

to determine which alternatives are considered acceptable and which are not.

The question of acceptable alternatives comes back to international norms, and to what philosopher Alan Wertheimer calls the “moral baseline.” In assessing what counts as coercive and what counts as consensual, states are forced to engage in moral decisions about what types of conduct are acceptable or permissible in a society and what are not. Slavery and slavery-like work are clearly not acceptable. But what about destitution — lack of access to essential food, medicine, and shelter?

This discussion applies to the distinction between smuggling and trafficking. If the person consents to be transported knowing what the working conditions abroad will be like, then, according to UN TOC, the person is smuggled — unless the con-

sent was obtained by force, by undue influence, or “abuse of a position of vulnerability” because the person had no morally acceptable alternatives.

But by this standard, many people who are now considered “smuggled” should fall within the category of trafficking victim, even though they have formally consented to travel and/or to engage in exploitative work in the destination state.

Conclusion

From a human rights perspective, migration is an inherently risky activity. Despite the potential rewards and benefits, switching the familiar for the new, and the status of a national for that of a non-national or alien in a world in which the state is still the prime guarantor of rights entails material, social, and psychological challenges.

These risks are heightened when combined with an irregular status. The UN TOC and its two protocols on trafficking and smuggling mark an important step forward in the battle against some of the most exploitative and dangerous situations that migrants can encounter. Although motivated primarily by law enforcement concerns, the protocols contain important protective measures, which, if implemented fully, could significantly advance the human rights of migrants.

However, it is critical that these new provisions be read against the corpus of existing human rights law and labor standards that already exist to protect the rights of migrants and that policymakers strike an appropriate balance between the security interests of states and the human security entitlements of migrants.

Pouring New Wine into Old Bottles: Understanding the Dilemmas of Contemporary Trafficking Work

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This short essay explores the dilemmas faced by anti-trafficking activists working to bring human rights to bear. Although the essence of ‘trafficking’ is most often framed as about gender, sexual harm, and prosecution of ‘traffickers’, effective rights interventions in ‘trafficking’ must be situated in a deeper understanding of the modern reality of globalization. While I am not arguing that understanding gender or sexual harm are irrelevant in anti-trafficking work, hyper-attention to stories of sex slaves weakens our interventions. It is critical to understand the histories of the frameworks (like ‘trafficking’) in which we work. Failing that, we become inadvertent pawns, allowing governments to take up the rhetoric of rights without a real shift in power. Anti-trafficking work is on the edge of this form of complicity.

To understand how we have come to this dangerous edge, reverse the proverb about the trick of pouring old wine into new bottles. Trying to use contemporary human rights strategies within the framework of ‘trafficking’ finds us pouring new wine into old bottles: residues of the law and ideology of the late 19th and early 20th century campaigns against ‘white slavery’ linger in the ‘old bottle’ of the trafficking framework. Despite our demand that “more rights, not fewer rights” must be the basis of state responses to trafficking, the anti-trafficking framework has served at times to justify limiting rights.

Signs of danger?

A recent warning of co-option flashed globally when the President of the US linked his moral crusade against trafficking (all trafficking rendered as 'sexual slavery') to the war against terrorism in a UN General Assembly speech in September 2003. However, there were earlier warning signals: in 1995, the Philippines temporarily suspended visas for domestic workers going to Singapore in response to allegations of abuse, in 1998, Nepal denied visas to women for their protection. Although some activists struggled to keep a rights-focus in the US Victims of Trafficking and Violence Protection Act of 2000, the law only provides full remedies for trafficked persons willing to cooperate with prosecution. In what other human rights abuse is a remedy *conditional*? Jyoti Sangera, advisor on trafficking in the OHCHR, has been alarmed at evidence that anti-trafficking activists have become complicitous in regulating borders, such as interdicting young women on the India/Nepal border.

Contemporary rhetoric on trafficking harnessed the language of rights and horrendous harm – indeed, often slavery (or when focused on sex trafficking, of sexual slavery) to move *some* persons out of the category of despised illegal migrant and into the category of deserving victim. This move is connected to the astounding recent growth of international criminal law. In 2000, the UN adopted a new constellation of trans-national criminal law treaties, including one specific to trafficking, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime. While effective and fair prosecution for servitude and violence, whether in providing sex, picking tomatoes or harvesting shrimp, is a key component of rights work, it is notable that other aspects of rights work have languished. The 1990 International Convention on the Rights of All Migrant Workers and Members of their Families took over ten years to come into force, and so far only primarily sending countries have ratified it. At the 2001 World Conference against Racism, receiving states of the North and South

fought against recognizing rights for irregular migrants. In the 2001 UN General Assembly on HIV/AIDS, states refused to reference persons in sex work as rights holders. There has been almost no progress made in compelling richer states or the international financial institutions (IFIs) to revise structural adjustment policies or destructive trade restrictions, even in the face of evidence of their role in rights violations, including exploitation in new and irregular markets.

More on the 'old bottle' of the trafficking framework: why history matters

The first wave of anti-trafficking coincided with the waves of migrating women within and out of Europe and North America from the mid-late 19th to early 20th Century. As Elaine Scully has noted, the 'white slavery' panic arose as a response to a rapidly changing world, shaped by paradigms of colonial power, immigration, social hygiene and urban angst ... entangled in issues of class, gender, race, and sexuality. Anti-trafficking's ideological and legal roots tap into beliefs that prostitution (violation of women's dignity) is the central harm of trafficking, and yield one remedy: rescue and return. Of course, only some women were worth rescuing in the name of re-asserting control of some men over all women of all colors, of some nations over all colonized peoples. Yet, today as 100 years ago, the focus on sex trafficking serves another purpose. What Carole Vance in "Innocence and Experience" calls trafficking "melomentaries" (melodramatic pseudo-documentaries) claim to be part of a critique of global inequality, yet their rescue stories displace attention from geo-political economic conditions. Rescue and prosecution of brothel-owners resonate with this story; advocacy on the WTO does not.

Markets, movement, borders, exploited migrants, gender and citizenship

Yet, contemporary analysis of 'trafficking' reveals that it primarily results from people with the need – and agency, albeit constrained — to move, and who must pay agents to get them past increasingly high barriers. This position, combined with fail-

ure to accept that irregular migrant workers need rights, renders them vulnerable to traffickers and exploitation in the exploding, unregulated markets. In "Planet of Slums", Mike Davis plumbs recent UN reports on shelter to expose the future of global poverty. By the year 2050, the majority of the world's poor will live in megacities, sprawling urban areas unable to absorb the labor of or provide essential services for intra and trans-national migrants. Yet the poor move to these cities because their rural livelihoods have been destroyed by Northern-directed trade and development policies, impacts often amplified by local political repression. For many women, movement is linked not only to the destruction of traditional livelihoods, but also to gendered and ethnicized subordination operating within tradition.

In this brave new world, there is exploitation by the poor of those more poor, (think of children enslaved as domestic workers in Haiti for families only marginally less poor), as well as exploitation of the less poor (persons able to pay smuggling agents) by new capitalists, such as textile mill owners on the Thai/Burma border or brothel owners in Bosnia Herzegovina. In "Why Migration Policies Fail", Stephen Castles exposes contradictory border and labor policies — strong states often promote economic policies (trade restrictions, SAPs) that compel movement, then trumpet restrictions at the border: claims to "...exclude undocumented workers may really often be about allowing them in through the side doors and back doors so that they can be more readily exploited". In regard to the exploitation of person in the sex sector, this double discourse of condemnation and reliance on that sector facilitates exploitation with impunity. As described in Lin Lean Lim's 1998 Report for the ILO, states derive large proportions of their GNP from sex sectors, but refuse to grant those working – or trapped — in those sectors rights.

People remain in need of real protections, whether working locally or migrating, and the power to participate in the policies that determine their lives. Yet, their claims as citizens disappear in the current stories of "trafficking", as contemporary anti-traf-

ficking reports tell stories which retain the impress of anti-vice and social purity movements. The hypocritical focus on sexual harm masks the absence of concrete steps to create the conditions for sexual – or economic –rights for women and men. Instead, they are increasingly patrolled while capital moves. We come full circle:

without the ability to intervene meaningfully against state practices and interests that generate unsafe migration, we are left helping – through the operation of the criminal law— those very same states regulate the movement of already constrained persons. All anti-trafficking work is not rights based. As rights activists, we

must begin to work with economic justice as well as anti-impunity and prosecution activists. By this, we can re-affirm human rights in the context of globalization as a tool of struggle, and ensure that the women and men on whose behalf we claim to work are actual beneficiaries.

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The is an excerpt from their article, “International Approaches to Human Trafficking: The Call for a Gender-Sensitive Perspective in International Law”, in *Women’s Health Journal*, April 2004 (Latin American and Caribbean Women’s Health Network, <www.reddesalud.org>).

The essay opens with the following epigraph:

“The illegal trade in drugs, arms, intellectual property, people and money is booming. Like the war on terrorism, the fight to control these illicit markets pits governments against agile, stateless and resourceful networks empowered by globalization. Governments will continue to lose these wars until they adopt new strategies to deal with a larger, unprecedented struggle that now shapes the world as much as confrontations between nation-states once did.”

- Moisés Naím, “The Five Wars of Globalization”, *Foreign Policy Magazine*, January/February 2003

The UN Trafficking Protocol and CEDAW: At Legal Odds

Phyllis Coontz & Catherine Griebel

Despite the comprehensive legal approach to trafficking in persons represented by the UN Trafficking Protocol, from a feminist and human rights perspective the document is flawed. Through its indirect treatment of women and tentative language regarding the obligations of the State to guarantee victims’ civil rights, such as due process and unconditional protection, the Protocol fails to extend meaningful rights.

The focus of the UN Protocol is on criminalization, deportation and border control strategies, resulting in a supply-side approach that places primary responsibility on law enforcement and pays scant attention to the demand side of the problem or to factors of economic inequality between developing and developed nations. The total neglect of a fundamental actor — the trafficked person —in many ways reinforces the structural factors that give rise to human trafficking. This serious ellipsis likewise reveals the distance between new UN rhetoric concerning economic, social and cultural rights and non-discriminatory treatment of women on one hand and the enforceability of the instruments of international law on the other, which continues to depend on former notions of state sovereignty, notions that historically have been framed and carried out by predominately male UN assemblies. In so doing, the Protocol contradicts and compromises the gains that have been made to ensure gender equality through the international legal system.¹⁹

Such contradictions permeate the UN system. For example, the female subject is treated quite differently in the UN Trafficking Protocol and the 1979 Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),²⁰ the exemplary international legal document addressing women. To appreciate how the UN Trafficking Protocol resonates with a type of state-centered, paternalistic language reminiscent of former discriminatory international lawmaking, it is helpful to review three conceptual models regarding women’s treatment in international law proposed by Natalie Kaufman Hevener.

Varying Conceptual Models in Feminist Law: Protective, Corrective and Non-Discriminatory Legal Action

In *International Law and the Status of Women* (Boulder, CO: Westview Press, 1983), Natalie Hevener-Kaufman analyzed all the major international agreements dealing with