1, 2005, p. 62, last retrieved 25 February 2015, <http://sls.sagepub.com/content/14/1/61>

the inclusion of a non-discrimination clause to ensure that trafficked persons would not be subject to discriminatory treatment in law or in practice.<sup>10</sup>

While the Caucus recognised sex work as work, the second bloc, the International Human Rights Network, lobbied to include all prostitution in the definition of trafficking, irrespective of conditions of consent or force, with little or no interest in expanding the definition to address other forms of trafficking and forced labour. This position goes back to the early treaties on trafficking, in particular the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, as the next section shows.

### Back to History<sup>11</sup>

The first treaties on trafficking—or ‘white slavery’ as it was called then—stem from the early twentieth century. They define ‘trafficking’ as the compulsive procurement of women and girls ‘for immoral purposes’, originally only across borders, later also within national borders.<sup>12</sup> The dominant concern was the protection of ‘innocent’ women and girls from being lured into brothels, thus ‘distinguish[ing] the innocent woman who found herself in the sex industry as a result of abduction or deceit, from the ordinary prostitute.’<sup>13</sup> Coercive conditions inside brothels were explicitly not addressed, and instead considered ‘a question of internal legislation’, as the closing statement of the 1910 International Convention for the Suppression of the White Slave Traffic states.

In later treaties, in particular the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, trafficking became linked to the exploitation of prostitution, and coercion as defining element was abandoned. Declaring prostitution ‘incompatible with the dignity and worth of the human person’, the 1949 Convention obliges States to criminalise all forms of procurement and exploitation for the purpose of prostitution, with or without consent of the woman involved. The prostitute herself, however, was not to be penalised as she was seen as a passive victim in need of protection, if necessary against her will. Although addressed in two separate articles, ‘trafficking’ and ‘exploitation of prostitution’ are mentioned in the same breath.<sup>14</sup> Illustrative are various national laws that followed the Convention, such as the Indian Immoral Traffic (Prevention) Act, which targets the exploitation of prostitution rather than ‘trafficking’.<sup>15</sup>

As stated by Bravo, this preoccupation with prostitution continues today, despite the recognition of other exploitative purposes:

The spectre of involuntary sex and of despoilment of innocent white maidens seized the world’s attention in the late 1800’s and early 1900’s.

<sup>10</sup> M Ditmore & M Wijers, p. 81.

<sup>11</sup> See for an extensive description of the historical development of the concept of trafficking: Wijers & Lap-Chew, 1999.

<sup>12</sup> International Agreement for the Suppression of the White Slave Traffic, 1904; International Convention for the Suppression of the White Slave Traffic, 1910; International Convention for the Suppression of the Traffic in Women and Children, 1921; International Convention for the Suppression of the Traffic in Women, 1933. Whereas the 1904 Agreement only addresses the compulsive procurement of women for immoral purposes abroad, the 1910 Convention broadens the scope to include the traffic in women within national boundaries. The 1933 Convention importantly includes boys (‘traffic in children of both sexes’). The 1933 Convention removed the requirement of constraint, but solely in regard to the international traffic in women.

<sup>13</sup> J Bindman & J Doezema, ‘Redefining Prostitution as Sex Work on the International Agenda’, *Anti-Slavery International and NSWP*, 1997, p. 2.

<sup>14</sup> M Wijers & L Lap-Chew, pp. 25-26.

<sup>15</sup> M Wijers & L Lap-Chew, p. 148; GAATW, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights Around the World*, GAATW, Bangkok, 2007, p. 116.

Overtone of that appalled, fascinated, and condemnatory prurience continue to pervade public and institutional perceptions of the traffic in human beings in the early twenty-first century.<sup>16</sup>

From the first treaties, and later in the 1980s as trafficking debates re-emerged following a period of silence, the concern about ‘trafficking’ was mixed with concerns about the morality of women as well as about national borders. A recurring theme is the issue of consent.

### *Free vs Forced Prostitution: The issue of coercion and consent*<sup>17</sup>

Whereas coercion had been abandoned in the 1949 Convention, in the years before the Trafficking Protocol discussions began, a number of definitions, e.g. in the 1994 UN Resolution on Traffic in Women and Girls, tried to reintroduce coercion or force as a crucial element of trafficking.<sup>18</sup>

Although this reintroduction had the potential to give some room for disentangling trafficking from an equation with all prostitution, the question as to what exactly coercion and consent refer to remained a permanent source of confusion. Debates on this also impacted the Protocol as is explored later in this paper.

Relatively clear is the viewpoint in which ‘coercion’ or ‘force’ is interpreted as referring to both the process of recruitment and the conditions of work. ‘Forced prostitution’ in this interpretation is the equivalent of ‘forced labour in prostitution’.

A second interpretation of the coercion/consent dichotomy, as per the early twentieth century treaties, is that coercion and consent refer to the process of recruitment only. ‘Forced’ in this interpretation merely addresses the way a woman came to be a prostitute: as a result of her own decision or forced by others. Once a woman works in prostitution, the conditions under which she works—be they good or exploitative—are not considered relevant. ‘Coercion’ or ‘force’ defined in this way excludes women who consciously make the decision to work in the sex industry, but who are subject to force and abuse in the course of their work. The abuses she undergoes are considered to be the consequences of her willingness to be a prostitute.

A third view is that the institution of prostitution itself is a violation of human rights, akin to slavery. Within this view, any distinction which refers to the consent or will of the woman concerned is irrelevant, as no person, even an adult, is believed to be able to give genuine consent to engage in prostitution. The conditions of recruitment or work—whether forced or free—are not relevant as prostitution is believed to be ‘forced’ per definition.<sup>19</sup> It follows that anyone involved in assisting a woman move from one place to another to engage in sex work is a trafficker.<sup>20</sup> In addition, it is difficult to see how prostitutes can be respected if their work is viewed as inherently degrading.<sup>21</sup>

<sup>16</sup> K E Bravo, ‘Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade’, *Boston University International Law Journal*, vol. 25, no. 2, 2007, pp. 207-221.

<sup>17</sup> See for a more fundamental discussion of the forced/voluntary dichotomy and the issue of consent: J Doezema.

<sup>18</sup> Resolution 49/166 of the General Assembly of the UN (UN Doc/A/Res/49/166), adopted December 1994.

<sup>19</sup> M Wijers & L Lap-Chew, pp. 37-38, 223.

<sup>20</sup> J Doezema, p. 67.

<sup>21</sup> Illustrative is the characterisation of prostitutes by a member of CATW as ‘empty holes surrounded by flesh, waiting for a masculine deposit of sperm’, during the NGO consultation with UN/intergovernmental organisations on Trafficking in Persons, Prostitution and the Global Sex industry: ‘Trafficking and the Global Sex Industry: The need for a human rights framework’, 1999, Palais des Nations, Geneva (quoted in J Doezema, p. 74).



### Trafficking vs Illegal Migration

During the 1990s the historical focus on (cross-border) recruitment and transportation re-emerged leading to a range of repressive immigration measures, especially by industrialised Western countries. For example, at a European conference on trafficking coorganised by the European Commission and the International Organization on Migration in 1996, an overwhelming number of documents prepared by governments and international organisations were titled ‘trafficking in migrants’ or ‘trafficking in aliens’ and predominantly addressed illegal migration, aiming to ‘prevent the entry of possible victims’.<sup>22</sup>

Measures to combat trafficking varied from tightening up visa policies, closer supervision of international marriages and the criminalisation of third parties who facilitate illegal entry or stay (and sometimes of the migrant her or himself). Some countries, like the United Kingdom (UK), explicitly excluded (alleged) prostitutes from legal immigration to address trafficking.<sup>23</sup> Yet, ‘destination’ countries are not alone in seeking to combat trafficking by obstructing migration, especially of young women. Bangladesh, for example, issued a ban on migration for low- and semi-skilled women, arguing that ‘these women [...] have low moral standards and can easily be seduced to be engaged in immoral activities’,<sup>24</sup> while Hungary confiscated the passports of alleged prostitutes in order to prevent them from crossing borders.<sup>25</sup> These types of restrictions are combined with ‘awareness raising’ campaigns in countries of origin, warning women and girls of the dangers of trafficking, which they say are inherent in migration.<sup>26</sup>

### Key Points of the Debate on the Trafficking Protocol

From the historical roots of the anti-trafficking framework a number of problematic dominant themes were carried into the Protocol negotiations, notably: the focus on recruitment and transport, rather than on abusive or coercive conditions of work, coupled with concerns about protection of national borders; the preoccupation with the innocence, read: the morality, of the women concerned; the conflation of trafficking and prostitution; and the reduction of women to passive victims without regard to conditions of coercion or consent.

Concepts of women’s agency—i.e. whether women can actually choose to work in the sex industry—permeated all other discussions. A crucial term was ‘consent’:

States, supported by the CATW-network, argued that the definition must include wording on consent that indicated that a person could never consent to prostitution. Other States argued that as force and coercion had already been agreed as the key elements of trafficking, a statement on consent would be redundant. As one delegate put it [...] ‘by definition, no one can consent to abuse or coercion’.<sup>27</sup>

Whereas the International Human Rights Network was in favour of restricting the Protocol to the trafficking in women and children, leaving men out of the equation entirely, and advocated the inclusion of language like ‘with or without consent’,

<sup>22</sup> European Commission, ‘Report of the Conference on Trafficking in Women’, (CAB./183/96-en), Vienna, Brussels, 1996.

<sup>23</sup> M Wijers & L Lap-Chew, p. 198. See also a study on biases of immigration officers in Australia and Thailand, J Ham, M Segrave and S Pickering, ‘In the Eyes of the Beholder: Border enforcement, suspect travellers and trafficking victims,’ *Anti-Trafficking Review*, issue 2, 2013.

<sup>24</sup> S Sobhan, *Women Labour Migration, the case of Bangladesh*, Bangladesh, 1992.

<sup>25</sup> M Ditmore & M Wijers, p. 81.

<sup>26</sup> S Ghosh, ‘Anti-Trafficking and its Discontents: Women’s migrations and work in an Indian borderland,’ *Gender, Place & Culture*, 2014.

<sup>27</sup> J Doezema, p. 79.

the Human Rights Caucus advocated that the Protocol address trafficking for all types of work or services for both women and men, while removing any mention of prostitution from the international definition of trafficking. The Caucus also advocated the use of the term ‘trafficked persons’, rather than ‘victims’, as the latter term tends to reduce the identity of, in particular, women to that of a passive victim rather than recognising them as persons with agency, decision-making abilities and rights. In the same vein, the Caucus argued that the singling out and linkage of women and children as targets of the Protocol was problematic in that it often entails treating women as children, denying them the right to have control over their own bodies and lives.<sup>28</sup>

### Successes and Failures

The final definition in the UN Trafficking Protocol is a political compromise. Compared to the old definitions, the Trafficking Protocol signifies a step forward. The use of coercion, abuse and deceit are a key element of trafficking; the Protocol broadens the definition to include all forms of forced labour and slavery-like practices into which people—of any gender—can be trafficked, whether within or across borders; and, for the first time, the definition links trafficking with forced labour and slavery-like practices, thus bringing into play international conventions and agreements on forced labour.

Moreover, the Trafficking Protocol makes a clear distinction between trafficking and prostitution. Although it explicitly mentions the exploitation of the prostitution of others and other forms of sexual exploitation as one of the forms of exploitation, this type of exploitation must be combined with one of the deceptive or coercive ‘means’ listed in the definition to classify as trafficking. The terms ‘exploitation of the prostitution of others’ and ‘sexual exploitation’ were intentionally left undefined, leaving the question of how to address prostitution in their domestic laws to the discretion of individual States.<sup>29</sup>

Less successful were the efforts of the Caucus to include human rights protections for trafficked persons. Whereas all law enforcement provisions are mandatory, including those on strengthening border controls, the provisions on protection and assistance of trafficked persons are largely discretionary. A major cause for this failure was the deep and entrenched divide between the two NGO blocs, which made any concerted lobby almost impossible, even on issues on which one may have expected they agreed.<sup>30</sup>

### Old Problems in a New Coat

#### *‘Sexual exploitation’ vs ‘labour exploitation’*

In practice, in the post-Protocol years, the old problems have continued to reappear, though in a new coat. Firstly, the Protocol’s text has been interpreted in a way in which ‘sexual exploitation’ is singled out as separate from what now is called ‘labour exploitation’, i.e. forced labour, slavery, slavery-like practices and servitude in other industries. This is problematic for a number of reasons.

Apart from the fact that this implies that sex work cannot be labour, the separation of sexual exploitation from forced labour falsely suggests that forced

<sup>28</sup> M Ditmore & M Wijers, p. 82.

<sup>29</sup> See Interpretative Notes (A/55/383/Add.1/Addendum).

<sup>30</sup> J Ditmore & M Wijers, pp. 85-86.

labour cannot exist in the sex industry, consequently depriving sex workers of protection against the practice. This is one of the reasons why sex workers perceive the trafficking framework as unhelpful in the protection of their human rights. In this context it should be noted that the International Labour Organization (ILO) Committee of Experts has always dealt with forced prostitution as a form of forced labour. As stated by the 2007 International Labour Conference:

While a certain distinction has been drawn in the above definition between trafficking for forced labour or services and trafficking for sexual exploitation, this should not lead to a conclusion that coercive sexual exploitation does not amount to forced labour or services, particularly in the context of human trafficking.<sup>31</sup>

In this sense, the Protocol is a step backwards rather than forwards. Oppositely, the distinction does not recognise that sexual exploitation can take place in any labour sector.

Moreover, despite the distinction the Protocol makes between trafficking and sex work, in practice the singling out of 'sex trafficking' has reinforced the historical obsession with prostitution and fed into the old conflation of sex work and trafficking, more so since the terms sexual exploitation and exploitation of prostitution are left undefined.

The distinction between 'sexual exploitation' and 'labour exploitation' also gives rise to diametrically opposed strategies in combating trafficking in the sex industry and other industries.<sup>32</sup> In the latter case, strategies focus on strengthening rights of migrant workers and enforcing labour standards to combat abusive practices, e.g. by the ILO. Conversely, in the case of trafficking in the sex industry, the further criminalisation of prostitution is advocated, thus leaving sex workers with fewer instead of more rights. This is reinforced by the call on States in Article 9(5) of the Protocol to take measures to 'discourage the demand that fosters all forms of exploitation, especially of women and children, that leads to trafficking'. This paved the way for 'end demand' campaigns, which call for the criminalisation of clients of sex workers under the heading of combating trafficking. It, moreover, paves the way for excluding sex work from measures to address forced labour in other industries, such as those contained in the 2014 ILO recommendation for the suppression of forced labour.<sup>33</sup>

### *Movement vs Forced Labour and Slavery-Like Exploitation as the Crucial Element*

A second, but connected, fundamental problem is the focus on the way people arrive in a situation of forced labour or slavery-like exploitation. Attention on the movement elements of trafficking has taken focus away from its forced labour and slavery-like outcomes:

[...] the Trafficking Protocol does not equate 'exploitation' [...] with trafficking, but is concerned only with prohibiting forms of dealing which facilitate or lead to exploitation. There is, in consequence, no obligation

<sup>31</sup> ILO, 'Eradication of Forced Labour', ILO, 2007, p. 42.

<sup>32</sup> See further problematising of this in the Australian context in F Simmons & F David, 'The Road to Effective Remedies: Pragmatic reasons for treating cases of "sex trafficking" in the Australian sex industry as a form of "labour trafficking"', *Anti-Trafficking Review*, issue 1, 2012.

<sup>33</sup> 'ILO, R203—Forced Labour (Supplementary Measures) Recommendation', no. 203, 2014, retrieved 5 March 2015, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:3174688](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:3174688)



flowing from the Trafficking Protocol to do anything about the condition of being exploited, much less to provide a remedy to exploited persons.<sup>34</sup>

The focus on (cross-border) movement has not only provided States a justification to pursue a border control agenda under the guise of combating trafficking.<sup>35</sup> It also unjustifiably privileges a small subgroup of persons—i.e. those who arrived in a situation of forced labour through trafficking—while marginalising those who find themselves in forced labour or slavery-like situations but who do not meet the definition of trafficking.

In practice, the focus on movement often leads to discriminatory measures which deprive some people from exercising their freedom of movement and their right to a livelihood, because they *might* be trafficked, while excluding others who actually have been subjected to forced labour, slavery-like practices or servitude from protection or support because they do not fall under the trafficking definition. There is no reason why one category of victims of forced labour and slavery-like practices should have access to assistance and protection and other categories not, simply because of the way they arrived in that situation.

From a human rights perspective, the primary concern is to stop exploitation of people under forced labour or slavery-like conditions, no matter how people arrive in such situations and whether it concerns a victim of trafficking, a smuggled person, an illegal migrant or a lawful resident.

The logical way forward—at least from a human rights point of view—would be to focus policy interventions on the forced labour and slavery-like outcomes of trafficking, rather than on the means of trafficking. Importantly, this would shift the debate from morality<sup>36</sup> to actual working conditions.

### Collateral Damage

Since the adoption of the Trafficking Protocol in 2000, efforts to stop trafficking have mushroomed globally. While one may hope that this at least has led to some progress in the area of protection and assistance of victims, the Protocol has done little to address the old problems as above.

Notwithstanding the distinction the Protocol makes between trafficking and sex work, anti-trafficking measures increasingly target sex workers and sex work as such. Neither has it changed the emphasis of most governments on control and restriction of migration, instead of on protecting migrants against abuse and exploitation.<sup>37</sup>

Moreover, rather than safeguard the human rights of people who have been trafficked, the priority of governments has been to prosecute and punish traffickers, as per their commitments in the Protocol. Even when the need for assistance and protection of victims is recognised, most countries make access to assistance and protection of trafficked persons conditional on their cooperation

<sup>34</sup> J C Hathaway, 'The Quagmire of "Human Trafficking"', *Virginia Journal of International Law*, vol. 49, issue 1, 2008-2009, p. 10.

<sup>35</sup> M Lee, 'Human Trafficking and Border Control in the Global South' in K S Aas & M Bosworth (eds.), *The Borders of Punishment: Migration, citizenship and social exclusion*, Oxford University Press, 2013; B Anderson, 'Where's the Harm in That? Immigration enforcement, trafficking, and the protection of migrants' rights', *American Behavioral Scientist*, vol. 56, issue 9, 2012, pp. 1241-1257. Also for instance: BBC, 'UK "won't take Calais migrants"', *BBC News*, 22 Sept 2009.

<sup>36</sup> See for instance: R Weitzer, 'Moral Crusade Against Prostitution', *Society*, vol. 43, issue 3, 2006, pp. 33-38.

<sup>37</sup> See for instance: GAATW, 'Collateral Damage'.

with law enforcement officials, only to pack them off home when they are not useful anymore.<sup>38</sup> In many cases, trafficked persons are detained and deported without protection against reprisals from traffickers and without redress for unpaid wages and compensation for the damages they suffered.<sup>39</sup> Sometimes trafficked persons are, in the name of protection or rehabilitation, confined in public or private shelters under conditions no different from detention.<sup>40</sup> In other cases, as this section shows, trafficked persons are prosecuted for being complicit in offences they committed as a result of their being trafficked. Usually this is prostitution, either in the country where they were identified or upon arrival at home, but it can also be a migration offense.

In the name of combating trafficking, Sweden, Northern Ireland and an increasing number of other European countries have criminalised clients of sex workers, based on the logic that if there is no 'demand', there is no prostitution. And, if there is no prostitution, there is no trafficking for prostitution. Reports from sex workers and researchers indicate that, while there is nothing to support the claim that prostitution in Sweden has decreased since the country established the law on criminalisation of clients of sex workers in 1999, violence against sex workers has increased, in particular against those working on the streets. Stigma and social exclusion of sex workers have also increased, leaving them more isolated and vulnerable. In addition, criminalising clients has not only made it more difficult for sex workers to work independently but also increased unsafe sex practices, as police use condoms as evidence of prostitution.<sup>41</sup> And in the name of combating trafficking, the European Women's Lobby is campaigning for a 'prostitution-free Europe', in essence denying sex workers the very right to exist.<sup>42</sup>

The distinction between 'innocent' and 'guilty' victims persists and is one of the major obstacles to combating trafficking, as it denies sex workers protection against abuse. When sex workers do find themselves in a trafficking situation, they have to prove they are 'innocent'. The Protocol states clearly that 'consent' cannot be used as a legal defence once the use of one of the coercive or deceptive means has been proved.<sup>43</sup> However, in practice trafficked persons are having to

<sup>38</sup> See: GAATW, 'Collateral Damage'; S Ćopić & B Simeunović-Patić, 'Victims of Human Trafficking: Meeting Victims' Needs?' in J Winterdyk, B Perrin & P Reichel (eds.), *Human Trafficking: Exploring the International Nature, Concerns, and Complexities*, CRC Press, London, 2011.

<sup>39</sup> B Anderson; K H Heinrich, 'Ten Years After the Palermo Protocol: Where are protections for human trafficking?', *Human Rights Brief*, vol. 18, issue 1, 2010. S Plambech, 'Between "Victims" and "Criminals": Rescue, deportation, and everyday violence among Nigerian migrants', *Social Politics*, vol. 21, issue 3, 2014.

<sup>40</sup> A T Gallagher & E Pearson, 'Detention of Trafficked Persons in Shelters: A legal and policy analysis', 2008, retrieved 27 Feb 2015, <http://ssrn.com/abstract=1239745>

<sup>41</sup> A Jordan, 'The Swedish Law To Criminalize Clients: A Failed Experiment In Social Engineering', Center For Human Rights and Humanitarian Law, 2012, retrieved 25 February 2015, [http://www.nswp.org/sites/nswp.org/files/Issue-Paper-4%5B1%5D\\_0.pdf](http://www.nswp.org/sites/nswp.org/files/Issue-Paper-4%5B1%5D_0.pdf) ; S Thing, P Jakobsson & A Renland, 'When purchase of sex is a crime: About new legal measures and its impact on harm reduction among sex workers in Sweden and Norway', presented at International Harm Reduction Association's 22nd International Conference, Beirut, Lebanon, 3-7 April 2011; S Dodillet & P Östergren, 'The Swedish Sex Purchase Act: Claimed success and documented effects', Conference paper presented at the international workshop 'Decriminalizing Prostitution and Beyond: Practical experiences and challenges', The Hague, 3-4 March 2011; J Juosmanen, 'Attitudes and Perceptions about Legislation Prohibiting the Purchase of Sexual Services in Sweden', *European Journal of Social Work*, 2011, pp. 1-17; C Holmström, 'Report on the Effects of the Swedish Ban Against Sex Purchase' [original name in Swedish], Swedish Association for Sexuality Education, 2015.

<sup>42</sup> European Women's Lobby, 'Together for a Europe Free from Prostitution', retrieved 27 February 2015, <http://www.womenlobby.org/spip.php?rubrique187&lang=en>

<sup>43</sup> Article 3(b) of the Protocol explicitly states that the consent of a victim of trafficking in persons to the intended exploitation is irrelevant where any of the coercive or deceptive means listed in the definition are used. A person can thus consent to be smuggled, to migrate or to work as a domestic worker, sex worker or any other work, but this does not imply that the person consented to the exploitation. On the issue of consent also see: UNODC, 'The Role of Consent in the Trafficking in Persons Protocol', Issue Paper, UNODC, 2014.

prove that they did not consent to prostitution in order to be considered a ‘real’ victim.<sup>44 45</sup> As noted by the European Expert Group in its report:

The effect is that in many cases, instead of the offender standing trial, it is the victim who has to prove her ‘innocence’, thus shifting the focus from the acts of the trafficker to the morality of the victim.<sup>46</sup>

The distinction between ‘good’ women who deserve protection and ‘bad’ women who forfeited their right to protection against abuse sends two messages. The first one is that sex workers can be abused with impunity.<sup>47</sup> The second is that the right of women to be protected against violence and abuse is determined by their sexual purity or ‘honour’. This is not only harmful for sex workers, but for all women.

In Romania, for instance, forcing ‘innocent’ women into prostitution is a crime. The same acts, however, will be qualified as ‘pandering’ when the victim is a sex worker. In the first case the victim is entitled to protection and support; in the second she is seen as co-perpetrator and prosecuted and punished.<sup>48</sup> Similarly, in Albania the articles in the Criminal Code on trafficking and aggravated forms of exploitation of prostitution overlap. Depending on whether the crime is qualified as trafficking or as exploitation of prostitution, the victim will either be entitled to assistance or be prosecuted and punished.<sup>49</sup>

Conversely, Bulgaria and Mexico deleted the requirement of coercion in the UN definition of trafficking, putting adult women on the same level as children, for whom coercion is not applicable in the Protocol.<sup>50</sup> Although ‘pimping’, including consensual partner relationships of sex workers, has always been criminalised in Mexico, the new anti-trafficking law now defines what was formerly ‘pimping’ as ‘trafficking’ with much harsher sanctions. This law effectively criminalises as ‘traffickers’ all people who associate with sex workers, including colleagues, partners, adult children, cleaners, barmen etc., while defining all sex workers as ‘victims’. At the same time the law criminalises clients. The effect has been a massive increase in raids on brothels, leading to the arrest and detention of sex workers, who consequently have the choice to either declare themselves to be a ‘victim’ and betray their colleagues, partners and other associates as ‘traffickers’, or refuse to do so and themselves be prosecuted and imprisoned. At the same time the rights of those who actually became victims of trafficking and exploitation are disregarded.<sup>51</sup>

<sup>44</sup> M Ticktin, *Casualties of Care: Immigration and the Politics of Humanitarianism in France*, University of California Press, Berkeley, 2011. C M Jacobsen & M-L Skilbrei, ‘Reproachable Victims?’ Representations and Self-representations of Russian Women Involved in Transnational Prostitution, *Ethnos: Journal of Anthropology*, vol. 75, issue 2, 2010, pp. 190-212. On images of ‘real’ victims, see: T G Blanchette, A P Silva & A R Bento, ‘The Myth of Maria and The Imagining of Sexual Trafficking in Brazil’, *Dialectical Anthropology*, vol. 37, no. 2, 2013, pp. 195-227.

<sup>45</sup> A similar reasoning in regard to trafficking for, e.g., domestic labour would imply that if a person consented to work as a domestic worker or did so before, it would exclude that person from being recognised as a victim of trafficking for domestic labour.

<sup>46</sup> Experts Group on Trafficking in Human Beings, ‘Report of the European Experts Group on Trafficking in Human Beings’, European Commission, 2004, p. 51, retrieved 5 March 2015, <http://lastradainternational.org/doc-center/1049/report-of-the-experts-group-on-trafficking-in-human-beings>

<sup>47</sup> J O’Connell Davidson Davidson, ‘Will the Real Sex Slave Please Stand up?’, *Feminist Review*, no. 83, 2006, pp. 4-22.

<sup>48</sup> Pro Refugio/Adpare, ‘Legal Analysis of the Rights of Trafficked Persons’, Association Pro Refugi, Bucharest, 2013, p. 19.

<sup>49</sup> Centre for Legal and Civil Initiatives (CLCI), ‘Promotion of the rights of trafficked persons in Albania. Legal analysis of the current situation in regard to the rights of victims of trafficking’, CLCI, Tirana, to be published in 2015.

<sup>50</sup> Animus Association, ‘Promotion of the Rights of Trafficked Persons in Bulgaria’, Animus Association, Sofia, 2013; Rights4Change, *Report Right Guide Training Mexico*, Utrecht: Rights4Change, 2013.

<sup>51</sup> Rights4Change; personal interviews with the Colectivo contra la Trata de Personas, 2015.

In India the police still uses the Immoral Trafficking (Prevention) Act to carry out so-called raid and rescue operations, leading to the arbitrary arrest and detention of sex workers, confiscation of their property, forced rehabilitation and the deportation of undocumented migrant sex workers, both trafficked and non-trafficked.<sup>52</sup> The same goes for Thailand, as described by Empower in their report on the impact of anti-trafficking measures on sex workers' rights.<sup>53</sup>

Although the problem of needing to prove innocence is particularly visible and began in relation to the sex industry, it has spread in relevance to all trafficked undocumented migrants who may be perceived to lack the necessary 'innocent victim' status, as they may have consented to illegal border crossing, smuggling or working in exploitative conditions.<sup>54</sup>

For many years now, anti-trafficking, sex workers' rights and migrants' rights organisations have argued that anti-trafficking policies can do and do significant harm and have collected evidence to prove this. GAATW's *Collateral Damage* report, for instance, documents a wide range of examples of how anti-trafficking policies negatively affect the people they are supposed to benefit. As stated in the report, the evidence available also suggests that it is especially marginalised groups, such as sex workers, migrants, refugees and asylum seekers, who suffer the negative consequences.<sup>55</sup> It is difficult to avoid the conclusion that the anti-trafficking framework is inherently and irreparably flawed—being overly focused on women's sexual purity and national borders and therefore the wrong instrument to further human rights.

### A Human Rights Approach

In the years following the Protocol's adoption, there have been increasing calls for a human rights approach to trafficking. However, the question is whether this solves the fundamental problems in the anti-trafficking framework and will help to reduce the collateral damage of anti-trafficking measures. In practice, those who advocate for a human rights approach tend to exclusively focus on the rights of trafficked persons, while ignoring the concerns of other people affected by anti-trafficking laws and policies, as well as basic human rights principles, such as participation, empowerment and non-discrimination.

In 2002, the then UN High Commissioner for Human Rights, Mary Robinson, issued a set of 'Recommended Principles and Guidelines on Human Rights and Human Trafficking'. These stress that:

...anti-trafficking measures should not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked and of migrants, internally displaced persons, refugees and asylum seekers.

While this was, at the time, a brave and important thing to say, significantly sex workers are not mentioned, though they are clearly among the groups that suffer most from anti-trafficking measures. The 2010 'Commentary on the Recommended

<sup>52</sup> R Manjoo, 'Report of the Special Rapporteur on violence against women, its causes and consequences', Human Rights Council, 26<sup>th</sup> session, A/HRC/26/38/Add.1, 2014.

<sup>53</sup> Empower Foundation, 'Hit and Run: The impact of anti-trafficking policy and practice on sex workers' human rights in Thailand', Empower University Press, Nonthaburi, 2012, retrieved 14 June 2013, [http://www.empowerfoundation.org/sexy\\_file/Hit%20and%20Run%20RATSW%20Eng%20online.pdf](http://www.empowerfoundation.org/sexy_file/Hit%20and%20Run%20RATSW%20Eng%20online.pdf)

<sup>54</sup> Experts Group on Trafficking in Human Beings, p. 51.

<sup>55</sup> GAATW, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights Around the World*, GAATW, Bangkok, 2007.

Principles and Guidelines’, while stressing the importance of monitoring the impact of anti-trafficking measures to ensure that they do not interfere with established rights, also ignores sex workers when listing the groups whose rights in particular should be taken into account.<sup>56</sup>

If this makes anything clear it is that human rights are a highly contested area, as they have always been. A human rights approach touches upon strong interests of States. This is clear in the case of migration and crime control, but as much applies to the control of female sexuality, as the debates on, for example, reproductive rights show. Contestations about human rights, as we have seen, touch upon deep ingrained ideas about gender roles, the value of men’s work and women’s work, female and male sexuality, sex work and concepts of sexual purity of women and their entitlement—or lack of entitlement—to protection from violence and abuse.

### What Does this Mean for the Anti-Trafficking Movement?

This does not mean that we should denounce the human rights-based approach or that this is not a valid framework. On the contrary we need to look at what policies and practices do uphold rights *de facto*, and we need to change or deprioritise those that do not. As this paper argues we firmly need to move away from the focus on how people get into a situation of forced labour or slavery-like exploitation and extend our concern about the protection of human rights to *all* people who are subjected to these abuses. A first step would be to demand that the protections afforded to trafficking victims—however minimal they may be—are extended to all people subjected to forced labour, slavery or slavery-like practices. In fact, this is precisely what States are already obliged to do under the relevant conventions.

It also means that we should not only be concerned about the human rights of trafficked persons, but also about the impact of anti-trafficking policies and measures on the human rights of other groups affected by them, in particular sex workers, migrants and refugees. With regard to the first, there is a lot to learn from the sex workers’ rights movement. It is up to the anti-trafficking movement to listen. Lack of awareness is no excuse: the body of research on the negative human rights impacts of anti-trafficking measures is ever growing.<sup>57</sup> The same goes for the impact on the rights of migrants and refugees.<sup>58</sup>

Furthermore, as a basic principle, groups affected by trafficking and anti-trafficking measures must be involved in the design, implementation, monitoring and evaluation of anti-trafficking measures. Their participation is key.

Lastly, it means that we should refuse to accept the distinction between people (usually women) who deserve protection and those who do not. This implies opposing the distinction between ‘sexual exploitation’ and ‘forced labour’ and its implicit gender bias. Forced labour is forced labour, no matter in which industry it takes place.

<sup>56</sup> Office of the High Commissioner on Human Rights, ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary’, 2010.

<sup>57</sup> See other citations in this paper, but also Empower Foundation; A Ahmed & M Seshu, “‘We have the right not to be ‘rescued’...’: When Anti-Trafficking Programmes Undermine the Health and Well-Being of Sex Workers’, *Anti-Trafficking Review*, issue 1, 2012; M Ditmore, *The Use of Raids to Fight Trafficking in Persons*, Sex Workers Project, New York, 2009.

<sup>58</sup> See for example J C Hathaway; B Anderson.

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**Marjan Wijers** works as an independent researcher, consultant and trainer and has published on trafficking, sex work and human rights. She is co-founder of Rights4Change, which specialises in development and application of human rights impact assessment tools. She has worked at the Dutch Foundation against Trafficking in Women, the Clara Wichmann Institute, the Dutch Expert Centre on Women and Law, and the Verwey-Jonker Institute. She has wide experience in providing support to victims of trafficking, as well as in policy development and advocacy. She was actively involved in the NGO lobby around the UN Trafficking Protocol as part of the Human Rights Caucus, a coalition of anti-trafficking, human rights and sex workers rights organisations. She also was one of the organisers of the first European sex workers conference in Brussels in 2005. From 2003-2007 she was President of the Experts Group on Trafficking in Human Beings, established by the European Commission.