

From repression to empowerment: is there a way back?

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Summary

When the women’s movement fell back on the 19th 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 defines the debate on trafficking up till today, exemplified by the distinction in the UN Protocol between so-called “sexual exploitation” and “labour exploitation” and its emphasis on the recruitment process, as well as by the range of repressive measures against migrants and sex workers in the name of combating trafficking. This focus on the purity and victimhood of women, coupled with the protection of national borders, not only impedes any serious effort to address the true human rights abuses we are confronted with, that is the exploitation of human beings under forced labour and slavery-like conditions, but actually causes harm to real people. The call for a human rights-based approach does not necessarily solve these fundamental problems, as it tends to restrict itself to victims of trafficking, while neglecting the protection of the human rights of sex workers and migrants.

Full text

I called my speech ‘from repression to empowerment, is there a way back?’ I am afraid I am not going to tell you a story with a happy end. I will talk a lot about trafficking and sex work, for two reasons. In the first place there is simply more evidence on how the anti-trafficking framework has worked out in this area, as experience goes back to the beginning of the 20th century, contrary to the application of the anti-trafficking framework on other industries, which only started from 2000 with the adoption of the UN Protocol. Secondly I myself come from a trafficking in women and sex workers rights background. Still, I think there are lessons to learn from the past also for other industries than the sex industry. I hope my presentation will contribute to do so.

1. Introduction

Since the adoption of the UN Protocol in 2000, efforts to stop trafficking have mushroomed around the world. However, while intentions may be good, in practice in many cases the effects have been less positive. Where States have given priority to the prosecution and punishment of traffickers, measures have largely failed to safeguard the human rights of people who have been trafficked. Many anti-trafficking efforts even undermine or negatively affect the human rights of the people who they are supposed to benefit or of other groups that are intended or unintended affected by these efforts, especially migrants or sex workers.

In India the police uses the Anti Trafficking Act (Immoral Trafficking (Prevention) Act) to carry out so-called raid & rescue operations, leading to the arbitrarily arrest and detention of sex workers, confiscation of their property, forced rehabilitation and the deportation of migrant sex

workers, both trafficked and non-trafficked. In the name of combating trafficking, Sweden and an increasing number of other European countries have criminalised clients of sex workers. Since then violence against sex workers has increased, in particular against those working on the streets, as has the stigma and social exclusion of sex workers. It has also made it more difficult for sex workers to work independently and has increased unsafe sex practices, as the police use condoms as evidence of prostitution. Also 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 be, to exist. What damage this causes to sex workers is easy to understand if you replace the word prostitution with homosexuality or Judaism. In order to prevent women from being trafficked, some Asian States prohibited all young women to travel abroad for certain types of work or only allowed them to travel with the consent of their husband or a male family member. This not only violates their right to freedom of movement, but also makes them more dependent of middlemen. And in Japan the government tightened the issue of entertainer visas, driving the women concerned into illegality, with the ensuing worse working conditions and hardship.

In some cases discriminatory measures against women migrants are taken in their own country. In other cases, it is upon their arrival in another country that young women are stereotyped as potential prostitutes or victims of trafficking, e.g. women arriving in Europe from Brazil and Nigeria.

And as to who is protected by trafficking laws:

In Germany until a few years ago, trafficking was considered less serious if it involved a prostitute or a women who was 'nor far from prostitution'. In Colombia until recently the Criminal Code only prohibited the forced prostitution of '*una persona honesta*'. Also the use of violence was allowed as long as it did not concern a 'chaste' woman. In Brazil any recruitment into prostitution is defined as trafficking even when it does not involve coercion or deception. And in Nevada, a new law has recently been filed which, if I understand well, equates pimping and pandering with sex trafficking and defines it so broadly that it turns prostitutes into traffickers by just sharing a clients' telephone number.

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. An example is the 2007 report of the Global Alliance against Trafficking in Women (GAATW) *Collateral Damage, the impact of anti-trafficking measures on human rights around the world*¹, which documents a wide range of examples how anti-trafficking policies negatively affect the people they are supposed to benefit. Many of the examples I gave come from this 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.

But, you will ask, didn't anti-trafficking measures at least benefit persons?

Yes, in some cases they do. However, most countries make access to assistance and protection of trafficked persons conditional on their cooperation with law enforcement officials, which

¹ http://www.gaatw.org/Collateral%20Damage_Final/singlefile_CollateralDamagefinal.pdf.

obviously puts them and their families at greater danger, only to pack them off home when they are not useful anymore for the prosecution.

Rather than safeguard the human rights of people who have been trafficked, the priority of governments around the world has been to prosecute and punish traffickers. Many government agencies doubtless assume that the two objectives – enforcing law and upholding human rights – amount to the same thing. However, in the case of human trafficking, there is substantial evidence that they are not.

Secondly, the main emphasis of most governments is to control and limit migration, rather than protecting migrants against abuse en exploitation. In many countries the narrow focus on trafficking rather seems a justification for not taking action to end ALL abuse to which migrant workers are subjected in the informal sectors of the economy.

Moreover, despite the definition of trafficking in the UN Protocol, many countries continue to equate trafficking with sex work, particularly sex work involving migrants. Many of the victims who are picked up by the police in the course of raid & rescue operations have not been trafficked, but turn out to be migrant sex workers who want to get back to earning money, rather than being protected from their employers, let alone repatriated.

And lastly, the focus on the sexual purity of women means that in many cases it is the victims who stand trial, having to prove their ‘innocence’, like in the US, where trafficking victims have to prove that ‘they did not consent to become prostitutes and did so because of force, fraud or coercion’.

The effects are that in the majority of cases trafficked persons are detained and deported without protection against reprisals from the side of their traffickers and without redress for unpaid wages and compensation for the damage they suffered. Sometimes trafficked persons are, in the name of protection or rehabilitation, confined in public or private shelters under conditions no different from detention. In other cases they are prosecuted themselves for being complicit in offences they committed as a result of their being trafficked. Usually this is prostitution, either in the country in which they were identified or upon arrival at home. But with the increasing attention for trafficking in other sectors, more cases become known where victims of trafficking are prosecuted for other offences. One of these cases, of a Vietnamese boy who was put to work in a cannabis nursery, in the UK is now lodged with the ECtHR (N. v UK).

For all of these reasons many victims rather choose not to identify as a victim of trafficking *in order not to become a victim of anti-trafficking*.²

Misuse of the concept of trafficking to further the political agenda of governments

All around the world governments have used the issue of trafficking to further their own political agendas, which have little to do with protecting people against exploitation and abuse. This is particular clear in the area of migration and sex work.

Immigration policies

²Quote from Collateral Damage, p. viii.

Rather than addressing the exploitation of migrants in their own countries, governments have put millions of dollars in so-called awareness raising campaigns in countries of origin, aiming to deter people from poorer countries to migrate to the industrialised countries. At the same time, in the name of protection, they have taken increasingly repressive immigration measures, varying from tightening up visa policies to discriminatory border controls to “identify” potential prostitutes or victims of trafficking, justified by arguments like “if they can’t get in, they can’t become a victim of trafficking”.

Moreover, by stating that trafficked persons are ‘rescued’, governments imply that they were brought to the country against their will and consequently have no right or wish to stay there, while in fact they do not take notice of their wished and forcibly repatriate them. Similarly, by labelling cases as ‘trafficking’ they imply that these cases do not involve a violation of labour rights and that organisations that traditionally defend the rights of workers, such as labour unions, have no role to play, thereby reducing the number of potential advocates for trafficked persons and the chances for them to be compensated or have access to justice.

Sex work

Although the definition in the UN Protocol makes a clear distinction between trafficking and sex work, many countries use the argument of trafficking to justify measures to suppress sex work in general rather than addressing situations of forced labour in the sex industry (and other industries).

This is nowhere clearer than in the crusade the US launched against prostitution, which has had a considerable impact around the world. Part of this crusade is the 2003 anti-prostitution pledge which obliges organisations that receive US money to explicitly condemn prostitution. This prevents US government agencies, such as US AID, from funding any work on trafficking or HIV by sex workers organisation or organisations that cooperate with sex workers. The policy is backed up by claims that the legalisation of sex work encourages trafficking. A claim, however, which is not backed by any evidence as is recognised by the US Government Accountability Office (GAO).³

Another example is the TIP report published by the US Department of State, which rates states according to a set of minimum standards for the elimination of trafficking which the US believes are applicable to all countries. The report categorises countries in a 4 tier system.⁴ Being categorised as Tier 3 can trigger the withholding of assistance from the US. Critics note that tier 3 tends to include various countries which are well known for having poor relations with the US and suspect that this is the reason or their ranking, rather than because they have a serious trafficking problem. Until 2010 the US itself was not subjected to a tier ranking⁵. There is no monitoring or evaluation of the impact of the annual TIP reports or the other anti-trafficking measures supported by the US.

For all these reasons the anti-trafficking framework has been seriously questioned over the last ten or more years, both by sex workers rights and migrant’s rights organizations and anti-

³ US GAO, Report to the Chairman, Committee on the Judiciary and the Chairman, Committee on International Relations, House of Representatives. *Human Trafficking Better Data, Strategy and Reporting Needed to Enhance U.S. Antitrafficking Efforts Abroad*, 2006, cited in *Collateral Damage*, p. 18.

⁴ Tier 2 is divided into two categories: tier 2 and the tier 2 watch list.

⁵ From the 2010 UD TIP report on the US is ranked in Tier 1.

trafficking organizations. Over the years we have witnessed how “trafficking” has been kidnapped to serve very different interests than protecting people from abuse and exploitation. As a result, it has done little good to trafficked people and great harm to migrants and sex workers.

This raises the question whether human rights defenders must try to reform governments’ anti-trafficking strategies by advocating specific changes or whether an entirely different approach is needed, one who shifts the emphasis to empowerment and participation.

This in turn raises the question of how big our chances are in achieving this.

2. No coincidence: Concept of trafficking inherently biased.

I am not optimistic. The problems attached to the anti-trafficking framework are deeply rooted in the history of the concept of trafficking. When in the eighties the women's movement fell back on the 19th 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 nationalistic and racist overtones.

There are four basic problems:

- the conflation of trafficking with prostitution
- the focus on recruitment rather than on forced labour or slavery like conditions of work
- the preoccupation with the morality of the women concerned, exemplified by the division between “innocent” or “real” and “guilty” victims

And last but not least:

- the focus on the protection of national borders

Back to the future

All four problems go back to the first treaties on trafficking in women - or white slavery as it was called then - at the beginning of the previous century,⁶ which define “trafficking” as the forced recruitment and transport of women into prostitution. That is, the process up to the moment the woman is actually handed over. Dominant concern was the protection of ‘innocent’ women from being lured into brothels, thus aiming to distinguish the “innocent” woman who found herself in prostitution as a result of abduction or deceit from the ordinary prostitute. Coercive conditions inside brothels were explicitly not addressed as this was considered “a question of internal legislation” as the closing statement of the 1910 convention explicitly states.

To give you a feeling of the debate which preceded these treaties, I quote from the discussion on the first treaty on trafficking in the Dutch Parliament in 1890. Members of Parliament noted

⁶ See for an extensive discussion of the early anti-trafficking treaties: *Trafficking in Women, Forced Labour and Slavery-like Practices in Marriage, Domestic Labour and Prostitution*, Marjan Wijers & Lin Lap-Chew, STV/GAATW, 1999, pp. 23-45.

with concern the increase of clandestine – nowadays we would say illegal – prostitution “fed by an increasing wave of foreign, in particular, German prostitutes”. I quote:

*“Young German women come , either lured by others or on their own initiative, in big numbers to the Netherlands as “waitresses” in beer or coffee houses, generally without fixed wages, but with the aim to support their maintenance through the receiving of tips and illicit sexual acts.”*⁷

Parliamentarians speak about our society being “flooded by foreign women of the lowest sort” who “literally poison our society” and of “an invasion of foreign kelnerinnen”.⁸

Fifty years later the debate is still about the supposed immorality of German women. A researcher in 1940: *“Like of all people the Negroes have proven to be most fit for slavery, the distribution of characteristics which give women a predisposition for prostitution, seems to be very strong with German women”*.⁹

And again 50 years later it are the Latin American, Asian and Eastern European women who work in the sex industry in Western Europe and about whom one can hear the same notions as 50 years before about German women. Think for example of the representation of Thai women as particularly submissive and eager to please men. But also more subtle examples can be found. One of the reasons, for instance, that was given to exclude migrant women from legally working in the Dutch sex industry after the abolition of the ban of brothels in 2000 was the repression of trafficking. Migrant women were presented as victims per definition, as – I quote the then Minister of Justice – they did not possess *“the mental ripeness to make deliberate decisions and oversee the consequences”*.¹⁰

Equation of trafficking with prostitution

In later treaties “trafficking” became linked to the exploitation of prostitution, and coercion as a restraining condition was abandoned. This is exemplified by the 1949 *Convention for the Suppression of the Traffic in Women and the Exploitation of the Prostitution of Others*, which obliges to criminalise all exploitation of prostitution, with or without consent of the women involved. With the 1949 Convention the distinction between “trafficking” and the “exploitation of the prostitution of others” more or less disappeared. It, however, only obliged to criminalise the involvement of “third parties”. The prostitute herself should not be penalised as she is seen as the passive victim in need of protection, or rescue as we would say nowadays, if necessary against her will. Although ratified by few countries, this convention still feeds the definition of trafficking in many countries.

The resurfacing of trafficking on the political agenda

⁷ *Voorwaarden voor strafbaarstelling van vrouwenhandel (Requirements for the criminalisation of trafficking in women)*, Dissertation, Roelof Haveman, Gouda Quint Deventer/Willem Pompe Instituut Utrecht, 1998, p. 121.

⁸ *Ibid*, p. 121.

⁹ *Ibid*. p. 162 (Quote from: J.D.F. Stachhouwer, *Criminaliteit, prostitutie en zelfmoord bij immigranten in Amsterdam* (Criminality, prostitution and suicide under immigrants in Amsterdam), Dekker & van der Vegt NV, Utrecht/Nijmegen, 1950, p.85).

¹⁰ *Sekswerk. De moraal van seks voor geld* (Sex work. The morality of sex for money), Roelof Haveman & Marjan Wijers, *Nemesis* 2001 nr. 6, p. 193.

After a period of silence, the issue of trafficking resurfaces on the political agenda during the eighties, not by coincidence at a time of increasing migration movements. However, trafficking only became a hot political issue in Western Europe after the fall of the Berlin Wall in 1989.

Several reasons can be given for this. One might be the shift in images about the victims and the perpetrators. Rather than exotic women from foreign countries the new victims were white women from European descent: they became “us” rather than “them”. With regard to the perpetrators an opposite movement took place. It now became assumed that trafficking was organized from the Eastern European side rather than the Western European one, thus coupling trafficking with fears of organized crime and a “mafia invasion” from the East. Although we tend to concentrate on the stereotyping of the “victims” it is important to realize that the counterpart of the stereotyped victim is the stereotyped perpetrator or “pimp”.

In the same period trafficking made it comeback at the UN agenda. In 1991, for example, the prevention of trafficking and the exploitation of the prostitution of others is the main topic at the 16th session of the Working Group on Contemporary Forms of Slavery, followed by a resolution of the UN GA in 1994.

3. Efforts to counter the flaws: the UN Protocol

Over the last 15 years a number of anti-trafficking organizations, human rights organizations and sex workers organizations have tried hard to counter the problems attached to the traditional concept of trafficking – in particular the conflation of trafficking with prostitution - and to redefine it into an human rights instrument designed to further the right of people to protection against forced labour and slavery-like exploitation, not only in the sex industry but also in labour sectors.

These efforts focused on three issues:

- ∞ the broadening of the concept to include other contemporary manifestations of “trafficking”, such as trafficking for domestic labour, sweatshops, agricultural work and the construction industry,
- ∞ the linking of trafficking with forced labour, as a more neutral and less gender-biased concept, and
- ∞ the reintroduction of coercion as the defining element of trafficking, reflected in the debate about “forced” versus “free or voluntary” prostitution.

However, to what exactly “consent” and “coercion” refer appeared to be a new source of confusion.

One view holds that “coercion” or “force” refers to both the process of recruitment and the conditions of work. “Forced prostitution” in this view is the equivalent of “forced labour in prostitution”. 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, such as the Forced Labour conventions, are advocated.

However, the more traditional – and still common - interpretation of the free/forced dichotomy is the one in which “free” or “forced” is understood as referring to the process of recruitment only. In line with the early treaties on trafficking, “force” then refers to forcing “innocent” women into prostitution. From this perspective, once a woman works in prostitution, the conditions under which she works are of no importance anymore. Force defined in this way excludes women who consciously made the decision to work in the sex industry, but who are subject to force and abuse in the course of their work, or who are promised other working conditions than those in which they find themselves. The abuses she undergoes are considered to be her own fault.

Yet others view the institution of prostitution itself as a violation of human rights. Within this view any distinction which refers to the will of the woman concerned is irrelevant, as no person is believed to be able to give genuine consent to engage in prostitution. Neither do the conditions of recruitment or work bear relevance as prostitution is believed to be “forced” per definition. This view is, for example, strongly reflected in the Swedish policy and the EWL campaign.

UN Protocol

Both developments – the broadening of the definition and the re-introduction of the element of coercion - are reflected in the 2000 UN Trafficking Protocol. In that sense the efforts to redefine trafficking have been successful, due to a joint lobby of anti-trafficking and sex workers organisations.¹¹

Compared to the old definitions the UN Protocol definitely signifies a step forwards:

- it takes as the central element of trafficking the use of coercion, abuse and deceit
- it broadens the definition of trafficking to include all forms of forced labour and slavery like practices into which people – male and female - can be trafficked, no matter which industry, whether within or across borders.
- It, for the first time, links trafficking with forced labour and slavery like practices, thus bringing into play the forced labour conventions
- it makes a clear distinction between trafficking and smuggling, which is being addressed in a separate Protocol.

Moreover, the Protocol makes a clear distinction between trafficking and prostitution. Although the Protocol explicitly mentions the exploitation of the prostitution of others and other forms of sexual exploitation as one of the purposes, it addresses the exploitation of prostitution of others and other forms of the sexual exploitation only when one of the deceptive or coercive means is used. The terms “exploitation of the prostitution of others” and “sexual exploitation” were intentionally left undefined to allow all states, independent of their domestic policies on prostitution, to ratify the Protocol. It does not require criminalising sex work. Different legal systems - whether criminalising, legalising or regulating sex work – can all be in compliance with the Protocol.

¹¹ See for a discussion of the UN lobby: *The negotiations on the UN Protocol on Trafficking in Persons. Moving the focus from morality to actual conditions*, Melissa Ditmore & Marjan Wijers, *Nemesis* 2003 nr. 4, pp. 79-88.

However, significantly the consensus about a definition was reached, not in a human rights document, but in a UN Convention on organised crime. The Protocol is primarily a law enforcement instrument intended to promote cross-border cooperation by government and to ensure that all countries have adequate laws to address trafficking. This is reflected in the fact that all law enforcement provisions are mandatory, while the provisions on protection and assistance of trafficked persons are to a large extent at the discretion of the member states.

And, though when the UN Protocol was adopted, we had good hopes that it would solve some of the “old” problems, in practice these reappear in a new coat:

- ∞ The singling out of sexual exploitation as separate and apart from forced labour, slavery, slavery-like practices and servitude in other industries, which reinforces the old confusion between sex work and trafficking.
- ∞ The focus on the process through which people arrive into a situation of forced labour and slavery like exploitation, that is the aspect of movement and coercion, rather than on the forced labour and slavery like outcomes itself.

‘Sexual exploitation’ vs. what is now called ‘labour exploitation’

This distinction is problematic for a number of reasons.

For the majority of the purposes as listed in the Protocol, i.e. forced labour, slavery or slavery like practices, the added element of coercion is unnecessary, as they are inherently coercive. You cannot legally consent to forced labour or slavery. Yet, the element of coercion in the definition is essential in relation to the purpose of “exploitation of the prostitution of others or other forms of sexual exploitation”, in order to distinguish that it is the use of coercion or deceit which give rise to it falling under the Trafficking Protocol.

Nevertheless the singling out of sexual exploitation as separate and apart again feeds into the conflation of trafficking and prostitution. This is reinforced by the lack of definition of the terms sexual exploitation and exploitation of the prostitution of others. In fact we have seen an explosion of anti-prostitution measures since the adoption of the Protocol.

Moreover, the element of coercion brings us back again to the old confusion as to what exactly force or coercion refers: only force into or also coercive conditions with the sex industry. This in its turn taps into the old debate about “innocent” (“real”) victims and “guilty” ones, those who deserve protection and those who do not. The “innocent” or “real” victims then are those who can prove that they were forced to become a prostitute, whereas the “guilty” ones are those who were engaged in prostitution before, knew they would be and/or are willing to continue to do so under non-coerced conditions.

This distinction not only seriously impedes the combat of forced labour and slavery-like situations in the sex industry but is also one of the reasons why sex workers perceive the trafficking framework as not particularly helpful in the protection of their human rights.

Although the problem is particularly visible in relation to trafficking into forced prostitution and other forms of sexual exploitation, it is relevant to all trafficked illegal migrants who may be perceived to lack the necessary “innocent victim” status as they may have consented to illegal border crossing or smuggling.

The distinction between good women who deserve protection and bad women who can be abused with impunity as they forfeited their right to protection against abuse, not only harms sex workers, it harms all women. The idea that the purity of women defines their right to be free from abuse is extremely persistent and still pervades all our societies. A recent example is the case of the young woman in India who was gang raped and died from her injuries, about which you might have heard about. One of the reasons it took more than an hour before she got help was the assumption that she was an illegal prostitute. And here in the US, there is the recent example of the politician who stated that 'real' victims of rape don't get pregnant.

Moreover, the separation of sexual exploitation from forced labour falsely suggests that forced labour cannot exist in the sex industry. In this context it is relevant to note that the ILO Committee of Experts has always dealt with forced prostitution as a form of forced labour.

It also leads to totally different strategies in addressing trafficking in the sex industry and in other industries. Where in the latter case the strengthening of the rights of migrant workers and the enforcement of labour standards is advocated to combat abusive practices, e.g. by the ILO, in the case of trafficking in the sex industry, the contrary, that is the further criminalisation of prostitution, is advocated as prevention strategy.

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, i.e. through trafficking, rather than on the forced labour and slavery like outcomes itself. This feeds into States' attempts to combat trafficking by establishing more restrictive immigration and border control regimes. Also for many migrants, therefore, "trafficking" is perceived as an anti-migrant framework that hinders, not assists in protection of their rights.

From a human rights perspective, however, the primary concern is to stop the exploitation of human beings under forced labour or slavery like conditions, no matter how people arrive in such situation and no matter whether it concerns a victim of trafficking, a smuggled person, an illegal migrant or a lawful resident. This would be in accordance with international human rights law which prohibits any form of forced labour, servitude and slavery-like practices.

Consequently, from a human rights perspective the distinction between trafficking, smuggling and illegal migration is utterly problematic.

In practice this distinction often leads to discriminatory measures which deprive some people from exercising their freedom of movement and their right to a livelihood, because they *might* get 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 should have access to protection and other categories not, simply because of the way they arrived in that situation.

The logical way forward would be to focus policy interventions on the forced labour and slavery-like outcomes of trafficking, rather than on the mechanisms of trafficking itself. If such policies

were followed, many of the current confusions of the trafficking definition – whether a case is smuggling or trafficking, whether a case is trafficking or forced labour, and whether a victim was perceived as “innocent” or “guilty” would become redundant. **Moreover, it would enable – and this is a core issue - shifting the debate from morality to actual working conditions.**

4. A human rights approach

Over the last years there has been an increasing call for a human rights approach. The question is, however, if this solves the fundamental problems attached to the anti-trafficking framework and will help to reduce the collateral damage of anti-trafficking measures.

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, among others, stress *“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”*.¹²

While this was – at that time – a brave and important thing to say, significantly sex workers are not mentioned, though they are clearly among the groups that suffered most from anti-trafficking measures. Also the 2010 Commentary on the Recommended Principles and Guidelines ignores sex workers when listing the groups which rights in particular should be taken into account, when stressing the importance of monitoring the impact of anti-trafficking measures to ensure that they do not interfere with established rights.

This example makes clear that although the increasing call in international and other documents for a human rights approach suggests that we all agree, in fact it is a highly contested area, as human rights have always been. A human rights based approach touches upon strong interests of States, e.g. migration and crime control. It touches upon our ideas about gender roles, the value of men’s work and women’s work, about 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.

And, above all, it raises the question whether we truly believe that human rights are universal and apply to everybody, including sex workers and migrants, legal and illegal. Or that it perpetuates a two-, or perhaps even three- or four- tier system, in which some people are entitled to more rights than others.

In practice, those who advocate for a human rights based approach tend to exclusively focus on the rights of trafficked persons, while ignoring the concerns of the people affected by anti-trafficking laws and policies as well as basic human rights principles, such as participation, empowerment and non-discrimination.

Still States have human rights obligations. How could we use them?

In the first place, States not only have the obligation to investigate and punish trafficking and its forced labour & slavery-like outcomes, but also to provide victims with appropriate remedies.

¹² Principle 3, 2002 Recommended Principles and Guidelines on Human Rights and Human Trafficking, OHCHR.

This means that trafficked persons should be treated as subjects accorded with rights rather than powerless pawns or passive victims – objects - ‘in need of rescue’. Which is, by no means, a commonly accepted and practiced attitude.

Secondly, policies to prevent trafficking should address the factors that increase vulnerability to trafficking, like inequality, poverty, discrimination, stigmatisation and social exclusion. They should aim at giving people the power, capacities, capabilities and access needed to change their situation, to speak up for their own rights and, in the case of trafficked persons, to take back control of their lives (empowerment).

Measures that add to marginalisation or stigmatisation must be avoided. They can easily be at odds with the protection of human rights and may create or exacerbate – in the words of the former High Commissioner for Human Rights, Mary Robinson - existing situations that cause or contribute to trafficking in persons. Again, something that is quite controversial, especially in relation to sex workers. States rather criminalise clients of sex workers than ratify the Convention on the Protection of the Rights of Migrant Workers and their Families.

Thirdly, anti-trafficking measures should comply with existing human rights obligations of States, as set forth in the major human rights instruments. At the minimum, they should not undermine or negatively affect human rights (‘do no harm’).

In the fourth place, a human rights approach implies respecting a number of principles that relate to the way in which policies, programs and measures are developed, implemented and evaluated, in particular participation, empowerment and non-discrimination.

This aspect has been hardly addressed within the trafficking debate. Participation of the groups affected is an essential condition for the development of effective change strategies. A persistent complaint of sex workers, for example, is that they are not listened to. Participation also means asking critical questions like: who are the experts, who produces the knowledge on which measures are based, who defines what the problem is and what the solutions are?

Moreover, anti-trafficking measures should not be used to discriminate against migrants, sex workers and other vulnerable or marginalised groups, but instead empower them to take control over their lives.

Are we going to achieve this?

This brings me back to the title of my speech: is there a way back from repression to empowerment?

The experience up till now does not make me optimistic. We have not been able to repair the flaws in the past and the signs are not positive that we will be able to do this in the future. Rather the experience in the past leads to the conclusion that the anti-trafficking framework is inherently and irreparably biased and once and for all the wrong instrument to further human rights.

This, in its turn, raises the question whether it is wise for migrant's rights organisations to jump on the band wagon of trafficking, or that they do better to stay away from it as long and as far as they can. I am happy to discuss this question with you.