

(United Nations Office on Drugs and Crime 2005). However, research by Kathleen Barry for her book *Female Sexual Slavery*, as early as 1979, and that of her contemporaries, indicates that large-scale trafficking in women clearly existed prior to current levels of market and labour globalisation. This would suggest that situating the causes of trafficking solely in terms of economic or migration issues cannot account for why the majority of those trafficked are women and girls, nor why they are most often trafficked into *sexual* exploitation (United States State Department 2004).

International responses

UN instruments and feminist responses

Among the earliest international conventions applicable to trafficking are the two slavery conventions: the League of Nations *Slavery Convention* of 1927, and the United Nations *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* of 1957. Under these conventions State Parties are required to prohibit slavery and slavery-like practices, including debt-bondage, forced marriage and the “transfer” of women by members of their family for “value received” (United Nations General Assembly 1957, Article 1). These conventions did not specifically define or prohibit “trafficking”, but they cover some aspects of it and remain valid.

Before the 2000 Trafficking Protocol, the only international treaty on trafficking was the United Nations 1949 *Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others* (hereinafter referred to as the 1949 Convention), which consolidated several earlier treaties adopted by the League of Nations. The drafters of the 1949 Convention did not explicitly define trafficking because they saw it as “a cross-border practice of ‘the exploitation of the prostitution of others’” (Leidholdt 2003: 175). “Trafficking in persons and the exploitation of the prostitution of others” encompassed the activities of an increasingly global sex industry whose activities were “incompatible with the dignity and worth of the human person” (Markovitch 2002, citing United Nations General Assembly 1949). Under Article 1 of the 1949 Convention, State Parties agree to punish any person who:

- 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 (United Nations General Assembly 1949).

That is: traffickers are to be prosecuted (along with other “third-party profiteers” such as pimps and brothel owners), but trafficked and prostituted women are not⁶. In limiting its scope to trafficking for the purpose of sexual exploitation, and in drawing no real distinction between the terms “trafficking” and “exploitation of the prostitution of others”, the 1949 Convention has provoked different reactions from theorists, depending upon their views on prostitution. In many respects the 1949 Convention reflects the view, held by many feminists and women’s human rights activists, of prostitution as a form of violence against women for which the perpetrators should be punished and not the victims (Jeffreys 2003, Leidholdt 2003; Barry 1979). Australia has not signed this convention.

Article 6 of the United Nations 1979 *Convention on the Elimination of All Forms of Discrimination against Women* uses the same wording as the 1949 Convention, calling on State Parties to: “take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women” (United Nations 1979). In both documents, “exploitation of prostitution” refers to third-party profit from prostitution. In both documents, prostitution is considered inextricably linked to trafficking, which indicates that, until 1979 at least, there was a general consensus in feminist and international politics that prostitution and trafficking could not be considered separate issues (Jeffreys 2003). Kathleen Barry’s milestone book of the same year, *Female Sexual Slavery*, contained methodically-researched evidence of violence against women in prostitution, trafficked or not, and its wider links to all forms of sexual violence.

Dorchen Leidholdt notes that the “perceived need to define trafficking and to distinguish it from prostitution came only much later, in the 1980s (2003: 175) and attributes this to lobbying by the sex industry to “confine both the scope of domestic and international laws addressing the sex industry and activism against it” (2003: 175):

“Ignoring or denying the harm of the sex industry was not an option, for that harm was well documented. A more pragmatic approach was to focus on the most brutal and extreme practices of the sex industry – transporting women from poor countries to rich countries using tactics of debt bondage and overt force – while legitimising its other activities in the name of workers’ rights. The old dichotomy of Madonna-whore was replaced by a new dichotomy: sex worker-trafficked woman. In order to defend prostitution as sex work, trafficking was articulated as gender-neutral, with labour trafficking and sex trafficking collapsed under the same rubric as ‘trafficking in persons.’ Otherwise it would be too evident that the ultimate harm of sex trafficking is the decidedly gendered condition into which the trafficking victim is transported – prostitution. “Prostitution” was stricken from the lexicon and replaced by “sex work”. Similarly, “pimp”, “procurer” and “brothel owner” were replaced by “business owners” and “third-party managers” (Leidholdt 2003: 175-6).

This quote from Leidholdt refers to the division that has appeared over the last decade over whether prostitution should be viewed as violence against women per se, or as an area of legitimate work (in which women might choose to be employed) where violence is seen as “accidental” rather than “inherent”. Some organisations, such as Scarlet Alliance in Australia, and the Network of Sex Work Projects internationally, take this latter view and have lobbied extensively for legalisation of prostitution and its recognition as legitimate work. They argue that this will reduce the harm done to women in the sex industry. Other organisations of ex-prostituted women hold the opposite view (for example, WHISPER: Women Hurt in Systems of Prostitution Engaged in Revolt, and SAGE: Standing Against Global Exploitation). These organisations claim that legalisation, instead of decreasing the harm of prostitution, simply serves to portray prostitution as harmless, thereby legitimising men’s use of prostitutes and increasing demand⁷.

The debate is highly relevant to the issue of trafficking in women for sexual exploitation, with governments and policy commentators in the United States and Sweden linking legalisation of prostitution with an increase in this form of trafficking (US State Department 2004b; Ekberg 2001). Independent researchers

such as Victor Malarek, in his book *The Natashas: Inside the New Global Sex Trade* also argue that legalisation serves to empower traffickers as victimization of women in prostitution becomes legally sanctioned (Malarek 2004). A dearth of primary research on the topic means that there is little evidence to either support or contradict the link, making it difficult for debate on the issue to move forward. This has further implications for addressing the demand side of trafficking, as will be discussed later in the paper.

International human rights responses

International human rights organisations such as Amnesty International and Human Rights Watch consider the trafficking of women for sexual exploitation to be a widespread and systematic violation of the human rights of women (Amnesty International 2004). Amnesty International stresses that while this form of trafficking is an abuse “not least [of] the right to physical and mental integrity [it also] violates the rights of women and girls to liberty and security of person, and may even violate their right to life. It exposes women and girls to a series of human rights abuses at the hands of traffickers, and of those who buy their services. It also renders them vulnerable to violations by governments which fail to protect the human rights of trafficked women” (2004: 1).

Human Rights Watch outlines how a human rights-based approach to trafficking differs from treating trafficking solely as a criminal justice or migration issue:

“Any program must first and foremost return control to the victims. It is only when we have created the space for the trafficking victim to see her or himself again as a person, not an object, whose agency we respect and whose value is inherent, that she or he becomes a survivor. Sometimes, in a rush to accomplish other goals, such as prosecuting the traffickers, states focus on victims for the information they can provide or their usefulness to the criminal justice system. The danger is that states treat the victims as merely a pawn in a struggle between the state and the trafficker, not as a human being in need of services and deserving of respect” (Human Rights Watch 2002: 2).

Trafficking in persons is also recognised as a human rights abuse by the United Nations, analysed and commented on by the Working Group on Contemporary Forms of Slavery, within the Office of the High Commissioner on Human Rights (OHCHR). The Working Group monitors state compliance to the relevant treaties and conventions (the two slavery conventions, the 1949 Convention and the 2000 Trafficking Protocol). It also reports every year via the OHCHR to the UN Economic and Social Council, giving recommendations for member states to combat the abuse. In their latest Report, the section on the “Traffic in Persons and Exploitation of the Prostitution of Others” makes the following recommendations to states:

- *Calls upon* states to recognise that human trafficking is a gross violation of human rights and fundamental freedoms and, hence, to criminalise it in all its forms and to condemn and penalise traffickers and intermediaries;
- *Urges* states to ensure that their policies and laws do not legitimise prostitution as the victims’ choice of work, or promote the legalisation or regulation of prostitution;
- *Urges* governments that have not yet done so to sign and ratify the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Pros-

titution of Others of 1949, the Convention to Eliminate All Forms of Discrimination against Women and the United Nations Convention against Transnational Organized Crime, including the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children;

- *Calls upon* states to ensure that the protection and support provided to the victims are at the centre of any anti-trafficking policy and to provide protection, assistance and temporary residence permits to victims that are not contingent on their cooperation with the prosecution of their exploiters, as articulated in Articles 6, 7 and 8 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime;
- *Urges* states to allocate resources for comprehensive programmes designed to provide assistance to, protection for, and healing reintegration into society and rehabilitation of victims;
- *Also urges* states to devise, enforce and strengthen effective measures at the national, regional and international levels to prevent, combat and eliminate all forms of trafficking through comprehensive anti-trafficking strategies which include legislative measures, prevention campaigns and information exchange. (United Nations Economic and Social Council 2003: 22).

Most of these recommendations go beyond the binding Trafficking Protocol, which, like many UN protocols, is limited in its requirements in order to maximise the number of states willing to ratify and be bound by it. These recommendations represent, essentially, an outline of international best practice, as recognised and developed by the experts in the Working Group, to combat trafficking *as a human rights abuse*, rather than simply a crime or migration issue. The extent to which Australia has engaged with these recommendations will be explored in the section entitled “The Situation in Australia”.

International criminal law

Theorists have noted that international criminal law is yet to become a viable legal system capable of dealing with all international crimes, and that its development in this direction is “hindered by the shield of state sovereignty and its attendant ramifications” (Kittichaisaree 2001: 4). This, combined with certain historical circumstances outlined below, means that the application of international criminal law tends to be limited to cases where international aspects of national criminal law converge with international humanitarian law protecting victims of armed conflict, such as in the tribunals established in response to the conflicts in Rwanda and the former Yugoslavia (Kittichaisaree 2001). State sovereignty was sidelined in the case of these tribunals because the UN Security Council could exercise enforcement power under Chapter VII of the UN Charter, which covered “action with respect to threats to the peace, breaches of the peace, and acts of aggression” (United Nations 1945)⁸.

The longest-standing permanent international court is the International Court of Justice, the principal judicial organ of the United Nations. Its role is to settle, in accordance with international law, the legal disputes submitted to it by states, and therefore only states (not individuals) may apply to and appear before the Court. This might happen when parties to an international treaty or protocol (such as the Trafficking Protocol) disagree over its interpretation or application.

The Court has existed since 1946 and has delivered judgments on such issues as border disputes, territorial sovereignty, the non-use of force, the right of asylum, and economic rights. The Court is not, therefore, a criminal court: it does not exist to try individuals (such as traffickers), nor to try states for failing in their obligations under international law (for example, in not introducing anti-trafficking legislation), but simply to hear disputes as to the interpretation and application of international law (International Court of Justice 2005). The only case, therefore, where the Court might be an organ of justice with regards to trafficking in persons would be if a certain State Party to the Trafficking Protocol claimed to be fulfilling the requirements of the Protocol and another state disagreed. Both states would then have to agree to take the matter before the Court and abide by its decisions, and the Court could then decide whether the first state was fulfilling its international obligations or not.

In the 1980s, the idea of establishing a permanent international *criminal* court was floated as a “last resort to prosecute international drug traffickers” (Kittichaisaree 2001: 27)⁹. Such a court, set up to deal with illegal international trades, could have had wide-reaching significance for the prosecution of traffickers in people. However, before a statute for such a court was drafted, the conflicts in the former Yugoslavia and Rwanda necessitated the rapid establishment of *ad hoc* tribunals (in 1993 and 1994 respectively) to deal with the crimes committed in these conflict situations. The subsequent drafting of the statute for the permanent International Criminal Court (ICC)¹⁰ in the late nineties was, as a result, greatly influenced by the statutes of these *ad hoc* tribunals. Consequently, the statute for the ICC (referred to as the “Rome Statute”, and entered into force on 1 July 2002) focuses on crimes relating to conflict situations, rather than on illegal international trades. This has important implications for the adequacy (or otherwise) of the court to deal with international crimes perpetrated in “peacetime”, such as trafficking in women. The court has jurisdiction over four specific crimes: genocide, crimes against humanity, war crimes and the crime of aggression. Whilst article 7(1)(g) of the International Criminal Court Statute defines rape, sexual slavery and enforced prostitution as crimes against humanity, it has not heard cases of such crimes committed in non-conflict situations.

Although the Court is relatively young, it is doubtful whether it will hear such cases for two major reasons. First, the Court “will only investigate and prosecute if a state is unwilling or unable to genuinely prosecute. This will be determined by the judges” (International Criminal Court 2004). Second, its jurisdiction is limited to those states who are party to the Statute. Australia is a party to the Statute (having signed it on 9 December 1998 and ratified it on 1 July 2002). A declaration made by the Australian Government upon ratification stressed the primacy of Australian criminal jurisdiction and affirmed that “the offences in Article 6 [relating to genocide], 7 [relating to crimes against humanity] and 8 [relating to war crimes] will be interpreted and applied in a way that accords with the way they are implemented in Australian domestic law” (Australian Government 1998). Thailand, believed to be the country of origin of many trafficked women, has signed but not ratified the Statute, and therefore is not a party to it and its nationals cannot be tried. So though the Court exists to “ensure that the gravest international crimes do not go unpunished” (International Criminal Court 2004), it is unlikely, in the face of the above factors, that it will hear cases of trafficking in women to Australia.

South-East Asia regional responses

Whether or not the International Criminal Court would extend its jurisdiction to include hearing cases of trafficking may prove incidental given that Australia is soon to bring in its own domestic laws against trafficking (outlined in the next section). However, the international nature of the crime means that Australia's laws cannot, on their own, adequately address the problem. Carrington and Hearn outline the limitations of national law when it comes to addressing trafficking:

“The globalisation of the world economy has provided new and lucrative opportunities for criminal entrepreneurs to be relatively free from detection and prosecution. With the compression of time and distance, alongside the rapid development of information technologies, criminal syndicates operate in a global village criss-crossing national borders. Yet the majority of policy and legislative instruments and resources for responding, prosecuting and preventing crime tend to be limited by the boundaries of nation states” (2003: 2).

According to the Global Alliance Against Traffic in Women group, there are two basic types of trafficking systems, each feeding into or using the services of the other. The first is localised crime structures and individual “recruiters”:

“It seems that very often the trafficker is someone the victim knows, often someone from within the family. One of our research projects, in Cambodia, shows that 85 per cent of the victims interviewed were trafficked by someone close to them, someone from within the family, a friend of the family, a neighbour or a boyfriend. These people are not professionals but get involved in trafficking when they see a profit to be made. Their work is of course made easier because of the relationship with the potential victim (Global Alliance Against Traffic in Women 2005).

These local recruiters then “feed” victims to transnational or nationally-operating organised crime syndicates. Some of these might be large syndicates, but some are made up of just three or four traffickers. They are “usually involved in drugs and arms as well as human smuggling” (2005).

It is suspected that traffickers use particular routes within any one region – the apparent flow of trafficking victims from Burma (Myanmar) to Thailand to Australia being a case in point. Regional cooperation is therefore essential in order to “map out the routes employed by traffickers that require international cooperation, so as to assess the interdependence between the traffic and other crimes, and thereby improve the strategies currently being employed” (Pomodoro 2001: 242). Research has been identified as essential at both regional and international levels: “We have to develop and activate centralised instruments that can constantly monitor and verify what is happening, and bring the data together in order to understand the phenomenon. This calls for coordination and an indispensable fund of data on which to base counter-measures” (2001: 242).

Recently there has been an increasing recognition by governments that an effective response to trafficking requires regional and international cooperation. Australia has signed bilateral agreements with Thailand, Cambodia, Lao PDR and Burma (Myanmar) as part of the Asia Regional Cooperation to Prevent People Trafficking (ARCPPT) Project, to provide aid and strengthen “national capacities to apprehend and prosecute traffickers” (Commonwealth Attorney-General's Department 2003d). A “mobile strike force” of regional police

investigators to “strengthen the capacity to actively target and investigate trafficking syndicates” (Commonwealth Attorney General’s Department 2003a) has also been set up as part of the national *Action Plan to Eradicate Trafficking in Persons*.

Human rights commentators (Amnesty International and Anti-Slavery International 2004, Human Rights Watch 2002, Pomodoro 2001) have noted that, unlike the trades in narcotics and arms, the act of trading in people is, in itself, a human rights abuse and not simply a crime. This necessitates a human rights-based response that supports and empowers the victim, as well as a criminal justice response that investigates and punishes the perpetrators. International legislation beyond criminal justice and anti-migration responses is essential. The need is:

“to create and activate a global system that will include serious penalties, but avoid a situation where women and children are simply avenged (even if this does not occur in 90 per cent of the cases) and is able to give assistance to the victims” (Pomodoro 2001: 241).

The 2000 Trafficking Protocol goes some way towards achieving this, although according to Pomodoro, such international agreements are a first step, and first step only, in the creation in public opinion of “a serious cultural movement to combat and reject such forms of exploitation” (2001: 241).

Application of the Trafficking Protocol

The Protocol to Prevent, Suppress and Punish Trafficking in Persons (the Trafficking Protocol) requires the countries ratifying it to adopt basic criminal offences for trafficking in persons, and to establish a framework for international cooperation, including various forms of assistance in the conduct of investigations and prosecutions, and provisions for the extradition of offenders. The Trafficking Protocol also asks governments to establish human rights protections for victims of trafficking, including medical and psychological care, appropriate shelter, legal assistance, protection and safety, temporary residence and safe repatriation.

Australia signed the Protocol on 11 December 2002, but has yet to ratify it. However, the Australian Government has indicated its intention to do so once legislation and policy have been brought into accordance with the Protocol’s requirements (Commonwealth Attorney General’s Department 2004b: 86). According to the US State Department, Australia is “a destination country for Chinese and Southeast Asian women trafficked for the purpose of forced prostitution. Many of these women travel to Australia voluntarily to work both in legal and illegal brothels but are deceived or coerced into debt bondage or sexual servitude” (US State Department 2004a: 86). Project Respect’s research, interviewing trafficked women in Australia, suggests that the majority of trafficked women in Australia enter the country on Thai passports, although it is believed many may have already been trafficked to Thailand from Myanmar (Burma) (Project Respect 2004)¹¹. Thailand signed the Protocol in December 2001, but has not ratified it. Myanmar ratified it in March 2004 (although with reservations regarding the referral of disputes to the International Court of Justice). The Philippines ratified the Protocol in May 2002. Indonesia signed in December 2000, but has not ratified it. Malaysia, China and Vietnam have neither signed nor ratified the Protocol.

Summary of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons

http://www.unodc.org/unodc/en/trafficking_protocol.html



Part I - Purpose, scope and criminal sanctions (Articles 1-3)

Articles 1 and 2 set out the basic purpose and scope of the Protocol. Essentially, the Protocol is intended to “prevent and combat” trafficking in persons and facilitate international cooperation against such trafficking. It provides for criminal offences, control and cooperation measures against traffickers. It also provides some measures to protect and assist the victims. “Trafficking in persons” is intended to include a range of cases where human beings are exploited by organised crime groups, where there is an element of duress involved and a transnational aspect, such as the movement of people across borders or their exploitation within a country by a transnational organised crime group. Trafficking is the “. . . recruitment, transportation, transfer, harbouring or receipt of persons. . . ” by improper means, such as force, abduction, fraud or coercion, for an improper purpose, like forced or coerced labour, servitude, slavery or sexual exploitation. Countries that ratify the Protocol are obliged to enact domestic laws making these activities criminal offences, if such laws are not already in place (Article 3).

Part II - Protection of trafficked persons (Articles 4-6)

In addition to taking action against traffickers, the Protocol requires states that ratify it to take some steps to protect and assist trafficked persons. Trafficked persons would be entitled to confidentiality and have some protection against offenders, in general and when they provide evidence or assistance to law enforcement or appear as witnesses in prosecutions or similar proceedings. Some social benefits, such as housing, medical care and legal or other counselling are also provided for. The legal status of trafficked persons and whether they would eventually be returned to their countries of origin has been the subject of extensive negotiations. Generally, developed countries to which persons are often trafficked have taken the position that there should not be a right to remain in their countries as this would provide an incentive both for trafficking and illegal migration. Countries whose nationals were more likely to be trafficked wanted as much protection and legal status for trafficked persons as possible. The negotiations are still ongoing, but the text presently requires states “to consider” laws which would allow trafficked persons to remain, temporarily or permanently, “in appropriate cases” (Article 5). States would also agree to accept and facilitate the repatriation of their own nationals (Article 6).

Part III - Prevention, cooperation and other measures (Articles 7-11)

Law enforcement agencies of countries that ratify the Protocol would be required to cooperate with such things as the identification of offenders and trafficked persons, sharing information about the methods of offenders and the training of investigators, enforcement and victim support personnel (Article 7). Countries would also be required to implement security and border controls to detect and prevent trafficking. These include strengthening their own border controls, imposing requirements on commercial carriers to check passports and visas (Article 8), setting standards for the technical quality of passports and other travel documents (Article 9) and cooperation in establishing the validity of their own documents when used abroad (Article 6, paragraph (3)). Cooperation between states who ratify is generally mandatory. Cooperation with states who are not parties to the Protocol is not required but is encouraged (Article 11). Social methods of prevention, such as research, advertising and social or economic support are also provided for, both by governments and in collaboration with non-governmental organisations (Article 10).