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THE INSECURITY OF TRAFFICKING IN INTERNATIONAL LAW

BY

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PLAN

I. – INTRODUCTION

The body of international legal norms on trafficking has experienced a considerable growth in the past year. There seems to be a consensus bridging the North-South divide in migration policies that there is a struggle to be fought against trafficking, and a framework of treaties and other instruments at universal and regional levels has been produced, aiming mainly at making trafficking into a crime in a large number of jurisdictions. There can hardly be any doubt that counter-trafficking initiatives form

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part of what has been described as the securitization of migration (2).

At the core of this work is the launch of a definition, which has been replicated from the international level into domestic jurisdictions. The present chapter is devoted to this definition (3). The concept of trafficking seems to offer a self-evident point of departure to broach inequality and migration in the international domain. It emphasises the inequality between trafficker and the trafficked person, and States task themselves to side with the latter – and weaker – party in that relationship. Other dimensions of inequality, as that between migrants and States, are removed from the limelight of trafficking language. Trafficking of human beings is distinct from human smuggling: while trafficking is about non-consensual and exploitative relations between the migrant and a trafficker, smuggling is based on a consensus amongst the parties involved in an illegal border transgression. The present chapter shall explore in greater detail how the concept of trafficking is constructed in instruments of international law. A particular focus will be on the use of human rights to legitimize the trafficking concept (4). In the following, I will try to show that this use is selective.

II. – The Trafficking Definition and its Antinomies

In the international discourse on trafficking, measures to prevent specific forms of migration are typically justified by a language of vulnerability. The tradition of invoking the vulnerability of women and children goes back to the earliest trafficking conventions on the

(2) This perspective profits from the extension of the security concept beyond traditional territorial defence to issues affecting «societal security» (such as migration and organised crime). The works of Barry Buzan and Ole Wæver in the 1990s were crucial for this extension, which has made its way into governmental and intergovernmental policies. See: Buzan B., Waever O. and de Wilde J., *Security. A New Framework for Analysis*, London, Lynne Rienner, 1998.

(3) The content of this chapter forms part of a larger research project, featuring an analysis of the discursive functions of trafficking, of its conceptualisation in international law and of the law and practice in domestic jurisdictions.

(4) The critique of counter-trafficking norms in this chapter should not be mistaken as a negation of the suffering of men, women and children migrating under forms usually described as trafficking. On the contrary, the question is whether such norms are a suitable tool to diminish suffering, or merely shift it to another arena.

"white slave trade" concluded in the early 20th century (5) – a time when women had not acquired the right to vote. Anchoring anti-trafficking legislation in the protection of women and children reflects that neither of the two groups can protect themselves, *e.g.* by participating in a democratic process. It also speaks to a popular lifeboat ethics of routinely protecting those presumed to be most vulnerable. The drafters of the 2001 UN Trafficking Protocol (6) kept up with this tradition. Its preamble states:

> "that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights".

Beyond another three references to women and children in the preamble, the protocol's operative articles emphasize the protective needs of "women and children" on four occasions (7). Both women and children are constructed as objects of benevolent care. Children can be adequately cast in these terms due to limitations in their legal and political capacity. However, the routine reference to the vulnerability of women is symptomatic for how little material change there has been over the past century, the extension of voting rights to women notwithstanding. With formal equality in the political domain, women should be as capable of protecting themselves from exploitative practices as men (8). Where this is not the

(5) See *e.g.*: 1904 International Agreement for the Suppression of White Slave Traffic, 24 *UKTS* 1; 1910 International Convention for the Suppression of White Slave Traffic, 20 *UKTS* 269; the 1921 International Convention for the Suppression of the Traffic in Women and Children 9 *LNTS* 415 and the 1933 International Convention for the Suppression of the Traffic in Women of Full Age, 150 *LNTS* 431.

(6) In conjunction with the UN Convention Against Transnational Organized Crime, 8 January 2001, UN Doc. A/RES/55/25, two protocols were adopted: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children [hereinafter the Trafficking Protocol] and the Protocol against the Smuggling of Migrants by Land, Sea and Air [hereinafter the Smuggling Protocol].

(7) See Arts. 2 (a), 9 (1) (b), 9 (4), 9 (5) of the Trafficking Protocol.

(8) Trafficking of men exists, but is little mapped and researched. «In contrast to the response given to child trafficking, the reaction of those organisations actively involved in anti-trafficking responses to information about men trafficked for the purpose of labour exploitation has been overwhelmingly hesitant. Whereas an increasing amount of anecdotal information is becoming available suggesting that men are being trafficking in [South Eastern Europe] and that this could be a serious problem in the region (especially in Albania), there are still no comprehensive research initiatives, nor has any theoretical framework been developed to tackle this problem in a more in-depth manner. Is trafficking in men a marginal, newly emerging issue or has it been occurring, but is simply being ignored?», UNICEF/UNOHCHR/OSCE ODIHR, *Trafficking in Human Beings in South Eastern Europe*, Sarajevo and Warsaw, 2005, p. 63.

case, it is questionable whether the recasting of women as mere objects of security and protection in anti-trafficking legislation really offers a sustainable solution.

The definition of trafficking epitomizes this construction. The challenging question is whether or not a person can consent to being trafficked. If consent is accepted as a defence, the task of the prosecution will be more difficult. Also, a trafficker would expose clients to massive pressure in order to produce a statement of consent. However, where consent is rendered immaterial, the division between trafficking and smuggling is blurred, which raises issues under the maxim of *nullum crimen sine lege*.

The definition contained in the 1949 Trafficking Convention (9) squarely rendered consent immaterial (10). At first sight, the 2001 Trafficking and Smuggling Protocols seems to take a more differentiated stance on the issue. Voluntary transportations are apparently falling under the Smuggling Protocol, while coercion and deception seem to be captured by the Trafficking Protocol. A closer look at the definition in Article 3 of the Trafficking Protocol raises doubts whether the division is really that clear :

> "For the purposes of this Protocol :
>
> (a) 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
>
> (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used; [...]" (11).

(9) United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, G.A. Res. 317(IV), 2 December 1949. Entry into force : 25 July 1951.

(10) Its Art. 1 reads as follows : "The Parties to the present Convention agree to punish any person who, to gratify the passions of another : (1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; (2) Exploits the prostitution of another person, even with the consent of that person".

(11) A largely identical definition can be found in Article 1 (1) and 1 (2) of the binding Council framework decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA), *Official Journal*, 2002, L 203, p. 1 [hereinafter EU Framework Decision on Trafficking].

When reading paragraphs (a) and (b) in conjunction, it emerges that consent is as immaterial as under the 1949 Trafficking Convention. To fall under the definition in Article 3 (a) of the Trafficking Protocol, an act must be combined with a means and a purpose. The purpose to be served is "exploitation", which is exemplified by a non-exhaustive list in the second sentence of the provision. Amongst the means listed in the first sentence, we find "the abuse of power or of a position of vulnerability". The concepts of "exploitation" and "abuse" suggest that some form of inequality is a pivotal element of the definition. However, as we shall see in the following, both concepts are empty of precise content.

A. – *Exploitation*

The meaning of "exploitation" is painfully unclear in the Protocol. International law holds no generally accepted definition of the term, and it is hardly helpful to consult Marxist theory (12) to make it operational in an international criminal law context. Resorting to the findings of ethics leaves us with an overbroad range of meanings (13). Furthermore, it is difficult, if not impossible, to derive abstract criteria from the enumeration of examples in the second sentence of Article 3 (a) of the Trafficking Protocol. Is it a quality of moral repugnancy which is at the heart of exploitation ? The fact that the second sentence names "exploitation of the prostitution of others" and "other forms of sexual exploitation" might make us believe so. Yet the article's *travaux préparatoires* indicate that the Protocol addressed the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms "exploitation of the prostitution of others" or "other forms of sexual exploitation" are not defined in the Protocol, which is therefore without prejudice to how States Parties address prostitution in their respective domestic laws (14). This makes abundantly clear that there is

(12) In very general terms, Marxism holds that the capitalist class exploits the proletariat and attempts to measure exploitation through calculations of surplus value.

(13) For an overview, see : WERTHEIMER A., "Exploitation" *in Stanford Encyclopaedia of Philosophy*, available at : http ://www.science.uva.nl/~seop/archives/win2001/entries/exploitation/ (last accessed on 16 May 2006).

(14) Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions. Addendum. Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations

no self-evident referent community whose values can be drawn on when determining whether or not a particular form of migration is exploitative and should be criminalised. So it must be something else than a component of moral repugnancy in exploitation.

Could it be the unequal benefits derived from trafficking? This would seem a reasonable thought, leading us to exercises in comparison. What is to be compared? Most likely, the benefits of the trafficker with the benefits of the person to be trafficked. Here, the dimension of migration adds grave complications to the evaluation of benefits. What comparison will be constitutive for the benefit of the trafficked person (15)? Will we compare his or her benefit in the destination country to that derived by staying put in the country of origin? Or shall we compare to a person in a comparable situation in the country of destination? While a salary below the minimum wage of the destination country might make us associate it with exploitation, that salary may very well exceed the one realistically available to the trafficked person in the country of origin. Should the problem be solved mathematically, by resorting to an international average calculated on the basis of the expected benefits for the individual in each of the two countries involved? With benefits equal or above the average, there will be no question of exploitation, while sub-average benefits will be labelled as exploitative? Will the average prosecutor be in a position to make such calculations?

How about situations where the trafficked person is not worse off in terms of access to resources and exercise of autonomy, while the trafficker is better off? Take the example of a woman choosing between working in slave-like conditions in her country of origin and the services of a trafficker, leaving her in similarly deprived working conditions in the country of destination? The example need not be hypothetical, given the prevalence of working conditions in violation of human rights standards in certain economies of the South, which are affecting women in a disproportional manner (16). Is that a case of exploitation, or is it rather an expression of the trafficked person's autonomy in choosing an arena of misery, which the legal system should respect? What, then, if the trafficked person is better off in terms of access to resources and exercise of autonomy after trafficking? Would that automatically cancel the possible reproach of exploitation? Or does it bring us back to the abstraction of moral repugnancy? But did not the prostitution example show that this is bound to fail as a stand-alone criterion? Does this mean that a judge would need to acquit a person from trafficking indictment where a benefit comparison has shown that the impugned act was pareto-optimal (leaving at least one person better off, while no one worse off)? To avoid misunderstanding, I am not suggesting a criterion of pareto-optimality to solve the riddle of exploitation. Rather, my intention is to show that the concept is with all likelihood inoperable in a criminal law context with its demands on predictability flowing form the maxim *nullum crimen sine lege*. The ambiguity of the exploitation concept ultimately dissolves the divide between trafficking and smuggling (17).

Convention *against Transnational Organized Crime and the Protocols thereto*, 3 November 2000, UN Doc. A/55/383/Add.1, §64, p. 12. See also: Council of Europe, *Council of Europe Convention on action against trafficking in human beings. Explanatory report*, 3 May 2005, CM (2005) 32 Addendum 2 final, §88, which is phrased in analogous terms. There are good reasons for the agnosticism of the two instruments in this matter. Domestic legal orders offer quite different solutions in their approach to prostitution, ranging from acceptance over toleration to criminalisation. Criminalisation can target providers, clients and facilitators.

(15) When determining the benefits derived by the trafficker, other complications need to be taken into account. Should the trafficker's risks be factored in? If so, what taxonomy of risks should a judge resort to?

B. – *Abuse of power or of a position of vulnerability*

The comparative dimension coming with the term of "exploitation" is not the only stumbling block in the definition. Amongst the eight means listed in the definition of Article 3 (a) of the Trafficking protocol, two give rise to similar problems. The "abuse of

(16) Oxfam, the development NGO, has argued the linkage between the global trade regime and an increasing disempowerment of women in the labour markets of the South: "Globalisation has drawn millions of women into paid employment across the developing world. [...] At the end of their supply chains, the majority of workers – picking and packing fruit, sewing garments, cutting flowers – are women. Their work is fuelling valuable national export growth. And their jobs could be providing the income, security, and support needed to lift them and their families out of poverty. Instead, women workers are systematically being denied their fair share of the benefits brought by globalisation. Commonly hired on short-term contracts – or with no contract at all – women are working at high speed for low wages in unhealthy conditions. They are forced to put in long hours to earn enough to get by. Most have no sick leave or maternity leave, few are enrolled in health or unemployment schemes, and fewer still have savings for the future. Instead of supporting long-term development, trade is reinforcing insecurity and vulnerability for millions of women workers". Oxfam International, *Trading Away our Rights. Women Working in Global Supply Chains*, Oxford, 2004, p. 4.

(17) Article 3 of the Smuggling Protocol defines "smuggling of migrants" as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident".

power" (18) as well as the abuse "of a position of vulnerability" raises additional comparative issues. Both suggest that the power of the trafficker should be compared to that of the trafficked person. While the *travaux* are tacit on the abuse of power, they explain that "the reference to the abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved" (19). The absence of alternatives must be something different from and additional to the threat or use of force or other forms of coercion, which are listed as separate means in Article 3 (a) of the Trafficking Protocol. This would suggest that we look further than the relationship between trafficker and trafficked person, which brings us once more to a comparison of the alternatives available in the country of origin to the trafficked person. In the final analysis, this suggests that the "means" and the "purpose" referred to in Article 3 (a) collapse into each other, rendering parts of the trafficking definition circular. An act is abusing vulnerability because it is exploitative, and it must be deemed exploitative, because it constitutes an abuse of vulnerability.

The Explanatory Report of the 2005 Trafficking Convention elaborated within the Council of Europe (20) reflects how difficult it is to give the concept of vulnerability a precise meaning. In the tradition of earlier instruments, the Memorandum States that "[b]y abuse of a position of vulnerability is meant abuse of any situation in which the person involved has no real and acceptable alternative to submitting to the abuse". The Report continues its exploration as follows :

> "The vulnerability may be of any kind, whether physical, psychological, emotional, family-related, social or economic. The situation might, for example, involve insecurity or illegality of the victim's administrative status, economic dependence or fragile health. In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited. Persons abusing

(18) Article 1 (1) (c) of the EU Framework Decision on Trafficking employs the term "abuse of authority" instead of "abuse of power".

(19) *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions. Addendum, op. cit.*, §63, p. 12. Article 1 (1) (c) of the EU Framework Decision on Trafficking has included this specification into the definition of trafficking. The same applies to the 2005 Council of Europe Convention on action against trafficking in human beings, Warsaw, 16 May 2005, CM (2005) 32 Addendum 1 final, 3 May 2005 [hereinafter 2005 Trafficking Convention].

(20) Council of Europe, *Council of Europe Convention on action against trafficking in human beings. Explanatory report, op. cit.*

> such a situation flagrantly infringe human rights and violate human dignity and integrity, which no one can validly renounce" (21).

This illustrates neatly how States use the inalienability of human rights to articulate the meaning of trafficking. At large, we are asked to accept a chain of single concepts, which all refer to each other. The incapacity of the individual to renounce his or her human rights renders consent void, and is linked backwards to the abuse and exploitation by the trafficker.

The language of "acceptable" alternatives used in the quoted *travaux* as well as in the EU Framework Decision on Trafficking begs the question of an adequate standard. Consider for a moment that human rights standards would be applied, and that any substandard alternative must be discarded as not acceptable to the person in question. This would greatly expand the number of cases covered by "abuse of a position of vulnerability". Take the situation of a person suffering human rights violations in the country of origin without a realistic remedy at hand, and who possesses sufficient financial resources to pay for a "travel agent" who organizes migration to another country. As such a person would lack an «acceptable» alternative, the facilitation of migration would constitute not smuggling, but trafficking (provided that the criterion of exploitation is fulfilled, which is not too difficult to imagine, given its fuzzy conceptualization in Article 3 (a). Such an interpretation would be fraught with problems, and undercut the distinction between smuggling and trafficking. However, in the purportedly universal setting of migration, what other standards severing acceptable from unacceptable alternatives do we have?

The reference to the «abuse of power» may be equally problematic. What about situations where the power of the trafficker derives from her or his access to the market of the destination country? When is the use of such power an expression of the rationality of an agent relating to a global market, and when is it abusive? Or, put otherwise, when is the inequality between two domestic markets attributable to the international system at large, and when is it attributable to an agent converting it into personal gain?

(21) Council of Europe, *Council of Europe Convention on action against trafficking in human beings. Explanatory report, op. cit.*, §83.

C. – *Self-cancelling consent*

The silence of the Trafficking Protocol on the precise content of concepts as "exploitation" and "abuse" must be taken as a strategic one. It tones down international inequalities at the heart of migration, and emphasises single actors who derive benefits from it. To do so, it needs to deprive the trafficked person from any capacity to intervene into this setting. This brings us back to the elimination of consent by the trafficked person.

As noted earlier, Article 3 (b) of the Trafficking Protocol states that «[t]he consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used". Above, we have suggested that this makes consent immaterial at large, although the reference to intent and to means would seem to provide constraints on the scope of Article 3 (b). Given the emptiness of "exploitation" and "abuse", we now find that they provide no clawback to the scope of Article 3 (b).

What is the function of the reference to "intended exploitation", then (22)? Does it limit the number of cases where consent is immaterial? It might, if we interpret it to mean that cases of where exploitation not only was intended, but also has been realised. Those would indeed be open to the consent of the concerned person. But does such an interpretation make sense, which potentially hits harder at attempts of exploitation than at successful exploitation? That complication apart, consent to "intended exploitation" relates to a stage of the process where both parties involved know nothing about the actual outcomes (23). So what is it that the person to be trafficked consents to? It can, at best, be a projection of each party's outcomes which are so unequal that such an outcome should be termed as exploitation. This presupposes that the person concerned is correctly informed about outcome inequalities, which is quite unlikely. What then, if the migrant is correctly informed, yet considers that outcome inequality is not exploitative? We would have to conclude that it is for the migrant to determine where consent is immaterial and where it is not. If so, the rationale of Article 3 (b) would be eradicated altogether.

(22) It should be observed that Art. 1 (1) (2) of the EU Framework Decision on Trafficking deviates from the definition in Article 3 (b) of the Trafficking Protocol. It renders consent to intended as well as to actual exploitation immaterial.

(23) This could be because the migratory process is only at its beginning, or because a law enforcement agent has intervened and stopped the process believed to constitute trafficking.

It is hardly probable that a prosecutor or a judge will always find the time to penetrate the antinomies of the construction of consent in the trafficking definition. Most likely, the practitioner's interpretation of Article 3 (b) of the Trafficking Protocol would be that consent is immaterial in the case which s/he is set to deal with. Through this shortcut, the agency of the migrant is reduced to nil, even when it comes to choosing between different forms of misery.

D. – *Selective human rights arguments*

The choice between different forms of misery raises the question what conditions make persons accept the offers of smugglers and traffickers. Those conditions could be described as violations of human rights, particularly in the economic and social domain. In such situations, individuals would be faced with the choice between two set-ups of human rights deprivations: that are caused directly and indirectly by trafficking, and that are caused by remaining in the country of origin.

However, the text of the Trafficking Protocol avoids the association of conditions promoting trafficking with human rights language. In Article 9, which deals with the prevention of trafficking in persons, it emerges that:

> "States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the *factors* that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity" (24).

These "factors" may very well be human rights violations. By way of example, poverty makes individuals increasingly dependent on the provision of economic, social and cultural rights through the public sector, and the lack of equal opportunity might translate into discrimination proscribed under human rights instruments. Yet

(24) Art. 9 (4) of the Trafficking Protocol [emphasis added]. Principle 4 of the non-binding U.N. Recommended Principles on Human Rights and Human Trafficking is phrased in a similar manner: "States and intergovernmental organizations shall ensure that their interventions address the factors that increase vulnerability to trafficking, including inequality, poverty and all forms of discrimination". This is disappointingly weak, as the first Guideline formulated in the same document describes violations of human rights as "both a cause and a consequence of trafficking". UNHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, 20 May 2002,UN Doc. E/2002/68/Add.1.

the usage of human rights language is carefully avoided in the quoted provision as well as in other documents addressing the issue of trafficking (25). This colludes the legal obligations of the country of origin vis-à-vis its citizens.

We recall that the passage of the Trafficking Protocol's preamble quoted above expresses the desire "to protect the victims of such trafficking, including by protecting their internationally recognized human rights". The allusion to trafficking *victims* emphasises an *ex post facto* viewpoint, and limits the human rights perspective to that part of the process when an individual already has become the object of trafficking (26). The enumeration of purposes in Article 2 of the Trafficking Protocol confirms this limitation, yet it also features a slight, but important shift in emphasis :

> "The purposes of this Protocol are
>
> [...]
>
> b) to protect and assist the victims of such trafficking, with *full respect* for their human rights; [...]" (27).

The language of protection in the non-binding preamble has been swapped for a language of "full respect" in the operative article. Quite apparently, the drafters chose to focus on negative State obligations in protection and assistance, which provides a potent constraint on the scope of human rights in the Protocol's context. As we shall see in the non-committing formulation of provisions relating to the protection of victims, the language of respect was carefully chosen. It eliminates the role of positive human rights obligations both in the prevention and the protection dimensions of trafficking.

(25) See, *e.g.*, European Parliament resolution on the Communication from the Commission to the Council and to the European Parliament "For further actions in the fight against trafficking in women" (COM (1998) 726 – C5-0123/1999 – 1999/2125 (COS)), *Official Journal*, 2001, C 59, p. 307, §B, pointing out "that, as a rule, prostitution is not the result of a lifestyle choice, but is a phenomenon closely linked to the economic, social, political and cultural *possibilities* open to women in a given social environment and, in one way or another, is forced upon those who carry it out, and that sexual exploitation is a serious crime; points out that it is therefore necessary to focus greater efforts and resources on the fight against forced prostitution and trafficking in human beings, particularly women, aimed at sexual exploitation [...]" [emphasis added]. The resolution is not binding for the Member States, and is adduced here to illustrate that the avoidance of human rights language in the description the root causes of trafficking is not an exclusive feature of the UN Protocol.

(26) The third preambular paragraph of the EU Framework Decision on Trafficking contains the sole mention of human rights violations in the whole preamble of the Decision. As the 2001 Trafficking Protocol, it focuses on an *ex post facto* perspective when emphasising that "[t]rafficking in human beings comprises serious violations of fundamental human rights and human dignity".

(27) Emphasis added. The official interpretative notes do not contain any further explanation on the underlying rationale of Art. 2. None of the other two purposes enumerated in the same provision relate expressly to human rights.

Let us take the limited human rights perspective suggested by the Trafficking Protocol for the sake of argument. Consider the situation of a person having being trafficked to a receiving State. What does it mean to protect that person with full respect for his or her human rights? It must be of considerable importance whether that person will remain in the receiving State or return to the country of origin. The level and effectiveness of human rights protection might diverge to an important degree, given differences in human rights obligations and resources to live up to them.

At face value, Section II of the Trafficking Protocol is tellingly agnostic on this issue, and avoids any reference to human rights obligations (28). However, a look at the type of obligations enshrined in the provisions of Section II suggests that there is an unambiguous preference for return to the country of origin – the only part of the Section which features hard obligations.

First, all States Parties are obliged to render assistance and protection under Article 6, which makes no difference between receiving States and countries of origin. The language used to formulate these obligations is weak, limiting States' commitment to "appropriate cases and to the extent possible under domestic law" (privacy protection of victims under Article 6 (1), asking States "to consider" implementing measures serving victims' recovery (Article 6 (3)) or to "endeavour" to provide for the physical safety of trafficking victims "while they are within its territory".

Second, Article 7 addresses the «status of victims of trafficking in persons in receiving States». Again, weak language is used. The provision's first paragraph enshrines a State obligation to "consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases". Its second paragraph adds : "In implementing paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate

(28) The final Section IV of the Trafficking Protocol contains a general saving clause for humanitarian law, human rights law and refugee law in Article 14 (1), comprising *inter alia* the 1951 Refugee Convention and the 1967 New York Protocol with "the principle of non-refoulement contained therein".

factors". By emphasising such factors, receiving States' hard obligations under human rights and refugee law are removed from sight. The risk of persecution or inhuman treatment of a certain severity in the country of origin would render removal illegal under refugee law and human rights law respectively (29). Article 7 bypasses this issue, and thus fails to deliver on the protective assurances given in Article 2 (b). In a surreal fashion, the clawback clause of Article 8 (5) circumvents the naming of such international obligations and exclusively refers to domestic law, as if such matters were entirely at the disposal of the domestic legislature: "This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State". The savings clause in Article 8 (6) refers exclusively to bi- or multilateral readmission agreements, which typically regulate the interstate dimension of readmission without offering human rights safeguards to individuals subjected to readmission proceedings. The only reminder of this is the reference to "due regard for the safety of" the person returned.

Third, the repatriation dimension of protection is definitely cast in terms of hard obligations. Article 8 (1) prescribes that countries of origin "shall [...] accept" the return of their nationals or permanent residents. While return of trafficking victims "shall preferably be voluntary" under Article 8 (2), the *travaux* make clear that this phrase is "understood not to place any obligation on the State Party returning the victims" (30). Article 8 also contains unqualified duties on the country of origin to verify nationality or permanent residence entitlements, to issue necessary travel documents and authorisation.

Seen as a whole, the Trafficking Protocol articulates the response to the human rights dimension of trafficking in a peculiar manner. Hard human rights obligations owed by receiving States are entirely absent in the detailed provisions of Section II, and emerge only as a generally formulated saving clause in Section IV, holding final provisions. By contrast, readmission obligations incumbent on

(29) Relevant treaty provisions are, *inter alia*: Article 33 of the 1951 Refugee Convention, Article 3 of the 1984 Convention against Torture, Article 7 of the 1966 ICCPR and Article 3 of the 1950 ECHR.

(30) *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions. Addendum*, *op. cit.*, §73, p. 14.

countries of origin are formulated in a mandatory way and regulated in detail. In all, the Trafficking Protocol will be read as a comprehensive multilateral readmission agreement, suggesting that return will be the standard response in handling trafficking victims. The proper place of the trafficked migrant is at home.

Beyond that, the Trafficking Protocol articulates human rights violations as those committed by traffickers against trafficked persons. Technically, it is odd to emphasise human rights in an area where their capacity to bind actors is at its weakest. After all, private actors have not ratified human rights treaties, but States have. And the extent to which States' positive human rights obligations to protect individuals from violations inflicted by third parties will be contested, and does certainly not comprise *any* violation.

From this perspective, it would have made more sense to employ human rights language to reiterate the human rights obligations incumbent on countries of origin, and related to the root causes of trafficking. Article 10 is careful not to do that. Moreover, the non-committal language of protection in Articles 6 and 7, setting out protective obligations of all States Parties and receiving States respectively, could have been swapped for a reiteration of obligations under human rights treaties relevant for the protection trafficked persons. The fact that reference to such hard obligations is avoided can only be read as an attempt to weaken them in the migratory context.

Where does this leave the migrant's agency? A person endowed with justiciable rights can choose to vindicate them, or to abstain from doing so. The absence of human rights language in Section II suggests that this choice is undesirable. Migrants are not to determine their own security – this remains a prerogative of States. It was undesirable to reiterate or elaborate on States' human rights obligations in the context of trafficking, as this might have cast trafficked migrants as autonomous agents rather than as victims.

E. – *The Victim as witness*

There is one area, however, where States are in need of the trafficked person as an autonomous agent. The successful prosecution of traffickers presupposes that trafficked persons are available and

prepared to witness. Yet the cooperation of the trafficked persons with State authorities is not without risks, and could expose him or her to retaliation by the trafficker. Witness protection is problematic already in a purely domestic setting, and authorities encounter considerable difficulties in the prevention of retaliation by indicted persons. Consider the case where a trafficked person testifies against members of a trafficking organisation in the receiving State, to then be returned to the country of origin, where that organisation is active and capable of retaliation. Effective protection demands considerable efforts by both States involved, and a high degree of information exchange and coordination. What if the country of origin is a developing country with an underfinanced law enforcement sector, unable to live up to its positive protection obligations? Would the trafficked person make a wise choice when being loyal to the receiving State and offering testimony?

Is the receiving State in a position to make such loyalty more attractive? A permanent residence permit, secure accommodation and other protective benefits would represent one end of the spectrum, reflecting a reciprocal loyalty in exchange for the risks taken by the victim delivering court testimony. However, this would run counter to the very rationale of preventing irregular migration.

The EU Framework Decision on Trafficking is entirely silent on the granting of residence permits, and seems to leave the issue to the discretion of EU Member States. However, the EU Council framework decision of 15 March 2001 on the standing of victims in criminal proceedings (31) is also applicable in trafficking cases. According to its Article 3, "Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence". It could be argued that this provision entitles extra-communitarian victims to legal sojourn in the relevant Member State for a period necessary to employ the right under Article 3. Yet this would merely confer a conditional right of sojourn on victims: those cooperating with the prosecution may stay for the necessary period, those who do not cooperate may be deported immediately (32). This bestows a very narrow and conditional agency on the trafficked person, which is tailor-made for the needs of prosecuting the trafficker and thereby to prevent further irregular migration.

(31) Council framework decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), *Official Journal*, 2002, L 82, p. 1.

It is unsurprising that States attempt to minimize any dependency on the victim's choices. Article 7 (1) of the EU Framework Decision on Trafficking prescribes that «Member States shall establish that investigations or prosecution of offences covered by this Framework Decision shall not be dependent on the report or accusation made by a person subjected to the offence, at least in cases where Article 6 (1) (a) applies» (the latter contains an obligation on Member States to establish jurisdiction where the offence is committed in whole or in part within its territory). This means that prosecution of trafficking in criminal proceedings is not dependent on the presence of the victim in a large fraction of cases, and further reduces the value of the right to be heard and to supply evidence as a means to secure legal sojourn.

In the recently concluded Council of Europe Convention on action against trafficking in human beings (33), a different solution has been chosen. In the Convention, the linkage between victim's willingness and capacity to cooperate with residence entitlements is at least addressed. Its Article 13(1) reads as follows:

> "1. Each Party shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim. Such a period shall be sufficient for the person concerned to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities. During this period it shall not be possible to enforce any expulsion order against him or her. This provision is without prejudice to the activities carried out by the competent authorities in all phases of the relevant national proceedings, and in particular when investigating

(32) "A problem arises when these criminal proceedings are terminated, for example, due to a lack of sufficient evidence, or completed as when traffickers are convicted or acquitted. Under these circumstances, Member States can withdraw all the support since they may come to a conclusion that these victims do not have further value from the criminal justice viewpoint. Another problem is that those who do not cooperate are most likely to face enforcement actions, resulting in deportation to their States of origin even when they are exploited and victimized to a great extent during the course of their journey. Viewed in these contexts, the Framework Decision can be used in a discriminatory manner so as to distinguish those who deserve protection from those who do not, and its fairness can be called into question". OBOKATA T., "EU Council Framework Decision on Combating Trafficking in Human Beings: A Critical Appraisal", *Common Market Law Review*, 2003, p. 931.

(33) Council of Europe Convention on action against trafficking in human beings, Warsaw, 16 May 2005, CM(2005)32 Addendum 1 final, 3 May 2005. Not yet in force.

and prosecuting the offences concerned. During this period, the Parties shall authorise the persons concerned to stay in their territory.

2. During this period, the persons referred to in paragraph 1 of this Article shall be entitled to the measures contained in Article 12, paragraphs 1 and 2 [enumerating protective measures].

3. The Parties are not bound to observe this period if grounds of public order prevent it or if it is found that victim status is being claimed improperly".

This is certainly a more practicable solution than the one offered by the EU Framework Decision on Trafficking. Yet the solution is not exclusively inspired by compassion with the victim, but also emphasises the nexus between residence and loyalty to the receiving State. After all, the second purpose of the recovery and reflection period is "to take an informed decision on cooperating with the competent authorities". From the victim's perspective, it is still highly questionable that authorised presence during that period in conjunction with certain protective measures outweighs the risks of retaliatory action by trafficking organisations upon return to the country of origin. To that, the actual risks of being socially ostracised at home need to be added, the protective obligations of the country of origin notwithstanding. Very likely, the barter trade suggested by Article 13 will be perceived as unfair by many trafficking victims (34). Structurally, it will not alter the confinement of the trafficked person's agency to the capability of taking an "informed decision" on cooperating in criminal prosecution of the trafficker. More choices are not on offer, and the trafficked person is immediately deprived of her or his limited agency after his or her contribution to criminal proceedings.

In short, the trafficked migrant is used. By contrast to the relationship between trafficker and trafficked person, the relation between prosecuting State and trafficked witness is not articulated in terms of exploitation.

(34) An analysis of current trends in South Eastern Europe concluded that "[w]omen judged by the police to be victims of trafficking often refuse assistance, claiming that they are not victims of trafficking but prostitutes/entertainers/waitresses working voluntarily". UNICEF/UNOHCHR/OSCE ODIHR, *Trafficking in Human Beings in South Eastern Europe*, *op. cit.*, p. 50.

III. – Conclusion

The rule of international counter-trafficking law is insecure indeed: fraught with diffuse concepts, circular arguments, and human rights bias. The terms "exploitation" and "abuse of power" or of a position of vulnerability are self-referential and empty of precise content. This raises issues under the maxim *nullum crimen sine lege*. Given the emptiness of these terms, the consent of the migrant has in practice become immaterial, although the wording of the definition in the Trafficking Protocol would suggest otherwise.

The Trafficking Protocol and other international instruments following in its wake employ a selective and biased approach to human rights. A reference to human rights violations is absent when it comes to the description of factors making migrants turn to traffickers. Human rights violations are routinely cast as those of a private actor, that is, the trafficker. Moreover, the Trafficking Protocol offers a presumption of return as the standard solution, accompanied by hard obligations to readmit for the country of origin. From a human rights perspective, it is quite obvious that return may be far from the best solution for a trafficked person.

Yet the trafficked migrant possesses a limited agency in the international law framework: that of witnessing against the trafficker in court. It is yet another service requested from the trafficked migrant, the patron being the receiving State. Witnessing may entail great risks for the migrant at low or no returns. The rendering of this specific service is, however, not articulated in terms of exploitation.