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*Moving the focus
from morality to
actual conditions*

The negotiations on the UN Protocol on Trafficking in Persons

In november 2000 aanvaardde de Algemene Vergadering van de Verenigde Naties een nieuw Verdrag inzake transnationale georganiseerde criminaliteit met twee bijbehorende protocollen: één over mensenhandel en één over mensensmokkel. Aan de totstandkoming hiervan ging bijna twee jaar onderhandelen vooraf. Een van de grootste strijdpunten in de onderhandelingen over het Mensenhandelprotocol vormde de definitie van mensenhandel. Hier botsten twee radicaal verschillende visies op prostitutie: waar in de ene opvatting prostitutie en vrouwenhandel identiek zijn, is in de andere visie prostitutie arbeid en wordt mensenhandel niet gedefinieerd door de aard van het werk maar door de omstandigheden van dwang en uitbuiting, ongeacht het soort werk dat verricht wordt. Beide visies waren vertegenwoordigd door een krachtige NGO-lobby. Het onvermogen tot samenwerking van deze twee – diametraal tegenover elkaar staande – lobbygroepen gaf regeringen de ruimte om weg te komen met een protocol dat slachtoffers slechts een minimale bescherming van hun mensenrechten biedt.

During its meeting of 15 November 2000 the General Assembly of the United Nations adopted a new Convention Against Transnational Organized Crime. The purpose of this new international instrument is to prevent and combat criminal offences of a transnational nature committed by organized criminal groups. The Convention is supplemented by two Optional Protocols, one of which addresses smuggling of persons and the other trafficking in persons.¹ The Convention and the Protocols were negotiated at a series of eleven meetings of a special intergovernmental Ad-hoc Committee under the auspices of the UN Crime Commission, which were held in Vienna from January 1999 until October 2000 and in which more than 100 countries took part. They were opened for signature in December 2000 at a high level meeting in Palermo, Italy. While all countries, without exception, signed the Convention, eighty countries, among which the Netherlands, also signed the Trafficking Protocol.²

This article focuses on the Trafficking Protocol – 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 – and in particular on the NGO-lobby and the dynamics of the negotiations at the UN International Crime Commission. Both authors attended (part of) these negotiations as members of the Human Rights Caucus, an alliance of NGOs working in the field of human rights, trafficking and prostitutes' rights.³ One author has an anti-trafficking background, the other is a sex workers' rights activist.

One of the most controversial and hotly debated issues during the negotiations concerned the first major lobbying goal of the participating NGOs, namely the definition of trafficking. This is not surprising, as one of the fundamental problems in combating trafficking until then had been the lack of international consensus on a definition and thus on precisely which practices should be combated. Underlying this lack of consensus are two diametrically opposed views on sex work. The depth of this controversy was reflected in the presence of two opposed NGO-lobbying blocs, representing two types of feminist response to sex work and, consequently, the issue of how to define trafficking in persons. One sees all sex work as trafficking *per se*. The other view holds that conditions of

1. A third protocol, dealing with the trade in firearms and weapons, was adopted the year after at the General Assembly meeting of 8 June 2001 (Res. 55/255).

2. The Convention, the Protocols and the countries that signed them can be found at the UN website www.unodc.org/unodc/en/crime_cicp_convention.html. The *Travaux Préparatoires* can be found at www.unodc.org/unodc/crime_cicp_convention_documents.html.

3. For this article use has been made of the many documents that the Caucus produced during the negotiations, a.o. *Recommendations and Commentary on the draft Protocol* (July 1999), *Commentary on proposals made by States* (October 1999), *Recommendations and Commentary Articles 1-3, 5-7, 8, 10 and 13* (January 2000), *UN Trafficking Protocol: lost opportunity to protect the rights of trafficked persons* (October 23, 2000), and of the *Annotated Guide to the complete UN Trafficking Protocol* made by the International Human Rights Law Group (May 2002, updated August 2002). These documents can be found on the following websites: www.hrllawgroup.org, www.stoptrafficking.org/news.html, www.thai.net/gaatw, www.nswp.org.

(forced) labour in all industries, including the sex industry, should be addressed.

The debate whether prostitution *per se* is slavery and therefore equivalent to trafficking in persons was related most directly and vehemently to the definition of trafficking in the Protocol, but permeated the whole negotiating process. In order to understand why this was so, it is important to have some insight in the dynamics of the negotiation process.

The power dynamics of the international negotiation process

The negotiations that led to the formulation of the Protocol were carried out by government representatives, the vast majority of whom were male, and NGO lobbyists, who were almost uniformly female. This stereotypical divide between the male embodiment of political authority and the female embodiment of day-to-day experience was complicated by the necessity to discuss prostitution. This introduced a moral element in the debate, whereby the women taking part were in a position of 'moral authority', while the men were morally on the defensive. One might say the male political authority was nagged by a female conscience. This factor was most evidently present in the debates on addressing 'the demand side of prostitution', but more generally acted as an undercurrent during all debates. However, while one might assume that the female lobbyists' moral edge would have given them an advantage at the negotiating table, in actual fact it made any difference of opinion among themselves concerning the nature of prostitution highly painful and emotionally charged.

On the level of the general negotiations, preoccupation with the morality of prostitution deflected from the more general issue of human rights and migrant labour. Migration is actually the heart of international traffic in persons, as trafficked persons are (usually undocumented) migrants seeking work elsewhere who find themselves in untenable working conditions. It is these conditions, achieved by deception or outright enslavement, that distinguish between trafficked and smuggled persons. A smuggled person, like many (but not all) trafficked person, has clandestinely crossed a border or been transported, but unlike trafficking, smuggling is not linked to work. Whereas the illegal crossing of borders is the aim of smuggling, the aim of trafficking is the exploitation of one's labour. In other words, the issue of smuggling concerns the protection of the state against illegal migrants, while the issue of trafficking concerns the protection of individual persons against violence and abuse.

4. During the first part of the negotiations GAATW was represented by the Dutch Foundation Against Trafficking in Women, for which one of the authors then worked. The following organisations were part of the Human Rights Caucus: International Human Rights Law Group (IHLRG, US), Global Alliance Against Trafficking in Women (GAATW, Thailand), Foundation Against Trafficking in Women (STV, the Netherlands), Asian Women's Human Rights Council (AWHRC, Philippines, India), La Strada (Poland, Ukraine, Czech Republic), Fundacion 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).

At the NGO level, the debate concerning the role that prostitution should play in the definition of trafficking became so highly charged that cooperation appeared to be impossible even on the issue on which both factions could in principle have been in agreement, notably the need to include adequate protection and assistance provisions for trafficked persons in the Protocol. As a result the NGOs were ill-equipped to counter the natural tendency of government representatives to focus on repressive measures against illegal migration and organized crime, rather than on strengthening migrants' human rights.

One of the most controversial issues concerned the definition of trafficking

After an introduction of the two NGO lobbying blocs who attended the negotiations, we will discuss how their distinct approaches to sex work were reflected in the more general debates on the definition of trafficking. Subsequently we will show how, through lack of a concerted lobbying strategy to promote the inclusion of human rights protections, the Protocol in the end mostly provided Western states with a broader scope for repressive measures. Improvements in the protection of migrant workers against exploitation were marginal at best.

The two NGO lobbying blocs

At the beginning of the negotiations, only one of the two NGO lobbying blocs – operating under the name of Human Rights Caucus – was engaged in the lobbying process. The Human Rights Caucus consisted of an alliance of human rights, anti-trafficking and sex workers' rights organisations and activists, with a leading role for the International Human Rights Law Group (IHLRG) and the Global Alliance Against Trafficking in Women (GAATW).⁴ The very composition of this alliance was significant, in that for the first time these three distinct movements worked together in a joint lobby. In particular, the combination of anti-trafficking and pro sex workers' rights groups can be considered radical, bridging an historical gap between these two movements caused by the traditional and persistent conflation of 'trafficking' and 'prostitution'.⁵ Historically, anti-trafficking measures have been more concerned with protecting women's 'puri-

5. The Netherlands have always formed an exception in that from its start in 1987 the Dutch Foundation Against Trafficking in Women has worked together with the Red Thread, the Dutch prostitutes' rights organisation, based on the view that anti-violence and pro-rights strategies are two sides of the same coin.

6. See *Commentary on the Draft Protocol To Combat International Trafficking in Women and Children*, Network of Sex Work Projects January 1999 (available at www.nswp.org/mobility/untoc-comment.html). See for a historical description of how efforts to combat trafficking have ended up justifying repressive measures against prostitutes themselves in the name of protection for women and children also Jo Doezema (2002).

Art. 3 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children

'For the purposes of this Protocol:

- (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) "Child" shall mean any person under eighteen years of age.'

ty' than with ensuring the human rights of those working in the sex industry.⁶ This has led – and still leads – to a history of abuse of anti-trafficking measures to police and punish female (migrant) sex workers and to restrict their freedom of movement rather than protect them. Examples are the confiscation of passports of 'alleged' female prostitutes in order to prevent them from crossing borders 'so that they cannot become victims of trafficking' and the singling out of young female migrants as 'possible' prostitutes at the border to refuse them entry.⁷

Lobbying efforts by the Human Rights Caucus focused on the definition of trafficking in persons, advocating a broad and inclusive definition to cover all trafficking into forced labour, slavery and servitude, irrespective

7. These examples stem from contemporary anti-trafficking measures of respectively Hungary and Great Britain. They are, however, not 'new': already in 1912 Greece fought 'white slavery' by passing legislation forbidding women under 21 to travel abroad without a special permit (Doezema 2002).

8. For an extensive discussion of the definition of trafficking and human rights protections for trafficked persons as advocated by the Caucus, see also the *Human Rights Standards for the Treatment of Trafficked Persons*, drafted by the Foundation Against Trafficking in Women (STV), the International Human Rights Law Group and the Global Alliance Against Traffic in Women (1999). The standards are available in several languages on the GAATW website: www.thai.net/gaatw.

9. Abolition here stands for the abolition of prostitution. Other members of the CATW-faction were Soroptimist International, the Inter-

of the nature of the work or services provided or the sex of the trafficked person, and clearly excluding voluntary, non-coercive prostitution or other sex work. This would mean that sex work and trafficking are different issues, whereby trafficking is defined by the presence of coercion, deception, debt bondage, abuse of authority or any other form of abuse in relation to the conditions of recruitment and/or the conditions of work. It also means that a distinction is made between adults and children, whereby, to qualify as trafficking, an element of coercion is not required in the case of children as their legal status is different from that of adults. Additionally, the Caucus worked to include human rights protections for trafficked persons, regardless of their willingness to act as witnesses for the prosecution and including the right to a safe shelter, social, medical and legal assistance, the ability to sue for back wages and damages, as well as residency and working permits during judicial proceedings. Finally, an important goal was the inclusion of an anti-discrimination clause to ensure that trafficked persons are not subjected to discriminatory treatment in law or in practice.⁸

The second bloc, led by the originally American based Coalition Against Trafficking in Persons (CATW), stepped in after the first meeting of the Crime Commission. Contrary to the Caucus, the Coalition and its partners, among which the European Women's Lobby (EWL) and the International Abolitionist Federation (IAF),⁹ regard the institution of prostitution itself as a violation of human rights, akin to slavery. While the Caucus took a sex workers' rights stance, that sex work is a form of labour and should be addressed as such, outside criminality and deviance, the CATW-led Network took a victim's stance, that sex work is inherently a human rights violation and should be abolished and punished, without punishing prostitutes themselves as this would constitute blaming and punishing the victim. Within their view any distinction which refers to the will or consent of the women concerned is meaningless, as no person, not even an adult, is believed to be able to give genuine consent to engage in prostitution. Neither do the conditions of recruitment or work bear any relevance as a criterion of 'force'. Any distinction between 'forced' and 'free' prostitution is considered to be a false one as prostitution is by definition 'forced'.¹⁰ For the same reasons, the term sex work is rejected as legitimating the sex industry. Consequently the Network sought to include all prostitution as well as other sex work in the definition of trafficking in the Protocol, irrespective of conditions of

national Human Rights Federation and Equality Now. Documents explaining their position can be found at the CATW website www.catwinternational.org

10. In fact the terms 'forced' vs. 'free' prostitution are misleading, because they suggest that force refers only to the conditions of recruitment, i.e. to force somebody into prostitution. 'Forced' in this interpretation does not address coercive working conditions but only the way a woman came to be a prostitute: as a result of her own decision or forced by others, thus reinforcing the distinction between 'innocent' women who are deserving of protection and 'guilty' ones who can be abused with impunity because it is their own fault. From this perspective, once a woman works as a prostitute, the conditions under which she is working are of no importance. Therefore, it would be preferable to speak of abusive or coerced conditions of recruitment and work vs. conditions based on mutual agreement.

consent or force. As negotiations progressed, both groups brought larger numbers of representatives in order to have greater impact.

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While the Caucus took a sex workers' rights stance, the CATW-led Network took a victim's stance

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In this context, it is imperative to note that sex workers' rights advocates acknowledge that sex work is hard work and that conditions in the sex industry vary from relatively good to extremely exploitative and abusive, the latter often facilitated by the exclusion of (migrant) sex workers from the rights and legal protection granted to others as citizens and workers.¹¹ Consequently, they seek to correct these abuses by improving conditions and affording legal recognition to the sex industry, in contrast to the 'abolitionists' who seek to make the sex industry more illegal than it currently is and to prosecute and punish men involved as clients or otherwise.

The debates surrounding the definition of trafficking in the Protocol

Art. 3 of the Protocol defines trafficking in persons. Given the fundamental differences in the approaches taken, consensus was extremely difficult to achieve. The definition was discussed at all eleven sessions and was hotly contested every step of the way. Informal meetings and specially scheduled lunchtime meetings were held almost daily by a (closed) working group of governmental delegates devoted to discussing proposed definitions and trying to find middle ground after no headway was made during the plenary meetings. The frequency of special meetings not only demanded much time from the delegates concerned but also demonstrated the difficulty of achieving consensus. New definitions with slight but significant changes were circulated regularly. Central issues in the debate concerned women's agency – i.e. whether or not women can actually choose to work in the sex industry – and, in relation to this, the question whether trafficking should be defined by the nature of the work involved or by the use of deceit and coercion. To provide more insight in the dynamics of the negotiations, we will describe two of the more contentious points of debate in more detail: the concept of agency and the issue of consent.

Men, women and children: the concept of agency

The two Optional Protocols, on smuggling and trafficking in persons, each address movement of persons, but with different levels of agency. Trafficking in per-

sons defines a victim of crime rather than an agent, while smuggling necessarily implicates the person who has engaged the services of a smuggler: a smuggled person is not a victim but a criminal, an illegal immigrant, an undocumented alien, while a trafficked person is assumed to be an innocent victim.

This conception of agency divides in the imagination if not in reality along gender lines, as reflected in the title of the Trafficking Protocol: 'Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children' (emphasis added). This language was explicitly sought by the CATW-led Network, which initially argued in favour of the original title 'Trafficking in Women and Children', leaving men out of the equation entirely. The Smuggling Protocol has no such coda and no specific emphasis on gender. Smuggled migrants are assumed to be men seeking work elsewhere without proper documentation, while trafficked persons are assumed to be duped victims, usually women. In these documents trafficking is something that happens to women while smuggling is the province of men. This gendered distinction follows long-standing stereotypes of women as victims and men as less able to be victimised.

Contrary to the CATW-Network, the Caucus advocated the protocol to address trafficking in all persons, women and men, and the use of the term 'trafficked persons' rather than 'victims of trafficking'. Apart from the evident fact that men can be trafficked as well,¹² the historical linkage of 'women and children' has proven problematic in many ways. Often this linkage entails the treatment of women as if they were children and denies women the rights attached to adulthood, such as the right to have control over one's own body and life. When laws target typically 'female' occupations, they tend to be overly protective and prevent women from making the same type of decisions that adult men are able to make. This is reflected in the position that prostitution is 'forced' by definition, which effectively places women on the same level as children and denies them the agency to make their own decision to engage in sex work among the options available to them. Examples of corresponding strategies are 'anti-trafficking measures' which aim to prohibit or prevent women from migrating for (sex) work¹³ and the type of 'prevention campaigns' which predominantly aim to scare women from going abroad by 'warning them about the dangers of being trafficked', up to the use of (semi-pornographic) illustrations of women held in cages or hung up on meat hooks.¹⁴ Moreover, the linkage of women with children emphasises a single role for women as caretakers of children and obscures women's increasing role as the sole supporter of dependent family members and, consequently, as economic migrants in search of work.

11. See e.g. Sprinkle and Leigh, both in Nagle (1997). See also 'Addressing Sex Work as Labour', presented by one of the authors to the UN Working Group on Contemporary Forms of Slavery during the June 1999 NGO Consultation (available at www.swimw.org).

12. Although trafficking in women in the context of the sex industry has received most attention, women, men and children are trafficked for a variety of work and services, including domestic labour, marriage, sweatshop labour and agriculture.

13. In 1996, the Indonesian government e.g. announced that its citizens would no longer be allowed to work overseas as maids by the year 2000 after reports of maltreatment of Indonesian domestic workers (*Asian Migrant Bulletin*, Vol. IV, nr. 2, April-June 1996).

14. See e.g. the IOM 'prevention campaign' for the Baltic states (www.focus-on-trafficking.net/index.php?ln=en). Of course this is also inspired by increasingly repressive immigration policies, especially by the rich Western states.

For similar reasons the Caucus advocated the term ‘trafficked person’ rather than ‘victim’ because of its lack of gender ideology and the agency reflected in this term. Consistent use of the term ‘victim’ in the context of trafficking often results in policies and laws aimed more at ‘protection’ than at ‘empowering’. Moreover, it tends to reduce the identity of, in particular, women to that of passive victim, rather than recognising that someone is only a victim in relation to a particular crime and for a particular period of time, and that trafficked persons are not only victims of a crime, but also, and more importantly, persons having rights under international human rights law.

Central point of debate was the question whether trafficking should be defined by the nature of the work involved or by the use of deceit and coercion

Another objection to the term ‘victim’ is that it does not reflect the complexity of the issue or the experiences of all people who have undertaken to leave their homes and families to pursue a better future via economic migration (Finkel 2001b, Human Rights Watch 2000, Skrobaneck et al. 1997). Trafficked persons are often the go-getters of their home communities. It is ironic that the ambitious and industrial poor who undertake migration are unrewarded in this legislation, while ‘innocent victims’ garner greater sympathy. This insistence on the title of ‘victim’ from an anti-sexual feminist camp has historic precedent. Dubois and Gordon (1984) write that feminists of earlier eras

‘consistently exaggerated the coerciveness of prostitution. In their eagerness to identify the social structural forces encouraging prostitution, they denied the prostitute any role other than that of passive victim. They insisted that the women involved were sexual innocents, women who ‘fell’ into illicit sex. They assumed that prostitution was so degraded that no woman could freely choose it, not even with the relative degree of freedom with which she could choose to be a wife or a wage earner’ (p. 33).

The issue of consent

A second recurring point of debate regarded the inclusion in the definition of language like ‘irrespective of the consent of the person’ or ‘with or without her consent’. An argument put forward by the CATW-led network was that without it the consent of the victim could be used as a defence by traffickers to escape punish-

ment. This argument in turn was used to defend the position that all sex work should be defined as trafficking without regard to the means used.

The Caucus, on the contrary, took the position that trafficking should not be defined by the nature of the work but by the use of deceptive or coercive means and/or purposes, that is, the conditions of recruitment and work. Moreover, it argued that while people can consent to migrate or to work in prostitution, they cannot consent to forced labour, slavery or servitude:

‘Obviously, by definition, no one consents to abduction or forced labour, but an adult woman is able to consent to engage in an illicit activity (such as prostitution, where this is illegal or illegal for migrants). If no one is forcing her to engage in such an activity, then trafficking does not exist. (...) The Protocol should distinguish between adults, especially women, and children. It should also avoid adopting a patronising stance that reduces women to the level of children, in the name of ‘protecting’ women. Such a stance historically has ‘protected’ women from the ability to exercise their human rights’ (Human Rights Caucus 1999).

In fact the issue of consent is more a matter of evidence and not of definition. Once the existence of forced labour, slavery or servitude is established, ‘consent’ actually is irrelevant. The fact that force or deception may be difficult to prove is not solved by penalising a specific type of labour or services. If that were so, the Protocol should penalise all work or services to be effective, as it addresses trafficking and forced labour in all industries and not just the sex industry.¹⁵

Ultimately, agreement was reached on art. 3 (b), which reads:

‘The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) shall be irrelevant where any of the means set forth in subparagraph (a) have been used’.¹⁶

Art. 3 (a) defines as the means that determine the occurrence of trafficking:

‘...the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability¹⁷ or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person...’.

These means essentially require the use of force and/or deception. The elimination of this clause would define all sex work as trafficking in persons, while the inclu-

15. In fact this argument was successfully used in the Netherlands by the then Minister of Justice to include in the ‘trafficking article’ in the Penal Code a subsection which criminalises any recruitment for prostitution across borders, irrespective of the use of deception or coercion. See Roelof Haveman & Marjan Wijers (1992) and Eke Gerritsma & Marjan Wijers (2003).

16. UN interpretative note: ‘The *Travaux Préparatoires* should indicate that subparagraph (b) should not be interpreted as imposing any restriction on the right of accused persons to a full defence and to the presumption of innocence. The *Travaux Préparatoires* should also indicate that it should not be interpreted as imposing on the vic-

tim the burden of proof. As in any criminal case, the burden of proof is on the State or public prosecutor, in accordance with domestic law. Further, the *Travaux Préparatoires* will refer to article 11, paragraph 6, of the Convention, which preserves applicable legal defences and other related principles of the domestic laws of States parties’.

17. UN interpretative note: ‘The *Travaux Préparatoires* should indicate that the reference to the abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.’

sion of this clause still enables signatory states to address sex work as they see fit in their domestic law, including further reaching criminalization than the Protocol requires.

The fact that so much discussion revolved around whether or not the use of coercive or deceptive means was a necessary constituent of the crime of trafficking, reflected the exclusive focus on trafficking for prostitution, as nobody would want to argue that any recruitment *per se* for e.g. domestic or agricultural labour is trafficking, irrespective of the means used. States that were so focused included the Philippines, the Holy See and South Africa, while Belgium changed position more than once during the discussion. South Africa led one bloc of African nations. Others such as the Netherlands, Germany and Australia were adamantly opposed to a formulation of trafficking that would essentially define all prostitution or any sex work as trafficking in persons, because it would require them to alter their national domestic law upon ratification of the Protocol.

One of the most detrimental effects was that on the issue of human rights protections, cooperation became well-nigh impossible

A similar problem arose over the description of the purposes of trafficking, in particular the use of the terms ‘exploitation of the prostitution of others’ and ‘sexual exploitation’. Arguments against the inclusion of ‘sexual exploitation’ were that this term is undefined, imprecise and emotive when used in connection with adults and would undermine consensus, as countries that have laws decriminalising or regulating prostitution would be unable or unwilling to sign the Protocol if it forced them to change their prostitution policies. This position was supported by the High Commissioner for Human Rights,¹⁸ the Special Rapporteur on Violence Against Women¹⁹ and the International Labour Organisation,²⁰ which all proposed a definition concentrating on forced and/or bonded labour and servitude. A similar position was taken by the Netherlands, which submitted a written proposal to this aim.

For the same reasons, the inclusion of the term ‘exploitation of the prostitution of others’ was problematic as this is defined as all prostitution, with or without the consent of the person, in the 1949 Convention for

18. See Informal note by the United Nations High Commissioner for Human Rights (A/AC.254/16), Fourth session, 28 June-9 July 1999, available at www.uncjin.org/Documents/Conventions/dcatoc/4session/16e.pdf.

19. A/AC.254/CRP.13. This document is not available anymore on the website of the Crime Commission, but can be asked for through the contact address of the Centre for International Crime Prevention: www.unodc.org/unodc/contact_us.html.

20. A/AC.254/CRP.14. Ibid.

21. The 1949 Convention defines prostitution as ‘incompatible with the dignity and worth of the human person’ and obliges states to penalise all recruitment for and exploitation of prostitution, even with the consent of that person. Although this convention is ratified by very few states, prostitution policies of the majority of countries are

the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, the only international instrument dealing with trafficking and prostitution until the adoption of the Protocol.²¹ Ultimately, on the suggestion of the Caucus, a compromise was reached in the final stages of the negotiations to retain these two terms, but to leave them undefined, thus allowing individual governments to interpret these phrases according to their domestic legal regime. The final text of the Protocol reads:

‘Trafficking in persons shall mean [...] for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;²²

with an UN interpretative note, reading:

‘The *Travaux Préparatoires* should indicate that the Protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms ‘exploitation of the prostitution of others’ or ‘other forms of sexual exploitation’ are not defined in the Protocol, which is therefore without prejudice to how States Parties address prostitution in their respective domestic laws’.

Irreconcilable differences

The issues addressed in the Protocol were serious and have strong emotional appeal. This fact led to great tension and argument between the NGO blocs. This is significant because it demonstrates the bitterness between ideologies both in such fora and in feminism more generally. Examples of bad behaviour, bitter arguing and accusations demonstrated both how emotionally charged these issues are and the rancour and bad blood between the feminist factions addressing trafficking in persons. Especially the issue whether to define prostitution as trafficking *per se* evoked extremely emotional responses.

This malice was neither new nor unique to the Crime Commission meetings. For example, earlier CATW-publications referred to a number of members of the Caucus (among whom the authors of this article) as ‘pro-prostitution’ advocates ‘paid by pimps’. This language is akin to the use of the term ‘pro-abortion’ rather than ‘pro-choice’ by activists who seek to ban abortion. Alice Echols, in her article about the sexuality debates in the larger feminist movement, described

based on an abolitionist view. In practice, prohibitions often not only aim at the ‘profit making third parties’ but also at prostitutes – like those that prohibit soliciting, loitering or advertising –, and/or their non-profit making associates – like partners and adult children of sex workers-, thus severely limiting not only the space for a professional life but also for a private life. For a discussion of the various legal regimes regarding prostitution and trafficking see Marjan Wijers & Lin Lap-Chew 1999.

22. The inclusion of ‘the removal of organs’ seems incongruous, but numerous delegates repeatedly requested to include the trade in organs and the issue evoked relatively little debate. See for more information on the trade in organs Finkel (2001a) and Donovan (2001).

similar discrediting and silencing tactics when she wrote:

‘Anti-pornography feminists have tried to silence their intra-movement critics with the same red-baiting tactics of feminist capitalism. Recently, Kathy Barry characterised the feminist opposition to the anti-pornography movement as a cabal of leftist lesbian and heterosexual women who want to destroy the movement so that “male leftists can continue their sexual abuse of women without fear of censure”.’ (Echols 1984, p. 54)

In the same way, rumour had it – as reported to a Caucus lobbyist by a government delegate – that the Human Rights Caucus was funded by the ‘European prostitution mafia’. When confronting the CATW-bloc with this accusation, it was asserted that the positions put forward by the Caucus were those which traffickers wanted and therefore the Caucus was essentially advocating for traffickers, to which was added that the Caucus could not deny working with traffickers. Other examples included the taking away of Caucus documents from the desks of government delegates and the CATW-block dubbing their coalition the Human Rights Network and duplicating the format and font of the Caucus documents distributed earlier in a move seemingly intended to confuse government delegates.

One of the most detrimental effects, however, was that on the issue of human rights protections, cooperation became well-nigh impossible.

Human rights protections for trafficked persons

The second important lobbying goal of the Caucus regarded the inclusion of strong human rights protections for trafficked persons in the Protocol, separate and distinct from their value as witnesses for the prosecution. At a minimum, assistance and protection provisions should meet basic international human rights standards, which clearly provide that victims of human rights violations, such as trafficking, should be provided with access to adequate and appropriate remedies. Core issues were the access to adequate housing, health care, legal assistance and other necessary support facilities; protection of trafficked persons against immediate deportation and/or detention or prosecution for offences related to their status of being trafficked (including violation of immigration law, prostitution, etc.); respect for the right to privacy, including confidentiality of legal proceedings; the right to information with regard to court and administrative proceedings; access to a temporary and, if needed, permanent residence; guarantees on safe and voluntary return; and access to appropriate and adequate remedies, including compensation for damages. The inclusion of such protections would not only be in the interest of trafficked persons and in line with international human rights law, but would also be in the interest of prosecution as it would encourage trafficked persons to co-operate with the authorities and thereby contribute to achieving the law enforcement goals of the Protocol.

However, while the Caucus succeeded in its goal to achieve a broad definition, covering all forms of traf-

ficking into slavery, forced labour and servitude and leaving out voluntary, non-coerced (migrant) sex work, it did not accomplish this second goal. Whereas the Protocol contains strong law enforcement provisions, its few protection and assistance provisions are all discretionary.

Under the present Protocol trafficked persons appear to gain very little from cooperating with national authorities

Government delegates were not keen to commit their countries to protecting the rights of non-nationals and managed to avoid a serious debate on the need for mandatory protections due to lack of time created by the protracted debate on the definition. In discussing the need for mandatory protections, there was a clear division between countries which perceived themselves as ‘sending states’, those countries whose nationals were expected to be trafficked and who were interested in protecting the rights of their nationals in other states, and countries which perceived themselves as receiving states, who expected trafficked persons to arrive, perhaps illegally, within their jurisdiction and whom they expected to prosecute or deport or offer protections as required. In many cases however it was not so clear where a state’s interests lay. Many state are both sending and receiving countries, and/or ‘transit’ countries where people pass through and may work to earn money to continue moving. Working while in transit is not unusual in long-distance migration and has long precedent in history, both in migration and nomadic movement and even pilgrimage.

Moreover, many government delegates came from a law enforcement background and were not trained in human rights issues, which meant that especially in the beginning of the negotiations, a great number of them did not even see the connection between combating the crime of trafficking and the need to provide assistance to trafficked persons and protect their rights. Insofar as the need for assistance of trafficked persons was recognised in the course of the negotiations, this was viewed as a prosecution tool rather than a state obligation. Numerous delegates expressed the view that trafficked persons were valuable as witnesses and, therefore, deserving of protections during trials but that they should be deported immediately after the trial. One delegate even wanted assurances that the Protocol would not prevent his government from ‘prosecuting the victims’. Whereas the developed countries were mostly concerned about according rights to ‘illegal migrants’, the developing countries were especially concerned about the financial costs of taking up obligations to provide protection and assistance. This meant that both types of countries had their own – be it different – interests in keeping such provisions discretionary.

A serious additional problem was the lack of cooperation between the NGO-blocs. Although the issue of human rights protections was not related to the definition of trafficking and therefore not in dispute between

NGO factions, the Network refused to make any effort to address anything but the definition of trafficking or even to support the protection language proposed by the Caucus. A concerted lobby could – and probably would – have made a difference here, but appeared to be impossible to achieve.

Support, however, did come from the Office of the High Commissioner on Human Rights²³, UNICEF and the International Organisation for Migration (IOM)²⁴, among others, who stated their objection to the discretionary nature of the provisions as unnecessarily restrictive and not in accordance with international human rights law. Although this helped to include at least a number of human rights inspired provisions, it was not enough to achieve mandatory protection.

Almost all provisions contained in art. 6-8 regarding assistance and protection, the status of trafficked persons in receiving states and repatriation are phrased in terms as ‘in appropriate cases’, ‘to the extent possible under its domestic law’, ‘shall consider’, ‘shall take into account’, ‘shall give appropriate consideration’ etc. rather than in terms of ‘shall’ or ‘shall ensure’, meaning that basically there is no obligation for states to implement these provisions. In this sense the Protocol represents a regression in international human rights law and undermines commitments in other international human rights instruments, because it transforms rights into privileges that can be conferred or withheld by governments for any reason. Moreover, under the present Protocol trafficked persons appear to gain very little from cooperating with national authorities.

International efforts at prevention and cooperation

Specific law enforcement measures such as border control, control of documents and international exchange of information as well as preventive efforts are delineated in art. 9-13. The issues addressed include information sharing among law enforcement, immigration or other relevant authorities – a.o. to determine whether individuals illegally (attempting to) cross an international border are ‘perpetrators or victims’-, legal paperwork including actual documents and who may receive them, as well as the socio-economic roots of trafficking in persons.

Measures intended to ‘prevent and combat trafficking in persons’ and to protect trafficked persons, ‘especially women and children’ from re-victimisation are listed in art. 9. Significant is para. 5 of art. 9, which encourages states to take measures ‘to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking’. This ambiguous ‘demand language’ essentially defines all sex work as trafficking and allows states to prosecute prostitutes’ clients as traffickers. It is illustrative of the judgemental attitude towards men

who visit prostitutes that permeated the debates. Most clients however do not merit such treatment. What’s more, prosecuting clients could well prove to be counter-productive considering that they are the people most likely to bring prostitutes in coercive situations to the attention of those who can help them.

Non-discrimination clause

Another risk of ‘preventive’ anti-trafficking measures is that they, as formulated by the High Commissioner on Human Rights, can be and have been used to discriminate against women and other groups in a manner that amounts to a denial of their basic right to leave a country and to migrate legally.²⁵ Therefore, the inclusion of a provision was advocated to the effect that actions aimed at preventing trafficking should not have discriminatory effects or infringe upon the right of an individual to leave her or his country or legally migrate to another. This proposal failed, but a reminiscence of it is found in the article dealing with ‘border measures’ (art. 11), which states that measures to strengthen border control to prevent and detect trafficking, should be ‘without prejudice to international commitments in relation to the free movement of people’. Additionally a savings clause was included in art. 14 (1), which reads:

‘Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein’.

For similar reasons the inclusion of a broad non-discrimination clause was advocated. Not only is this a fundamental principle of international human rights law, it is also particularly relevant in this framework given the vulnerable and often marginalised situation of the groups the Protocol deals with. As a model the non-discrimination clause of the Rome Statute of the International Criminal Court of Justice was proposed, which prohibits discrimination on a wide number of grounds, such as gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.²⁶ Again, however, government delegates were not prepared to include strong human rights protections. The final clause in art. 14 (2) of the Trafficking Protocol is a pale shadow of the ICC provision:

‘The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognised principles of non-discrimination’.

pretation of law pursuant to this article must be consistent with internationally recognised human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status’.

23. Informal Note of the UNHCHR, see footnote 18.

24. Note of the OHCHR, UNICEF and IOM (A/AC.254/27), available at www.uncjin.org/Documents/Conventions/dcatoc/8session/27e.pdf.

25. Informal Note of the UNHCHR, see footnote 18.

26. Art. 21 (3) of the Rome Statute reads ‘The application and inter-

Conclusions

Negotiations in international law occur between government delegates, not with non-governmental organisations. This was especially true in this case because contact between the two blocs of NGOs was almost entirely hostile and accompanied by covert malicious behaviour. The rancour resembled interactions between pro-choice and anti-abortion advocates. As a result, shared goals could not be effectively pursued.

This schism emerges whenever trafficking is discussed²⁷ and mirrors the delegates' deliberations over the definition of trafficking. The debates reflected two opposing positions. One position is that sex work is work and that trafficking is a grievous violation of human rights. The other position views prostitution itself as a human rights violation and sees trafficking as a vehicle with which to address this violation.

An alternative view, neatly summarised by Meillón (2001, p. 156-157), is that this debate will not be resolved in the near future and that therefore these conferences are not the place to come to conclusions about whether sex work is *per se* trafficking. This third view first emerged at the United Nations Beijing + 5 conference and has subsequently played a role in other discussions of trafficking, including the Crime Commission negotiations. It is manifest in the compromise reached in the final definition, in which each nation legislates its own view of prostitution. The Protocol thus recognises the existence of both coerced and non-coerced participation in sex work and takes no position on the legal treatment of adult, non-coerced sex work. But despite this final agreement to disagree the division between NGOs did have serious consequences, the most disturbing of which was that it effectively blocked a concerted advocacy to protect the rights of trafficked persons. The preoccupation with the morality of prostitution from the side of the CATW-Network and the unwillingness to compromise made cooperation even on the issue upon which both factions could be supposed to agree – the need for more and stronger protections for trafficked persons – impossible. This enabled government delegates to avoid any serious debate on the human rights dimensions of trafficking and turned the Protocol into a lost opportunity to strengthen migrants' human rights. For local NGOs it means that they will continue to run up against enormous obstacles in advocating for mandatory protections in their domestic anti-trafficking laws since the Protocol fails to contain any obligation for governments to treat trafficked persons differently from undocumented migrants. Ultimately, however, not NGOs but the migrants concerned will suffer the consequences of this inability to overcome an exclusive focus on prostitution in the interest of a common goal. This seems too high a price to pay and underscores the need to find more sensible and productive ways to deal with differing views, if only in the interest of a more effective human rights advocacy in international decision making processes.

The fact that trafficking is a complex issue is demonstrated both by its lengthy definition and the conflicting views on trafficking described above. Although much lobbying literature addresses difficult issues and includes complex recommendations, simpler analysis is tempting. Some delegates may have preferred shorter documents with less analysis, even at the expense of specificity and accuracy. While simplifying issues may help some people understand them, this would be to the detriment of complex problems – an overly simplistic solution is not a solution but a seed for new problems. The anti-prostitution stance is an example of an overly simple and inefficient analysis that claims moral high ground while eclipsing not only the plight of many trafficked people in other industries and trafficked men, but also the potentially harmful consequences for a group that already finds itself in a marginalised position. An additional concern is that policies that restrict travel, and especially women's travel, actually encourage the practice of trafficking in persons. By closing legal avenues of migration, they leave would-be migrants no other option than to use the services of traffickers and smugglers (Meillón 2001, Kwong 1997).

The inclusion of force or deception as an essential element of trafficking signifies an important departure from the abolitionist perspective

The definition finally agreed upon allows a certain interpretative leeway for its enforcement by signatory nations. This was necessary in order to achieve consensus in such a large meeting. However, it does mean that, although the Protocol leaves governments free to treat sex work as legitimate work, it (also) does not prevent them from further criminalising sex work and sex workers in the name of combating trafficking. In addition, the Protocol does little to protect the rights of trafficked persons, leaving it to the discretion of the signatory countries whether to arrest, prosecute and deport them or provide them with protection and assistance.

However, despite these comments, there are reasons for optimism in light of this document. As Radhika Coomaraswamy, UN Special Rapporteur on Violence Against Women, has rightly stated, this definition of trafficking is a 'breakthrough'²⁸ because of its establishment of trafficking as a crime that extends beyond the realm of prostitution and of which both women and men are possible victims. The inclusion of force or deception as an essential element of trafficking signifies an important departure from the abolitionist perspective of the 1949 Convention and has an emancipatory potential. This was enabled by moving the focus from sexuality and morality to actual working conditions and crimes against persons.

27. This has been the case at other meetings, such as Beijing + 5 (Mitchell 2000) and the United Nations Working Group on Contem-

porary Forms of Slavery.

28. Talk delivered at Columbia University Law School, April 2001.

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