

Only rights can stop wrongs¹: A critical assessment of anti-trafficking strategies

Marjan Wijers, Clara Wichmann Institute, Expert Centre Women and Law, Amsterdam (mwijers@clara-wichmann.nl)

Marieke van Doorninck, Mr A. de Graaf Foundation, Dutch Institute for Prostitution Issues, Amsterdam (mdoorninck@mrgraaf.nl)

Introduction

This paper critically examines the current strategies employed by both governmental and non-governmental agencies (NGOs) to address the issue, focussing on their impact on the women affected.² In this context attention is also paid to the measures taken by the European Union, in particular the recent European Commission *Proposal for a Council Directive on a short term residence permit*³ for trafficking victims. Central perspective throughout the paper is that of the women concerned.

Guiding principle is that anti-trafficking instruments should not only be in line with the protection of human rights, but should also care not to create or exacerbate existing situations that cause or contribute to trafficking by instituting policies and practices that further undermine the rights of the concerned groups, in particular women. As stated by the UN High Commissioner on Human Rights, Mary Robinson:

'That [...] is the only way to retain focus on the trafficked person: to ensure that trafficking is not simply reduced to a problem of migration, a problem of public order or a problem of organised crime. It is also the only way to ensure that well-intentioned anti-trafficking initiatives do not compound discrimination against female migrants or further endanger the precariously held rights of individuals working in prostitution'.⁴

Strategies to prevent and combat trafficking⁵

Trafficking in women is a complex problem, related to different fields and interests: migration, organized crime, prostitution, human rights, violence against women, the feminisation of poverty, the gender division of the international labour market, unequal international economic relationships, etc. Solutions vary, depending on how the problem is defined, that is to say, what is seen as the problem that needs to be solved. For example, if the problem is viewed as a human rights or labour problem, then logically other solutions will be drafted than if trafficking is predominantly viewed a problem of organized crime or illegal migration.

However, precisely because trafficking in women is related to so many other areas and (state) interests, any proposed measure must be carefully questioned as to what problem and, above all, *whose* problem it aims to solve, whose interests it serves and what the impact on the women

¹ The title of this paper is the slogan of the Millennium Milan Mela in Calcutta, where 25.000 sex workers from India and other South Asian countries came together to stand up for their rights and to protest against stigmatisation, bad working conditions, exploitation and abuse.

² Although also men become victim of trafficking practices, women still form the majority of victims.

³ Proposal for a Council Directive on the short term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities (COM(2002)71 final), Brussels, 11 February 2002.

⁴ Message from the UN High Commissioner for Human Rights, Mary Robinson, to the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, Fourth session, Vienna 28 June- 9 July 1999.

⁵ This paper is largely based on an international investigation carried out by the Dutch Foundation against Trafficking in Women in collaboration with the Global Alliance Against Trafficking in Women on the request of the UN Special Rapporteur on Violence Against Women, Ms. Radhika Coomaraswamy. The results of this investigation were published in: Marjan Wijers & Lin Lap, *Trafficking in Women, Forced Labour and Slavery-*

concerned will be. Does a given strategy address the problem of the women concerned or rather the problems of the state? Will it help to prevent and combat abuse and violence or does it in fact target another problem? Will it improve conditions for the women involved or will it make their situation worse?

Trafficking in women as a moral problem

The traditional approach to trafficking in women is what could be called the moral based response, rooted in the moral condemnation of prostitution. Within this approach trafficking in women is considered to be just part and parcel of the overall evil of prostitution, without regard for conditions of consent or coercion. So viewed, prostitution and trafficking become practically identical. Measures to combat trafficking aim at suppressing prostitution, either by criminalising all parties in prostitution, including the prostitute herself (as in a prohibitionist system) or by criminalising any third party (as in an abolitionist system). Policies of most governments are based on such moral condemnation of prostitution. The impact on women is invariably a combination of isolation, stigmatisation and marginalisation, putting them at greater risks of abuse and violence due to the illegal and stigmatised status of their work. Women are divided into good or “innocent” women – i.e. non-prostitutes - who are deserving of protection, and bad or “guilty” women – i.e. prostitutes - who can be abused with impunity as it is their own fault. Even in the contemporary trafficking debate, the image of the “innocent victim” appears to be extremely persistent, implying that only those women who succeed to comply with this image of innocence can count on support. An attitude which traffickers gratefully exploit.

Although the moral approach is still dominant in the international debate, e.g. on UN level, over the last years non-governmental organisations have begun to challenge this position. New approaches are being developed, starting from the point of view of the women involved and moving the focus of the debate from moral positions to working conditions.

Trafficking in women as a labour problem

Over the last years sexworkers’ rights groups and anti-trafficking organisations have begun to challenge the traditional approaches. New approaches are being developed, starting from the point of view of the women involved and moving the focus of the debate from moral positions to working conditions and workers’ rights. Essential questions within this approach are: how do the women involved define the problem? What are *their* problems, motives and needs, in what do *they* want to be protected? Instead of excluding prostitutes from the debate - as has been unquestioned for centuries - their participation is considered an essential condition.

From the perspective of the women concerned, the core of the problem is violence, exploitation and abuse. From the perspective of women it is exactly their illegal status, the lack of legal migration opportunities - in combination with the demand for work in the informal sector - , the unregulated and unprotected character of the types of work open to them, and the unavailability of work in their own country that make trafficking such a profitable business and that force them into an illegal circuit without protection against violence and exploitation.

Trafficking in women is then put in the perspective of labour and labour migration, of traditional female roles - i.e. providing domestic and sexual services -, a gendered labour-market and the world-wide feminisation of labour migration⁶. World-wide women are predominantly relegated to the informal labour market - domestic labour, prostitution, the entertainment industry - that is, unprotected and unregulated labour, which is partly not even recognised as labour, as in the case of prostitution (no matter the fact that thousands and probably millions of women make a living for themselves and their families through this work). As a consequence, there are few legal ways for women to migrate, they are dependent of the informal and unprotected migration channels. It is not by coincidence that it is these sectors where trafficking predominantly takes place. It is also not by coincidence that these sectors, where especially women work, are unprotected or only marginally

6. A. K. ...

protected by labour law. In this context, it is an interesting question whether the exclusion of the informal labour sectors from labour law protection, does not constitute a form of indirect discrimination and thus a violation of the Women's Treaty (Convention on the Elimination of all forms of Discrimination Against Women).

When trafficking in women, forced labour & slavery-like practices are defined as labour problems, these practices can be seen as the result of the poor legal and social position of women: as women, as workers and as migrants. Within this view the position of women as workers is the focus of change strategies. The concept of "trafficking in women" is expanded to include other forms of "trafficking in women" in which women end up in slavery-like conditions, such as the trade in domestic workers and the trade in women in the context of the commercial marriage market.

Moreover, given the history of abuse of anti-trafficking measures to police and punish female migrants and female sex workers and to restrict their freedom of movement rather than to protect them from violence and abuse, serious doubts are raised as to appropriateness of the existing anti-trafficking framework and anti-trafficking laws to promote the rights of women and the prosecution of their violators. The concept of "trafficking" is questioned as outmoded and the development of new language to describe abuses in labour migration and abusive conditions in the sex-industry is advocated, separate and apart from national and state interests in protecting borders and controlling female sexuality.

Such a perspective opens a whole new array of instruments to combat violence and abuse. Strategies aim at the recognition of women's work in the informal sectors as legitimate work, including work in the sex-industry, at labour law protection for the women involved and at improving working conditions: basically the same mechanisms and instruments that are developed since the beginning of the 20th century to combat violence and abuse in other labour sectors, i.e. labour regulations and civil law. In the case of prostitution for example, middle-men, brothel-keepers and employers clearly are in a position of power, as long as prostitutes lack any legal protection of their rights as workers. Improvement in the social and legal position of prostitutes would impede traffic in women and slavery-like practices, and would give women instruments to defend themselves against such practices, similar to workers in other labour sectors.

The focus then changes from the development of "new" instruments to combat trafficking to the application of "old" instruments to women's work in the informal female designated labour sectors. Rather than isolating trafficking in women as a separate issue, the inclusion of women and women's work in the existing labour and human rights instruments becomes the central question.

Government policies rarely, if ever, share this perspective and certainly not in relation to prostitutes or migrant workers. Still, aspects of this approach can be found on both the United Nations and European level. An example is the 1996 Resolution of the European Parliament which "welcomes the ILO (International Labour Organisation) and WHO (World Health Organisation) initiatives to draw up standards for the informal economy" and believes "that it is advisable to draw up legislation on unregulated work within the Union in order to reduce the vulnerability and lack of rights of persons working in this sector, and to ensure access to health care, social services and insurance".

Among international bodies, the ILO has tentatively begun to address the issue by researching the situation of migrant domestic workers and (migrant) workers in the sex industry. The ILO could play an important role in setting standards appropriate to the informal sectors, particularly those affecting a large number of women, such as domestic work and sex work. ILO conventions, such as the Conventions on Forced Labour, the Convention concerning the Protection of Wages and the Migrant Workers Conventions could be used to abolish slavery-like practices. However, until now this course has hardly been taken.

Trafficking in women as a Human Rights problem

Also mainly employed by NGOs is the approach of trafficking in women and slavery-like practices as a violation of human rights for which states are accountable. Instruments designed to protect human

rights are invoked as key guidelines and used to enhance and defend the rights of victims of trafficking. Important milestone in this approach was the World Conference on Human Rights in 1993 in Vienna, where for the first time violence against women was recognised as a violation of human rights.

However, also within this approach, two different currents of analysis exist. Some define prostitution itself as a violation of women's human rights equal to slavery. Such judgement brings us back to the moral approach, in which prostitutes are stigmatised as either victims or deviants and are denied a legitimate place in the public debate, but now via the detour of human rights. For others it is not the work as such that violates women's human rights, but the conditions of deceit, abuse, violence, debt-bondage, blackmail, deprivation of freedom of movement etc, be it in prostitution, in domestic labour or in the commercial marriage market.

However, if we are looking at the European situation, two other approaches become more and more dominant: trafficking in women as a problem of organized crime and trafficking in women as a problem of (illegal) migration.

Trafficking in women as a problem of organized crime

When trafficking in women is defined as a problem of the criminal law and the criminal justice system, strategies aim at introducing more stringent criminal legislation and heavier punishments, improving (international) police cooperation and other measures which enable a more effective prosecution of the offenders. Combating trafficking in women thus becomes equated with (and often restricted to) combating organized crime. However, the choice for a criminal approach is not without limitations and risks. A criminal approach necessarily focuses on individual victims and perpetrators, leaving aside structural causes. Moreover, it carries substantial risks for the women involved. Apart from the risk of secondary victimisation, criminal proceedings may expose women and their families to the risk of retaliation from the side of the perpetrators, harassment by the authorities in her home country or stigmatising exposure to her home community. Too often it is forgotten that the criminal justice system serves fundamentally other interests than those of the victims of a crime. The position of crime victims is a general problem in criminal law, but this is exacerbated in trafficking cases. Prosecution of the offenders does not automatically include rights for the victims. On the contrary, in general the interests of the women involved are made completely subordinate to the interests of the prosecution. The sole interest the criminal justice system has in victims is their value as "evidence". The devastating consequences which acting as a witness may have for the individual live and future of the victim concerned bear no relevance for the law.

A revealing example is the above mentioned *European Commission short term residence permit proposal*, which offers no rights, safety or security whatsoever to trafficking victims. On the contrary, even the temporary protection offered by a short term residence permit is made totally dependent on the usefulness of the victim for the purpose of investigation and prosecution, without any attention to the protection needs common to trafficking victims. If the victim is not able or willing to co-operate with the state authorities or if she is not - or no longer - deemed "useful" as evidence in the criminal proceedings, she (again) is subject to arrest, detention and deportation, without any protection against the possible consequences. This clearly fails to recognise the obligations states have under international human rights law to provide victims of serious human rights violations with appropriate remedies, including state protection, access to justice, reparation, restitution, compensation and rehabilitation.⁷

Trafficking in women as a problem of migration

Along with the criminal approach, trafficking in women has become more and more identified with illegal migration, especially within the Western European states. The focus then shifts from

⁷ See a.o. the Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law and the April 2002 resolution of the UN Human Rights Commission, referencing to the Basic principles; see also the comments of Human Rights Watch

combating violence and abuse to combating illegal entry and residence. Combating trafficking thus becomes transformed into combating (illegal) migration, whereas prevention of trafficking is taken to mean “to prevent the entry of possible victims”. Under the denominator of prevention of trafficking, repressive immigration measures are taken such as tightening visa policies, stricter border control, closer supervision of mixed marriages, and criminalization of third parties who facilitate illegal entry or stay, and sometimes of the illegal migrant her or himself.

Though purporting to combat trafficking, such measures rather aim at protecting the state against (illegal) migrants than at protecting women against violence and abuse, thus serving the interests of the state rather than those of the women. Moreover, repressive migration policies and the resulting illegal status of women in the destination countries make migrant women more dependent on and more vulnerable to various forms of exploitation and abuse and thus tend to promote rather than repress trafficking and slavery-like practices.

Again, the *European Commission short term residence proposal* is an example of this tendency, where it addresses human trafficking solely as an element of policies to combat illegal migration and mixes up smuggling of persons and human trafficking. However, the difference between these two crimes is crucial. Smuggling refers to the facilitation of illegal immigration, thus constituting an offence against the *state*. Trafficking in persons is the use of deceit, violence and abuse for the purpose of exploiting one’s labour, thus constituting an - internationally recognised - violation of the human rights of the *individual* concerned, and giving rise to certain obligations on the part of the state under international human rights law to provide victims thereof with a range of possible remedies for such violations.

The perspective of women opposes that of the state: for women it is exactly their illegal status and the lack of legal migration possibilities that makes them dependent on middle men and forces them into an illegal circuit without recourse in case of violence and exploitation.

Conclusion: repressive versus empowering strategies

Strategies to address trafficking seem to move between two poles: at the one hand repressive strategies, which aim at suppressing organized crime, (illegal) migration and/or prostitution. At the other hand empowering strategies, used primarily by NGOs, which aim at supporting the women concerned and strengthening their rights.

Both repressive and empowering strategies can be of value. At the same time, especially repressive strategies beg for caution, as they run a major risk of turning against the women. Repressive strategies tend to mix up other state-agenda’s, such as counter-acting migration, with the issue of trafficking in women as a form of violence against women and a serious violation of human rights. Moreover, they easily give rise to unintended, undesirable side effects for the women concerned. At worst they can cause repercussions which have repressive rather than emancipatory effects on the already precarious position of the women likely to be affected, e.g. by restricting women’s freedom of movement or by using women as witnesses against organized crime without providing them the corresponding protection. At the same time, it is obvious that such strategies appeal to governments for their simplicity and for their congruence with a range of state interests, such as immigration control.

Strategies which rest upon strengthening women’s rights are mainly put forward by NGOs. Participation of the women concerned is seen as essential to the development of effective change strategies. Support and lobby strategies are directed towards empowering women, enabling them to take back control over their lives, and facilitating their ability to speak up for their own rights. Repressive strategies are rejected, if the rights of the women concerned are not at the same time clearly defined and protected.

The real challenge we are facing is to ensure the rights of those involved, as women, as migrants, as workers, and as victims of serious human rights violations. As long as those rights are not recognised and guaranteed, trafficking in women, forced labour & slavery-like practices will continue to exist.