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# TRAFFICKING AND PROSTITUTION RECONSIDERED

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and Human Rights*



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## Unpacking the Trafficking Discourse

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Trafficking is a subject open to fierce debate, yet it also lends itself to critical reflection and honest conversation. In the following I offer an overview and analysis of the dominant discourse on trafficking by reflecting on the assumptions, interventions, and approaches followed by its practitioners. This essay is written in the spirit of an invitation for a collective reflection on the mainstream anti-trafficking paradigm with its package of interventions developed over the past decade or more, particularly in Asia. It is also a plea to think beyond and outside of the box, for this box has incarcerated and inhibited creative thinking and practice for far too many years. I draw confidence for my candor—which might seem to some audacious arrogance, but in all honesty is nothing more than a brutal reflection on our collective anti-trafficking practice—from the unwavering commitment of groups and allies to foreground the rights of those women whose struggle for a life of dignity they purport to support. In their commitment, these mindful practitioners have not shied away from abdicating their own strategies of engagement when these were found to be detrimental or lacking. It is no secret that the anti-trafficking arena is a beleaguered one. It has been made murkier by the melding together of complicated categories, constructs, and players. Issues of migration, trafficking, and sex work are peppered with constructs of sexuality, gender, and vulnerability, threaded through with categories of victim and agent, consent and coercion, and stirred together in a cauldron by cooks, who are far too many in number, much

too disparate in their culinary skills, and have at their disposal a budget which is far too lavish for a mere broth. These "too many cooks" have not only managed to spoil the broth, but some of them have also ended up bonking each other with their spatulas. I locate myself squarely within the company of these cooks and after several years of engagement and serious reflection, humbly offer some suggestions for improving the recipe.

Central to this reflection process is calling a spade a spade, and not a snake. In the context of anti-trafficking work, this merely means eschewing the moral panics and jettisoning the practice of categorizing social reality under mutually exclusive dichotomies. That trafficking in persons is a critical issue is not the contestable point in this discussion. What is under question is the manner in which the trafficking discourse has been constructed and the assumptions and myths that have underscored this construction. The trafficking debate has rendered itself too quickly to a simplistic association with the prostitution debate, the reasons for which will be discussed later. However, the outcome of this conflation has resulted in the ideological burdens of the prostitution and sex wars transmigrating into the anti-trafficking arena. It has also resulted in a dead-end scenario with a pro- and anti-prostitution position. Critical thinking and reflection, and hence hope, emerge from a growing and disparate range of players located in the middle, who consciously seek to complicate their analyses in commensuration with the layered reality of trafficking. At present, their plea for questioning, challenging, and complicating may simply be dismissed as a pro-prostitution position. However, it is from this forum of reflective practitioners that the praxis of embodying rights for women in the arenas of sexuality and labor will emerge.

#### MYTHOLOGIES OF TRAFFICKING: STATING THE PROBLEM

My thoughts are based upon the premise that there is a problem with the manner in which the "problem of trafficking," especially within the Asia-Pacific region, has been addressed by a majority of players over the past decade or so. This problem is connected to the construction of the discourse of trafficking or the manner in which the trafficking story is being told within the Asian region (Frederick 1998). The dominant anti-trafficking discourse, and consequently understanding, is not evidence-based but grounded in the construction of a particular mythology of trafficking. As a result, the interventions and programs flowing from this understanding have rarely led to the desired or expected results, i.e., the reduction of trafficking. Hence, despite the spate of heightened activity within the last decade on the part of a plethora of actors to curb the trafficking of women, and the investment of huge amounts of

funds on the part of a host of donors, the common refrain among the same community of donors and grantees is that trafficking is "rapidly increasing," and acquiring "monstrous dimensions." This begs the logical question: If all the energies and monies deployed to curb trafficking are not resulting in its reduction but, on the contrary, leading to an increase of it, then where are we going wrong?

The dominant discourse of trafficking is based upon a set of assumptions. These, in a large measure, merely flow from unexamined hypotheses, shoddy research, anecdotal information, or strong moralistic positions. The issue is not whether they are true or false, but simply one of pushing conclusions that are not supported by rigorous empirical research and a sound evidence base. This faulty methodology of disseminating a flow of information and data whose origins are questionable contributes to the construction of both the dominant paradigm and discourse of trafficking, as well as the mythologies of trafficking.

Some of the dominant assumptions that inform the mainstream trafficking discourse are:

1. Trafficking of children and women is an ever-growing phenomenon;
2. Increasing numbers of victims of trafficking are younger girls;
3. Most trafficking happens for the purpose of prostitution;
4. Poverty is the sole or principal cause of trafficking;
5. Trafficking within the Asian subcontinent and the region is controlled and perpetrated by organized crime gangs;
6. All entry of women into the sex industry is forced and the notion of "consent" in prostitution is based upon false consciousness or falsehood;
7. Based on the assumption that most women in prostitution are coerced and trafficked, it is then assumed that they would be only too happy to be rescued and reintegrated with their families, or rehabilitated;
8. Rehabilitation into families and communities is viewed as an unproblematic strategy for it is assumed to provide adequate protection and safety to the victims of trafficking;
9. Brothel-based prostitution is the sole or major form through which sex trade in the region is conducted;
10. Police-facilitated raids and rescue operations in brothels will reduce the number of victims of trafficking in the prostitution industry;
11. Absence of stringent border surveillance and border control is the principal reason for facilitation of transborder trafficking;
12. Anti-migration strategies based upon awareness-raising campaigns which alert communities to the dangers of trafficking

by instilling fear of strangers, and fear of big metropolises and cities, will curb migration and hence trafficking;

13. Strategies which club women and children together will be equally beneficial to both in extending protection against trafficking and redress after being trafficked;
14. All persons under 18 years of age constitute a homogenous category—children, devoid equally of sexual identity and sexual activity, bereft equally of the ability to exercise agency, and hence in need of identical protective measures;
15. Law enforcement is a neutral and unproblematic category and all it needs is sensitization and training on issues of trafficking in order to intervene effectively to curb the problem of trafficking.

These fifteen assumptions are the major founding blocks of the dominant discourse on trafficking. In challenging the dominant discourse of trafficking, my intention is not to deny the existence of trafficking as a problem in Asia—far from it. There is no denying the fact that with growing insecurity of food and livelihoods and shrinking avenues for regular migration, several harms, including that of trafficking, may be on the rise. Rather, my intention is to unravel the puzzle of why the trafficking story is shrouded in mystery; to unpack the elements of the trafficking discourse; to comprehend why a spade is not called a spade; and to examine some persistent maladies of the paradigm in order to generate deeper analysis, understanding, and, consequently, action.

A critical tool that enables a spade to be called a spade is the lens through which it is viewed. This, in effect, holds true of any social phenomenon. Here the trafficking discourse is analyzed through the lens of a rights-based approach, which incorporates within its core both a gender and development perspective as well.

## THE CONTEXT OF TRAFFICKING

Trafficking in women and girls is acknowledged by the international community as a global problem today. Reportedly, millions of children and women are said to be trafficked across borders and within countries, and the profits accruing from this trade are alleged to be phenomenal, exceeding, according to some estimates, the clandestine gains made from the underground trade in arms and narcotics.<sup>2</sup> There is general consensus that trafficking in women and children has become a significant facet of transnational organized crime, and the growth of such activities has been referred to as the “dark side of globalization.”<sup>3</sup>

We learn, through an endless cycle of stories, how trafficked women are separated from their families, and sexually exploited by means of coercion, violence, or abuse of authority. Their ability to seek help is severely constrained, especially if they are minors (UNICEF-EASRO 2001; Estes and Weiner 2001). In addition, trafficked women and minors are often further disadvantaged if they are undocumented migrants or immigrants; refugees or displaced; or if they belong to a marginalized ethnic, cultural, or religious social group. Poverty and lack of sustainable livelihood are common conditions of those who become victims of trafficking. These trafficked persons are often uneducated, unskilled, and debt-ridden.

Women are trafficked for a variety of reasons, including for the purposes of prostitution, domestic work, marriage, industrial and agricultural work, and trade in human organs. All victims of trafficking are not necessarily subjected to commercial sexual exploitation. Some of the purposes for which trafficking occurs, such as prostitution, pornography, sex tourism, and the marriage market, are by their very nature marked by commercial sexual exploitation. However, other sites into which trafficking feeds might result in other types of exploitation, forced labor, and abuse. It has been reported that even when women and minors are not ostensibly trafficked for the purpose of commercial sexual exploitation, their trafficked status renders them highly vulnerable to sexual exploitation and sexual abuse (UNICEF Innocenti Research Centre 2003).

The growth of trafficking in persons has been attributed to many causes, including poverty, lack of sustainable livelihoods, structural inequities in society, gender discrimination, war and armed conflict, and other forms of natural or constructed disasters. However, it is critical to understand that these factors are not in themselves the causes of trafficking; they merely exacerbate the vulnerability of marginalized and disadvantaged groups and render them increasingly more susceptible to a variety of harms. Factors such as lack of livelihood options, conflict, and structural inequities create conditions for the displacement and mobility of populations and, hence, contribute to the “freeing up” of marginal and vulnerable groups, thereby creating a potential supply of migrants and livelihood-seekers. The sites of work that draw this supply of migrant livelihood-seekers are contingent upon demand from particular sectors of the economy for certain types of labor that would enable maximization of profit. Trafficking for commercial sexual purposes is tied to the expansion and diversification of the sex entertainment industry as well as to the expansion of marketable, intimate services and arrangements, including marriage.

The drive for maximizing profit under a competitive economic regime fields a demand for workers who are the most vulnerable and therefore the most exploitable and controllable. Children, followed by

women, fit this description perfectly. It must be remembered that trafficking of persons is, most importantly, a demand-driven phenomenon. And yet the majority of anti-trafficking interventions in the arenas of rescue, repatriation, rehabilitation, and even prevention are targeted only toward the supply of trafficking or the victims. This is a serious gap in the sphere of interventions.

### THE NEXUS OF VULNERABILITY AND ILLEGALITY

A close examination shows that the recent impetus for transborder trafficking, as well as smuggling or other clandestine forms of labor recruitment, is connected to striking imbalances between the increasing supply of unskilled, indigent jobseekers on the one hand and the availability of legal and sustainable work in places where the jobseekers have legal rights to residence or citizenship on the other. A recent International Labour Organisation (ILO) study supports this view and maintains that "labor trafficking should not, in theory, take place if the jobseeker has freedom of geographical movement and freedom of access to employment" (ILO 2001, 53). Lack of legal rights to mobility and to legally accepted forms of livelihood compel marginal and vulnerable groups to lead underground lives, enhancing manifold their vulnerability to harms such as trafficking, bondage, slavery-like working and living conditions, and HIV/AIDS. This is the "quintessential knot" in the nexus of vulnerability where prevailing vulnerabilities of age, gender, and socio-economic status forge a complex relationship with newer vulnerabilities, such as widespread and unprecedented insecurity of food and livelihood.

This nexus of vulnerability is increasingly cemented by the "illegality factor," where practically everything about the victim of trafficking is covered by a shroud of illegality. It may seem that the discussions on legality of work and freedom of movement are irrelevant for minors because, in principle, they should not be migrating as jobseekers. However, the reality is that minors, perhaps more than anyone else, are marked most by the illegality factor because they too are an integral part of the vast pool of mobile jobseekers. Their inherent vulnerability as minors is often exacerbated several-fold by the formal and informal sanctions against child labor. As far as women are concerned, we do have enough statistics to show that, especially in Asia, a majority of the migrants today are women, moving not as part of a family unit but in their independent capacity (Asis 2003; Sanghera 2003).

The illegality factor taints almost every aspect of the trafficked person's life. Hence, the work done by this trafficked person is often considered "illegal" in the informal sector—her age may be below the legally stipulated age of employment; her status within the country of

residence may be undocumented; the conditions of work under which she labors may be illegal or not up to legal standards; the hovels, slums, or brothels in which she resides may be unlicensed or exist on squatted land; and several of her partners in business or life may be defined as "illegal," such as agents, pimps, madams, other sex workers, children, and siblings. (While both females and males are victims of trafficking, the term "her" is used here to foreground a gender approach, as well as to underscore the specific vulnerability of girls and women.) In being compelled to lead "illegal" lives, victims of trafficking are simultaneously converted into criminals. Their illegalization keeps them from accessing most of the freedoms and rights that are extended to all as human beings. These trafficked persons invariably live hidden and invisible lives. Much of their energy is spent upon averting either state agents such as law enforcement officers from apprehending them, or non-state agents such as their employers and exploiters from squeezing them further.

Any strategy to address the issue of trafficking of persons from a rights-based perspective must address their illegalization and criminalization. A preventive strategy in this regard entails exploring options for legal employment as well as ensuring that existing forms of illegal work are made consistent with legally stipulated standards of labor. With special regard to minors this discussion enters a controversial arena since child labor is a contentious issue. However, in principle it has been seen that in order to remove the illegal status of a victim and empower her, it is vital to simultaneously address all those locations of her existence that imbue her with this illegality and ultimately render her a criminal in the eyes of the law. In addition to employment, it is also crucial to address the issue of mobility and the right to freedom of movement. This is tied in integrally with questions of migration and the rights of migrants. In the context of transborder movement of people and border controls exercised by nations, questions regarding the illegality of migrants are complex ones. Nonetheless, concerns related to rights of a person regardless of citizenship and nationality remain to be taken up in a systematic fashion within the dominant anti-trafficking discourse. At the same time, the debate on the rights of young people to migrate has been kept largely at bay.

### UNPACKING THE MYTHOLOGIES OF TRAFFICKING

#### Naming and Defining the Problem

Until the finalization of the UN Trafficking Protocol Supplementing the UN Convention Against Transnational Organized Crime at the end of

the year 2000, there was no comprehensive international definition of trafficking whose basic elements were acceptable to State parties and key stakeholders. Therefore, until recently the term "trafficking" was employed to describe varied and disparate phenomena, processes, and outcomes.

Historically and most commonly, trafficking has been conceptually conflated with prostitution and illegal migration, and more recently with the commercial sexual exploitation of children (CSEC). In fact, the reason for equating child trafficking and CSEC can be logically traced to the practice of equating trafficking in women and children with prostitution over the past several decades. It is not a coincidence that a majority of the anti-trafficking laws in most countries are also prostitution laws, which seek to variously criminalize or regulate the sex trade.

A commonly agreed upon definition of trafficking is now contained in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime, which was adopted in 2000. The UN Convention came into force in September 2003, and the Trafficking Protocol in December 2003.

In the recent past, the need to expand the definition of trafficking to include purposes other than prostitution, such as forced labor, forced marriage, and slavery-like practices,<sup>4</sup> has also been recognized. This is reflected in the new UN protocol on trafficking. An acknowledgement of the key understanding that trafficking is a problem of human-rights violation, and not of law and order or public morality related to prostitution, is of recent origin, and gaining currency in some quarters. However, despite this growing realization, in actual practice crime prevention and concerns with public morality continue to be foregrounded as the core of the anti-trafficking discourse.

## TRAFFICKING, MIGRATION, AND PROSTITUTION

The dominant trafficking paradigm rests upon an absence of the critical distinction between trafficking and migration on the one hand and trafficking and prostitution on the other. What are the implications of conflating and collapsing the categories of migration and prostitution with trafficking? And what are the implications when these concepts are often value-loaded, with an inherent bias that marginalized people who migrate are vagrants, and women who migrate into the sex industry are sexual delinquents?

### Curbing Migration to Prevent Trafficking

Equating trafficking with migration has led to simplistic and unrealistic solutions within the mainstream anti-trafficking paradigm. As a result

in order to prevent trafficking there is a move to stop the migration of those who are considered vulnerable to trafficking. Even when curbing migration is not a stated programmatic focus, an inadvertent impetus is to dissuade women and girls from moving in order to protect them from harm. Hence, conflating trafficking with migration in an unproblematic manner results in reinforcing the gender bias that women and girls need constant male or state protection, and therefore must not be allowed to exercise their right to movement.

Curbing migration has not and will not stop trafficking. A demand on the part of some practitioners to implement greater border control and surveillance on the Indo-Nepal border for instance, by introducing passports or other measures, merely served to drive the activity further underground, and make it still more invisible (Sanghera and Kapur 2001). This outcome has been repeatedly underscored in all those instances where states have proceeded to enforce increasingly stringent immigration control as a response to heightened trafficking in persons and narcotics. Borders cannot be impermeable, and stricter immigration measures have merely resulted in pushing the trafficked persons further into situations of violence and abuse, and rendering them more inaccessible.

### Banning Prostitution to Prevent Trafficking

There has been a continued persistence among anti-trafficking players within the dominant discourse to conflate trafficking with prostitution. By collapsing the process with the purpose, the abuse and violence inherent in trafficking is mistaken for the actual site of work and form of labor. Furthermore, trafficking for all other purposes is largely ignored, and targeting trafficking for prostitution becomes the principal agenda of anti-trafficking interventions, policies, and laws.

To provide protection and redress to women and girls who are trafficked, a clear distinction needs to be made between the abuse and human-rights violations committed during the entire process of recruitment, transport, and confinement via coercion to exploitative labor conditions on the one hand, and the form of employment or purpose of trafficking on the other. In the case of trafficking for the purpose of domestic work, forced marriage, or work in carpet factories, the objective of anti-trafficking interventions must be to target the abuse, forced labor, and violation of rights that is endured by those affected by trafficking and not to eradicate marriage as an institution, or domestic work and the carpet industry as sectors of employment. Similarly, attempting to eradicate the sex industry in a bid to prevent the harm of trafficking may be an unrealistic agenda. Not all victims of trafficking are prostitutes, nor are all prostitutes victims of trafficking.<sup>5</sup>

Figures on the scale of trafficking are often derived from small-scale surveys based upon disparate methodologies or sources such as

police records, local information, or media reports which cannot be statistically representative or empirically sound. These calculations are based on many untested assumptions. Most data on the number of trafficked persons are based on speculation and projection. To date, there is no sound methodology to calculate the numbers of those who have been trafficked.

The United Nations estimates that, in the last 30 years, trafficking in women and children for sexual exploitation in Asia alone has victimized more than 30 million people.<sup>6</sup> There are few statistics which distinguish the number trafficked according to the age of the victim. In South Asia it has been noticed that several of the statistics on trafficked victims have remained unchanged over the years. To elucidate this point the case of Nepal would serve as a good example. The figure of 5000–7000 Nepali girls trafficked into India each year, with 150,000–200,000 in Indian brothels, has remained unaltered over the past 15 years.<sup>7</sup>

When trafficking is equated with migration on the one hand and prostitution on the other, then it logically follows that the number of victims of trafficking is equal to the number of those who have migrated or those who are engaged in prostitution. This logic operates particularly in the case of adolescent girls and women migrants, and not in the case of men. This practice has resulted in an extremely flawed methodology for conducting baseline surveys on trafficking in “risk-prone” and “affected districts.” Household surveys have been conducted in South Asia by well-meaning community-based organizations (CBOs) and researchers, for example, on the number of women and girls who are absent from their villages. These persons may have migrated voluntarily or under deception—however, there are no methodological variables to ascertain this information. Absence of women or girls is routinely considered tantamount to “missing persons,” and therefore, trafficked (Sanghera and Kapur 2001). In this context a pressing query begs a response: Why are female migrants considered to be trafficked by anti-trafficking stakeholders while male migrants are considered to be simply that—male migrants?

For all of the above reasons statistical data are highly questionable and contestable, and consequently the weakest link as far as the issue of trafficking in persons is concerned. And yet, statistics of trafficked women and children constitute one of the legs upon which the dominant trafficking paradigm stands. Victims of trafficking are presented as the fastest growing population under globalization, and the “trafficking problem” is portrayed as a formidable and heinous serpent, constantly tightening its coils around vulnerable women and girls of poor and marginalized communities, especially of the Third World. A statement by a Third World activist aptly sums up this fear: “Because everything becomes marketable, and everything becomes a commodity in the new world of globalization, men can travel thousand of miles just to buy

girls from poorer countries” (Shifman 2003). In this dominant frame, men prey upon women, the rich countries gouge out resources, including women, of the poorer ones, poor women are not human beings but merely commodities, and on and on... This is the trope and the principal refrain of the saga of unmitigated victimization of the dominant discourse on trafficking.

### Equating Children with Women

The UN Protocol on Trafficking and the US Trafficking Victims Protection Act 2000, as well as a majority of the major documents and laws addressing the issue of trafficking, fail to make a distinction between the trafficking of women and children. In commenting upon the SAARC (South Asian Association for Regional Cooperation) Draft Convention on Trafficking, which clubs children and women together, the previous UN Special Rapporteur on Violence Against Women stated, “The legal regime surrounding women should be based on a framework of rights and the concept of coercion when it comes to trafficking. The legal regime with children must be completely different” (Coomaraswamy 2000).<sup>8</sup> The issue of consent for children with regards to certain arenas of work, including prostitution, is deemed irrelevant. This is in accordance with the Convention on the Rights of the Child (CRC), whereas treating women like children or in accordance with similar norms infantilizes women and denies them both their right to autonomy and to make decisions. “Some women may have been trafficked while they were under age. In such a case a woman should be entitled to a legal remedy for any harm she may have endured as a child, whether it is in the form of child sexual abuse, slave labor, or coerced work while still a minor. Providing such remedies is different from setting up a legal regime that treats all women like children” (Sanghera and Kapur 2001, 24).

Why are women and children clubbed together in anti-trafficking legislation and the dominant trafficking paradigm when in all other instances, including labor laws, great care is being taken to separate child labor from adult labor? The Convention on the Rights of the Child is a clear statement on the ideological, strategic, and operational need to make distinctions between children and adults. This distinction is based on the principle that the development of children as human beings is a process and is not complete so long as they are minors. Children are deemed “innocent” and in need of special protection and assistance in making decisions. It is believed that minors cannot be expected to act in their own best interest as their ability to exercise full agency is not yet entirely developed.

The category of children with regards to “consent” will be complicated in a subsequent section of this paper; however there should be no

dispute over the fact that women, as adults, have a full right to all their freedoms, including the freedom to exercise their agency and to seek a livelihood. Why then are they clubbed together with children in anti-trafficking laws? The fact that a woman may have been trafficked as a minor in the past does not justify her continued treatment as a child past the age of majority.

### POST-FACTO NATURE OF THE CRIME OF TRAFFICKING

One of the key problems in understanding and dealing with the problem of trafficking is that it is deemed a crime only after it has happened. Herein lies its operational and conceptual complexity. There are three interlinked core elements involved in the operation of trafficking based upon its definition: (i) Movement of a person; (ii) under deception or coercion; (iii) into a situation of forced labor, servitude, or slavery-like practices (GAATW 2001).

The first of these elements, namely movement, involves both recruitment and transportation of the person. In present times, many trafficked women migrate voluntarily or willingly in their desire to better their life situation. Therefore, agents or traffickers do not encounter much difficulty in recruiting or transporting their victims within or across borders. In fact, it may be said that most victims actively collude in their own trafficking through cooperation with traffickers during the process of transportation. The traffickers pose as well-wishers offering to deliver the innocent persons into lucrative situations of work or marriage. Hence, the first phase of trafficking is achieved oftentimes with little coercion or force; various forms of deception and false promises are employed in this phase.

Coercion, sometimes of an extreme nature, is evident at the point of destination in the trafficking process. At the destination end, the process of trafficking entails consignment to, and continued confinement in, the situation of forced labor, servitude, or slavery-like practices. At the point of destination the person who, during the process of recruitment and transport, is a willing collaborator and migrant, becomes a victim of trafficking. This chain process is characterized by the involvement of one or more agents/traffickers—recruiter, transporter, broker, employer—who derive profit through this activity.

Given the nature of the process of trafficking—namely, recruitment, transportation, and confinement—it is difficult to determine the crime during its earlier phases. At its commencement, trafficking is indistinguishable from agent-facilitated voluntary migration or smuggling. It can only be established as a crime once it has happened and the person has been trapped and confined to exploitative conditions. At the destination point the trafficking process enters its most clandestine and in-

visible phase; it simultaneously puts on its criminal face. Just as trafficking becomes a crime in its final stage, the jobseeker and willing migrant becomes a victim at the destination point. And as the crime of trafficking goes underground into invisibility, the victim of trafficking becomes increasingly inaccessible. It is critical to grasp that the process of trafficking, while transforming itself into a crime, simultaneously transforms the seeker of a better life into a victim. In fact, if her situation is suffused with illegalities,<sup>9</sup> as argued earlier, then she is transformed paradoxically into both a victim and a criminal. And thus, in a desire to expand and enjoy her rights as a human being, the victim of trafficking might experience a brutal and systematic violation of her rights.

The complexity of the process of trafficking, where the crime can be ascertained only post-facto, complicates any endeavor to formulate an effective, rights-based response to address it at the point of origin and transportation, and indeed, poses a great challenge to all anti-trafficking advocates. To establish "intent" of trafficking and apprehend the trafficker or recover the potential victim during the phase of recruitment and transportation is fraught with immense challenges and pitfalls. In fact, it is extremely difficult to design apprehension or recovery interventions during this first phase of the process. Although there may be "suspicion," there is a lack of a systematic or verifiable methodology to ascertain that the woman crossing the border is a potential victim and that her companion is a trafficker. Intense interrogation of the suspected "victim" has often proven to be extremely intimidating, and detention of her chaperone without adequate grounds of proof of the crime, unconstitutional. Therefore, a rights-based intervention especially during the phase of recruitment and transportation needs very careful consideration. And yet the dominant discourse on trafficking does not adequately acknowledge nor address these complications.

### ORGANIZED CRIME GANGS OR THE GUY NEXT DOOR?

Who are the traffickers? The new UN Convention that deals with trafficking through one of its protocols is entitled the UN Convention Against Transnational Organized Crime. It is obvious that encoded within the title of the new convention is an understanding that trafficking of children and women is perpetrated by members of organized crime, and it is a transnational problem. There is certainly evidence to prove that in some instances in certain parts of the world, organized crime gangs are involved. However, in view of the overall paucity of evidence on the issue of trafficking globally, it is near impossible to make a claim that trafficking is entirely or even largely a problem of organized crime. Neither is there enough evidence or data to establish the extent or nature of involvement



of members of organized crime in various countries.<sup>10</sup> A number of tentative studies and case profiles from both Asia in general and South Asia in particular reveal that contrary to the commonly held impression of the existence of highly organized national and transborder networks of crime gangs, the perpetrators of trafficking in the form of recruiters and agents are primarily small-time operators functioning mostly in an individual capacity, and are based upon personal and sometimes familial sets of relationships.

Evidently, the definition of a trafficker is too broad and open-ended to be legally operationalized with ease. To establish the "intent" to traffic, until the crime is committed, is difficult. However, once the crime of trafficking is committed the trafficker(s), if apprehended, could be charged for a variety of crimes, including debt-bondage, fraud, assault and battery, rape, torture, abduction, sale of human beings, unlawful detention, murder, deprivation of labor rights, child abuse, and exploitation through enforcement of child labor. All countries have laws against these crimes, thus all countries do have some laws that can be used to prosecute traffickers. And while some traffickers commit all of these crimes, very few are prosecuted or punished for committing them. It has been observed that, more commonly, traffickers are tried for migration-related offences that are less serious and carry milder sentences. It has also been observed that in the case of trafficking into the sex industry, traffickers are prosecuted for laws relating to prostitution, such as procurement, rather than for the serious harm often inflicted upon trafficked persons, including physical, sexual, and psychological violence; physical incarceration; and debt-bondage and other forms of forced labor and slavery-like conditions.

### RESCUE, REPATRIATION, AND REHABILITATION

A review of the dominant anti-trafficking paradigm and work reveals that the largest number of players are clustered around rescue and rehabilitation activities, primarily in the arena of prostitution. Rescue operations conducted in conjunction with police authorities in various brothel areas are the anti-trafficking activity most highlighted by the media, as well as by anti-trafficking practitioners. It needs to be stated at the outset that the recovery of trafficked persons from situations of abuse, forced labor, and slavery-like practices is indeed a very legitimate and necessary anti-trafficking intervention. However, such an activity needs to be carefully designed, taking into account all aspects of holistic recovery based integrally upon a rights-based approach. A close analysis of interventions in this sector reveals that there is a marked absence of any clear anti-trafficking rescue and rehabilitation strategy. In addition, there is little rescue

happening from other sites into which people are trafficked; an exception may be the greatly publicized case of boys who have been apprehended while being trafficked to the Middle East as "camel jockeys." A few cases of young girls rescued from forced marriages have also come to light. Notwithstanding these exceptions, there is no doubt that the most favored site for rescue operations continues to be brothels in major red-light areas.

Implicit behind these rescue operations are the assumptions that (i) all trafficked girls are to be found in the sex industry, and (ii) all prostitution, especially in South Asia, is confined to brothels in red-light areas of cities. Both these assumptions are not based upon a realistic understanding of either trafficking or prostitution. New research reveals that many women and young people are trafficked to sites other than the sex industry. At the same time sex trade in the region takes many diverse forms, including street-based prostitution, sex trade sites along major highways, casual sex service-provision in rental buildings, guest-house and hotel-based sex trade, tourist industry-based sex trade, call-girl operations, and independently run arrangements. The proportion of sex trade conducted through brothels in the region is unknown, but it is known that a myriad of other forms and arrangements exist within the sex industry.<sup>11</sup>

An assessment of rescue initiatives in Asia clearly shows that rescues are commonly conducted in brothels of big cities. There are few services planned or implemented for women who may be trapped in other forms of prostitution. Almost all rescue operations are conducted through police-facilitated raids in which "seemingly minor-looking girls" are picked up and consigned either to government remand homes or to shelters run by NGOs. The reason for this exclusive focus on brothels for rescue work is not difficult to comprehend—it is relatively easy to engage in such rescue operations, as the brothel is a distinct physical location which houses residents of a certain profession. In addition, the police, who are indispensable partners of NGOs in rescue operations, know the ins-and-outs of these locations, not the least on account of the fact that many of their members are allegedly the beneficiaries of the regular payoffs and commissions received from brothel owners. Therefore, all-in-all, the relative ease of rescue work in brothels, coupled with the high-publicity potential of this activity and the assistance of the police, has made this kind of rescue work a favored anti-trafficking activity. Demonstrable impact in terms of the numbers of women scooped out of brothels provides immediate proof of the anti-trafficking work, unlike prevention or reintegration activities which are extremely long-term, arduous, and consume vast amounts of money and time.

And yet, despite the focus on rescue of victims of trafficking from brothels, we need to ask ourselves whether there is any tangible reduction in the incidence of trafficking into prostitution? On the contrary,

such highly publicized and single-focus activity might actually result in a change of venue on the part of traffickers for their activities.<sup>12</sup> In addition, perpetrators of trafficking may end up devising more repressive forms of confinement which render the victims even more inaccessible. However, in view of this discussion, it must not be concluded that comprehensive, rights-based recovery initiatives operations are unnecessary and therefore should not be conducted. This analysis merely alerts anti-trafficking advocates to diversify their interventions to other sites as well, while at the same time devising more innovative strategies for recovery.

Reintegration has been the most difficult stage within the anti-trafficking process, especially in the case of women and girls returning from the sex industry. The incidence of reintegration at the family and community levels has been low and painstakingly slow. Recognizing the nexus between sexual abuse of girls and their commercial sexual exploitation, reintegration within the family or community may not even be desirable when sexual abuse is perpetrated within intimate family settings. However, alternative forms of recovery and reintegration, which are both innovative and rights-based and can be emulated as models, have been slow in emerging. In addition, the development of non-institutional support in terms of foster homes and alternative community care has not gone very far.

Therefore, in the area of rescue and reintegration in particular, there is an urgent need to think outside the box and to think beyond prescribed and existing templates of anti-trafficking interventions. Innovative, rights-based strategies must be developed for alternative recovery and reintegration programs.

### **GROPING IN THE "GREY ZONE"—THE PROBLEM OF "CONSENT"**

This section of the paper attempts to enter a rather grey zone by complicating the categories of "child" and "consent." By virtue of its very nature this discussion will consciously stray into a minefield of controversy for the purpose of pushing the boundaries of analysis and thinking. However, from this discussion the reader is cautioned against drawing simplistic conclusions and assuming that this paper (i) advocates support of child prostitution, or (ii) assumes that consent is without limits and boundaries.

According to the Convention on the Rights of the Child (CRC), a child is "every human being below the age of 18, unless under the law applicable to the child, majority is attained earlier." No distinction is made in the convention between a four-year old and a seventeen-year-old. Both are defined as children and therefore, "need special safeguards

and care, including appropriate legal protection" (CRC). Common sense, experience, and social research tell us that, in reality, the concept of "childhood" varies according to social, cultural, historical, religious, and relational norms, as well as according to one's personal circumstances. Marriage confers adult status on a person. In many countries a girl is married off at a younger age than a boy, and often below the age of eighteen. Hence, in her particular social context, she acquires the status and responsibilities of an adult before she reaches eighteen years of age. If she becomes a mother as well, then her adulthood is further confirmed. However, pregnancy and adulthood are tied to marital status, and if this very girl were to become pregnant before being married she would not automatically be assigned adulthood. The legal age for sexual consent in many countries is below the age at which the CRC deems a child to be an adult. Therefore many countries allow sexual activity and recognize sexual agency in young people below the age of eighteen years. Ironically, the legal age of sexual consent in many countries is also below the legal age of independent access to contraceptives, abortion, and sexual health services. Thus, young people may be accepted as sexually active but denied safe-sex measures.

In contrast to trafficking in adults wherein the question of consent is contested, there is a broad agreement that the issue of "consent" is irrelevant in the case of children under eighteen years of age when considering commercial sexual exploitation and hazardous forms of labor. It is held that children cannot give consent in these sectors of work. One commentator points out the possibility that any minor who has reached the legal age limit for having a (part-time) job or having sexual intercourse—which usually is set below the age of eighteen, for instance at the age of sixteen or fourteen—could also agree to his/her exploitation in labor or sex (Vermeulen 2001). However, the author also mentions that even in the Netherlands, where the exploitation of prostitution in brothels has been decriminalized since October 2000, protection through criminal law against sexual exploitation has been fully maintained for all persons below the age of eighteen, irrespective of their actual consent or legal ability to consent to sexual intercourse at a lower age.

Trafficking of children, unlike that of adult women, does not need to involve means of coercion, deception, or any form of illicit influence, in order to meet the conditions of criminality. The UN Trafficking Protocol provides that the recruitment, transportation, transfer, harboring, 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 the article, and that "child" shall mean any person under eighteen years of age.

It needs to be pointed out that what is deemed illegal under law may be socially and culturally acceptable in many instances. Hence, girls

from traditional occupational groups, such as the Bedias, Devadasis, or Nats in India, who are engaged in sex entertainment and prostitution, may be socially acceptable but criminalized by law. Similarly Thai girls engaged in sexual activity to support their families may be socially honorable but punishable under the law. On the other hand, girls having sex before marriage may be legally acceptable depending on the legal age of consent but socially impermissible. Social stigma and vulnerability are integrally linked to social status and privilege. It has been seen that in the mainstream reformist discourse the children who are the most disadvantaged, including poor and street children, are considered the most vulnerable. And yet, they are subjected to the maximum degree of institutional surveillance, the minimum of institutional protection, and severe legal-punitive action against sexual and economic activities undertaken mostly for self-preservation and familial responsibilities. These "most-vulnerables," including street children, are also the most stigmatized.

It must be borne in mind that millions of street children and youth may have no unit such as a family, nor any responsible person or institution to depend on. As such they are minors but non-dependents. Laws against legitimate employment of these young non-dependents leave them no alternative but to resort to occupations that are illegalized and criminalized and to work sites that are unprotected and underpaid.

An analysis of the legal and other initiatives reveals that under the dominant reformist-protectionist approach, protection of the "young-vulnerables" has not created an expansion of opportunities and choices for them. On the contrary, vulnerable young people have been criminalized for exercising autonomy in the economic and sexual spheres, stripped of all powers to exercise agency and independent choices, reduced to deeper vulnerability due to lack of viable alternatives, rescued and confined in dead-end remand homes, rehabilitated into abusive situations, which they fled from in the first place, and above all, stigmatized.

To sum up this brief description of the complexities involved around the issue of consent and coercion in relation to the age of majority, some crucial questions emerge. I wish to reiterate that the argument forwarded here must not be assumed to advocate support for youth prostitution or labor. The objective is merely to complicate the discussion on "consent" and autonomy with regards to young people. These questions become all the more pressing when one perceives the actual ground reality of many underage persons engaged in labor for survival, when often this labor may be exploitative. According to the UN Convention Against Transnational Organized Crime and the protocols supporting it, all youths under the age of eighteen years would be deemed trafficked if they ended up in sexual arrangements which were exploitative—even if it was marriage—or in exploitative work situations. Similarly, all such young people who were undocumented migrants could be considered traf-

ficked, especially if they were also engaged in labor. And parents who consented to the migration of their children on the children's behalf would be criminalized as traffickers, especially if the children ended up in exploitative situations. The fact that a number of terms such as youth, young persons, adolescents, minors, underage persons, children, etc., are in currency, and sometimes used interchangeably, underscores the complexity of this issue as well. The principal motive in generating this far-from-easy discussion with regards to minors and consent stems from the concern related to how best to promote the rights and agency of young people while ensuring that they stay out of harm's way.

### CONCLUDING COMMENTS

The inherent complexity of the issue of trafficking, combined with lack of data on the one hand, and a heightened commitment to urgently rectify the problem on the other, has resulted in overenthusiastic responses in many instances. Such responses are predicated on the assumption that "tightening the screws" will alleviate the crime. However, contrary to their goal, several of these responses have not achieved the aim of promoting the human rights of those trafficked. The ambit of anti-trafficking initiatives is further weakened by the relative lack of rigorous indicators for evaluating the impact of interventions at various levels. A paucity of reliable data and the gap in devising a rigorous research methodology for procuring good data on trafficking continues to pose a major challenge.

A "tightening the screws" strategy, which has tended to underpin overenthusiastic and dominant responses to trafficking, is noticeable in the arenas of policy and legislation, rescue and repatriation, and interception of "seemingly potential victims" at border points during the process of transportation and migration. A number of increasingly stringent laws with draconian measures and harsh punishments have been implemented. At the same time, aggressive and intrusive rescue operations with little regard to the personhood, wishes, or rights of the trafficked person have been conducted. Judicial procedures which are not rights-based have been employed during trials, with little attention to witness protection in many cases. Evidence reveals that in some instances prevention initiatives at source have been tantamount to restricting women and girls' right to freedom of movement, reinforcing thereby the patriarchal practice of keeping them trapped within the four walls of the home as a measure of protection. Surveillance and watchdog committees at the community level have gone overboard in their enthusiasm to police young girls and women, and in their intent to protect, have been responsible for violating the rights of the girls deemed to be

vulnerable. Rehabilitation has sometimes meant nothing more than a change in venue of the victim's incarceration from a brothel to a shelter.

The purpose of this analysis of anti-trafficking strategies and interventions, and the identification of gaps, is not to construct a dismal picture. Nor do I seek to demolish the work and commitment of well-intentioned practitioners. My attempt here is to merely put out a strong cautionary note that in forging ahead on the beaten track of anti-trafficking work, it is vital to stop and engage in a systematic stock-taking of both the theory and the practice.

## NOTES

1. The common refrain in most anti-trafficking fora is the ever-increasing and mounting terror of trafficking. The document prepared by the Government of India for the Yokohama Congress states that trafficking "has never before reached the proportions as in the world today, not under slavery, not in feudal times" (in *Protecting Children from Trafficking and Sexual Abuse: Initiatives in India*, Department of Women and Child Development, Ministry of Human Resource Development, Govt. of India, December 2001).

2. The profits accruing from the international trade of trafficking in persons are estimated to range between US \$5–7 billion annually (see Jonas Widgren, *Multinational Cooperation to Combat Trafficking in Migrants and the Role of International Organisations*, IOM Seminar on International Responses to Trafficking in Migrants and Safeguarding Migrant Rights, Geneva, October 26–28, 1994).

3. Communiqué of the Ministerial Conference of the G-8 Countries on Combating Transnational Organized Crime, Moscow, October 19–20, 1999.

4. See the Beijing Platform for Action, 1995, Strategic Objective D3 130 (b), which states, "trafficking in women and girls for prostitution and other forms of commercialized sex, forced marriages and forced labor."

5. The misplaced conflation of trafficking with prostitution has a historical basis. For decades, the problem has been defined by governments and advocates alike as "sex trafficking in women and children" or the "immoral traffic in women." This belies a concern which stems from a protectionist agenda and in some instances, is based entirely on a welfare and charity approach where the "fallen need to be uplifted."

6. <http://www.unicef.org/programme/cprotection/trafficking.html>.

7. The article which first published these statistics was written by Dr. I.S. Gilada of the Indian Health Association in Mumbai, and was presented at a workshop in 1986. Subsequently, a version of this piece was published in the *Times of India*, 2 January, 1989. These figures have since then been recycled by innumerable reports and articles on trafficking in Nepal.

8. Radhika Coomaraswamy, "Addendum, Mission to Bangladesh, Nepal and India on the issue of trafficking of women and girls" (28 October–15 November 2000), *Integration of Human Rights of Women and the Gender Perspective: Violence Against Women*, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, in accordance with the Commission on Human Rights resolution 2000/45: GE. 01-10865 (E)

9. See discussion under the section of this article on "The Nexus of Vulnerability and Illegality."

10. A study carried out by the IOM in Cambodia on the recruitment of girls and women for the purpose of prostitution leads to quite the opposite conclusion. Evidence from South Africa, many parts of Asia, and Latin America supports the finding as well that local-

level operators and individuals are mostly involved in the trafficking of children. See the report by the organization Molo Songololo: *The Trafficking of Children for the Purposes of Sexual Exploitation*, South Africa, 2000. In Europe and to some extent in Southeast Asia, organized international criminal groups are reportedly more prevalent. Chinese, Japanese, and Vietnamese criminal networks, as well as Russian and Albanian gangs and the Italian mafia, are among the major traffickers of underage persons and women.

11. Ongoing research by CARE India reveals that in Mumbai, the core of the sex trade has moved out of brothels into beer bars and parlors in the recent past. It is estimated that currently, only about 10–20 percent of the sex trade in Mumbai is conducted out of brothels (conversations with the CARE India Assistant Country Director). Such patterns are emerging as well in other Indian cities, as well as in Nepal. In the state of Kerala in Southern India, there is no brothel-based sex trade; most of it is street-based or conducted through beer bars (based on information provided by the Foundation for Integrated Research in Mental Health, Kerala).

12. Experience with ongoing raids for rescue of women and girls on the GB road brothels in 2002 in Delhi, India, clearly revealed that many brothel keepers shifted their businesses out of the brothel area into apartments and houses in general residential areas of Delhi.

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