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Agency, Sex Trafficking, and Transnational Law: Applying Feminist Theory to the
Palermo Protocol.
Elsien van Pinxteren
DRAFT

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[S]ex trafficking and mass rape should no more be seen as women's issues than slavery was a black issue or the Holocaust was a Jewish issue. These are all humanitarian concerns, transcending any one race, gender, or creed.
— Nicholas D. Kristof and Sheryl WuDunn (Half the Sky)

In the summer of 2014 I carried out ethnographic fieldwork for my Master thesis in Lebanon. As my fieldwork considered largely nightlife in Lebanon, I decided to apply for a volunteer position with a human's rights organization. I had the great privilege of being accepted to volunteer at the Lebanese women's rights organization KAFA. In addition to assisting in writing funding proposals and looking into models of safe-houses and shelters, I was asked to write a memo on the terms used in the Palermo Protocol and elsewhere. My supervisor asked me how the Palermo Protocol defined 'agency,' if it was defined at all. The answer: It was not. This at first did not trigger me, and I reported the conclusions rather bluntly. Yet, I was soon to be confronted with the importance of the word 'agency': During different meetings with women's rights- and gender right's activists in Lebanon and elsewhere, it became clear that the term 'agency' had led to such furious debates that groups and organizations separated from one another. I listened to individuals who reported back to me on fiery arguments and disagreements. I also read materials in an attempt to understand what 'agency' means. It seemed that no two individuals had adopted the same meaning to the term 'agency.' Agency was then not simply another theoretic term, but a key phrase that lacked consensus on its meaning, which seemed to be of crucial importance to activists, and it was absent from the legal vocabulary. My by-stander position throughout these debates and my surprise at the fact that, as I noted down in my field notes, "this was even a thing" led me to think about this more. I would like to thank my supervisor at KAFA, Ghada Jabbour, to encourage me to write a paper on this topic. The following paper is the start of what I would like to develop into a more in-depth thesis.¹

In this paper I will examine the possibility of incorporating the notion of 'agency' in a legal framework in regard to the trafficking of humans, and especially women, for the purpose of sexual exploitation –which shall be referred to as sex trafficking in the remainder of this paper. As a site for such examination I will use the "Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against

¹ I would like to note that none of the below is advised or informed by Ms. Jabbour.

Transnational Organized Crime,” the latter convention being better known as the Palermo Protocol (2000).² From hereon I shall refer to the supplementing protocol as ‘Palermo Protocol.’

I argue that the application of the term ‘agency,’ as I shall define in this paper, to the Palermo Protocol is not only possible, but also helpful in offering satisfactory provisions to victims of human trafficking. In doing so, this paper presents a rather controversial and provocative statement. Perhaps it is then best to view this paper as a provocative thought experiment that emphasizes both the importance and the limitations of the Palermo Protocol. Likewise, it addresses the debate around this legal body, as well as the discussion in general concerning sex trafficking. I will restate a definition of ‘agency’ that I consider both in line with the scholarship on agency and autonomy - such as presented by Antonio Gramsci (Gramsci 1975) and Charles Taylor (Taylor 1985) – and workable in a legal framework; agency is approached in this paper within a two-fold understanding of the word. Agency signifies both the choice of an autonomous individual, but also includes an understanding that underlying hegemonic structures influences autonomy. Agency then both connotes ‘choice,’ as well as the structure in which choice is made.

As an experimental paper, I attempt to combine anthropological field notes, anthropological literature, feminist philosophical literature, and activist literature in addition to works that discuss the implementation of the Palermo Protocol from a policy perspective, fact sheets, and, evidently, the Protocol itself. Because the terms ‘sex trafficking’ and ‘agency’ have instigated much debate and controversy, they have been covered in an exhaustive amount of literature ranging from feminist philosophy to state implementation memos. This paper is bound to run into limitations in dealing with such a broad topic. I shall here focus on a small fraction of the existing literature in which I try to address influential and recent writings on the question of agency and human trafficking. Moreover, I attempt to demonstrate the limitations of the protocol and the existing writings, and I will contribute to this literature by trying to offer a pragmatic solution that might exceed current limitations.

² In reference list: UNODC 2004.

I acknowledge that this paper is also limited in its scope as it focuses on the Palermo Protocol as a body of law that discusses sex trafficking. Evidently, there are many more legal bodies that address sex trafficking, and there are many different approaches that one may take to discuss sex trafficking. I acknowledge these limitations, but hope that in the below my choice to focus on the Palermo Protocol will be justified.

This paper will first discuss in brief how sex trafficking has been discussed elsewhere and how it will be approached here. The paper shall then proceed as follows: It will explain my choice to use the Palermo Protocol through a close reading of the Protocol. Following, two key terms in the Palermo Protocol, namely ‘consent’ and ‘exploitation,’ will be examined. Afterwards, the paper will discuss in brief some concerns of the representation of victimhood. This will be followed with a brief overview of the term ‘agency’ and how it is applicable in this discussion. This paper will also present a definition of agency that I deem more accurate and helpful in legal frameworks. Finally, this paper will demonstrate how the Palermo Protocol then might incorporate ‘agency’ as a term and how this might aid in transcending current limitations of the Protocol.

I Sex Trafficking: Approaches, Numbers, and Trends

Sex trafficking can be approached from many different perspectives. It can be approached as an element of migration (Anderson & Andrijasevic 2008; Augustín 2006) or as slavery (Bales 2004, McCarthy 2014, Koettl 2009, MacKinnon 1996, Jeffreys 2009), as an economic model (Kara 2009), as a human rights issue (Gallagher 2001, 2010, Smith, n.d.), or as a criminal offense (Palermo 2000); as a local, regional or international (e.g., Brussels Declaration on Preventing and Combating Trafficking in Human Beings 2003), or transnational issue (Palermo).³ However, such approaches are never clear-cut and often overlap with one another (Cavaliere 2011).

³ Regional conventions acknowledge the transnational dimension of trafficking, but inform local and regional policies.

Trafficking has been distinguished from smuggling and illegal immigration with the notion that trafficking is (i) not always trans border, and (ii) consent has not been given or has been tainted (Allain 2014, 2015, Cavalieri 2011). Trafficking also may or may not be for the purpose of sexual exploitation. Moreover trafficking may or may not include sexual exploitation as a secondary consequence of trafficking for the purpose of a non-sexual related activity –such as labor. When trafficking concerns sexual exploitation it comes to overlap with prostitution and pornography (Cavalieri 2011, Matter 2013, Jeffrey 2009). As such, the term ‘trafficking’ encompasses many different aspects, and its complex nature has been expressed in the substantial amount of literature on the topic.

Sex trafficking, among other forms of trafficking, has been at the foreground of much public and international attention. Some have lamented the focus on sex trafficking, claiming that it has diminished the focus on other forms of trafficking (Anderson and Andrijasevic 2008). Others have asserted that this focus has brought too much negative attention to prostitution or sex work (described in Barry 1996). Many scholars and activists have pointed out that because of the lack of clear definitional terms and, because of the nature of trafficking as covert, that data is either simply lacking or gives a problematic representation (Koettl 2009, McCarthy 2004, Feingold 2010, Goodey 2008).

However, “NGOs and government agencies estimate that between 20 million and 35 million people worldwide are victims of human trafficking” (Dusek, et al. 2014, 1; confirmed by Social Development Notes, 2009). Following findings of the “Global Report on Trafficking in Persons” (United Nations Office on Drugs and Crime 2014) 49% of all human trafficking victims are adult women – above 18 years of age - and made up for “the vast majority of the detected victims who were trafficked for sexual exploitation” (10). According to the International Labor Organization 2005, report “[o]f those who are subject to nonconsensual sexual exploitation, 98% are women (Koettl 2009 , 16). UNDOC’s annual GLOTIP report indicates a trend in which the detection of victims in the category ‘adult women’ is shrinking, whereas the number of ‘minor girls’ is steadily

increasing (United Nations Office on Drugs and Crime 2014, 10). It also states that that 33 per cent of detected victims of all forms of trafficking are children (of all sexes). This is a 5 per cent increase compared to the 2007-2010 period (5).⁴

According to the International Labor Organization 2005 report, the total annual profit “is estimated at US\$32 billion. Half of this illicit profit is realized in industrialized countries and about a third is realized in Asia and the Pacific. In the United States traffickers make on average US \$67,200 annually per victim of nonconsensual sexual exploitation” (Koettl 2009 , 16). Siddarth Kara has argued that trafficking in humans, and especially sex trafficking is a lucrative business (Kara 2009). For example, Romanian criminal organizations in Italy have leased sex slaves, as Kara refers to victims of sex trafficking, to brothel owners “allowing brothel owners to eventually own slaves without up front costs” (Kara 2009, 93 in Smith n.d, 8). While the number of *detected* adult women that are trafficked for sexual exploitation might have decreased in the past years, there are strong indications that the total volume of sex trafficking has increased over the past years (Smith n.d., 9).

Based on the currently available data, it is evident that sex trafficking is an issue that deserves attention in present-day discussions. Moreover, while trafficking may be approached from different angles, the relation between sex trafficking and prostitution cannot be overlooked. Sex trafficking overlaps with a wide arena of issues, ranging from poverty, gender inequality, violence against women, rape, commodification of individuals, slavery. In its tight relation to prostitution of all sorts, human trafficking for the purpose of sexual exploitation becomes a focal point when thinking about gender based violence. Catherine MacKinnon has demonstrated how prostitution,

⁴ This bares some clarification on the measurement tools: Trafficking under the transnational and international frameworks that are used by the United Nations note that any form of trafficking of children, i.e. any individual under 18 years of age, is de facto illegal. Trafficking is in the case of minors rendered trafficking based on the purpose of the movement of children. This then excludes two major other factors on which it is decided whether a form of movement is considered trafficking or not: i.e. consent and means. These shall be discussed in more detail in the below, but should be mentioned here as these factors influence the statistical findings. Whereas any person who is moved for the purpose of any act that can be rendered as ‘exploitation’ by proving his or her age, those who are not considered to be ‘minors’ also need to proof their non-consent or demonstrate how their consent has been ill-informed. To this we shall return in the following section.

whether consensual or not, is impeding on basic human rights (1996). In doing so, she connects the commodification of the (female) body with all other sorts of gender based violence, demonstrating how sex trafficking is in fact “a thread in a ball of yarn” that symbolizes the relation and overlap between different forms of gender based violence (Rosenfeld, *Gender Violence, Law and Social Justice* 2014). Given the limited scope of this paper, it shall not address questions of criminalization and decriminalization of prostitution in-depth, nor shall it consider other forms of human trafficking.

II The Palermo Protocol

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (which entered into force on 25 December 2003) is the first supplemental protocol that is solely dedicated to the *trafficking*⁵ of humans, and especially women and children, for the purpose of sexual exploitation on a global level. Rather than a body of international law, this U.N. protocol is reasoned from a transnational perspective; this protocol is one of the three supplementing protocols to The United Nations Convention against Transnational Organized Crime. It is “the first global legally binding instrument with an agreed definition on trafficking in persons. The intention behind this definition is to facilitate convergence in national approaches with regard to the establishment of domestic criminal offences that would support efficient international cooperation in investigating and prosecuting trafficking in persons cases. An additional objective of the Protocol is to protect and assist the victims of trafficking in persons with full respect for their human rights” (United Nations Office on Drugs and Crime n.d.).

In the Protocol ‘trafficking’ is defined as follows

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

⁵ Other conventions and protocols have addresses, for example, slavery and prostitution.

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;

(c) The recruitment, transportation, transfer, harbouring 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 subparagraph (a) of this article;

(d) “Child” shall mean any person under eighteen years of age.

(Article 3 “Use of Terms,” Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime in Annex II the United Nations Convention against Transnational Organized Crime, 2000, 42-43).

Trafficking then consists of three parts: process, means, and purpose (Social Development Notes 2009, 2). With 117 signatories out of the 124 parties the Palermo Protocol seems to have been effective in providing a template for states across the world to model their national laws concerning sex trafficking accordingly.

However, the protocol has been met with some resistance. For example, the Protocol’s statement of purpose claims that

The purposes of this Protocol are:

(a) To prevent and combat trafficking in persons, paying particular attention to women and children;

(b) To protect and assist the victims of such trafficking, with full respect for their human rights; and

(c) To promote cooperation among States Parties in order to meet those objectives.

(Article 2, 42)

Nevertheless, it has been noted that, due to the Protocol’s criminal law approach, victims’ rights have been limited and not satisfactory met by states (Heinrich 2010; Amiel 2006). It has been suggested that the European convention on human trafficking better integrated criminal law and human rights approaches (Amiel 2006). Others have pointed to a “lack of clarity in definitions and measurement” (McCarthy 2014, 222) causing the failings of state representatives to properly identify victims of human trafficking (Laczko 2007). It has also been noted that the protocol is limited through “a focus

on sex trafficking to the exclusion of other types of trafficking, [...] navigating the blurry lines between “trafficking victim” and agency, [...] and causes a] framing of the trafficking problem as one of organized crime versus one of human rights, and [...]this effects] how human trafficking policies have been adopted and implemented” (McCarthy 2014, 222).

Other critiques address the limitedness of the Protocol’s scope of the protocol in what it considered trafficking. While some have criticized the notion that trafficking is trans-border (Allain 2014, 2015), there is no such limitation in the Palermo Protocol. Whereas smuggling is by definition transnational according to the Protocol, “trafficking may not be. Trafficking can occur regardless of whether victims are taken to another state or moved within a state's borders” (United Nations Office on Drugs and Crime n.d.). However, the Protocol envisions trafficking as transnationally organized. This has caused definitional confusion within its implementation on state levels (Allain 2014, 2015).

Regardless of some well-placed questions marks and criticisms, the Protocol has emphasized the need to address sex trafficking as a form of organized transnational crime, *in addition to* existing human rights conventions that mention trafficking and general rights of women (such as the Committee on Elimination of All Forms of Discrimination against Women, 1993, General Recommendation No 19; the Human Rights Bill; or the less successful 1949 Convention on the Suppression of the Trafficking of the prostitution). Moreover, the Palermo Protocol has functioned as an effective model for states to consider victims of sex trafficking and set-up prevention plans and global organizations in an attempt to eliminate trafficking. Effective change can be achieved not through focusing on existing executive programs and enforcements groups (Koettl 2009), and by critically looking at the protocol as a framework to bring change.

III a. Consent and Exploitation

‘Exploitation’ and ‘consent’ are two keywords in the definition of sex trafficking. As mentioned

above, trafficking is differentiated from smuggling through consent and exploitation. Jean Allain has commented in-depth on the shortcomings of the definition of ‘exploitation,’ and has demonstrated how different states have incorporated different definitions of ‘exploitation’ in domestic applications (Allain 2014; 2015). However, ‘exploitation’ is key in understanding consent in the definition of the Protocol. Exploitation may generally be defined as one person benefitting from the vulnerability of another person (Wertheimer 2005). Allain asserts that “[a]s a result, we can appreciate the value of Wertheimer’s theoretical reading of exploitation as not only does it recognise, as does the Palermo Protocol, that ‘the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, [etc.]’ are clear instances of defects in the process which underpin exploitation in creating a situation of an unfair advantage; but his reading of exploitation, like the Protocol, also declares that such defects invalidate consent” (2015, 4). Moreover, exploitation is linked to, and invalidates any consent achieved through to certain ‘means.’ The Protocol states that consent should be dismayed when it is achieved through

[...] 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. (Article 3, Protocol to Prevent, 42).

The abuse of power of a position of vulnerability can be termed ‘exploitation’ according to Wertheimer’s definition. From here it may be concluded that “[t]he Palermo Protocol sets forth that the consent of the victim to the exploitation is irrelevant” (Amiel 2006, 26). This has been particularly sensitive among liberal feminists who believe that the Palermo Protocol in this manner impedes on the notion that women are able of making choices, regardless of what situation they are faced with (explained in Weisberg 1996, Cavalieri 2011, Barry 1996, Ericsson 1996).

As the meaning of ‘consent’ becomes inherently intertwined with the meaning of exploitation, a next question one must asks is what this exploitation exists of exactly? As mentioned, there has been little consensus, even when employing Wertheimer’s definition of exploitation.

Exploitation, in the trafficking Protocol is broadly defined through sentences such as “the abuse of power or of a position of vulnerability.” As the Protocol sets out to prevent trafficking the convention states 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. (Article 9, 46).

However, in focusing merely on economy and inequality and, states might fail to understand the underlying motivations that cause women to consent in the first place.

b. Victims or Agent? The problem of a constructed binary

As mentioned above, there has been a concern with the extent to which the Palermo Protocol has enhanced provisions for victims. While the Protocol includes a section on “Protection of victims of trafficking in persons” (articles 6-8), both Heinrich (2010) and Amiel (2006) have stressed that approaching trafficking through criminal law has led to a marginalized consideration for the victims. Moreover, the current approach creates a binary between victim and agent (Cavalieri 2011).

Anette Brunovskis and Rebecca Surtees (2008) claim that the constructed binary between naïve, helpless or desperate ‘victim’ versus proactive agent has been extended to existing after care programs. While these are not in direct relation to the Palermo Protocol, it is worth mentioning here: if existing after care programs show features in which victims are patronized or their accounts are doubted, then perhaps the problem is not so much what legal approach human trafficking law takes, but in what ways ‘victimization,’ ‘exploitation,’ and ‘choice’ are explained.

The focus on perpetrators also obstructs the responsibility of states; the current focus is on how to avoid the *organization of crime*. However, such an approach does not consider *why* women consent. It is understood that the vulnerability of women is, in addition to naivety (Brunovskis and Surtees 2008), particularly due to existing inequality and economics (ibid.) and economic, social and

cultural rights, and push and pull factors (Amiel 2006, Allain 2014, Kara 2009, Dempsey 2014).

Article 9, however, only mentions 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.

It then does *not* concern the social structure as a whole, but is focused on underdevelopment and women's economic status. Undeniably, this is an important factor. However, if sex trafficking involves commercial sexual exploitation (Dempsey 2014), and must be understood an economic model (Kara 2009), then we must also inquire who creates such a demand, and why? These questions strongly relate to current social and legal debates on prostitution and pornography (Farley 2007).

Current human trafficking laws send out an underlying messages in which human trafficking is seen as problem that happens 'somewhere else' somewhere "other," by virtue of a focus on economic development and through vague notions of whether trafficking can be local or not. However, international and transnational laws provide a written statement of state responsibility and their relation to citizens and other states (Andersson 2011). Hence, international and transnational law should also include a critical examination of local underlying causes for trafficking.

When 'development' is mentioned as a focal point for improvement, we should not limit our focus on the economic aspects that influence women –which remains to be of crucial importance- but also examine the social factors that are at stake? If 'patriarchal violence' (Rosenfeld 2009) is prevalent, then societies and states should look closely at how the 'genderial hierarchy in this world' (Gavrielli n.d.) is created and upheld, and on what levels patriarchal violence –that what upholds and enables gender based violence- is enabled: following Rosenfeld and Gavrielli, law is then in need of a clear understanding of societal norms, rather than simply an economic impetus, in order to reconstruct such norms.

How can societal and social changes be captured in human trafficking law? The United Nations Model Law that accompanies the Palermo Protocol might give an insight into this: In an additional note on what “Abuse of a position of vulnerability” shall refer to, the model law notes

For the purposes of this Law the following definitions shall apply:

“Abuse of a position of vulnerability” shall refer to any situation in which the person involved *believes* he or she has no real and acceptable alternative but to submit;

or

“Abuse of a position of vulnerability” shall mean taking advantage of the vulnerable position a person is placed in as a result of [provide a relevant list]: [(i) Having entered the country illegally or without proper documentation;] or [(ii) Pregnancy or any physical or mental disease or disability of the person, including addiction to the use of any substance;] or [(iii) Reduced capacity to form judgments by virtue of being a child, illness, infirmity or a physical or mental disability;] or [(iv) Promises or giving sums of money or other advantages to those having authority over a person;] or [(v) Being in a precarious situation from the standpoint of social survival;] or [(vi) Other relevant factors.] (U.N. Model Law, Article 5, p. 9, brackets in original).

This is important for two reasons; first this clause is followed with a footnote that mentions that mental state can create grounds for exploitation. However, what ‘mental’ means remains undefined. According to Michel Foucault ‘mental’ is a social construct and defined by society (Foucault 1965, 1973). ‘Mental’ may then include perceptions of the Self that are constructed through societal norms. Second, the model law leaves a blank space to fill-out “other relevant factors.” Again, this could include societal norms. Social structures are then not prevented from entering an understanding of exploitation. This is where ‘agency’ might be a helpful term.

IV Re-conceptualizing Agency: Unhelpful Binaries and Helpful Solutions

Agency has been at the core of feminist disagreements. Weisberg recounts how different feminist waves have understood ‘agency’ in relation to prostitution (1996, 187-198). The main disagreement

between the different fronts of feminist (legal) theory, and particularly between the liberalists and the radical feminists, concerns the term ‘agency.’ On the one hand, liberal theorists (such as Alison Jaggar quoted in Weisberg 1996, 189-90) are of the belief that women’s autonomy should be kept intact; if prostitution is approached from the perspective that women are in one way or another forced into prostitution, women’s autonomy and agency is suppressed and stripped away from them. The formation of the group “Call Off Your Old Tired Ethics” (COYOTE) in 1973 voiced such liberal notions. They called for decriminalization rather than legalization of prostitution, as, following the classic liberalist theories of John Stuart Mill, they feared that the latter approach would involve state regulation and interference (Weisberg 1996, 189). Existentialist feminists, such as Simone De Beauvoir, also considered prostitution favorably, as they rationalized it as a form of women’s liberation (191). On the other hand, socialist, Marxists and radical feminists have expressed concerns that power abuse is exerted against women, and that this causes women to be in a position in which they are forced into prostitution.

The question of criminalization or decriminalization has also been connected to notions of agency. If prostitution is criminalized –even if it are the Johns who are criminalized, as is the case in Sweden – liberal feminist will argue that this undermines a woman’s choice to exercise her profession. However, prostitution is not simply another service offered on a capitalist market provided through free will. If this is the case then why, as Catherine MacKinnon asks, do we have objections to child prostitution? (2011, 297) Carole Pateman provides us with an answer

Services and labor power are inseparably connected to the body and the body is, in turn, inseparably connected to the sense of self. Ericsson writes of the prostitute as a kind of social worker, but the services of the prostitute are related in a more intimate manner to her body than those of other professionals. Sexual services, that is to say, sex and sexuality, are constitutive of the body in a way in which the counseling skills of the social worker are not [...]. Sexuality and the body are, further, integrally connected to conceptions of femininity and masculinity, and all these are constitutive of our individuality, our sense of self-identity. When sex becomes a commodity in the capitalist market so, necessarily, do bodies and selves. The prostitute cannot sell sexual services alone; what she sells is her body. [...] In prostitution, because of

the relation between the commodity being marketed and the body, it is the body that is up for sale. (Pateman 1996, 218)

Kathleen Barry adds that prostitution then becomes a “disengagement” strategy, constructing a “split-identity” between “that” what a woman performs and her “other” self (quoted and paraphrased in Baldwin 1996). This has often been understood as a binary position in which women are either forced and come to see themselves as victims of the power dimensions in which they are stuck or as “bad girls” then become patronizing of women –and their agency (Brunovskis and Surtees 2008).

Such binary approaches are then not helpful. This is especially the case when discussing criminalization or legalization of prostitution; it is often not clear *what* is meant by criminalization, and *who* and *what* is criminalized may differ (Baldwin 1996), seen in the variety of different models (Peršak and Vermeulen 2014, Allain 2014, 2015, Heinrich 2010, Dempsey 2014). Moreover, these binary constructions embedded in ‘agency’ are not helpful to understand prevalent protest slogans, such as “Better A Blowjob Than No Job” or “Sex Work is Work” (Spooner 2013). These phrases need to be taken serious. One must question why reports from the Netherlands have indicated that 90% of the women in prostitution want to quit but feel that they cannot (van der Zee 2013). Other reports that are still confidential have revealed numbers that suggest that the vast majority of women who are currently practicing ‘voluntary’ prostitution were initially forced into prostitution.⁶

The discussion around agency has thus often revolved around a distorted conceptual framing of what agency *is* and what function it (should) carry within these debates (Cavaliere 2011). As is mentioned in the note at the start of this paper, it seems that ‘agency’ is conceptualized differently, making it difficult to discuss the term. Agency is often referred to as the free choice of an autonomous person. However, if agency is the expression of one’s autonomy, it is necessary to know what autonomy is. Antonio Gramsci claims that the notion of ‘hegemony’ is inherently intertwined with autonomy. Someone is an autonomous actor, but only within the society in which he or she

⁶ This is an unpublished document. Source may be disclosed upon request.

moves. Hegemony is then the underlying (dominant) structures that restrict autonomy in the sense that it creates the possibilities from which one may (be likely to) choose (Gramsci 1975). Marilyn Friedman has termed this the “degrees of hindrance” that affect the autonomous being. She draws on the notion that autonomy is then inherently connected to the context in which it is shaped (Friedman 2003). From here it follows that agency is not merely the free choice itself (legally phrased as ‘consent’) or the decision-making process (which is mentioned under an explanatory note on exploitation in the Palermo Protocol), but also incorporates structures that influenced choice. This does not strip of *women* as a category of their autonomous beings, but rather complicates notions of how free choice is made generally.

Hegemonic structures that influence agency change overtime, but this is a long process. This notion of agency embedded in hegemony is particularly interesting when taking into consideration that patriarchy as a hegemonic structure historically considered women as voiceless trade commodities (Lerner 1986). This is not to say that women cannot have autonomy, but it requires a critical look at how agency is constructed. Kathy Miriam examines the notions of agency through adopting Charles Taylor’s theory of autonomy, which also adopts the Gramscian recognition of structural hegemony. Following Pateman, she focuses her approach to prostitution is not on the question whether women “choose” prostitution or not, but why men have the right to “demand that women’s bodies are sold as commodities in the capitalist market” (2005, 2). Based on this contextualization she denounces the strict binary between agent/victim. Sheila Jeffreys (2009) follows a similar deconstruction of the binary claiming that

Women who suffer violence are victimized by the men who abuse them, but this does not mean they are deprived of ‘agency’. They may still seek to survive and engage many strategies to do this. Victimization and agency are not either/ors, but exist alongside each other (Jeffreys 2009, 318).

While Shelley Cavalieri attempts to deconstruct this binary through policy changes and suggests legal reform, she focuses merely on one set of dominating factors that disrupt ‘choice,’ such

as economic inequality (2011). Most other recommendations also suggest an examination of economic and gender inequalities (for example, Allain 2014, 2015, Koettl 2009, Kara 2009).

While states might be lacking in taken affirmative action to create equality the Palermo Protocol at minimum recognizes the need for ‘development’ and ‘equality.’ Current policies may then want to focus on creating and enforcing policies and legal statues that call for bridging the gender inequality gap. However, this often brings the focus to countries that have been indexed as ranking low on ‘gender equality,’ such as shown in the American Tier system (Andersson 2011). However, trends have shown that women are mostly trafficked to states that rank high on the gender equality world ranks (Koettl 2009, Smith n.d.). Clearly, there is more at stake than simply ‘gender (in)equality,’ if such (in)equality is merely defined by legal rights and economic status.

If gender is a social structure (Butler 1990, 1993, 2004) surely gender (in)equality also has a social aspect. This may be seen most evident in recent debates concerning pornography and the effect of pornography of women’s self-perceptions (Pearson 2015) and men’s perceptions of women (Gavrielli n.d.).⁷ Perceptions of women and men, perceptions of gender overall, and perceptions of how these perceptions *are created* are then essential to understanding gender-based violence. Judith Butler has demonstrated how gender as a construct (1990) has affected understandings of agency. The fact that the meaning of agency changes is then attributed to the ways in which agency is constructed. Legal frameworks so far have done little to address the ‘underlying root or cause’ of social constructions that inform agency (Butler, *Sexual Consent: Some Thoughts on Psychoanalysis and Law* 2011).

Similarly, Ulrika Andersson offers an important insight into how notions of autonomy are affected by what she calls ‘discursive power’ (referring to Foucault). Likewise, she demonstrates how this has affected trafficking law. Based on feminist theories offered by Sandra Harding, Joan Wallach Scott, and Iris Marion Young, Andersson adopts a Sartrean understanding of the interaction

⁷ And these are a few examples of the gamut of articles dealing with this topic.

between “categories” or “series” and discursive power in order to demonstrate the limitations of the employment of ‘vulnerability’ as a key term in human trafficking law (2011, 181). Andersson’s deconstruction of categories such as ‘gender’ and ‘vulnerability’ is extremely helpful in understanding the shortfalls and double standards within the U.N. and E.U. laws concerning trafficking. Moreover, her call to address state responsibility for its citizens through the law by emphasizing a critical look at the ‘root causes’ rather than superficial causes that “other” the human trafficking problem is an important critique. However, her account does not leave space for understanding individual choice, nor does she provide a helpful framework in which her criticism of international trafficking law may be addressed. She points out a problem, but does not provide her reader with a solution in practical terms: How might the law address this in practical terms?

‘Agency’ might capture the notion that autonomy is structured in relationship to other limiting hegemonic or discursive powers, as expressed by Friedman and Andersson. ‘Agency’ when understood as the autonomy to make choice within the structures that limit such autonomy also exceeds the limitations that Andersson’s thesis brings. Moreover, it allows a space in which ‘autonomy’ can be critically assessed without removing the notion that some individuals are in fact vulnerable. Rather, it offers a space to examine how and why individuals are in a (vulnerable) position, in which they make ‘decisions.’ This also offers a practical tool in addressing vulnerabilities that surpass economic inequality, and focus at the core of the construction of gendered categories in societies.

This is particularly important, because gender and agency are constructed differently in various societies, as anthropologist Lila Abu-Lughod has demonstrated. Agency can then be perceived differently, regardless of the value other societies attach to this (Do Muslim Women Need Saving? 2013). Holly Wardlow offers a particular fitting example, in which she discusses the role of prostitution among the Huli of Papua New Guinea. She here demonstrates that so-called “passenger women” consider themselves liberated through offering sex in exchange for pay, regardless of the

dangers attached to sex work. These women believe prostitution is believed to be emancipating, based on their notions of womanhood, femininity, masculinity, and sex as they constructed among the Huli. It might be looked down-upon by others and it can certainly be approached from a perspective in which these women are characterized by their histories of sexual abuse. However, it is only when notions of gender roles and ‘sex,’ as presented among the Huli, are understood that it can be explained how both men and women consider sex work as liberating (Wardlow 2004). Both Abu-Lughod and Wardlow demonstrate how agency can be formed differently, based on root causes –that surpass economic equality- and need to be understood in order to evaluate whether someone is a victim, of what, and how? When these structural root causes are comprehended, these might be addressed effectively by states.

Agency, as an understanding of the choice and the structural frameworks that lead to choice, is then a useful term in understanding sexual exploitation. Complicating notions of victimhood and agency can lead to clearer understandings of root causes of prostitution and can in turn be addressed by states. This should be done in addition to or as part of tackling questions of economic inequality and development.

V Agency and the Palermo Protocol

With the exception of Anderson, the above discussion has dealt with questions of agency in prostitution and sex work.⁸ Human trafficking for the purpose of sexual exploitation includes a wide spectrum of what ‘sexual’ means. To narrow this down I have focused on prostitution and agency, rather than trafficking. However, given that the two are related and are in fact, as mentioned above, threads of the same ball of yarn, I shall now turn how this understanding of agency in ‘sex work’ can

⁸ I here adopt a broad understanding of the terms ‘prostitution’ and ‘sex work’ that includes pornography.

be applied to the Palermo Protocol and its supplemental Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children.

In the Protocol ‘consent’ is of crucial importance. This is conditioned by ‘decision-making.’ The Protocol takes in consideration the abuse of power among other factors such as deceit and force, however, as it is described and implemented now the understanding of ‘abuse of power’ and ‘vulnerability’ is limited. While the Palermo Protocol addresses several factors that lead to exploitation it fails to question deep, long-standing power structures and “genderial hierarchies” (Gavrielli n.d.) that exceed notions of gender inequality as limited to the global south (Wardlow 2004). As explained in the above section, agency might be helpful in understanding the creation of choice within such hegemonic structures that surpass binaries of free/unfree, victim/agent, and naivety/desperation.

It is then also of vital importance that we ask ourselves what is the task of laws, and what do we aim to create or eliminate through laws? This is particularly so the case for the Palermo Protocol that is a transnational law and surpasses different norms and values globally. While international law requires sensitive politics, and is difficult to amend it presents an understanding that states carry responsibility for its citizens and for citizens worldwide; that through cooperation on an international level, individuals on a local level are insured of their protection as individual beings and offered a place of justice (Andersson 2011). As a partly international and transnational problem (Smith n.d.), the addressing of sex trafficking in international and transnational law is of crucial importance.

While some have pointed out the limitations of this supplemental protocol (see above), the Protocol has been of great importance in shaping national and regional laws, protocols and (legal) policies. Moreover, it has a symbolic meaning, as it comes as an addition to existing legal bodies that concern women’s rights, gender-based violence, and trafficking. Including ‘agency’ as a term would reinforce the symbolic message in an attempt to not only comprehend victims better, but also in an attempt to understand and eliminate underlying factors of gender-based violence.

Including the term ‘agency’ can also help victims in their claims to their rights. The law would exceed its symbolic function and enhance its direct functional importance to victims. A strong case in which states were held accountable was the *Rantsev versus Cyprus and Russia* case under the European Convention (European Court of Human Rights 2010). Provisions in which legal bodies demonstrate that they take victims serious would extend accessibility to making claims; current studies find that women often do not trust law enforcement and the protection of their rights, because they *feel* stigmatized (Miriam 2005, Augustín 2006). States should be held responsible for such failures.

States would also emphasize their accountability for underlying structural problems, such as in seen in the CEDAW. Moreover, the recognition of structural complicated factors would bring a larger ground on which victims can access legal protection, regardless if they had been well informed or whether they were victims of force, deceit, etc. according to current notions. It is generally accepted that most women are forced in one or another (ILO 2005, UNDOC 2014). However, for those women whose “free choice” is more complicated, the legal statute would offer larger grounds for her rights. This provision does not take away women’s autonomy. It also does not judge prostitution and sex work. It would offer a form in which states may be accountable for overlooking structural problems in protecting women’s rights, regardless of the theoretic approach the law adopts. It takes into account how ‘agency’ is created within the social environment of women.

Currently there is a focus on consent, exploitation and vulnerability envisioned as if humans live in full autonomy. “As a result, the crime of trafficking is used very rarely [...]. An adult’s body and sexuality is thus indirectly produced as open and accessible to trafficking” (Andersson 2011, 185). The adaptation of ‘agency’ might then also lead to greater accessibility for rights protection, and extend the breakdown of the ‘victim versus agent’ narrative to provisions made for aftercare programs for victims, allowing a more humane approach to victims.

The implementation of ‘agency’ might then prove extremely helpful in reinforcing both the Palermo Protocol’s practical and symbolic function, to which other conventions –such as the European convention (Brussels 2003, see Amiel 2006)– find further guidance. The power of the Protocol, in adopting ‘agency’ would then lie in tying together different threads of the ball of yarn that is gender-violence and the ball that is inequality together in bringing a the multi-disciplinary focus that many have demanded, but failed to write out in practical steps (Allain 2014, 2015, McCarthy 2014, Amiel 2006, Cavalieri 2011).

The possibilities of the application of the term ‘agency’ need to be further explored. This is difficult because of the lack of clear data on sex trafficking, forced prostitution, and understandings of how these women –and men- are trafficked, and for what reasons. Perhaps this lack simultaneously offers a site through which a more in-depth exploration of such questions can be carried out: Given that transnational and international legal bodies are the structuring factors to national policies and international cooperation groups, this amendment can create greater implementation through which data would become better visible.

This paper, as is indicated in the above, is provocative and presents a thought experiment. Nevertheless, there are current provisions in the protocol’s U.N. model law that make the inclusion of the term ‘agency’ possible. I have demonstrated in the section on definitions that the model law links the ‘abuse of a position of vulnerability’ to, first, ‘mental’ conditions that are not further elaborated and may include socially created thought processes (Foucault 1973 and 1965). Second, it links vulnerability to “[v) Being in a precarious situation from the standpoint of social survival;] or [(vi) Other relevant factors]” (UN Palermo Protocol Model Law, art. 5, 9) without further explication. This leaves enough space to apply an understanding of ‘agency’ as presented in this paper to the protocol.

VI Conclusion

In this paper I have aimed to provide a workable definition of agency that may be applied to legal bodies concerning sex trafficking, and by extension prostitution. I have demonstrated how such a definition forms a helpful tool to overcome both binary understandings of victimhood and simplistic notions of gender inequality. In this sense, this paper is a thought experiment through which I hope to have demonstrated that legal protection measures need to take into consideration more complex and long-term perpetuated forms of patriarchal violence that can manifest in different forms and to different extents.

Had I been more courageous, this paper would have had a more triggering title that would generate a productive thought experiment, such as “Take Your F-ing Agency and Stick it in Your Palermo Protocol.” For now I hope that this paper has demonstrated that a binary approach of victim versus agent is unhelpful. Additionally, while the term ‘agency’ might be universal, the manners in which agency is created are not; agency is not simply whether one has choice or not. Rather, it is a two-fold understanding that an individual has choice, but that these choices are set within a certain context. These contexts may differ and should, therefore, be taken into consideration. This does not strip away individual autonomy, but rather uncovers the perpetuation of genderial hierarchies that extent superficial notions of gender inequality. While current policies address important factors of gender inequality, they remain to be limited.

I have chosen to look at the Palermo Protocol first because it is one of the most important symbolic additions to gender based violence law. Furthermore, it has impact on trafficking laws all over the world. While this body of law is of incredible importance, it has some defects, as have been addressed in this paper. I believe that these shortcomings in the Palermo Protocol can be overcome; the Protocol offer a space in which agency may be negotiated, even when it is not termed ‘agency.’ If done so, trafficking law, whether approached as in a human rights context or through criminal law,

will develop a deeper understanding of underlying issues. Consequently, it may be more versatile to offer protection to victims and eliminate sex trafficking by focusing policy reforms there where it matters.

Through its focus on ‘agency’ as a term, this paper thus brought to the attention the use of language and consequences of the language in legal protection measures when it comes to sexual violence and exploitation, and gender based violence in international treaties. As a suggestion for further research, I propose that we extend the notion that the binary approaches are unhelpful and that underlying root-causes for sex trafficking are still to be addressed in-depth in current international legal provisions. I propose that further in-depth research is done in this area, and may seek to explore how ‘agency,’ different from ‘consent’ and ‘decision-making’ can be further incorporated in sex trafficking law. A close examination of the, with care chosen, language in legal bodies may also lead to further research questions about the meaning of ‘gender’ as a category.

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